are recovered by the cable operator, the optimal benchmark formula should permit a program cost acquisition pass-through in much the same way that the Federal Energy Regulatory Commission allows pipelines to pass through the increased cost of natural gas to their customers.

This proposal will permit the Commission to establish parallel regulatory regimes between basic service tiers and cable programming service. The Office of Advocacy agrees with the FCC that such parallelism will reduce the likelihood that cable operators will move services to different tiers to avoid rate regulation. NPRM at ¶ 127. More importantly, a cost pass-through will ensure that operators will not be hindered in meeting the Cable Act's goal of fostering diversity in programming due to the cost of program acquisition. The ultimate beneficiary will be cable subscribers who will continue to gain access to the widest diversity of programming. This diversity is especially important for communities served by small cable operators in rural areas. These communities often lack the entertainment amenities available in larger communities and cable programming provides numerous alternatives from arts to science fiction. Finally, a benchmark formula with cost pass-through

---

[28](...continued)
dimensions of that cost are impossible to estimate at this time especially since these provisions of the Cable Act are currently under attack in court as infringements on the cable operator's First Amendment rights. In contradistinction, the costs for cable programming services are very evident and easily determined at the present.

provides a low-cost and efficient means for determining the unreasonability of rates. The concomitant reduction in regulatory burdens will benefit the FCC staff, cable operators, and subscribers.

VI. *Cable Programming Service Rate Complaint Procedures*

For cable programming service rates, the Commission not only must develop a rate regulation formula but also must develop procedures for receiving and adjudicating citizen complaints about these rates. The FCC is faced with the unenviable task of developing procedures that are easily understood by 55 million cable subscribers, the vast majority of whom are not familiar with the law.

The Office of Advocacy sees little opportunity to limit the potential number of complaints. Nevertheless, the Commission must adopt rules that require the complainant to demonstrate, not that the rates are unreasonable, but the reasons why the complainant believes such rates are unreasonable. The complaint on its face shall demonstrate, to the best of the complainant's capacity, that the rate charged by the operator exceeds that obtained by the benchmark. The cable operator, who will be notified simultaneous with the Commission, can then demonstrate: 1) that the formula was used incorrectly; or 2) that other reasons exist for the reasonability of the rates, i.e., why an

exception to the benchmark is appropriate. If either explanation is valid, the complainant's petition will be denied. This simple two-step procedure satisfies the goals of the Cable Act without unduly burdening the complainant, the Commission staff, or the cable operator.[29]

Once the Commission has made the determination that an operator's cable programming service rate is reasonable, subsequent petitions claiming that the same operator is charging unreasonable rates, absent evidence of a rate increase, simply retraces already trod ground. These petitions need not be considered by the FCC staff; invocation of res judicata shall lead to summary dismissal. In the alternative, the Commission may wish to require that any complainant must demonstrate that the contents of the petition have not been ruled on by the FCC. Failure to do so will result in automatic dismissal with prejudice. This will require that the complainant obtain a signed statement from either the cable operator or local franchising authority that no decision concerning the reasonability of cable programming service rates has been made. While some complainants may still decide to file, the proof of a determination by the FCC probably will deter most subscribers. Moreover, this procedure will maintain control and input at the

---

[29] The Office of Advocacy cannot vouch for the potential that this proposal has in reducing the burdens on the Postal Service's deliveries to Commission headquarters.

local level as franchising authorities attempt to dissuade complaints on matters already adjudicated by the FCC.[30]

VII. *Alternative to the Benchmark for Cable Programming Service*

The Office of Advocacy believes that the benchmark formula represents the ideal methodology for regulating rates for cable programming service. However, the benchmark formula is system specific and may require more extensive recordkeeping and paperwork requirements than currently employed by small multiple system operators. The Office of Advocacy believes that an alternative that focuses on system-wide operation may prove beneficial to these operators.

