

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-177
Washington, D.C. 20554

MAY 4 3 00 PM '93

In the Matter of)
DISPATCHED BY)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
Rate Regulation)

MM Docket 92-255

DISPATCHED BY
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FCC MAIL SECTION

Report and Order
and
Further Notice of Proposed Rulemaking

Adopted: April 1, 1993

Released: May 3, 1993

By the Commission: Commissioner Marshall not participating;
Commissioners Barrett and Duggan issuing
separate statements.

Comment Date: June 17, 1993

Reply Comment Date: July 2, 1993

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I. Introduction

1. This Report and Order and Further Notice of Proposed Rulemaking ("Report and Order") and ("Further Notice") amends our rules to implement Sections 623 (subscriber rate regulation), 612 (commercial leased access), and 622(c) (subscriber bill itemization), of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Cable Act").¹ The Report and Order reflects, in large part, the Commission's efforts to ensure that cable subscribers nationwide enjoy the rates that would be charged by cable systems operating in a competitive environment. The Further Notice examines whether the Commission should refine its initial analysis by excluding the rates of cable systems with less than 30 percent penetration, even though such systems are defined as systems that face effective competition under the 1992 Cable Act.

2. The Cable Act of 1992 generally provides that where competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market. The Act contains a clear and explicit preference for competitive resolution of issues where that is feasible.² Other provisions of the Act, also being implemented today in a separate proceeding,³ are intended to assure that the potential for competition to cable is given every possibility of becoming a reality. However, where competition is absent, cable rates are to be regulated to protect the interests of subscribers. This regulation is to be undertaken jointly by the Federal Communications Commission and by state and local governments. For purposes of allocating that responsibility, the services offered by cable systems are divided into several categories.

¹ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992) ("Cable Act of 1992"). The Cable Act of 1992 became law on October 5, 1992. This proceeding was commenced through the issuance of our Notice of Proposed Rule Making in Docket 92-266, 8 FCC Rcd 510 (1992) ("Notice"). The Commission is required to prescribe regulations to carry out its obligations under the rate regulation provisions of the Act within 180 days of the law's enactment.

² Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2) ("Preference for Competition.")

³ Report and Order in Docket 92-265, FCC 93-173 (released April 30, 1993).

3. The first category is the "basic service tier" that includes, at minimum, the broadcast signals distributed by the cable operator (except for superstations), along with any public, educational, and government (PEG) access channels that the local franchise authority requires the system operator to carry on the basic tier. This tier of service, at the discretion of the cable operator, may also include additional program services. Regulation of rates for this category of service is generally the responsibility of state and local governments. Equipment used to receive the basic service tier is also to be regulated by them. However, although the primary responsibility is that of local government, regulation is to be undertaken only upon certification of the local authority's regulatory qualifications by the Commission. Substantive and procedural rules to govern regulation of basic rates are to be adopted by the Commission, which is also to serve as an appellate body to review local rate decisions. In certain circumstances, the Commission is itself required to stand in the place of the local authorities and directly regulate basic service tier rates.

4. The second category of service, called "cable programming service," includes all video programming distributed over the system that is not on the basic service tier and for which the operator does not charge on a per channel or per program basis. This category of service is subject to regulation by the Commission and only in response to specific complaints regarding an operator's cable programming service. The third category of service includes video programming for which the operator does charge a per channel or per program fee. The rates for this service are not subject to regulation by either local governments or the Commission. Finally, under the Act, cable systems are also required to make certain of their channels available for lease by outside unaffiliated parties. The conditions of offering and rates for these channels are subject to Commission regulation.

5. Our tasks in this proceeding are to: 1) develop a process for identifying those situations where effective competition exists (and rate regulation is thus precluded), 2) establish the boundaries between local and state, and federal responsibilities, 3) develop procedural and substantive rules to govern the regulation of basic service tier, cable programming service, and leased channel rates, and 4) create a process of gathering information to facilitate the regulation that is being undertaken and periodically review its effectiveness.

6. To analyze the issues, some historical context is necessary. Cable television has long been recognized as having significant potential to increase both the competitiveness and the diversity of our telecommunications system. As long ago as 1972, the Commission made reference to cable television as "an

emerging technology that promises a communications revolution."⁴ Industry growth, however, was for many years uneven and uncertain, a circumstance attributed in significant part to unnecessary and uncoordinated regulation. As a response, Congress enacted the Cable Communications Policy Act of 1984.⁵ One of the stated purposes of the 1984 Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."⁶ Congress believed that reduced regulation would enable the cable industry to prosper, "benefiting both consumers and industry participants alike."⁷

7. The 1984 Act achieved many of its objectives. The number of communities and homes served by cable grew dramatically. System channel capacity increased and continues to do so. New channels of programming were created and investment in programming multiplied.⁸ The 1984 Act, however, generally was not successful in creating a competitive multichannel video distribution marketplace as cable systems continued to develop without direct multichannel video competitors. Thus, consumers were left without the protections with respect to cable rates and customer service that they would have had in a more competitive environment. The challenge presented by this situation was how to preserve and extend the benefits of increased investment, programming diversity, and technical innovation that cable provides while protecting subscribers from noncompetitive rate

⁴ Cable Television Report and Order, 36 FCC 2d 143, 210 (1972).

