(i) Rate Regulation Barred at the State Level

63. It appears that the first question is largely theoretical, since the record does not reveal any instances in which state law currently forbids state and local governments from engaging in cable rate regulation. Nonetheless, because this issue may arise in the future, we will resolve it here.

64. Cable operators argue that state laws barring rate regulation are not preempted; otherwise, they assert, Section 623(a)(3) is meaningless. If the Act were an independent source of authority to regulate rates, they reason, every franchising authority would have "legal authority" and there would be no need for this certification standard.[181] Franchising authorities vigorously dispute the cable industry's statutory analysis, arguing that in order to achieve the congressional objective of ensuring reasonable rates, the FCC should interpret the Act as an independent source of authority for franchising authorities to regulate rates.[182]

65. An examination of the statutory scheme persuades us that Congress did not intend to preempt state laws barring rate regulation by state or local authorities. We first look to the language of the statute. As TCI and others suggest, in interpreting a statute we should attempt to give each clause and word meaning, if possible.[183] We believe that Section 623(a)(3) must be interpreted to require that a franchising authority be the body under state and local law authorized to regulate cable rates.[184] If the Act were an independent source of authority for franchising authorities to regulate rates, there would be no need

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[181] See, e.g., TimeWarner Comments at 27; TCI Comments at 46.

[182] See, e.g., New Bedford Comments at 4; Sommerville Comments at 4; Dade Comments at 6.

[183] See n. 180, supra.

[184] NATOA attempts to import another meaning into Section 623's requirement of legal authority; it argues that by this provision, Congress intended to ensure that the governmental entity filing the certification is the authority authorized to regulate the cable system in that franchise area. NATOA Reply Comments at 26-27. This is certainly part of the provision's meaning, but neither the legislative history nor the statutory scheme support such a limited reading of the requirement of legal authority.

for franchising authorities to certify as to their legal authority.[185]

66. The bifurcated regulatory regime created by the statute supports the view that state law barring rate regulation by state or local authorities is not preempted. Franchising authorities could seek certification to regulate basic cable rates; if the certification were disapproved or revoked because the franchising authority lacked the requisite legal authority, the Commission would regulate those rates until the franchising authority could be certified.[186] Since state laws barring rate regulation thus are not inconsistent with the federal statutory scheme, we conclude that the provision of the Communications Act that preempts state and local laws and provisions in franchise agreements that conflict with the Communications Act,[187] does not preempt such state laws.

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[185] See, e.g., Cablevision Reply Comments at 45; Cole Reply Comments at 11-12.

[186] The Notice also asked whether FCC regulation of basic cable rates in a state that barred rate regulation would in fact constitute preemption of state law. Notice, 8 FCC Rcd at 516. To the extent the state law bars only state and local rate regulation, FCC regulation in that situation would not constitute preemption because it would be pursuant to federal, not state or local law. Moreover, since the Commission has authority to regulate in states that bar rate regulation, there is no conflict between such a state law and the federal regulatory system and the state law does not impose an obstacle to the effectiveness of the federal statute. See Head v. New Mexico Board, 374 U.S. 424, 432 (1962) (holding that New Mexico statute barring optometry advertisements not preempted by Communications Act). Of course, in the unlikely event that the state law purports to prohibit federal--as opposed to just state or local--regulation, the state law would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress to protect consumers from unreasonable rates. In those circumstances, the state law must give way to federal law under established preemption principles. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

The Notice also questioned whether, if state law were preempted, the FCC could extend to franchising authorities the authority to regulate rates where they otherwise would be without such power. In the absence of Congress' express authorization to so empower the states, we have no power to do so. Planned Parenthood Fed. of America v. Heckler, 712 F.2d 650 (1983).

[187] Communications Act, § 636(c), 47 U.S.C. § 556(c).

67. Our conclusion is consistent with Supreme Court precedent on preemption. The main issue as to whether Congress and its agencies can exercise exclusive jurisdiction over state laws rests on the question of whether Congress has in fact intended to make its jurisdiction exclusive.[188] The Supreme Court has upheld state law in areas not inherently requiring national uniformity, unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field."[189] Therefore, absent any evidence of legislative intent to preempt state law, the Court has not allowed federal law to prevail over areas of local concern and requiring the attention of the state.[190] On the other hand, if Congress has created regulations about matters of national concern, and state law is frustrating the very purpose of the congressional objectives in a specific area of law, federal law will preempt state law to render effect to the particular Federal Act.[191] As discussed above, because a state law barring rate regulation does not prevent the Commission from regulating rates, such a law is not inconsistent with the federal statutory scheme set forth in the 1992 Cable Act.

68. Finally, we note that cable operators urge an interpretation of the Act that would prevent Commission regulation of basic cable rates in states that bar rate regulation.[192] They base this argument on Section 623(a)(6), which provides that if the Commission disapproves or revokes a franchising authority's certification, the Commission shall exercise "the franchising authority's regulatory jurisdiction" ... until the franchising authority has qualified by filing a new certification that meets the Act's requirements. This language, the commenters contend, requires the Commission to "step into the shoes" of the franchising authority and limits the Commission's jurisdiction to whatever power the franchising authority has under state law. If the state bars rate regulation, these commenters conclude, the Commission cannot regulate rates. Commenters thus urge us to limit the exercise of our regulatory

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[188] Head, supra, 374 U.S. at 430.

[189] Head, supra, 374 U.S. at 430.

[190] Head, supra, 374 U.S. at 432; De Canas v. Bica, 424 U.S. 351, 357 (1976).

[191] Hines v. Davidowitz, supra, 312 U.S. at 66, 67 n.20 (for example, in Hines, federal law preempted state law in an effort to further the comprehensive federal schemes of the immigration and naturalization laws).

