530. It appears that the leased access requirement added to the Communications Act in 1984 has not created "the widest possible diversity of information sources" intended by Congress when it amended the Communications Act in 1984 to include this requirement.[1328] In the Cable Act of 1992, Congress has broadened the purpose of the set aside "to promote competition in the delivery of diverse sources of video programming."[1329] In this proceeding we are setting forth regulations designed to assure that the leased access option brings about the intended diversity of programming and competition in programming delivery. Because few programmers have exercised their option to lease access since 1984, we believe that it is important to monitor this market and to make timely adjustments to the rules if necessary. Thus, although we are not adopting specific reporting requirements in this Report and Order, we intend to incorporate into our general reporting and monitoring process mechanisms for obtaining specific information on leased channel usage and rates. We believe it may be possible to efficiently collect such information as part of the process in which data relating to system rate and financial information are collected for purposes of compliance with Sections 623(g)(collection of information) and (k)(reports on average prices) and will address the gathering of leased access data in that context.

5. Leased Access: Procedures for Resolution of Disputes

i. Background

531. Section 612(c)(4)(A)(iii) of the Cable Act requires us to establish procedures for the expedited resolution of disputes concerning rates or carriage on leased access channels.[1330] The legislative history of Section 612(c)(4)(A) indicates that Congress believed that the existing provisions of the Cable Act of 1984 entitling aggrieved users to bring action in federal district court or to file complaints at the Commission resulted in procedures that were too cumbersome. Congress concluded that these provisions, together with a high burden of proof on access providers, may have limited demand for leased access.[1331] The Notice proposed procedures for addressing petitions for relief by leased access providers alleging that

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[1328] Communications Act, § 612 (a), 47 U.S.C. § 532 (a).

[1329] See Conference Report at 68.

[1330] Communications Act, § 612(c)(4)(A)(iii), 47 U.S.C. § 532(c)(4)(A)(iii).

[1331] House Report at 39-40.

the operator's rates or terms and conditions for use of leased channel capacity violated our rules. We also sought comment on whether to devise procedures for emergency, time-sensitive cases, on the use of Alternate Dispute Resolution ("ADR") to dispose of leased access petitions, and on the role the local franchising authority might have in such dispute resolution.[1332]

ii. Comments

532. Commenters generally support our underlying goal of expediting the resolution of disputes involving leased access channels.[1333] In order to achieve this goal, some cable interests suggest using the general procedures available for petitions for special relief under our current cable regulations.[1334] MEA opposes this proposal, arguing that the pleading cycle under these is too long for leased access disputes.[1335] NATOA stresses that our regulations should be easy to administer and should not unduly burden those complaining about a denial of reasonable rates, terms, and conditions.[1336] Some cable interests emphasize that the 1992 Cable Act did not revise the existing presumption contained in Section 612(f)[1337] that the rates, terms and conditions for use of access channels are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.[1338] Cable interests argue that expedited procedures to resolve leased access channel disputes obviate the need for emergency procedures.[1339] MEA,

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[1332] Notice, 8 FCC Rcd at 543-544, paras. 166-170.

[1333] See, e.g., Blade Comments at 26; Continental Comments at 87.

[1334] 47 C.F.R. §76.7. See Cole Comments at 69; TCI Comments at 77-78.

[1335] MEA Reply at 23.

[1336] NATOA Reply at 8 n.7.

[1337] Communications Act, § 612 (f), 47 U.S.C. § 532 (f). The statute states "In any action brought under this section in any Federal district court or before the Commission, there shall be a presumption that the price, terms, and conditions for use of channel capacity designated pursuant to subsection (b) are reasonable and in good faith unless shown by clear and convincing evidence to the contrary."

[1338] Cox Comments at 50; CIC Comments at 53.

[1339] Comcast Comments at 57; TCI Comments at 79; TimeWarner Comments at 105; Continental Comments at 89.

however, thinks oral rulings could provide meaningful relief for time-sensitive programming such as political advertisements, live concerts, sporting events, and holiday specials.[1340] All parties commenting on the issue support the use of ADR as long as both parties agree to its use.[1341] Cable interests generally oppose the involvement of local authorities in the resolution of leased channel access disputes[1342] while municipalities believe they should have this option.[1343] Cole believes that Section 612(c)(4)(A)(iii) of the Act preempts local authority involvement,[1344] while Cox argues that local authorities do not have the resources and expertise to resolve such disputes.[1345]

iii. Discussion

533. Review of leased access rates or terms and conditions will be triggered by the filing of a complaint with the Commission. In order to ensure that complaints are timely, thus guarding against determinations based on a stale record, and to forestall development of patterns of abuse,[1346] we will require that petitions be filed within 60 days of the alleged violation.[1347] This requirement minimizes the possibility of changed circumstances, such as availability of channel capacity, intervening and thereby making a remedy more difficult to implement.[1348] Second, this 60-day period will afford the

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[1340] MEA Reply at 24.

[1341] See e.g. Cole Comments at 70; TCI Comments at 78. See also MEA Comments at 24.

[1342] LeBoeuf Comments at 6-7; Cox Comments at 51; CIC Comments at 54.