One viable alternative is to examine the profit and loss of these systems as a whole. If the cable systems are not making money from their cable operations or their profits fall within a fixed percentage,[31] then the Commission can fairly conclude that

---

[30] The Office of Advocacy supports other means of involving local franchising authorities in the regulation of cable programming service rates to the extent permitted by the 1992 Act. The Office of Advocacy believes that increased intervention by the good offices of local governments will be beneficial to the Commission staff and cable operators.

[31] The most obvious percentage to be utilized is the one the FCC develops during its represcription proceeding for local exchange carriers (LECs). While the Office of Advocacy recognizes the substantial differences between cable operators and small LECs, the rate-of-return prescribed in that proceeding represents an adequate benchmark for using this system-wide alternative.

the rates for cable programming service are reasonable. Excessive profits will be evidence that rates are unreasonable. The absence of excessive or monopolistic profits perforce dictates a finding of reasonability. This determination then applies to all of the operator's systems and either the operator or the Commission can then inform the appropriate franchising authorities. Any subsequent complaint to the Commission then will have to meet the strict standard limned in Part VI or be dismissed.

The Office of Advocacy realizes that this alternative may create problems if made available to all multiple system operators.[32] To alleviate this concern, the Office of Advocacy recommends that this alternative only be made available to multiple system operators who do not have investment in cable programming or are willing to modify their accounts to isolate the profits and losses of their cable operations. The Office of Advocacy also recommends that this alternative be limited to cable systems that do not exceed a certain percentage of control over the total number of cable subscribers in the United

---

[32] For example, large multiple system operators with interests in program production may be able to cross-subsidize losses in program production with profits from cable operations. This masks profits of the cable operations and produces an unrealistically low assessment of the profitability of these systems. A similar problem may occur in smaller systems if their operators also have investments in other businesses that can be cross-subsidized by cable profits.

States.[33] The percentage should be calculated to exclude the twenty largest multiple system operators in the United States.[34]

The ability of cable operators to demonstrate that they are not making excessive (monopolistic) profits on their cable operations will prevent the FCC from imposing rate rollbacks that are confiscatory and in violation of the Fifth Amendment. These systems also will have the benefit of reduced recordkeeping requirements because they will not have to establish benchmark formula rates for each separate cable system. Finally, this will alleviate a substantial administrative nightmare for the FCC and allow it to focus its attention on those systems that affect the greatest number of subscribers.

VIII. *Recordkeeping and Reporting Requirements*

The Commission recognizes that the 1992 Act may require substantial recordkeeping and reporting requirements for cable operators. This will be especially true if the FCC adopts cost-

---

[33] The percentage should be set after the FCC has obtained data from its survey issued as part of this proceeding.

[34] Data from past FCC and GAO surveys and Congressional testimony reveals that the largest percentage increase in cable rates has occurred in systems operated by large vertically-integrated multiple system operators. The Office of Advocacy sees no reason to provide these large systems, with their substantial centralized administrative capacities, to benefit from a less burdensome alternative to cable programming service rate regulation.

of-service rate regulation or some complex benchmark formula that relies heavily on a continual evaluation of costs. In the NPRM, the Commission requests comments on ways to ameliorate the burdens imposed by the substantial number of recordkeeping and reporting requirements. *Id.* at ¶ 129.

The most straightforward approach to eliminating reporting and recordkeeping is to develop rate regulatory schemes that are simple and rely on data in a form already maintained by cable operators. Both the benchmark formula and the system-wide profit and loss methods achieve this goal. Even after adopting these rate regulatory methodologies, further reductions in information collection requirements may be possible.

The Commission mandates different recordkeeping and reporting requirements for different size local exchange carriers (LECs). In fact, the FCC utilizes two separate standards: 1) one for LECs with revenue in excess of $100 million; and 2) one for LECs with less than 50,000 loop lines. The Office of Advocacy recommends that the Commission adopt similarly tiered recordkeeping and reporting requirements for cable operators.[35]

---

[35] The Office of Advocacy does not proffer any particular set of demarcations. In calculating the appropriate tiers, the FCC must not rely solely on subscriber size. The technological capabilities of the system may be strong evidence of the operator's ability to install sophisticated management tools to make information collection and reporting more efficient.