[192] See, e.g., TCI Reply Comments at 57.

authority only to those jurisdictions where the franchising authority has the legal authority to regulate rates.[193] We find this argument without merit. As discussed above, the Congress provided for FCC regulation of rates when a franchising authority could not meet the certification standards set forth in the Act, one of which requires the franchising authority to have the requisite legal authority. This provision would have little meaning if the Commission could not regulate in states that bar rate regulation. The better interpretation of this provision is that Congress intended the Commission to exercise what would otherwise be the franchising authority's regulatory jurisdiction until the franchising authority has qualified to exercise such jurisdiction (e.g., by having the impediment to its legal authority removed).[194]

(ii) Rate Regulation Authority Exercised at State Level

69. The second preemption issue raised by the commenters concerns state laws that prohibit local franchising authorities, but not state government entities, from regulating rates. We believe that, for the same reasons discussed in the preceding section, such state laws are not preempted by the 1992 Cable Act. These laws do not prevent state regulation of cable rates; rather, they simply define which governmental entity in the state is empowered to regulate rates. Since local franchising authorities receive their power to grant franchises and regulate rates from the state, there is no reason why the state cannot retain that power and exercise it at the state level. Thus, although local governments may be barred by state law from regulating rates, the state itself may engage in such activities. In these instances, the state would file a certification with the Commission as the franchising authority.

70. The application of these principles is illustrated by the regulatory scheme constructed by the Commonwealth of Massachusetts. In this regard, the Massachusetts Community Antenna Television Commission ("MCATC") requests clarification of

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[193] See, e.g., Nashoba Comments at 30-31; TCI Comments at 44-45.

[194] Cable operators also argue that Congress did not intend for the Commission to exercise jurisdiction for a franchising authority in perpetuity, and that Congress intended the Commission only to regulate a franchising authority's rates until that authority could be certified. See Cole Comments at 12-13; TCI Reply Comments at 57. However, we find no indication in the Act or its legislative history that Congress intended to limit the exercise of our jurisdiction to a certain time frame.

its role and the role of localities in regulating basic cable service.[195] Under Massachusetts law, local governments issue franchises.[196] They thus arguably would be considered "franchising authorities" under the Act's definition.[197] The right to regulate rates, however, is explicitly given under state law to MCATC.[198] Therefore, under the Cable Act, franchising authorities in Massachusetts would be unable to certify that they have the "legal authority" to regulate rates; yet, MCATC is concerned that under a narrow reading of the Act's definition, it would not be a "franchising authority" authorized by the Act to regulate rates.

71. We conclude that, under principles of municipal corporation law, MCATC can be considered a "franchising authority," which the Act defines as "any governmental entity empowered by Federal, State, or local law to grant a franchise." The power of a local government to grant franchises must be expressly granted or necessarily implied from an express grant of power.[199] Local governments have no inherent regulatory power.[200] That Massachusetts chose to delegate its franchising powers to municipalities does not mean that it gave up its power to grant franchises. Moreover, we must bear in mind that Congress certainly did not intend for "regulatory gridlock" to occur as a result of a state's statutory structure. We thus clarify that "franchising authority" means, for rate regulation purposes, the authority empowered by state law to regulate rates. In Massachusetts' case, this entity is MCATC, even though it has delegated its authority to issue franchises to local governments. Massachusetts may, of course, delegate its rate regulating power to localities should it choose to amend its statutory scheme.

(2) The Certification Process

(a) The Certification Form

i. Background

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[195] See MCATC Comments at 4-6.

[196] M.G.L. Ch. 166A, § 3.

[197] Communications Act, 47 U.S.C. § 522(9).

[198] M.G.L. Ch. 166A, § 15.

[199] See Antieau, Municipal Corporation Law, § 29.02.

[200] See Ferris, Lloyd, Casey, Cable Television Law, ¶ 13.14[1].

72. The Notice proposed that a franchise authority intending to regulate basic cable rates be required to submit a certification meeting the requirements of Section 623(a)(3)(A-C), discussed above, and also stating the basis for its finding that its franchisee is not subject to effective competition. The Notice sought comment on the tentative conclusion that a standardized, simple form could be used for certifying to the three criteria of Section 623(a)(3), and that the form should include a section for the authority's explanation of its finding that effective competition is lacking, with reference to documentable data.[201]

ii. Comments

73. Most franchising authorities agree that a standardized, simple form, similar to the form contained in Appendix D of the Notice, is sufficient and desirable.[202] TCI and Cole agree that the form should be kept simple but also propose that it include a representation that the franchising authority has provided the cable operator notice of its intent to seek certification.[203] Other cable interests argue that the form should require the franchising authority to provide evidence of the absence of effective competition and show how it meets the three criteria of Section 623(a)(3).[204]

iii. Discussion

74. Given our decisions regarding how effective competition determinations can be made and on the certification pleading cycle, there is no need to require franchising authorities to submit detailed information regarding effective competition on the certification form. Cable operators will have a reasonable opportunity to challenge certifications on effective competition and other grounds before rate regulation actually begins. Therefore, we adopt the form included in Appendix D to the Notice with one change, suggested by NATOA, which incorporates the decision we have made regarding the presumption

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[201] Notice, 8 FCC Rcd at 516.

[202] See, e.g., Austin Comments at 28; Kansas Comments at 1; Cal Cities Comments at 7.

[203] TCI Comments at 54; Cole Comments at 15. The form does include a representation that the franchising authority has served a copy on the cable operator.

[204] See, e.g., Nashoba Comments at 43; Carib. Comments at 8-10; NCTA Comments at 68.

of effective competition.[205] In addition, we will require franchising authorities to serve copies of their certification requests on cable operators. Such service copies must be sent by first-class mail on or before the date the certification form is filed with the Commission.