[1343] See e.g. NATOA Comments at 94; Hays Reply at 6; Madison Reply at 5; Mankato Reply at 5; Marshall Reply at 4; Metro Dade Reply at 9; Oakland Reply at 4; San Antonio Reply at 5.

[1344] Cole Comments at 70.

[1345] Cox Comments at 51; CIC Comments at 54.

[1346] Notice, 8 FCC Rcd at 543, para. 167.

[1347] Continental Comments at 88; Cole Comments at 70. Of course, when a continuing violation is involved, complaints may be filed at any time based on current information.

[1348] TCI Comments at 78.

parties a brief but reasonable period of time to resolve the dispute without governmental involvement.[1349]

534. The procedures we adopt for streamlined resolution of leased access disputes are based on the general approach proposed in the Notice. A petitioner will be required to state concisely the facts constituting a violation of our leased access rules,[1350] and the specific rule or regulation allegedly violated and to serve a copy of the petition on the operator. The cable operator would have 30 days from the date of filing the petition in which to respond.[1351] In the case of a rate dispute, an operator would be required to submit data showing that the rate charged was not higher than the highest implicit fee it charged for a comparable category of service. We would also require the operator to submit the affidavit of a responsible company official to support such a response. If, after the operator's submission, we find a prima facie violation of our rules, the operator might then be required to produce additional information.[1352]

535. After the evidence has been submitted, in order for us to grant relief, the complainant must show by clear and convincing evidence that the operator has violated our leased access rules or otherwise acted unreasonably or in bad faith.[1353] For successful complainants, such relief could take various forms, including, but not limited to, refunds,[1354] and injunctive measures. We will also use, where necessary, forfeitures.[1355]

[1349] We encourage parties to attempt to resolve their disagreement through informal means such as through the Alternative Dispute Resolution Process.

[1350] In the case of a rate dispute, a petitioner would have to allege that a given rate was higher than the maximum reasonable rate permitted under our rules.

[1351] We will apply 47 C.F.R. § 1.4 to compute filing times in all cases, including service by mail.

[1352] Notice, 8 FCC Rcd at 543, para. 165.

[1353] Communications Act, § 612 (f), 47 U.S.C. § 532 (f).

[1354] We believe that refunds are a form of relief necessary to ensure the "expeditious resolution of disputes" required in Section 612(c)(4)(A)(iii). For example, it will enable a leased access provider to obtain access while a dispute is pending, because any access charge can later be refunded.

[1355] Communications Act, §§ 503(b)(1)(B) and (2)(A), 47 U.S.C. §§ 503(b)(1)(B) and (2)(A).

We agree with Cox and CIC that while the 1992 Cable Act authorizes the Commission to implement expedited resolution procedures, there is no indication that Congress intended to change the burden of proof set forth in Section 612(f) of the Act,[1356] and our procedures do not change this statutory burden.[1357]

536. We agree with cable interests that our expedited leased access procedures may obviate the need for oral rulings or other emergency processing of leased access disputes.[1358] We decline to establish procedures for such emergency treatment at this time. We do, however, require that pending resolution of a dispute, the operator be required to provide access[1359] if the leased access provider is willing to take access under the rates, terms and conditions set by the operator, subject to any refund or other relief we order.[1360]

537. The Notice tentatively found ADR[1361] might be a

[1356] Cox Comments at 50; CIC Comments at 53.

[1357] Pursuant to statutory direction, our rules regarding leased access rates, terms and conditions, provide specific guidelines as to what is a reasonable practice in the provision of leased access. If an operator's rates, or terms and conditions of use for leased access are proved by clear and convincing evidence to violate our leased access rules or regulations, which rules establish what is or is not reasonable conduct, this would fulfill the complainant's burden of proof within the meaning of Section 612(f). Cf. Lowe v. General Motors Corp., 624 F2d 1373 (5th Cir. 1980) (statutory violation found to be negligence per se and, therefore, unreasonable conduct). As described above, a sufficient allegation of such a violation shifts the burden of production to the operator, who must then come forward with evidence showing conduct in keeping with our rules. We believe that our procedures harmonize the existing presumption in Section 612(f) with Congress' more recent concern that cumbersome leased access procedures have deterred use of such capacity.

[1358] Comcast Comments at 57; TimeWarner Comments at 105; TCI Comments at 78; Continental Comments at 89; See also Cole Comments at 69.

[1359] MEA Comments at 35.

[1360] Cole Comments at 70; TCI Comments at 78.

[1361] Alternative Dispute Resolution refers to procedures for deciding controversies in lieu of formal adjudications, as defined in the Administrative Dispute Resolution Act, 5 U.S.C. § 582(c) (1990). These procedures include, but are not limited to,

more appropriate means of resolving conflicts by offering both expedition and cost-effectiveness.[1362] Commenters generally agree that ADR should be used so long as all parties voluntarily agree to it.[1363] We continue to believe that ADR can provide parties with an exceptionally swift and economical way to resolve a dispute, and we strongly encourage parties to a leased access channel dispute to use ADR in lieu of adjudication before the Commission[1364]. As the record consensus suggests, because ADR is voluntary, parties may elect it at any time.[1365]

538. NATOA and other municipalities argue that local authorities willing to mediate disputes or enforce Commission leased access requirements be permitted to do so.[1366] On the other hand, some cable interests oppose such involvement by the local authority. TCI and Cole take the position that Section 612(c)(4)(A)(iii) of the Communications Act preempts local authorities from resolving leased access channel disputes.[1367] Blade and Cox argue that local authorities do not have the resources or expertise to resolve a dispute involving federal

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"settlement negotiation, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, or any combination thereof." 5 U.S.C. § 581(3).