⁵ Pub. L. No. 98-549, §1 et. seq., 98 Stat. 2779 (1984).

⁶ Communications Act, § 601(6), 47 U.S.C. § 521(6).

⁷ House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 10 ("House Report").

⁸ See, e.g., House Report at 56 ("The Committee notes that in the 7 years since passage of the Cable Act, the cable industry has experienced tremendous growth. Cable penetration has increased from 37 percent of television households in January 1985 to approximately 61 percent in June 1992. In addition, during this period cable advertising revenues increased five-fold, from less than \$600 in 1984 to approximately \$3 billion in 1991. Moreover, the quality and diversity of programming available to consumers and cable's annual investment in programming has increased greatly."); H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 56 (1992) ("Conference Report"); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. (1991) at 3 ("Senate Report"); Report in Docket 89-600, 5 FCC Rcd 4962, 4966 (1990) ("6 Year Cable Report").

levels. It is this balance that the 1992 Cable Act seeks to strike.

8. Although the Commission has been provided a significant measure of flexibility in carrying out the tasks assigned it⁹, the framework for cable rate-setting is set forth in the Act itself and further guided by the Cable Act's legislative history. The priority established in the Act is clearly to protect the interests of subscribers. An important focus for both basic tier and cable programming service rates, consistent with providing system operators a fair return, is the establishment of rate levels equivalent to rates that would be charged in the presence of effective competition.¹⁰ The traditional utility process for deriving a reasonable rate, however, is not endorsed. Indeed, the Act continues to provide, as it has since 1984, that cable systems "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."¹¹ The traditional utility rate setting process is notoriously complex and burdensome to regulators and regulatees alike. Congress, however, desired that regulations governing cable rates be designed "to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."¹² Thus, to the extent feasible, the Act appears to contemplate a simplified form of regulation, using

⁹ See, e.g., Conference Report at 62 ("Rather than requiring the Commission to adopt a formula to set a maximum rate for basic cable service, the conferees agree to allow the Commission to adopt formulas or other mechanisms and procedures to carry out this purpose. The purpose of these changes is to give the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process.")

¹⁰ With respect to basic service tier rates, the law specifies that the Commission's regulations "shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." Communications Act, § 623(b)(1), 47 U.S.C. § 543(b)(1). The criteria to be applied in setting both basic tier and cable programming service rates include a comparison with "the rates for cable systems, if any, that are subject to effective competition."

¹¹ Communications Act, § 621(c), 47 U.S.C. §541(c).

¹² Communications Act, § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A).

"formulas or other mechanisms" where possible.¹³ Finally, the legislative history makes it clear that the concern of the Act is with the exercise of market power by cable system operators, and is not with the returns earned by those entities supplying cable programming, a market in which there is abundant and increasing competition. Because cable operators bundle together transmission, equipment, and programming when selling cable service to subscribers, the need for broad oversight of cable rates was recognized. Nevertheless, the Senate Committee clearly indicated that it had "no desire to regulate programming." The House Committee recognized that programming costs were likely to change during the rate cycle and suggested that the Commission might develop "pass throughs" or other appropriate regulatory mechanisms to avoid unnecessary constraints on the cable programming market while protecting the interests of subscribers.

9. We have sought to establish in this Report and Order a comprehensive approach to cable rate regulation that achieves a reasonable balancing of statutory requirements and that will promote the broad policy objectives reflected in the statute. As required by the 1992 Cable Act, we provide for regulation of cable rates by local franchising authorities and the Commission pursuant to jurisdictional and procedural requirements that have been designed to reduce burdens on cable operators, local authorities, the Commission, and consumers. In addition, our requirements that will govern permitted rate levels for cable service and reflect a balancing of the interests of consumers and of cable operators. In this regard, we believe that our initial rate regulations should produce substantial savings to consumers on an aggregate industry basis. These savings will result from rate reductions required from a broad segment of regulated cable operators that service most of the nation's cable subscribers. We do not believe that the required rate reductions will hinder the ability of the cable industry to continue to provide quality services to consumers. On a going forward basis, we have implemented price caps for regulated cable systems that will reduce administrative burdens and permit the continued growth of services while effectively governing future rate levels.

10. We anticipate that the regulations we adopt today will change over time. In accordance with the statute, we will review and monitor the effect of our initial rate regulations on the cable industry and consumers, and refine and improve our rules as necessary. In addition, we will issue separately a Second Further Notice to obtain a better record for adoption of cost-of-service showings by cable operators seeking to raise

¹³ Communications Act, § 623(b)(2)(B), 47 U.S.C. § 543 (b)(2)(B).

rates above capped levels. This step is necessary to assure that our regulations governing such showings will correctly balance the interests of consumers in paying a fair rate and of cable operators in earning a reasonable profit.