(b) Joint Certifications

i. Background

75. In the Notice, we proposed to allow two or more communities served by the same cable system to file a joint certification and exercise joint regulatory jurisdiction.[206] We noted that the legislative history contemplates joint regulation.[207] We sought comment on whether we should provide incentives for joint regulation or require governmental entities regulating a single economic entity to coordinate their activities. We also asked commenters to address how a cable operator can fulfill the Act's requirement that the operator's rate structure be uniform throughout a geographic area[208] if franchising authorities do not coordinate their regulatory activities.

ii. Comments

76. Commenters generally agree that joint certification should be permitted, but not required.[209] Municipal states that the advantages of joint regulation are obvious, and no further incentives are necessary.[210] Cole and

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[205] NATOA Comments at 25; Appendix D, infra.

[206] Notice, 8 FCC Rcd at 516.

[207] House Report at 80.

[208] Communications Act, § 623(d), 47 U.S.C. § 543(d). See further discussion of Section 623(d) at section II.A.5.a, infra.

[209] See, e.g., NATOA Comments at 32; Austin Comments at 29; Cox Comments at 66; Municipal Comments at 55-56. Nashoba argues that communities jointly served by a small system should be required to regulate jointly in order to reduce small system burdens. Nashoba Comments at 114. In light of the explicit statement in the House Report that the legislation should not be interpreted to require exercise of joint regulatory authority, see House Report at 80, we do not believe that we have the authority to require joint regulation in any circumstances. For discussion of small system burdens, see section II.A.5.f, infra.

[210] Municipal Comments at 55-56.

Continental, however, argue that in many cases it will not be appropriate. These commenters point out that where communities are served by the same system but their franchises contain different terms and conditions, were awarded in different years, and run for different periods, it would be difficult to exercise joint regulatory authority. Where the initial franchise encompasses multiple communities, however, the exercise of joint regulatory authority would be appropriate.[211]

iii. Discussion

77. We will permit, but not require, joint certification for communities served by the same system. We agree with Austin that joint certification and joint regulation may occur regardless of whether the areas covered have uniform rates.[212] Even where community-specific factors might cause rates to vary, we believe that joint regulation would provide efficiencies to the communities and to the cable operator. We also agree with Austin that joint regulation may take several forms, including arrangements where communities share the costs of data collection and hold joint hearings but make independent rate decisions.[213]

78. We will also permit joint certification for communities served by different systems, as Austin suggests.[214] As stated above, joint regulation does not necessarily mean that rates in each franchise area must be the same. Such joint certification could provide administrative economies to local authorities and to this Commission, which must process certification requests, as well as petitions for denial and revocation of certification. Finally, such joint certifications could ease the regulatory burden on cable operators by providing greater resources for franchising authorities and increasing the efficiency and expertise of local regulation.[215] The economies

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[211] Cole Comments at 17; Continental Comments at 18-19.

[212] Austin Comments at 29.

[213] Austin Comments at 29.

[214] Austin Comments at 29.

[215] Although we encourage efficient resolution of rate disputes, we are primarily concerned that the Act's provisions be implemented as faithfully as possible. While joint certifications may make resolution more difficult, as Cole Reply Comments at 13; Continental Reply Comments at 11-12 suggest, we believe that the increased benefits to administration of the Act's explicit framework (certification by the FCC of local authorities, local authorities' regulation of basic service rates) outweigh its

realized by franchising authorities and by cable companies where joint certification and regulation occurs could ultimately be reflected in improved rates and services for cable subscribers.

79. A related issue is whether a state may file a blanket certification on behalf of its franchising authorities. New York State Commission on Cable Television argues that since the legal authority of municipalities to regulate cable television rates is a matter of state law, a state agency with jurisdiction over cable can ensure that the Act's certification standards exist or will be met.[216] While allowing such blanket certifications would certainly be administratively efficient, we cannot reconcile permitting this procedure with the dictates of the Act. Section 623(a)(3) requires the franchising authority to certify that it fulfills the criteria for certification.[217] Moreover, the Act contemplates that some franchising authorities may choose not to regulate.[218] A blanket certification would deny franchising authorities in that state an opportunity to forego rate regulation. However, if a state (e.g. a statewide public utilities commission) is the franchising authority, it obviously would be the entity filing the certification for itself.[219]

(c) Approval of Certification by the Commission

i. Background

80. In our Notice, we stated that, pursuant to the Cable Act, a certification submitted by a franchising authority to the Commission shall be effective after 30 days unless we find that (1) the authority has adopted or is administering regulations inconsistent with those we prescribe; (2) the authority lacks the legal authority to adopt, or the personnel to administer, the regulations, or (3) interested parties are not

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negative effects.

[216] NYSCCT Comments at 17-18.

[217] See also SBA Comments at 11 n.17 (stating that Congress rejected amendments to the Act that would have required state utilities commissions to regulate).

[218] See discussion at section II.A.3.a.(1), supra.

[219] If the state acts as the franchising authority for unincorporated areas, it would also file the certification as the "franchising authority" for those areas. See NECTA Comments at 18-22 for a discussion of examples of states that hold rate regulatory authority at the state level.

provided a reasonable opportunity to express their views.[220] Because of the 30-day time constraint, we assumed that Congress did not intend that the Commission establish a full pleading cycle before acting on a certification. We thus proposed to base our decision on certification on the submission by the franchising authority alone. We sought comment on allowing parties to submit challenges to certifications by filing a petition for revocation once a certification is effective.[221]

81. We tentatively concluded in the Notice that denial of certification would be subject to our normal procedures for reconsideration, review, and appeal.[222] We also proposed to assume regulation of basic service rates in the event we denied certification. If we certified an authority, however, we proposed to require the local authority to notify its cable system within 10 days of our decision.[223]

ii. Comments

82. Comments on these proposals were mixed. Cable interests recommend that the Commission require franchising authorities to provide local cable operators with advance notice (ten to fifteen days) of the filing of a certification application with the Commission.[224] Operators maintain that this would allow for disputes to be addressed informally without involving the Commission. Some operators suggest that a franchising authority should be required to implement regulations prior to the submission of a certification in order to determine if they are consistent with those adopted by the Commission, suggesting that this might reduce the need to file petitions for certification, revocation, or denial.[225] Some operators also argue that they should be afforded the right to contest certification requests on jurisdictional grounds, i.e., legal deficiency or the presence of effective competition, prior to Commission action. Operators maintain that it would make little

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[220] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[221] Notice, 8 FCC Rcd at 516-517, paras. 22-23.