[1362] Notice, 8 FCC Rcd at 544, para. 168.

[1363] DRG Comments at 8; Cox Comments at 48; CIC Comments at 54; Cole Comments at 70; LeBoeuf Comments at 7; TimeWarner at 76; MEA Reply at 24.

[1364] As noted above in the section addressing cable programming service complaints, parties may contact the Commission's Designated ADR Specialist to obtain information regarding the use of alternative dispute resolution. See note 888 , supra.

[1365] Continental Comments at 89; Cole Comments at 70; TCI Comments at 79. Parties should notify us that they are using ADR and request that the petition be either dismissed or held in abeyance.

[1366] NATOA Comments at 94; Oakland Reply at 4; Garden City Reply at 2; Niles Reply at 2.

[1367] TCI Comments at 79; Cole Comments at 70. Section 612(c)(4)(A)(iii) grants the Commission the authority to "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section."

requirements.[1368] Blade also notes the possibility of inconsistent decisions arising from determinations by multiple franchising authorities.[1369] A local authority, acting as a neutral, can aid the parties in resolving a leased access channel dispute under ADR if all affected parties agree.[1370] Section 612(c)(4)(A)(iii) does not preempt such voluntary agreements. A complainant choosing not to submit to such mediation can have leased access petitions resolved at the Commission. Finally, although local authorities may act as a neutral if all parties agree, the Cable Act does not provide for them to enforce our leased access rules.[1371]

6. Leased Access: Minority and Educational Programmers Alternative

i. Background

539. Section 612(i) of the Cable Act permits a cable operator to place programming from a qualified minority or educational programming source on up to 33 percent of the cable system's designated leased access channels. Programming carried by a cable system as of July 1, 1990 does not qualify as minority or educational programming for purposes of this section.[1372] In the Notice, we tentatively concluded that, for purposes of the minority programming provision, programming that covers "minority viewpoints" or is directed at members of "minority groups" would have to cover the viewpoints of or be targeted to members of the

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[1368] Blade Comments at 26; Cox Comments at 51; CIC Comments at 54.

[1369] Blade Comments at 26.

[1370] Under ADR, "neutrals" can arbitrate disputes. A "neutral" with an official conflict of interest may serve if such interest is fully disclosed and all parties agree. 5 U.S.C. §§ 581, 583, 587. We recognize that there could be inconsistent decisions by the various local authorities. However, under the Administrative Dispute Resolution Act, these decisions will be limited in their impact to the parties and would not be precedent for other local authorities or the Commission. 5 U.S.C. § 590(e).

[1371] Cf. Section 623(b)(5) (Commission authorized to prescribe procedures by which franchising authorities may enforce Commission regulations governing basic service tier rates).

[1372] Communications Act, § 612 (i), 47 U.S.C. § 532 (i).

groups designated as minorities.[1373] We asked parties to comment on this proposal and tentative conclusion. We also proposed to reflect the statutory definition of "educational programming source" in our rules.[1374] The Cable Act qualifies both minority and educational programming sources for leased access under this Section if they devote "substantially all" of their programming to the coverage of minority viewpoints or to educational or instructional programming. We sought comment on how much programming would be enough to fulfill this requirement.

ii. Comments

540. We received little comment on this provision. On the question of how much programming is "substantially all" of a minority source's programming under the statute, Continental proposes that programmers that devote 75 percent of their programming on a weekly basis to minority viewpoints or minority audiences should be deemed to satisfy the standard.[1375]

iii. Discussion

541. As proposed in the Notice, we will reflect the provisions of Section 612(i) in our rules.[1376] For the purposes of the minority programming provision, we conclude that programming that covers "minority viewpoints or is "directed at members of minority groups" has to cover the viewpoints of or be targeted to members of minority groups as defined in Section 309(i)(3)(c)(ii) of the Communications Act. Regarding the appropriate proportion of programming that must be devoted to the coverage of minority or educational programming to qualify as "substantially all" under the statute, we believe that

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[1373] The Cable Act defines a qualified minority programming source as one that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority owned, as the term minority is defined in Section 309(i)(3)(C)(ii) of the Communications Act. Section 309(i)(3)(c)(ii) identifies Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders as minority groups.

124 Section 612(i)(3) defines a "qualified educational programming source" as one that devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding $15 million.

[1375] Continental Comments at 90.

[1376] See Appendix C.

programming sources that devote 90 percent or more of their programming to such purposes may qualify as a statutory source of minority or educational programming. Contrary to the position of Continental, we believe that "substantially all" denotes a very high percentage of programming devoted to these uses and 75 percent would not be adequate under the statute.