11. The highlights of our decision today are set forth in an executive summary, attached as Appendix A. A list of commenting parties is set forth in Appendix B. Appendix C contains our new rate regulations, and Appendix D includes the new forms we are requiring cable systems, subscribers and local franchising authorities to use when following our rate regulations. Finally, an analysis of the survey of cable rates that we conducted in December 1992, which provided much of the factual basis for today's decision, is attached as Appendix E.

II. Report and Order

A. Rate Regulation of Cable Service

1. Rollback of Cable Service Rates

i. Background.

12. In the Notice, we cited Congress' findings in the 1992 Cable Act demonstrating that the average monthly cable rate since deregulation had grown almost three times as fast as the Consumer Price Index (CPI) since deregulation.¹⁴ We sought comment on whether the Cable Act reflects a congressional intent that our regulations yield rates generally lower than those in effect when the Cable Act was enacted, or rather a congressional intent that our rules serve primarily as a check on prospective rate increases. We also solicited comment generally on the impact of rate reductions, or of limits on prospective rate increases, on the ability of cable operators to provide service to subscribers on the basic or higher level service tiers, and on cable operators' retiering discretion.

ii. Comments.

13. Municipalities uniformly argue that Congress envisioned that the Commission would order significant reductions in existing cable rates.¹⁵ Municipalities maintain that the

¹⁴ Notice, 8 FCC Rcd at 511.

¹⁵ See, e.g., Atlanta Reply Comments at 2; Austin Reply Comments at 3-4; Ayden Reply Comments at 2; Bayonne Reply Comments at 3-4; Boston Reply Comments at 5; Burnsville Comments at 1; CalCities Comments at 2; Cincinnati Comments at 2; Clinton Comments at 3; Dade Reply Comments at 2; Dearborn Reply Comments at 2; Fairborn Reply Comments at 2; Fairfax Reply Comments at 8-9; Fort

Cable Act and its legislative history reflect Congress' intent that the Commission ensure that current cable rates are reasonable.¹⁶ Moreover, these parties contend that in order to effectuate Congress' intent, cable rates above those calculated to be reasonable under the Commission's rules must be lowered to comply with such guidelines.¹⁷ GTE claims that at the very least, rates should be reduced for the approximately 28 percent of the nation's cable subscribers that Congress determined were subject to the most egregious rate increases.¹⁸ In addition, municipalities state that congressional intent would be violated if the Commission limited regulation to prospective rate increases.¹⁹ NCTA and cable operators, on the other hand, argue that rate increases enacted between 1984 and adoption of the 1992 Cable Act were lawfully taken under the authority of the 1984 Cable Act.²⁰ They contend that such rate increases reflect the increased services offered by cable operators since deregulation and that deregulation has made it possible for them to bring additional services to subscribers.²¹ They argue that rate regulation could hinder or prevent the ability of cable operators to improve existing, and offer new, services and to invest in new

Lauderdale Comments at 2; Garden City Comments at 2; Georgetown Reply Comments at 2; Greensboro Reply Comments at 2; Greenville Reply Comments at 2; Hastings Comments at 2; Hays Comments at 2; Henderson Reply Comments at 2; Indian River Comments at 2; Iowa City Reply Comments at 2; Junction City Comments at 2; Kinston Reply Comments at 2; Lake Forest Comments at 2; Lakeville Comments at 2; Laurens Reply Comments at 2; Laurinberg Reply Comments at 2; Liberal Comments at 2; Lincoln Park Comments at 2; Louisville Comments at 2; MACC Reply Comments at 2; Madison Comments at 2; Mankato Comments at 2; Marshall Comments at 2; Mentor Comments at 2; Miami Beach Comments at 4-5; Multnomah Comments at 2; NATOA Comments at 4-6; Niles Comments at 2; Oakland Comments at 1; Ottawa Comments at 1; Palm Desert Comments at 2; Phillipsburg Comments at 4; Piscataway Reply Comments at 2; Prince George Comments at 2; Ramsey Comments at 2; Reidsville Reply Comments at 2; Salina Comments at 2; San Antonio Reply Comments at 2; Tallahassee Reply Comments at 2; Titusville Reply Comments at 2.

¹⁶ Id.

¹⁷ Id.

¹⁸ GTE Reply Comments at 10.

¹⁹ Id. See also NAB Comments at 3.

²⁰ NCTA Reply Comments at 65-66.

²¹ See AdelphiaII Comments At 2-3; Discovery Comments at 5-6; EET Comments at 1; ESPN Comments at 4-5.

technology that could benefit subscribers.²² NCTA adds that a reduction in existing rates would be inconsistent with the Cable Act's purpose to restructure service offerings by cable operators within the bounds of rate constraints.²³

iii. Discussion.

14. The explicit findings of the statute,²⁴ the overall scheme of regulation under the statute,²⁵ the fact that we must consider the rates of systems subject to effective competition in establishing regulations,²⁶ and the statutory goals articulated in the Act,²⁷ all persuade us that Congress was concerned that rates of systems not subject to effective competition reflect undue market power and are unreasonable to the extent they exceed competitive rate levels. In addition, we have conducted an industry survey to ascertain the differential

²² See AdelphiaII Comments at 2-3; NCTA Comments at 1-4; TIA Comments at 2.