[222] 47 C.F.R. §§ 1.101-1.120; 47 U.S.C. §§ 402, 405.

[223] Notice, 8 FCC Rcd at 517, para. 24.

[224] Cole Comments at 17-18; Continental Comments at 19; TimeWarner Comments at 29; TCI Comments at 54; Comcast Comments at 19.

[225] See, e.g., Cox Comments at 53.

sense to allow franchising authorities to begin rate regulation proceedings when they may lack the jurisdiction to do so.[226]

83. Most commenters agree that Congress did not intend that the Commission should institute a "full" pleading cycle in order to issue franchising authority certifications.[227] Nonetheless, there was concern, especially among cable operators, that given the constraints of this time schedule, the Commission's 30-day certification process may be nothing more than ministerial. Because there will be little time to review the substance of representations made, much less make adverse findings against certifications, operators argue that the Commission should establish a process where certification can subsequently be challenged without any presumption in favor of a "certified" cable franchisor.[228] NATOA, however, maintains that because Congress did not intend that the Commission establish a pleading cycle with an opportunity for interested parties to comment during the 30-day period, the Commission may base its decision on whether to grant certification solely on the filing by the franchising authority.[229]

84. Furthermore, in the event that we certify an authority, NATOA opposes our proposed requirement that a franchising authority notify a cable operator that it is certified within 10 days of the Commission's decision. Because NATOA does not oppose giving a cable operator prior notice that it has filed a certification, and because certification should be automatic absent an adverse finding, NATOA believes no further notice is necessary. Additionally, if the Commission does impose the requirement, NATOA contends that a franchising authority's failure to comply should not be the basis for revocation of its certification.[230]

iii. Discussion

85. The statute mandates that franchising authority certifications become effective within 30 days of filing unless this Commission finds that the authority does not meet the

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[226] Continental Comments at 19; Cole Comments at 18.

[227] See e.g., TCI Comments at 55; TimeWarner Comments at 30; NATOA Comments at 33; Cox Comments at 55.

[228] TimeWarner Comments at 30; TCI Comments at 55; Cole Comments at 19.

[229] NATOA Comments at 33.

[230] NATOA Comments at 33-34.

statutory certification requirements.[231] Given this extremely brief timeframe, and given that the grounds for certification pursuant to Section 623(a)(3) are matters to which a franchising authority is in the best position to attest, we do not believe that the Act contemplates or requires that operators be afforded an opportunity to contest any of these grounds prior to certification.[232] This interpretation will also alleviate administrative difficulties that will arise during initial implementation. The Commission may receive as many as 30,000 requests for certification (commensurate with the number of franchise areas across the nation) within a few weeks of the effective date of these regulations. As many cable commenters have recognized,[233] under such conditions, it is administratively impossible to provide a pleading cycle or to examine each franchising authority's certification in detail. Of necessity, this Commission must rely initially on the franchising authority's statement that it does in fact meet certification standards.[234] Therefore, we will permit challenges to certification only after the fact, as discussed below.

86. However, the finding of effective competition is essential to both franchising authority and FCC jurisdiction to regulate rates.[235] As described above,[236] franchising authorities may base their initial finding of effective competition on a presumption that such competition does not exist, with the burden on the operator to disprove this presumption. However, because of the short time frame in which certifications must be approved, operators will not have an opportunity to contest a finding of effective competition--a jurisdictional predicate to rate regulation--until after a franchising authority is certified. Under these circumstances, we will provide operators an opportunity to challenge a finding

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[231] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[232] See FCC v. Florida Power Corp., 480 U.S. 245, 253 (1987) (Fifth Amendment does not bar imposition of nonconfiscatory rate regulation when private property devoted to public uses involved).

[233] See, e.g., Continental Comments at 19-20; TimeWarner Comments at 29-30; TCI Comments at 55.

[234] As discussed in section II.A.2.b, supra, we will allow the franchising authority to rely on a presumption that the cable operator in its area is not subject to effective competition. The cable operator will then have the burden to show that it is subject to effective competition.

[235] Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2).

[236] See supra Section II.A.2.b.

of effective competition before rate regulation can be imposed upon them.

87. The process will work as follows. Franchising authorities may begin filing certifications with the Commission 30 days after publication of this Report and Order in the Federal Register, although there is no deadline by which a franchising authority must seek certification. As noted above, the franchising authority must use the FCC's certification form and must certify that it has served a copy of the certification request on the cable operator. The certification will take effect 30 days after it is filed unless the Commission denies certification within that period.[237] The franchising authority will then have 120 days in which to adopt regulations consistent with the Commission's regulations[238] and, if such rules are not already in place, to promulgate rules providing a reasonable opportunity for consideration of the views of interested parties.[239] The franchising authority must notify the cable operator that it has been certified and has adopted appropriate regulations before it can begin regulating rates and, if necessary, ordering refunds.

88. For its part, the cable operator may file a petition for reconsideration of the franchising authority's certification, subject to our normal requirements and procedures, including the statutory requirement that such a petition be filed within 30 days.[240] The 30-day period for such petitions will begin to run from the 30th day after the certification was filed with the Commission. A petition for revocation of certification,

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[237] To reduce our administrative burden, we will not notify the franchising authority that its certification has become effective. We will require the authority to either send the certification form by registered mail, "return receipt requested," or to hand-deliver the form to the Commission's Secretary in Room 222, 1919 M Street N.W., Washington, D.C., and obtain a date-stamped copy. Unless we notify the authority otherwise, the certification will become effective 30 days after the date on the return receipt or the date on the stamped copy.