C. Subscriber Bill Itemization

i. Background

542. Section 622(c) of the Cable Act states that:

> Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 623, as a separate line item on each regular bill of each subscriber, each of the following:
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> (1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.
> (2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.
> (3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.[1377]

The House Report states that a cable operator shall itemize "only [the] direct and verifiable costs" associated with the above-listed categories of costs and should "not include in itemized costs indirect costs."[1378] The House Report in addition makes it clear that while these costs may be itemized, they are to be included as part of the bill and not simply added to it. The Conference Report adopted Section 622(c),[1379] with the specific amendment that Section 622(c) be construed consistently with our

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[1377] Communications Act, § 622(c), 47 U.S.C § 542(c).

[1378] The House Report states, for example, that a cable operator shall not include in the itemized cost of providing PEG channels the value of such channels if they were used for commercial purposes. House Report at 86.

[1379] The House and Senate versions of Section 622(c) were virtually identical. Conference Report at 84.

rate regulations implementing Section 623 of the Cable Act.[1380] The Notice asked for comment on the interrelationship between Section 622(c) and Section 623. We also sought comment on whether to reflect in our rules the House Report statement that, while authorizing itemization, Section 622(c) does not authorize these charges to be separately billed as if they were not a part of the charge for cable service.[1381]

ii. Comments

543. Many local franchising authorities argue that, in light of the Notice and the House Report, cable companies choosing to itemize under Section 622(c) should be permitted to itemize only direct and documentable costs included in the categories listed explicitly in Section 622(c).[1382] Cable interests agree that the costs categorized in Section 622(c) may be itemized, and also argue that the term "any" within Section 622(c)(3) permits them also to itemize costs not stated explicitly in Section 622(c). For example, they argue that costs incurred for institutional networks,[1383] special municipal video services,[1384] free wiring of public buildings,[1385] governmental

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[1380] Id. at 84. Section 623 of the Act directs the Commission, in devising rules governing basic cable service, to take into account, inter alia: the direct costs of obtaining, transmitting, and otherwise providing signals carried on the basic tier; the properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind, or any other fee, tax, or assessment of general applicability imposed by the state or local authority on the transactions between cable operators and subscribers; and, any amount required to satisfy franchise requirements to support or use PEG channels or any other services required under the franchise. Communications Act, § 623(b)(2)(C)(ii), (v), (vi), 47 U.S.C. § 543(b)(2)(C)(ii), (v), (vi).

[1381] Notice, 8 FCC Rcd at 545.

[1382] See e.g., NATOA Comments at 91; Fort Lauderdale Comments at 3; Hays Reply Comments at 4; San Antonio Reply Comments at 4; Austin Comments at 77.

[1383] Cole Comments at 61; TCI Comments at 82; NECTA Reply Comments at 9; Continental Comments at 78.

[1384] Cole Comments at 61; TCI Comments at 82; Continental Comments at 78.

[1385] NECTA Reply Comments at 9.

studios,[1386] municipal voice and data services,[1387] copyright fees,[1388] and retransmission consent payments can be itemized pursuant to Section 622(c).[1389] Some franchise authorities assert that if Section 622(c)(3) permits cable companies to itemize such additional costs, operators should also have to disclose their per-channel programming costs, amounts attributable to the company's operating margin and debt service, and any other items the franchising authority deems appropriate for separate itemization.[1390] Time Warner and TCI disagree. They argue that the statute does not provide for itemization of these costs nor does the legislative history discuss their inclusion.[1391]

544. Franchising authorities generally believe that a subscriber bill should identify one total charge for cable service, within which all the company's costs are included. They envision, for example, the company including a legend in the bill explaining what percentage of the total charge results from Section 622(c) costs.[1392] Cable companies argue, however, that this method would result in "burying" the costs imposed upon them by the authorities. Operators argue that itemization means separately listing the itemized charges beyond the charge identified in the bill as the charge for cable service.[1393]

iii. Discussion

1. Content

[1386] Id.

[1387] Cole Comments at 61; TCI Comments at 82; Continental Comments at 78.

[1388] NECTA Reply Comments at 10; Harron Comments at 9-10; But see MCATC Comments at 26-27; Boston Reply Comments at 10-11.

[1389] See e.g., Adelphia Comments at 84; Comcast Comments at 61-62.

[1390] NATOA Comments at 92-93; Dearborn Reply Comments at 4; Grand Junction Reply Comments at 4; Hays Reply Comments at 5.

[1391] Time Warner Reply Comments at 81; TCI Reply Comments at 82.

[1392] See e.g., Austin Reply Comments at 70; MCATC Comments at 28.

[1393] See e.g., Harron Comments at 5; TCI Comments at 80; Newhouse Comments at 31-34; Adelphia Comments at 88-89; Falcon Comments at 49-53.