²³ Id.

²⁴ The Cable Act of 1992 finds that for a variety of reasons, including local franchising requirements and the extraordinary expense of constructing competing cable systems, most cable television subscribers have no opportunity to select between competing cable systems. Pub. L. No. 102-385, Section 2(a)(2). The statute states that without the presence of another multichannel video programming distributor a cable system faces no local competition. The statute finds that the result is undue market power for the cable operator as compared to consumers and video programmers. Id. The statute additionally finds that the average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation. Id.

²⁵ Under the Cable Act of 1992 only systems not subject to effective competition, as defined in the statute, are subject to rate regulation. See Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2). Thus, the statute implicitly finds no need for regulation of rates of systems subject to effective competition because the presence of competition prevents them from exercising undue market power.

²⁶ Communications Act, § 623 (b)(2)(C)(i), 47 U.S.C. § 543 (b)(2)(C)(i).

²⁷ Under the statute, regulations governing rates for the basic service tier must additionally be designed to achieve the goal of protecting subscribers from paying rates that exceed the rates that would be charged if the system were subject to effective competition. See Cable Act of 1992, Section 2(b).

in rates between systems subject and those not subject to effective competition as defined in Section 623(l)(1) of the Cable Act.²⁸ As explained in greater detail below, our analysis reveals that rates of systems not subject to effective competition are, on average, approximately 10 percent higher than rates of comparable systems subject to effective competition. Thus, our survey supports the findings of Congress that current rates for cable systems not subject to effective competition reflect pervasive market power.²⁹

15. We conclude, therefore, that our initial effort to regulate rates for cable service should provide for reductions from current rates of regulated cable systems with rates above competitive levels. Thus, our initial implementation of rate regulation of cable service will generally lead to significant reductions from current rate levels for most cable systems.³⁰

²⁸ See Order, 8 FCC Rcd 226 (1992). We explain in detail the methodology of this survey in Appendix E.

²⁹ As described below, to develop the initial rate standards, we have compared rates for cable systems in competitive markets with a random sample of noncompetitive systems using econometric analysis techniques. These analyses produced a consistent and statistically significant difference between the random sample data and the effective competition sample. The best estimate produced by these techniques is that rates for the competitive sample are 9.4 percent below the noncompetitive systems controlling for the effects of important system characteristics. Using this technique we have created a set of per channel "benchmark" rates. In addition, however, we are specifying that a system's rates (subject to certain adjustments) will be reduced no more than 10 percent below that specific system's rates as of the date of the survey. While the formula that produces the 9.4 percent differential is in our view the most accurate that we can develop given the data and time limitations involved, the statistical "confidence interval" of that estimate indicates that the actual difference between competitive and noncompetitive systems could be higher or lower. We have resolved the uncertainty here by limiting the reduction in rates to 10 percent while retaining the benchmark produced by the specific regression equation employed and by not requiring reductions below these benchmark levels. Although it embodies a number of compromises that are designed to account for the lack of precision in the data, this formulation taken as a whole is, we believe, responsive to the objectives of the Act.

³⁰ As noted above, cable systems that face effective competition in the local market are not subject to rate regulation. Our understanding, however, is that only a tiny percentage of the approximately 11,000 cable systems nationwide face effective competition, as that term is defined by the 1992 Cable Act. Thus,

Our approach will enable local franchise authorities to require rates for the basic service tier, and the Commission to require rates for cable programming services on the basis on individual complaints, to fall approximately 10 percent from September 30, 1992 levels, unless the operator can justify a higher rate based on costs. These reductions could be required of up to three-quarters of all regulated cable systems serving approximately three-quarters of the country's cable subscribers. As we explain below, rates of all regulated systems will then be subject to a price cap mechanism that will govern the extent to which rates can be raised on a going-forward basis without a cost-of-service showing. We will also examine systems with rates substantially above competitive levels to determine whether their higher rates are justified by higher costs. Finally, we will seek to refine our analysis through further industry surveys and order additional rate reductions if appropriate.

2. Standards and Procedures for Identification of Cable Systems Subject to Effective Competition

a. Application of Effective Competition Tests

i. Background

16. Under the 1992 Cable Act, if a cable system is not "subject to effective competition," the system's rates may be regulated. Cable programming service and equipment rates are regulated by the Commission pursuant to a statutory complaint process. Basic cable service and equipment rates are regulated by the local franchising authority or, under certain circumstances, by the Commission.³¹ The Act states that "effective competition" is established if one of the three following tests is fulfilled:

- (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
- (B) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and (ii) the number of households

the vast majority of cable systems will be subject to rate regulation and may be required to reduce rates from existing levels.