[238] This requirement is not onerous; a straightforward rule stating that the local franchising authority will follow the rate regulations promulgated by this Commission will suffice.

[239] Question 3 of the certification form in Appendix D of the Notice, which requires the franchising authority to certify that it will adopt regulations consistent with those promulgated by the Commission, will be amended to include these requirements.

[240] 47 C.F.R. 1.101-1.120; 47 U.S.C. §§ 402, 405.

however, may be filed at any time after the expiration of the period for reconsideration.[241]

89. If the petition for reconsideration challenges the finding that effective competition is absent,[242] rate regulation will be automatically stayed until resolution of the petition, subject to refund liability back to the date the petition was filed if we subsequently determine that there is no effective competition. We are providing for an automatic stay of rate regulation for these petitions because challenges to the absence of effective competition bring into question whether a "finding" of no effective competition, a jurisdictional prerequisite to rate regulation, can be made.[243] As discussed previously, a cable operator has a statutory right to be free of regulation if effective competition exists.[244] This procedure prevents the imposition of rate regulation until the issue of the existence of effective competition can be determined.[245] At the same time, if after evaluating the petition for reconsideration we find that effective competition does not exist, the cable operator will be liable for any overages that may have been charged, dating back to the day on which its petition for reconsideration was filed. This approach will ensure that the rights of subscribers are protected during the pendency of the petition at the FCC.

90. Challenges to franchising authority certifications on other grounds, e.g., the authority does not have the legal authority to adopt regulations or the personnel to administer the regulations, may also be raised by petition for reconsideration, if filed within 30 days, or later by a petition for revocation. The party filing the petition may request a stay of rate regulation, which will be evaluated under our general

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[241] See discussion of revocation procedures, Section II.A.3.(d), infra.

[242] See discussion at section II.A.2.(b), supra, where we impose on alternative service providers an obligation to furnish the operator information on the number of households offered service and the number of subscribers if the information is not otherwise available.

[243] Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2).

[244] See section II.A.2.(b), supra for discussion of due process concerns in the context of a finding of effective competition.

[245] As discussed section II.A.2.(b), supra, we will also adopt penalties for cable operators that file frivolous effective competition petitions simply to take advantage of the automatic stay of rate regulation.

requirements for imposition of a stay.[246] We will not impose an automatic stay of rate regulation when these challenges are made because the issue is not whether the cable operator should be subject to rate regulation at all, but rather whether the local authority or the Commission regulates the rates. Thus, there is no compelling need to stay rate regulation by the local authority pending resolution of these challenges, since the local authority will be performing the same function that we would conduct in any event.

91. We believe that this procedural approach strikes the appropriate balance between fairness to cable operators, satisfaction of the Act's jurisdictional prerequisites, and the congressional mandate for swift implementation of rate regulation. In providing that certifications become effective 30 days after they are filed unless the Commission disapproves them,[247] Congress clearly did not intend that we establish a full pleading cycle before certification. We have, however, provided cable operators an automatic stay of rate regulation if the existence of effective competition is at issue and provided an opportunity to petition for a stay if the franchising authority's certification is otherwise subject to challenge.

92. It is unclear how many challenges to certification requests we will receive as basic rate regulation is implemented across the country. Should a large volume of petitions for reconsideration[248] be filed, however, we will resolve the effective competition challenges first. Those pleadings will be limited in number since relatively few systems currently are subject to effective competition. We will then process the remaining petitions generally from the largest communities first to provide immediate benefit to cable operators with the most subscribers or, if the certification is upheld, to provide for speedy implementation of rate regulation in communities with the most subscribers. However, other factors, such as date of filing, may also be considered. A smaller community in need of immediate relief may petition the Commission for expedited consideration.

93. The Cable Act requires that, in disapproving a franchising authority's certification, we notify the authority of

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[246] 47 C.F.R. §§ 1.43(n), 1.106(n).

[247] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[248] We discuss general procedures for revocation petitions filed after 30 days from initial certification have elapsed <u>infra</u> Section II.A.3.(d).

any modifications necessary to obtain approval.[249] The Notice proposed to reflect this requirement in our rules, and tentatively concluded that denial of certification would be subject to our normal procedures for reconsideration, review, and appeal.[250] Under the rules we adopt governing the certification pleading cycle, as discussed above, certification will generally occur. Cable operators and other interested parties will then have an opportunity to file for reconsideration. Our rules will provide that if we uphold a challenge to a certification on other than effective competition grounds, we will notify the authority of this denial and provide the franchising authority an opportunity to modify its certification however necessary to obtain approval.[251] If, after this opportunity to cure, the authority still fails to meet the certifications requirements, its certification will be revoked and the Commission will regulate basic service rates. Cable operators and franchising authorities may appeal our decision on reconsideration, subject to our normal procedures.[252]

(d) Revocation of Certification

i. Background

94. Section 623 (a) (5) provides that if we determine that state and local laws and regulations do not conform to our rate regulations, we "shall revoke" the jurisdiction of the franchising authority in question.[253] The Notice sought comment on whether this requires us to revoke an authority's certification whenever an authority's actions involve a violation of Section 623 (a) (3) (A), in that local regulations are inconsistent with our rate regulations. The statute also provides that if, upon petition by a cable operator or other interested party, we find that an authority has acted inconsistently with the requirements of Section 623 (a), we shall grant "appropriate relief."[254] We asked if "appropriate relief" means lesser remedies in situations, for example, where local and state laws may be facially consistent with our regulations, but the authority has applied them inconsistently or has otherwise

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[249] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[250] Notice, 8 FCC Rcd at 517.