545. We understand that the purpose of Section 622(c) is to assure that there are no regulatory obstacles placed in the way of cable systems identifying certain governmentally imposed costs on subscriber bills. System operators are not required by this provision to undertake any such itemization, nor does the provision, by itself, preclude the itemization of additional costs (whether or not governmentally imposed) or otherwise mandate that subscriber bills have any particular format or content.[1394] Rather, Section 622(c) has to do with increasing political accountability for regulatory costs imposed, by permitting subscribers to be informed that a portion of their bills are related to governmentally imposed obligations. As Senator Lott stated in introducing the eventual final version of Section 622(c) as an amendment to the Senate bill:

> I would like to offer my amendment...dealing with subscriber bill itemization, to give the cable companies an opportunity to itemize these so-called hidden costs to explain to people what is involved in the charges so they will know it is not just the cable company jacking up the prices....The fact is sometimes the rates have gone up because of hidden, unidentified increases in fees or taxes which the cable [company] has to pay and ... passes on to the consumers ....[1395]

Thus, we conclude that the purpose of Section 622(c) is to ensure that cable operators are not prevented, by a franchise agreement or otherwise, from itemizing the specific costs enumerated in that section.

546. With respect to which costs may be itemized under Section 622(c), the provision is quite specific in covering franchise fees; public, education, and governmental channel costs; and fees of any kind imposed on the transaction between the operator and subscriber. The House Report indicates that itemized costs should be direct and verifiable[1396] and the

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[1394] Other provisions of the 1992 Cable Act, however, may have a direct impact on the form and contents of subscriber bills. Thus, for example, the customer service standards required by Section 632(b) address "communications between the cable operator and the subscriber (including standards governing bill and refunds)" and Section 632(c) makes it clear that "consumer protection" laws adopted by States or franchising authorities are not prohibited unless specifically preempted.

[1395] 138 Cong. Rec. S569 (January 29, 1992).

[1396] Cf. Cole Comments at 60-61 (arguing generally that the House Report should not apply); TCI Comments at 79-80 (same); Harron Comments at 9-10 (same); NECTA Reply Comments at 9-11

Conference Report states that itemization is to be consistent with the Section 623 rate regulation provisions adopted by the Commission.[1397] Thus, costs that are itemized include those that are direct and verifiable, as well as a reasonable allocation of overhead, and for PEG costs, the sum of the per-channel costs for the number of channels used to meet franchise requirements.[1398] Therefore, to the extent a franchising authority imposes special costs not of benefit to all subscribers in consideration of the award or renewal of a franchise, these may be included in an itemization as either a franchise fee or PEG cost, as appropriate under the precedents.[1399] If required under a franchise agreement, these costs could include support of institutional

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(same).

[1397] Conference Report at 84. See Sections II.A.(2)(g)AA, supra.

[1398] See e.g., Communications Act, § 623(b)(2), (c)(2), 47 U.S.C. § 543(b)(2), (c)(2).

[1399] Section 622(g) provides that a "franchise fee" may not include, for franchises in effect as of the enactment of the 1984 Act, "payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of public, educational, or governmental access facilities." That section also provides that, for franchises granted after the date of the 1984 Act, capital costs incurred for PEG access facilities may not be included in franchise fees. Thus, such costs would be itemized as PEG costs, or franchise fee costs, in a Section 622(c) itemization. Cf. Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 FCC 2d 175, 204-06 (1974) (prior to 1984 Act's distinction between franchise fee and PEG costs, services required by a franchising authority which benefit only one group of special users must be considered part of franchise fee); In re City of Miami Beach, Florida, Petition for Special Relief, 56 RR 2d 458 (1984) (prior to 1984 Act, extra fees to set up public access organization benefitted only access users of system and had to be considered payment-in-kind and part of franchise fee).

A special tax imposed on rights-of-way, also applicable to other utilities, over and above a franchise fee assessed under a franchise agreement would not be part of a franchise fee itemized pursuant to the definition in Section 622(g). Thus, we disagree with Intermedia that the California possessory interest tax may be itemized under Section 622(c). Intermedia Reply Comments at 6-7.

networks, free wiring of public buildings, provision of special municipal video services and voice and data transmissions.[1400]

Copyright and Retransmission Fees

547. Section 622(c)(3) assures that cable operators may identify as a separate line item on each subscriber bill "the amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber."[1401] A number of parties, including Harron and other cable interests, assert that the use of the term "any" in this provision justifies a broad interpretation of "governmental fee or assessment" permitting, for example, itemization of copyright and retransmission consent fees come within the category of fees or taxes imposed by governmental authority. We disagree. Retransmission and copyright obligations are, in our view, no different from all other binding obligations of cable operators to pay those who supply them with goods and services.[1402] They are imposed by

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[1400] NECTA Reply Comments at 9 (all); Institutional networks, municipal video services, municipal voice and data services: Cole Comments at 61; TCI Comments at 82; Continental Comments at 78.

[1401] Communications Act, § 622(c)(3), 47 U.S.C. § 542(c)(3).