³¹ Communications Act, § 623(a)(2)(A), (B), 47 U.S.C. § 543(a)(2)(A), (B). By contrast, rates for premium programming services offered on a per-channel or per-program basis are not subject to rate regulation under any circumstances.

subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the house-holds in the franchise area; or

(C) the franchising authority itself is a multichannel video programming distributor and offers video programming to at least 50 percent of the house-holds in the franchise area.³²

The Notice sought comment on various aspects of the Act's definition of effective competition.³³

ii. Comments

17. There is a divergence of opinion among commenters regarding whether we should treat video dialtone service providers, leased access programmers, and traditional broadcasters offering multiplexed multichannel programming as multichannel video programming distributors in competition with cable operators. Many cable interests believe that all of these services should be considered in the effective competition determination,³⁴ while consumer groups, local franchising authorities, and NAB offer objections to inclusion of specific services.³⁵ These groups also disagree over when a competitor of cable should be deemed to "offer" video programming within the meaning of the second and third tests. The cable industry generally believes that programming should be deemed "offered" when a system is technically capable of providing service to households,³⁶ and the households can reasonably be assumed to be

³² Communications Act, § 623(1)(1), 47 U.S.C. § 543(1)(1).

³³ Notice, 8 FCC Rcd at 512-13.

³⁴ Cable operator may face competition from all these services: Continental Comments at 6-7; TCI Comments at 14-15; Comcast Comments at 12. Cable operator may face competition from video dialtone: Nashoba Comments at 5; Falcon Comments at 4; Lenfest Comments at 2; TimeWarner Comments at 8.

³⁵ Objection to inclusion of video dialtone service at present: MCATC Comments at 17; CFA Comments at 115-19; BellSouth Comments at 22-23; NYNEX Reply Comments at 14-15; USTA Reply Comments at 3. Objection to leased access users offering multichannel video programming: NMCC Comments at 6; Austin Comments at 17-8; NATOA Comments at 18; Sommerville Comments at 3. Exclusion of broadcasters offering multichannel video programming: NAB Comments at 13.

³⁶ TCI Reply Comments at 7; Comcast Comments at 11-12.

aware of the service because of some marketing effort by the distributor.³⁷ Local franchising authorities and consumer groups, on the other hand, argue that only active local marketing will ensure that households are fully aware they are being "offered" alternative video programming services.³⁸ These parties also take opposing positions on whether we should measure on an individual or cumulative basis the penetration level of competing alternative services, for purposes of meeting the 15 percent subscribership threshold in the second effective competition test. The cable industry and CFA believe the Act calls for aggregating the subscribership of all alternative services,³⁹ while local franchising authorities argue that at least one alternative service must have the subscribership of at least 15 percent of the franchise area in order to fulfill the test.⁴⁰ Finally, commenters diverge on whether the term "comparable" in the second test means any measurable penetration by alternative services, as argued by most cable companies,⁴¹ comparable content and quality of programming provided by competing services, as suggested by some commenters,⁴² or a comparable number of channels carried by the competing systems, as offered by NATOA.⁴³

iii. Discussion

(1) First Effective Competition Standard

18. The first statutory test for effective competition is fulfilled when fewer than 30 percent of the households in the

³⁷ TimeWarner Comments at 11.

³⁸ Bayonne Reply Comments at 5-6; NATOA Comments at 15.

³⁹ NCTA Reply Comments at 51-52; CIC Reply Comments at 31-5; Continental Comments at 7; Caribbean Comments at 2; Nashoba Comments at 9 n.19; TimeWarner Comments at 12; TCI Comments at 13; Comcast Comments at 12; Lenfest Comments at 2; Liberty Comments at 15; Falcon Comments at 6-7; CFA Comments at 114.

⁴⁰ NATOA Comments at 10; Miami Comments at 6; Boston Reply Comments at 7.

⁴¹ TCI Comments at 15; Comcast Comments at 14; Continental Comments at 7; NCTA Reply Comments at 52-3; TimeWarner Reply Comments at 6.

⁴² NYConsumer Comments at 5; Austin Comments at 19; NYNEX Reply Comments at 16; USTA Reply Comments at 3.

⁴³ NATOA Comments at 13-4.

franchise area subscribe to the cable service of a cable system.⁴⁴ The measurement of subscribership under this test will be based on the subscribership of the particular cable system in question, and not an aggregation of the subscriberships of all cable systems and competitors in the franchise area.⁴⁵

(2) Multichannel Video Programming
Distributor

19. The Notice sought comment on which service providers should qualify as "multichannel video programming distributors" ("multichannel distributors") for purposes of the second and third statutory tests for effective competition.⁴⁶ Section 602(12) of the Cable Act defines the term "multichannel video programming distributor" as a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.⁴⁷ We construe this term according to the plain meaning of the statute as applying to entities that distribute, *i.e.*, make available to customers or subscribers, more than one channel of video programming in a franchise area.⁴⁸ We now turn to application of this definition to the specific services cited in the Notice but not explicitly listed in Section 602(12).⁴⁹

⁴⁴ Communications Act, § 623(1)(1)(A), 47 U.S.C. § 543(1)(1)(A).

⁴⁵ For example, assume a franchise area where 60 percent of the households subscribe to System A, 5 percent subscribe to System B, 5 percent subscribe to System C, and 3 percent subscribe to System D. Assume also that neither System B, C or D reaches 50 percent of households in the franchise area. Only System A is subject to rate regulation under the 1992 Cable Act, pursuant to the first statutory test for effective competition. Systems B, C, and D are not subject to rate regulation because each of their individual subscribership rates is below 30 percent.