[251] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4). We will reflect this requirement in our rules.

[252] 47 C.F.R. 1.101-1.120; 47 U.S.C. §§ 402, 405.

[253] Communications Act, § 623(a)(5), 47 U.S.C. § 543 (a)(5).

[254] Id.

departed from the terms of its certification.[255] We also asked parties if actions other than inconsistent local and state laws -- for example, lack of adequate personnel --which would have caused us to disallow a certification in the first instance, would also form the basis for revocation.[256] We also sought comment on what procedures should apply if a cable operator, once not subject to effective competition, becomes subject to it. We tentatively found that an operator should be required to petition a franchising authority for a change in regulatory status. We sought comment on whether a challenge to a franchising authority's denial of change in status could be made as part of a petition for revocation.[257]

ii. Comments

95. Comments were mixed regarding our interpretation of Section 623 (a) (5). Some cable operators believe that the Commission must revoke a franchising authority's certification if its regulations conflict with our regulations and there is a violation of Section 623 (a) (3) (A).[258] However, some municipalities suggest that this remedy is not mandatory,[259] and others assert that revocation is an extreme remedy which should be invoked only when the franchising authority has consistently and repeatedly disregarded our regulations.[260] NATOA agrees that lesser remedies are appropriate where the authority's actions involve noncompliance with Sections 623 (a) (3) (B) or (C), i.e., where local and state laws may be facially consistent with our regulations, but the authority has applied them inconsistently or has otherwise departed from the terms of its certification.[261] However, CATA and NCTA argue that the Commission should not limit the grounds for revocation only to Section (a) (3) (A), i.e., to state or local laws that are inconsistent with our regulations.[262]

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[255] Notice, 8 FCC Rcd at 517, paras. 25-26.

[256] Communications Act, § 623 (a)(3)(B); 47 U.S.C. § 543(a)(3)(B); Notice, 8 FCC Rcd at 517, para. 26.

[257] Notice, 8 FCC Rcd at 517, para. 28.

[258] Caribbean Comments at 10.

[259] NATOA Comments at 35.

[260] Palm Comments at 9.

[261] NATOA Comments at 35.

[262] CATA Comments 29-30; NCTA Comments at 70.

96. Municipalities agree with the Notice[263] that a petitioner for revocation should serve a copy of its petition on the local authority but they disagree on the amount of time an authority should have to respond to the petition. They are unanimous that 15 days as proposed in the Notice is not enough time to respond. They suggest response times ranging from 30 to 90 days.[264]

97. Comments also vary regarding what procedures and pleading cycles are to be implemented when a cable system that has been previously regulated becomes subject to effective competition. Cox maintains that in order to expedite the decertification process, the Commission should permit an operator and a franchising authority to agree that effective competition is present in the cable community. Thereafter, an operator would no longer be subject to rate regulation, and the authority would notify the Commission that its certification should be cancelled because of the changed status of the system.[265] NATOA argues that it is virtually impossible for a franchising authority, once it receives a petition from a cable operator, to review the petition, provide public notice of such petition, solicit opposition, and obtain public comment, all within a seven to ten day period the Notice proposes to allow for the filing of oppositions to such petitions.[266] NATOA suggests 120 days to make the initial review of the petition, which would include the filing of oppositions and public comments, with 90 days to make a decision if additional information is necessary.[267] NCTA, however, maintains that franchising review should be expedited and the authority should be required to render its decision within 30 days after submission of an operator's petition. Commission ratification of this decision, according to NCTA, should occur within an expedited time frame of 15 days after receipt of notification of the authority's decision.[268]

iii. Discussion

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[263] Notice, 8 FCC Rcd at 517, para. 27.

[264] See, e.g., NJ Comments at 20 (30 days); NATOA Comments at 37 (90 days); Austin Comments at 31 (60 days); Miami Comments at 11 (30 days).

[265] Cox Comments at 61-62.

[266] NATOA Comments at 36-37 n. 18; Notice, 8 FCC Rcd at 517, para. 28.

[267] NATOA Comments at 36-37 n. 18.

[268] NCTA Comments at 71.

98. The language of Section 623 (a)(5) requires us to revoke a franchising authority's certification if, after the franchising authority has been given a reasonable opportunity to comment, we determine that state and local laws and regulations do not conform to our rate regulations. In such cases, we will assume jurisdiction, as discussed below,[269] over basic service rates until an authority becomes recertified. We take the directive of 623 (a)(5), that we "shall revoke" certification if "state or local laws and regulations are not in conformance" with our rate regulations, to apply to local and state rules that on their face conflict with ours, and which have been interpreted by state and local authorities to so conflict.

99. We also find that an authority's failure to fulfill each of the three conditions for certification, Section 623 (a)(3)(A), (B) or (C), may be grounds for revocation, since failure to meet any of these conditions would have been grounds initially for denial of certification. However, as Continental and Cole suggest, in such cases we will first remand to the franchising authority with directions on how defects should be corrected. We will also consider any resubmission made by the franchising authority on an expedited basis. We believe that providing authorities this rapid opportunity to cure provides "appropriate relief" within the meaning of Section 623 (a) (5) for franchising authority actions that are inconsistent with certification. We will revoke certification in these cases only if the franchising authority fails to implement properly our remand order.

100. We will require a petitioner for revocation against a franchising authority to serve a copy of its petition on the franchising authority. The petition must contain a statement that such service was made. However, we are persuaded by municipalities' arguments that 15 days as initially proposed is not enough time for franchising authorities to file oppositions to such petitions[270] because such a time frame may be administratively impossible in jurisdictions that may require city or county approval before a response can be made. We will therefore grant authorities 30 days to file such oppositions, and also permit 15 days for replies. While the petition is pending, and absent grant of a stay, the franchising authority may continue to regulate the basic service rates of its franchisees.