[1402] Harron Comments at 8-10; NECTA Reply Comments at 10. Harron observes that a copyright fee is calculated on the basis of gross receipts, based on subscribership. Harron Ex Parte Statements at 1. Comcast Comments at 59; Adelphia Comments at 84; Time Warner Comments at 108; Comcast Comments at 61-62; TCI Reply Comments at 82. Comcast observes that the Act requires channels carried under retransmission consent arrangements to be carried on the basic service tier. Comcast proposes that retransmission consent fees should be subject to the same "sunshine effects" as the items specifically listed in Section 622(c). Comcast Comments at 59-60. Comcast further observes that Section 623(b)(7)(A)(iii) of the Cable Act requires that channels carried under retransmission consent arrangements are to be carried on the basic service tier, and that Section 325(b)(3)(A)(2) requires the Commission to consider the impact of retransmission consent on rates for the basic tier. Comcast Comments at 60. We recognize that there will be costs associated with cable systems complying with their copyright and retransmission consent obligations. These may be identified to subscribers if that is done in a manner that does not conflict with other provisions of the law (e.g. prohibited by franchise agreement). These costs, however, are not the kinds of fees, taxes, assessments, or charges that are the subject of Section 622(c) but rather are consensual arrangements relating the consideration to be paid in exchange for carriage of signals or programming.

government only in the sense that all legal obligations are imposed by government and are different in kind from the tax and regulatory impositions that appear to be the subject of this section.[1403] Thus,, we do not believe such costs are encompassed within the protections of Section 622(c).

548. NATOA and other municipal interests make reference to itemization of costs such as the part of the total bill attributable to the cable company's per channel operating costs, the cable company's payments on its debt service, and the company's operating margin.[1404] These, too, are not costs directly imposed by a governmental authority but rather represent business and operational expenses not encompassed in Section 622(c). To the extent municipal interests are suggesting that identification of additional costs should be a condition attached to the itemization of those costs specifically identified in the statute, we find this to be inconsistent with the objective of Section 622(c) and could discourage the accomplishment of its political accountability objective. Therefore, we do not believe that we may expand its scope. Franchising authorities thus will not be permitted to require operators to itemize costs not explicitly specified in Section 622(c), such as the operator's debt service or per-channel programming costs, as a condition for itemizing the specifically identified governmental obligations.

2. Format

549. Section 622(c) is intended to ensure public disclosure of costs imposed on the cable operator by specific forms of regulation,[1405] so that subscribers can understand what portion of their cable bill or rate increase results from certain types of governmental assessments beyond the cable company's

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[1403] Section 622(g)(2)(E), it should be noted, excludes from the franchise fee definition "any fee imposed under title 17, United States Code." Title 17 includes the copyright law.

[1404] See e.g., NATOA Comments at 92-3; Dearborn Reply Comments at 4; Grand Junction Reply Comments at 4; Fort Lauderdale Reply Comments at 4; MACC Reply Comments at 4-5. See also Coffeyville Reply Comments at 4 (operators should be required to disclose any other items a franchising authority believes are appropriate to itemize); Palm Desert Reply Comments at 4 (same); Phillipsburg Reply Comments at 2 (same); Louisville Reply Comments at 3 (same); Lincoln Park Reply Comments at 4 (same); Hays Reply Comments at 5 (same).

[1405] Comcast Comments at 58; TCI Comments at 79-80; Nashoba Comments at 84; Time Warner Comments at 79.

control.[1406] Cable interests generally urge us not to follow statements in the House Report[1407] that the law does not authorize cable operators to identify costs itemized pursuant to Section 622(c) as separate costs "over and beyond the amount identified as the charge for cable service".[1408]

550. Cable interests are correct that the Conference Report adopts the Senate, rather than the House version of Section 622(c).[1409] However, as some local franchising authorities note, and as the Conference Report points out, the House and Senate versions of Section 622(c) were virtually identical,[1410] and that the Senate Report was silent on the matter of subscriber bill itemization. On the other hand, the House Report gives specific consideration to the format of subscribers' cable bills.[1411] Thus, the silence of the Conference Report on the question of subscriber bill format does not necessarily imply that the intent of the House was overridden. We believe, therefore, that the statement in the House Report should be given weight.

551. The House Report states that:

> The cable operator shall not identify cost itemized pursuant to section [622(c)] as separate costs over and beyond the amount the cable operator charges a subscriber for cable service. The Committee intends that such costs shall be included as part of the total amount a cable operator charges a cable subscriber for cable service. For example, a cable operator might itemize pursuant to [Section 622(c)] a $1.50 per month charge to account for a five percent franchise fee obligation. If a cable operator charges $30 per month for basic cable service, the $1.50 itemized charge shall be included in such amount; the cable operator cannot provide the cable subscriber a basic bill for $28.50, with a $1.50 additional charge added as a franchise fee. Thus, the

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[1406] See e.g., Comcast Comments at 58.

[1407] CIC Comments at 48-50; Continental Comments at 75; Cole Comments at 59; TCI Comments at 79-80; Harron Comments at 5.

[1408] House Report at 86.

[1409] See e.g., Harron Comments at 5; CIC Comments at 48-50; Continental Comments at 75; Cole Comments at 59; TCI Comments at 78-80.

[1410] NATOA Reply Comments at 24 n.24 (citing Conference Report at 84); Austin Reply Comments at 76 (same).