⁴⁶ Notice, 8 FCC Rcd at 512.

⁴⁷ Communications Act, § 602(12), 47 U.S.C. § 522(12).

⁴⁸ Id.

⁴⁹ An entity, however, must also meet the statutory tests for penetration in a franchise area, comparability of programming to that of cable companies, and availability of service within a franchise area, discussed in more detail below.

20. The Notice sought comment on whether telephone companies offering video dialtone service should be treated as competing multichannel distributors for purposes of the effective competition test.⁵⁰ Video dialtone will permit local telephone companies to make available to multiple service providers, on a nondiscriminatory basis, a basic common carrier "platform"⁵¹ that can deliver video programming and other services to end users.⁵² By definition, video dialtone has the potential to distribute more than one channel of video programming and consequently to qualify as a multichannel distributor under the Act.⁵³ We do not believe that the current constraints on telephone company entry into cable television preclude a telephone company from effectively competing with a cable system within the meaning of the 1992 Cable Act. It is true, as NYNEX and BellSouth observe, that telephone companies are generally prohibited under the Commission's cross-ownership rules from packaging and offering video programming directly to households,⁵⁴ but rather offer a

⁵⁰ Notice, 8 FCC Rcd at 512.

⁵¹ A "basic platform" is a common carriage transmission service coupled with the means by which consumers can access any and all video program providers making use of the platform. In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Section 63.45 - 63.58, Second Report and Order, Recommendation to Congress, And Second Further Notice of Proposed Rulemaking, ("Video Dialtone Order") 7 FCC Rcd 5781, 5783 n.3 (1992), recon. pending, petition for review docketed sub nom. Mankato Citizens Telephone Co. v. F.C.C., No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

⁵² Id. at 5783.

⁵³ See generally Continental Comments at 6; Comcast Comments at 12; Nashoba Comments at 5 n.13; Falcon Comments at 4; Lenfest Comments at 2; TimeWarner Comments at 8.

⁵⁴ BellSouth Comments at 23; NYNEX Reply Comments at 15. BellSouth asserts that there are only two situations in which a telephone company providing video dialtone service could possibly qualify as a multichannel distributor: (1) where the company is providing multiple channel programming over a video dialtone facility directly to its rural area subscribers; and (2) where the company is providing video programming over a video dialtone facility to non-rural customers pursuant to a "good cause" waiver. Currently, the Cable Act does not prohibit a telephone company from providing video programming directly to subscribers in a rural area, or to other subscribers pursuant to a good cause waiver. See 47 C.F.R. §§ 63.56, 63.58, respectively. Comments at 23. See generally USTA Reply Comments at 3. We do not agree, however, that telephone companies may provide effective competition to cable operators in these circumstances alone, and instead take a broader

platform whereby multiple video programmers can offer such service pursuant to the Video Dialtone Order. However, the availability of the platform on a non-discriminatory basis to multiple video programmers could establish significant competition to existing cable operators even though the telephone company itself does not have direct control over programming as does a cable operator. Indeed, the availability of broadband transmission capacity to multiple video programmers could create greater competition than other potential multichannel providers of video programming. Accordingly, by providing the distribution system that makes video programming "available for purchase" by subscribers and customers, we conclude that video dialtone comes within the plain language of this section of the Act.⁵⁵

21. Although video dialtone is a nascent service,⁵⁶ we believe, contrary to the concerns of some commenters,⁵⁷ that the Act's other requirements for effective competition regarding reach, penetration, and program comparability will ensure that in any given franchise area, a video dialtone service functions as an effective competitor. Thus, we believe that any video dialtone system that meets these additional statutory requirements can provide effective competition to a cable operator, with one exception. We agree with CFA that a joint venture between a telephone company and a cable system located in the same franchise area to offer video dialtone service cannot be considered effective competition to that incumbent cable system. We also agree with CFA that to permit such joint ventures to qualify would not advance the Act's goal of furthering the widest

view of the competitive nature of non-cable, video dialtone services.

⁵⁵ Communications Act, § 602(12), 47 U.S.C. § 552(12). In light of the numerical, content-neutral test we adopt for comparability of programming, we do not believe, as NYNEX suggests, that telephone companies' common carrier status will prevent them from providing regulators with data necessary for an effective competition analysis. NYNEX Reply Comments at 15.

⁵⁶ At present, the Commission has granted one Section 214 application filed by a telephone company proposing to initiate a video dialtone system. See The Chesapeake and Potomac Telephone Company of Virginia, FCC 93-160 (released Mar. 25, 1993). Three other such applications are still pending: New York Telephone, FCC No. WPC-6836; New Jersey Bell Telephone, Florham, FCC No. WPC-6838; and New Jersey Bell Telephone, Dover, FCC No. WPC-6840.