101. If an operator in a particular franchise area, once not subject to effective competition, becomes subject to it, the operator may petition the franchising authority for change in its

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[269] See infra Section II.A.3.(e).

[270] NJ Comments at 20; NATOA Comments at 37; Austin Comments at 31; Miami Comments at 11.

regulatory status. We do not agree with NATOA that a 120 day time period is necessary in order for a franchising authority to review petitions and solicit oppositions in these matters, but we do agree that interested parties need more time to file oppositions to such petitions than the time period proposed in the Notice. To take account of the authority's obligation to give such petition for change in regulatory status adequate public notice, the time for filing oppositions will run from the time public notice of the petition is given, and will be set for 15 days. Oppositions must be served on the operator. The operator bears the burden of proving the existence of effective competition in challenges to initial certification,[271] so that formulating an opposition in these matters should not be that burdensome. Moreover, as the presence of effective competition nullifies the jurisdiction to regulate under the Act, we believe that comment on and opposition to such allegations must be taken expeditiously. We will also require authorities to permit operators to reply within seven days. In addition, as NCTA requests,[272] we will require franchising authority decisions on such petitions to be made 30 days after the pleading cycle closes and to be publicly released. Franchising authorities must submit to the Commission in ten days any decision changing status. Such decisions will become final in 30 days from the public notice of the decision, unless we receive a petition or other pleading opposing it, or decide, on our own motion, that it is defective. If an initial determination of the franchising authority that effective competition exists becomes final, the franchising authority would then cease regulating basic cable service rates, and our regulatory authority over cable programming services for the system in that franchise area would also cease. Operators denied a change in status by a franchising authority would be entitled to seek review of that finding by the Commission, by means of a petition for revocation, as discussed supra, this Section. In addition, in case a franchising authority has not been certified, a petition for change in status can be made directly to the Commission. We will apply the same time periods for filing pleadings as those set forth above for local franchising authorities.

102. We further conclude that in order to expedite a finding of changed status, we will allow an operator and a franchising authority to agree that effective competition exists, and to submit a joint statement to the Commission to that effect. The statement must stipulate which of the three statutory tests has been met for effective competition,[273] and explain how this

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[271] See supra Section II.A.2.b.

[272] NCTA Comments at 71.

[273] See Section II.A.2.a, supra.

test has been satisfied. The statement also must be released to the public by the franchising authority on or before the day it is submitted to the Commission. Such joint statements will become final decisions within 30 days of filing with the Commission, unless challenged by an interested party.

(e) Assumption of Jurisdiction by the Commission

i. Background

103. Section 623(a)(6) of the Communications Act requires that if we disapprove or subsequently revoke a franchise certification, we must exercise the jurisdiction of the franchising authority until the authority qualifies to exercise that jurisdiction.[274] The Cable Act also requires that we act on the new certification request within 90 days after it is filed by the franchising authority. The Notice sought comment on the procedures that we should utilize in the event that we assume jurisdiction over basic service rates.[275]

ii. Comments

104. There is some division among the parties regarding whether, in the event of denial or revocation of certification, our assumption of jurisdiction should be automatic. Cox believes that existing operators should not be required to file a rate schedule with the Commission, or have rates subject to Commission review unless the local franchising authority, upon dismissal or revocation of its certification, requests this.[276] In contrast, the City of Sterling believes that the Commission should require the cable operator to file its rate schedule with the Commission after denial or revocation of certification as proposed in the Notice.[277]

105. Where the Commission assumes jurisdiction over basic service rates, some municipalities and cable interests believe that we should follow the same procedural rules and deadlines we establish herein for local franchising authorities

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[274] Communications Act, § 623(a)(6), 47 U.S.C. § 543(a)(6). The Notice also explained that if we dismissed a request for certification or revoked an outstanding certification on the ground that effective competition existed in the franchise area, we would not assume rate jurisdiction.

[275] Notice, 8 FCC Rcd at 517.

[276] Cox Comments at 69.

[277] Sterling Comments at 8.

certified to regulate basic service rates.[278] The City of Sterling, however, states that it would be "administratively infeasible" for the Commission to meet the same deadlines that we are establishing for local franchising authorities.[279] Cox proposes a specific pleading cycle and decisional deadline for cases in which we assume jurisdiction.[280]

iii. Discussion

AA. Basic Rate Review

106. Section 623(a)(6) provides that if we disapprove or revoke a franchising authority's certification, we "shall exercise" the franchising authority's jurisdiction until it requalifies.[281] We do not believe, as Cox suggests,[282] that the Act permits our exercise of jurisdiction to rest on the authority's discretion to request us to do so. Moreover, because the Act provides that we can deny or revoke a certification if the authority's regulations do not conform to ours, there may be cases where an authority would not request our assumption of jurisdiction because of disagreement with federal policies.[283] Thus, upon denial of or revocation of certification, we will notify the local franchising authority and the cable operator of our action and inform them that we are assuming jurisdiction over regulation of basic service rates. The notification to the cable operator will require it to file its basic rate schedule with the Commission within 30 days using the appropriate FCC form.[284] We will also require the operator to serve a copy of its rate schedule on the local franchising authority.

107. When we assume jurisdiction over basic service rates and associated equipment, we will apply procedures

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[278] Rapids Comments at 22; Cox Comments at 68.

[279] Sterling Comments at 8.

[280] Cox Comments at 68-69 (30 days for interested parties to comment on proposed rate increase, 15 days for operator to respond; if within benchmark, rate increase automatically effective after 30 days; if outside benchmark, 60 days after the filing unless found unreasonable)

[281] Communications Act, § 623(a)(6), 47 U.S.C. § 543(a)(6).

[282] Cox Comments at 69.