[1411] House Report at 86.

bill would show a charge of $30, but the cable operator would have the right to include in a legend a statement that the $30 basic cable service rate includes a five percent franchise fee, which amounts to $1.50.[1412]

We also do not believe that Senator Lott's statement regarding the reason for the itemization provision[1413] directly relates to the format subscribers' bills must take.[1414] We further believe that separate billing of such charges would unnecessarily burden subscribers by requiring them to remit separate payments.[1415] Even listing such charges "below the line" would tend to confuse subscribers regarding what is or is not part of their bill.[1416] Thus, any bill itemized pursuant to Section 622(c) may require only one payment for the operator's services on the part of a consumer, the total for which must include all fees and costs itemized pursuant to Section 622(c).

[1412] House Report at 86.

[1413] See supra para. 545.

[1414] See e.g., Austin Reply Comments at 75.

[1415] Harron expresses concern that the rules we adopt governing subscriber bill itemization will complicate its efforts to comply with Section 623(d) of the Cable Act, which requires a cable operator to "have a rate structure...that is uniform throughout the geographic area in which cable service is provided over its cable system." Communications Act, § 623(d), 47 U.S.C. § 543(d). Harron notes that franchise fees and PEG expenses often vary among different franchise areas encompassed within a single service area. Harron Comments at 8-9. However, Section 622(c) addresses merely the form subscribers' bill should take, and not the overall rate structure relevant to Section 623(d). Moreover, we construe Section 622(d) as requiring uniform rates within a franchise area only. See section II.A.5.a, supra. Furthermore, we agree with NATOA that an operator may not quote a rate for cable service in advertisements and other promotional materials that does not include costs itemized pursuant to Section 622(c). NATOA Comments at 92. This prohibition avoids needless confusion on the part of consumers.

[1416] Some franchising authorities express concern that cable companies may use itemization to change the manner in which they calculate franchise fees. See NYSCCT Reply Comments at 6; MCATC Comments at 28-9. Section 622(c) affects the format, not the content of subscriber bills. It is intended to disclose costs attributable to governmental authorities and not to directly affect the amount of these costs.

552. The language of the Act expressly permits the itemization of certain governmentally imposed costs. Beyond the guidelines given above, we are refraining from dictating how a cable operator choosing to itemize may format its bill and implement Section 622(c). We agree with NATOA that local franchising authorities may adopt regulations consistent with those we adopt herein.[1417] However, we underscore that the policy of Section 622(c) is to permit subscribers to be fully apprised of the effect of the enumerated governmentally imposed costs on their bills. It would of course frustrate the intent of the statute if a franchising authority imposed burdensome additional itemization on an operator choosing to avail himself of the rights bestowed by this section,[1418] or otherwise attempted to nullify the effect of a Section 622(c) itemization through local regulations.

D. Cost Accounting/Cost Allocation Requirements.

i. Background

553. In the Notice, we solicited comment on the adequacy of simplified cost accounting and cost allocation requirements for cable systems that could be used to implement the cost-based regulatory alternatives described in the Notice.[1419]

ii. Comments

554. Municipalities, telephone companies, CFA and others agree that the Commission should develop some type of accounting and cost-of-service standards for the cable industry.[1420] Austin, Bell Atlantic, and Bowling Green recommend that the Commission adopt a uniform system of accounts.[1421] Telephone companies urge the Commission to adopt cost allocation

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[1417] NATOA Reply Comments at 23.

[1418] See supra this section.

[1419] Notice, 8 FCC Rcd at 524, para. 55, n.84.

[1420] See, e.g., Austin Comments at 50,72; Bell Atlantic Comments at 6-15; BellSouth Comments at 19; Bowling Green (Carson, Conneaut, Drexel, Keys, Mckinney, NewBern, Paducah, Parsippany, Salisbury, St. Pete, and Williamston) Comments at 18; CFA Comments at 85-86; Multiplex Comments at 11; Municipal Comments at 47-51; NARUC Comments at 4; NJ Comments at 14, 15, 23; NTCA Comments at 4; NYNEX Comments at 1-11; PacTel Comments at 9.

[1421] Austin Comments at 40; Bell Atlantic Comments at 13; Bowling Green Comments at 9.

procedures and other rules similar those applicable to the telephone industry in order to prevent the potential for cross-subsidization between non-cable activities and regulated cable activities.[1422] New Jersey claims that an allocation methodology for allocating joint and common costs to the basic tier is necessary to protect against cost-shifting between the basic service tier and unregulated channels.[1423]

555. Cable operators generally oppose the adoption of accounting and cost allocation requirements and argue that implementing such methodologies would be administratively burdensome, and would require the Commission to employ a uniform system of accounts.[1424] GTE agrees that cost-of-service rate methodologies present numerous administrative difficulties, and they question the validity of such methods since there is no existing accounting requirements or cost allocation procedures applied to cable operators.[1425] Finally, NTCA and CATA state that small cable television systems should be exempt from any accounting and data collection requirements that the Commission may adopt.[1426]

iii. Discussion

556. In Appendix A to the Notice we proposed simplified cost accounting and cost allocation requirements for cost-of-service determinations. Cable operators did not submit extensive comments on cost accounting and cost allocation issues.[1427] A few commenters, however, did recommend adoption of

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[1422] BellAtlantic Comments at 6-15; BellSouth Comments at 19; NYNEX Comments at 1-10; Pactel Comments at 1-6.