⁵⁷ See generally MCATC Comments at 17; CFA Comments at 116.

possible diversity of information sources and services to the public.⁵⁸

22. Multichannel video programming is often delivered to residents of multiple dwelling units via satellite master antenna television service ("SMATV"). A SMATV system generally receives satellite-transmitted signals at an earth station located atop a multiple unit building and distributes the signals through coaxial cables connecting the individual units of the building.⁵⁹ Typically, a SMATV provider will install a home satellite dish on the building and feed a package of multichannel video programming to the residents through the building's private cable distribution network. The provider will usually contract with a program-packaging service that deals with the various programmers to purchase the use of their material on a mass basis. Therefore, we agree with Falcon and others that the SMATV service operator functions much like a traditional cable operator and meets the general definition of multichannel distributor in Section 612(12).⁶⁰

23. Some commenters argue that leased access providers offering compressed multiplexed multichannel video programming on a cable system should be treated as competing multichannel distributors under the Act.⁶¹ TCI asserts that, by including television receive-only satellite programming distributors in the definition of a multichannel video programming distributor,⁶² Congress showed that a distributor need not be facilities-based in order to come within the scope of the effective competition

⁵⁸ CFA Comments at 117; Communications Act § 601(4), 47 U.S.C. § 521(4).

⁵⁹ See Definition of a Cable Television System, Report and Order, 5 FCC Rcd 7638, 7639 (1990), remanded on other grounds sub nom. Beach Communications, Inc. v. F.C.C., 959 F.2d 1103 (D.C. Cir 1992) (per curiam), cert. granted, 61 U.S.L.W. 3393 (U.S. Nov. 30, 1992) (No. 92-603) (argued Mar. 29, 1993).

⁶⁰ Falcon Comments at 3; TimeWarner Comments at 7 n.20 (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984) (SMATV systems are potential competitors to cable systems); Nashoba Comments at 5 n.12; Liberty Comments at 17.

⁶¹ Continental Comments at 7; Comcast Comments at 12; TCI Comments at 14-5.

⁶² Often, a household wishing to receive video programming will purchase a television receive-only earth station, or home satellite dish, from a supplier, and then subscribe to a package of programming through either the dish supplier or some other program-packaging service.

test.⁶³ We agree with TCI that a qualifying distributor need not own its own basic transmission and distribution facilities. However, to qualify as an entity effectively competing with a cable operator, we believe that the facilities a multichannel distributor uses cannot be those of the operator.⁶⁴ Therefore, leased access providers will not be considered multichannel video programming distributors for purposes of meeting the statutory tests for effective competition.

24. Cable companies also argue that traditional broadcasters offering multiplexed multichannel video programming should qualify as competing multichannel distributors.⁶⁵ Under TCI's expansive approach, for example, any distributor offering multiple video programming choices to households should be considered a multichannel distributor under the Act. TCI states that with video-on-demand and digital compression technology, one standard 6 MHz broadcast channel will be sufficient to offer a wide array of programming, and thus provide competition to cable.⁶⁶ NAB, however, argues that broadcasters offering such programming should not fall within the effective competition tests because they typically offer only a few channels or choices of programming and thus cannot be expected to provide genuine competition to cable.⁶⁷ Furthermore, CFA argues that Congress, in passing the 1992 Cable Act, rejected the Commission's finding that six broadcast signals constituted effective competition to cable television.⁶⁸ Although we agree with CFA that traditional broadcast signals carrying one channel of programming in a 6 MHz

⁶³ TCI Comments at 14, citing Communications Act, § 602(12), 47 U.S.C. § 522(12).

⁶⁴ Notice, 8 FCC Rcd at 512 n.15; see generally CFA Reply Comments at 65-6; NMCC Comments at 6; Austin Comments at 17-8; NATOA Comments at 18; Sommerville Comments at 3; see also NAB Comments at 9 n.9.

⁶⁵ Continental Comments at 6; see generally TCI Comments at 14-5.

⁶⁶ TCI Comments at 14.

⁶⁷ NAB Comments at 12-3.

⁶⁸ CFA Reply Comments at 65; see Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Report and Order and Second Further Notice of Proposed Rulemaking, in MM Docket Nos. 90-4 and 94-1296, 6 FCC Rcd 4545 (increasing the signal standard from three to six broadcast signals); Communications Act, § 623(1)(1), 47 U.S.C. § 543(1)(1) (redefining effective competition without a broadcast signal standard).

band do not qualify under the effective competition test, we do not agree that technological advances may never make broadcasters effective competitors to cable within the meaning of the statute.⁶⁹ For example, should digital compression or other technology advance to the point that a single broadcaster in a community were able to offer programming comparable to that offered by a cable system,⁷⁰ such a broadcaster might well be deemed a multichannel video programming distributor effectively competing with the cable operator. However, the extent to which such multichannel video programming will be feasible as a technological and regulatory matter is still unclear.⁷¹ We thus defer a ruling on whether a multiplexed broadcast signal can qualify a broadcaster as a multichannel video programming distributor until we can consider the question under more concrete circumstances.