(continued...)

To the extent possible, these information collection requirements should be tailored to meet the basic needs of rate regulators.

The Office of Advocacy frequently has noted that scale economies exist in complying with government regulations, including recordkeeping and reporting requirements.[36] By developing appropriate recordkeeping and reporting requirements for different size and type of systems, the Commission will ensure that these requirements are implemented in the most efficient and cost-effective manner for cable operators. This will palliate the potential cost increases associated with significant new information collection requirements.

IX. *Implementation Date*

The Commission has conducted this and many other proceedings associated with the implementation of the 1992 Act with all deliberate speed. Many of the provisions, including those

---

[35](...continued)
Nor does the Commission have to adopt the same tiers for rate regulation and information collection requirements. The FCC regulates the rates of all common carriers that are dominant and that includes all LECs irrespective of their size. Despite the rate regulation, the Commission uses very different reporting and recordkeeping requirements for smaller carriers.

[36] The Office of Advocacy commissioned a study which reached the same conclusion. Jack Faucett Associates, Economies of Scale in Regulatory Compliance: Evidence of the Differential Impacts of Regulation by Firm Size (1984) (Contract SBA-7188-OA-83). The Regulatory Flexibility Act is premised on the same principle.

related to rate regulation, require the FCC to adopt regulations within 180 days after the enactment of the Cable Act. Thus, the FCC must promulgate rate regulations by no later April 5, 1993.

However, nothing in the 1992 Act requires the Commission to put those rules into effect immediately. As a result, the Office of Advocacy recommends that the Commission adopt the rules but stay their effect until the FCC has had time to reconsider all petitions that inevitably will be filed subsequent to the adoption of regulations.[37] This will provide the Commission, cable operators, and small governmental jurisdictions sufficient time to study, analyze, and recommend modifications without going through a futile rate regulation process. This stay will prove especially salubrious for small cable operators who will not have to adapt to one set of regulations only to then have to quickly change course to meet a new set of regulations.[38]

---

[37] This is especially appropriate because the constitution of the Commission is likely to change with President Clinton's appointment of two commissioners. It will also provide the courts with the opportunity to determine the constitutionality of the must carry/retransmission consent issue which will have a significant bearing on rate regulatory matters.

[38] The potential for rapid changes in rate regulatory visions will increase the difficulty faced by small cable operators' attempts to make long-term plans for program acquisition or system upgrades.

X. *Conclusion*

The Office of Advocacy understands the difficult mission facing the FCC. Not only must the Commission adopt a plethora of new regulations for the cable industry; it must do so in an unduly short time period with an extremely limited staff. Despite these constraints, the Commission has done an admirable job in setting forth potential rate regulatory schemes.

The Office of Advocacy believes that the regulatory process must balance three objectives: administrative ease, cost-effectiveness, and certainty for long-term planning. The Office of Advocacy believes that its recommendations concerning the utilization of benchmark formulas and system-wide profit examination achieves the optimal balance among those three goals. Further reductions in costs and improvements in certainty will come from tiered recordkeeping and reporting requirements, strict adherence to standards in determining whether cable programming service rates are unreasonable, and a delayed implementation date until all potential challenges to the rules have been exhausted.

The Regulatory Flexibility Act represents the best tool available for the FCC to analyze whether particular alternatives meet the objectives of administrative ease, low cost, and

certainty. The Office of Advocacy recommends that the Commission perform a final regulatory flexibility analysis prior to the publication of a final rule. The Office of Advocacy believes that the analytical tools of the RFA will enable the FCC to adopt rate regulatory methodologies best suited for various sizes and types of systems. The Office of Advocacy offers it assistance in developing that analysis and in wrestling with the implementation of cable rate regulation.

Respectfully submitted,

Doris S. Freedman
Acting Chief Counsel for Advocacy
Office of Advocacy

Barry Pineles
Assistant Chief Counsel