[283] Cable Act, §§ 623(a)(4)(A), 623(a)(5), 47 U.S.C. §§ 543(a)(4)(A), 543(a)(5).

[284] See Appendix D.

analogous to those applicable to local franchising authorities. We make some modifications, however, to permit participation of local franchising authorities, to take account of our comparative lack of familiarity with the history and particular characteristics of basic rate charges in a community, and to allow us to resolve the significant volume of such cases, corresponding to the approximately 30,000 franchise areas in the country, which potentially may come before us.

108. Basic rate filings for existing rates or proposed rate increases for services and equipment (including increases in the average per channel rate that result from reductions in the number of channels in a tier) must calculate relevant benchmarks, caps, and permitted adjustment factors as required on FCC Form 393.[285] Operators with existing or proposed rates above their maximum permitted levels must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable.[286]

109. Basic rate filings must be served on the franchising authority on or before the day they are filed with the FCC. Such filings will also be placed on public notice by the Commission so that other interested parties may have an opportunity to review the filings. Filings proposing rates or rate increases within the Commission's reasonableness standard must be made on 30-days notice and can become effective 30 days after public notice if unopposed, unless the Commission issues an order deferring their effective date or denying them. Filings proposing rates above the presumptively reasonable level must be made on 90-days' notice[287] and be accompanied by a cost-of-service showing.[288]

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[285] See Appendix D.

[286] We will request further comment on cost-of-service standards and further refine the information required in a cable system's cost-of-service showing after we issue an order delineating these standards.

[287] Communications Act, § 623(b)(6), 47 U.S.C. 543(b)(6), requires 30 days notice "to a franchising authority" of any increase proposed for the basic service tier. As explained above, the different constraints which operate when a federal agency assumes jurisdiction over what is primarily a local function necessitate some modifications to local procedures.

[288] See supra Section II.A.3.(b). We disagree with Cox's position that a rate which appears to meet our reasonableness test should always be automatically effective. There may be circumstances, such as where calculations are erroneous, where automatic approval is unjustified.

110. Petitions opposing a filing which proposes a rate or rate increase that falls under the presumptively reasonable level must be filed within 15 days after public notice of the filing, and must be served on the cable operator. Oppositions will be due five days after filing of the petition. This streamlined procedure is appropriate for the relatively simple calculations necessary to ascertain whether a filing falls within permitted levels. Such petitions should demonstrate how the rates in issue are above the reasonable level. In addition, any such petitions that request that additional information be obtained from the operator must specify with particularity the reasons for the request. They will not be routinely granted.

111. Petitions opposing filings which propose rates above the presumptively reasonable level should be filed within 30 days after public notice of the rate filing, with oppositions due in 10 days after petitions are filed. Should it be necessary to request additional data from the operator, we will apply our existing rules to help protect against disclosure of proprietary information.[289] We believe that the different pleading cycles we adopt are preferable to the across-the-board cycle Cox proposes because they will result in expeditious handling of those rate filings that involve straightforward calculations, while also allowing additional time for parties to analyze more complex filings.[290]

112. We are concerned that operators' proposed rate increases be reviewed as thoroughly, but as quickly, as possible, in order to ensure that a cable system's basic service rates are reasonable for consumers and the operator. Thus, we expect that unopposed rates and rate increases which are beneath the permitted level generally can become effective in 30 days unless we issue an order suspending implementation of the proposed rate. For filings above the presumptively reasonable level, we will use the 180-day constraint we impose on franchising authorities as an internal processing guideline.[291] However, our review of rates will also need to take into account the views of any franchising authority that participates as a party in the proceeding, as well as to weigh any particular historical and local factors which are pertinent. Moreover, the volume of such cases could potentially outstrip our administrative resources. Thus, extraordinary circumstances may prevent resolution of all basic rate cases which come before us within the same 180-day deadline imposed on

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[289] 47 C.F.R. § 0.459. See Sections II.A.3.(b) and II.A.4.(b)(1), supra.

[290] Cox Comments at 68.

[291] See infra Section II.A.3.(b).

the franchising authority responsible for ensuring the reasonableness of the rates of a single cable operator.

BB. Recertification

113. The 1992 Cable Act permits our assumption of basic rate jurisdiction until the authority has filed a new certification and we approve it. We must act on a new certification request within 90 days.[292] In order to expedite processing, such a request should be clearly marked as a "Petition for Recertification." As the Act requires, it must meet the requirements for original certification.[293] The petition should also contain a clear showing, supported by either objectively verifiable data such as a state statute, or affidavit, that the underlying reasons for revocation or denial no longer pertain, and must attach a copy of the earlier decision denying or revoking certification. The new certification request must be served on the cable operator and any interested party that participated in the proceeding denying or revoking the original certification. Any party wishing to oppose the new certification request must do so 15 days after the request is filed. The authority may reply within seven days.

b. Implementation and Enforcement of Basic Tier Rates

i. Background

114. The Notice sought comment on the procedures we are required to establish under the Act for enforcement and implementation of basic service rate regulations. We invited comment on an expeditious way to trigger initial review of a cable operator's current basic tier rate once a local franchising authority has been certified to regulate those rates. We asked how local authorities might achieve expedition in ratemaking procedures while at the same time ensuring that all parties receive the due process to which they are entitled. We also sought comment on whether deadlines should be imposed for franchising authority action on a requested rate increase, and whether a requested rate increase should become effective if a franchise authority did not act within such period, with the possibility either that such an increase could be subject to later refund or that a franchising authority could toll its deadline in particular circumstances. We also asked for comment on how proprietary information should be handled, on what remedies and penalties might be afforded local authorities and the Commission, on the proper forum for appeals of local authorities' rate decisions, and on how to implement the

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[292] Communications Act, § 623(a)(6), 47 U.S.C. § 543(a)(6).

[293] Communications Act, § 623(a)(3), 47 U.S.C. § 543(a)(3).