25. Finally, some cable interests argue that future licensees in the proposed local multipoint distribution service ("LMDS"), while not specifically addressed in the Notice, should also be treated as multichannel video programming distributors under the statutory tests for effective competition to cable companies.⁷² We have recognized that a likely initial use of LMDS will be to provide video services in competition with cable

⁶⁹ Id.

⁷⁰ We define comparability of programming, infra Section II.A.2.a.(6), as the offering of at least 12 channels of video programming, at least one of which is nonbroadcast.

⁷¹ For example, under current plans for a transition from conventional to advanced television (ATV) transmission, broadcasters will be required to broadcast only in ATV approximately 15 years after an ATV standard is selected. Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, 7 FCC Rcd 6924 (1992), recon. pending. It is not clear that, as a technical matter, more than one channel of ATV programming can be carried on a standard 6 MHz bandwidth.

⁷² Falcon Comments at 3-4; TimeWarner Comments at 8 n.22. LMDS has been proposed by a group of inventors who have engineered a millimeter wave component technology which can be used to offer video and other communications services in the 27.5 - 29.5 GHz frequency range. Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557 (1993).

television,⁷³ although point-to point and point-to-multipoint telecommunications services can also be offered. However, we have not yet begun to accept applications for this service, and we do not yet know the extent to which LMDS providers will choose to offer video programming as opposed to telecommunications services.⁷⁴ Thus, while it is still too early in the development of LMDS to reach firm conclusions on the treatment of LMDS providers as multichannel video programming distributors, we currently expect to analyze LMDS providers for purposes of the effective competition determination in a manner appropriate to the degree of video distribution services they provide.

(3) Availability of Competing Service

26. The second test under the Cable Act for finding effective competition to an incumbent cable operator is fulfilled, in part, if the franchise area is served by at least two unaffiliated multichannel distributors, each of which "offers" comparable video programming to at least 50 percent of the households in the franchise area.⁷⁵ The third test for effective competition is satisfied if the franchising authority itself is a competing multichannel distributor, and "offers" video programming to at least 50 percent of the households in the franchising area.⁷⁶ The Notice asked whether the proper standard for measuring when households are "offered" video programming by alternative systems should be when video service is actually available to households.⁷⁷

27. Service of a multichannel video programming distributor will be deemed "offered" for purposes of the statutory effective competition tests when the service is both technically and actually available. Service will be deemed technically available when the multichannel video programming distributor is physically able to deliver service to a household

⁷³ Id., 8 FCC Rcd at 559-60.

⁷⁴ There is one licensee operating such a service pursuant to a waiver of our rules. Hye Crest Management, Inc. operates a 50-channel system in Brighton Beach, New York City, from two transmitter sites. The Commission has authorized Hye Crest to provide service to the entire New York MSA. Hye Crest Management, Inc., 6 FCC Rcd 332 (1991).

⁷⁵ Communications Act, § 623(1)(1)(B), 47 U.S.C. § 543(1)(1)(B).

⁷⁶ Communications Act, § 623(1)(1)(C), 47 U.S.C. § 543(1)(1)(C).

⁷⁷ Notice, 8 FCC Rcd 512.

wishing to subscribe, with only minimal additional investment by the distributor, if necessary. Cole suggests, and we agree, that the nature of this additional investment should be controlling: if the additional investment is of a "community" nature, i.e. necessary to serve an entire neighborhood or community, then service will be deemed not technically available; by contrast, if the additional investment is of an "individual" nature, i.e. necessary to serve a single subscriber, then the service will be held technically available.⁷⁸ Thus, for example, the services of a cable operator will be deemed technically available to a household when the operator's system, namely its cable, "passes" the household. This interpretation comports with generally accepted industry standards for service availability.⁷⁹ We find that a cable drop to a household necessary for the subscriber to actually receive service is a minimal additional investment peculiar to an individual subscriber, the cable drop being equipment particular to that subscribing household. Therefore, the service would be technically available if the operator's cable passed a household, but a drop was not yet installed. On the other hand, if the operator must install cable trunk to reach the neighborhood in which a potential subscriber lives, this would constitute an investment common to a community. Service to the household would thus not be deemed technically available.

28. NATOA argues that the Commission should only consider service as "offered" if it is both technically available and the distributor of such service is actively marketing the service to the households on a local basis. NATOA believes that a distributor's service should not be deemed actually available unless potential subscribers are aware of its existence and availability.⁸⁰ NATOA would not endorse advertising or marketing only in national media outlets as adequate assurance that consumers have a genuine choice among services. TCI, in opposition, states that any sort of local, regional or even national marketing should be sufficient. For example, a national

⁷⁸ Cole Comments at 4; see generally TCI Reply Comments at 6-7; TimeWarner Comments at 10-11; Falcon Comments at 6.

⁷⁹ The term "homes passed" means the number of homes a particular cable system has the technical ability to serve promptly if a potential customer orders service, and counts households even if individual cable drops are required.

⁸⁰ NATOA Comments at 15-16. For example, NATOA states that a direct broadcast service, which may be technically available to the entire country as soon as it launches operation, should not be considered actually available unless the direct broadcast service distributor is actively marketing the service through local means.. Id. See also Fairfax Reply Comments at 9.