[1423] NJ Comments at 14, 15, 23.

[1424] CIC Comments at 13; Cox Comments at 9.

[1425] GTE Comments at 9-10.

[1426] CATA Comments at 23; NTCA Comments at 4.

[1427] Several cable operators commented on the burden associated with reporting information required in Appendix A to the Notice, but did not address the proposals in Appendix A in terms of the appropriate methodology for cost of service determinations. See Adelphia I Reply at 85-87 and TimeWarner Reply at 61-62. Additionally, CATA stated that the kind of cost justification questions posed in Appendix B to the Notice would not properly apply to small cable television systems. CATA Comments at 23.

simplified accounting and costing procedures along the lines of those proposed in Appendix A to the Notice.[1428]

557. The rate regulations we are adopting today impose a price cap on cable service rates with certain categories of costs defined as external to the cap. Cost accounting and cost allocation requirements are necessary in order to assure that costs that we intend to receive external treatment are in fact accorded such treatment. Our regulations additionally authorize cable operators to make cost-of-service showings to justify a rate higher than the capped level. Cost accounting and cost allocation requirements are also necessary to permit identification of costs that will justify a rate above the cap.

558. Cost accounting and cost allocation requirements can significantly affect rates and the way cable operators currently conduct business. For example, requiring that certain categories of costs be directly assigned at the franchise level could prevent cable operators from incurring costs at a higher level as a joint and common cost. Similarly, requiring that costs be directly assigned at the franchise level could effectuate a rate deaveraging throughout the cable industry. Although, the Notice requested comment on the optimum level of rate averaging in the cable industry, little comment was gathered on this point. Accordingly, while we are also adopting in this Report and Order requirements that will permit immediate implementation of our rules, we have determined that we will include in the Second Further Notice issues pertaining what cost accounting and cost allocation requirements we should adopt on a permanent basis. Our goal is a better record that will enable us to decide the appropriate level of cost averaging that should be permitted or required under our rules. These rules will also address the impact on carrier operations of requiring operators to identify costs at given level.

[1428] Several commenters stated their support for the requirements in Appendix A and Appendix B or otherwise stated support for simplified accounting and costing requirements, including: Austin Comments at 50 and 72, and Reply at 53-54; CFA Comments at 85-86; Fairfax Reply at 21-22; GTE Comments at 9-10, and Reply at 15-16; Municipal Comments at 47-51; NJ Comments at 14-23; Muzac Comments at 2-6 and 9; NYNEX Comments at 1-11, and Reply at 10-12; USTA Comments at 15, and Reply at 5 and 9. Other commenters stated support for accounting and/or costing requirements without specifying whether simplified procedures would be adequate, including: BellAtlantic Comments at 6-15; BellSouth Comments at 16-21; Bowling Green, Carson, Conneaut, Drexel, Keys, McKinney, NewBern, Paducah, Parsippany, Salisbury, St.Pete, and Williamson (all, Comments at 18, and Bowling Green Reply at 8-9); Multiplex Comments at 11; NARUC Comments at 4; PacTel Comments at 1-6, and Reply at 5-6; Rocky Comments at 3.

559. The cost accounting rules we adopt today will nevertheless permit a successful immediate implementation of our rate regulations. We require cable operators to identify costs and maintain accounts sufficient for administration of our rate regulations. Cable operators will be required to identify certain locally incurred costs such as franchise fees and local taxes at the franchise level. Instead of mandating that other costs be identified at any level, we require that cable operators, for purposes of calculating external costs and costs in a cost-of-service showing, identify costs at the level at which they identified the category of costs for accounting purposes on April 3, 1993. We require cable operators in any cost-of-service showing to justify and explain this identification and to demonstrate that it is, in fact, the level used to identify costs on April 3, 1993. Costs will then generally be allocated to the franchise level on a per subscriber basis. Costs allocated to, or directly identified at, the franchise level will then be allocated between tiers in proportion to the number of channels on each tier.[1429] Programming costs and retransmission consent fees will be allocated to the tier on which the programming or broadcast signal is offered. Because franchise fee determinations may be revenue, tier, or subscriber sensitive, we require that franchise fees be allocated between tiers and subscribers in a manner most

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[1429] The Cable Act of 1992 requires that in establishing regulations governing rates for the basic service tier we take into account only a reasonable and properly allocable portion, as determined by the Commission, of the joint and common costs of obtaining, transmitting, and providing signals on the basic service tier. Communications Act, § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C). Our cost accounting and cost allocation requirements that govern identification of costs at, or allocation of costs to, the franchise level and then allocation between tiers assure that only a reasonable and properly allocable portion of joint and common costs is allocated to the basic service tier because such costs are generally allocated to the basic service tier proportional to the number of subscribers served by the system and the number of channels on the tier. In addition, our methodology for determination of the permitted per channel rate on the initial date of regulation of the basic service tier is, as indicated, tier-neutral and is based on an average of rates across all tiers appropriately weighted for channels and subscribers on each tier. Similarly, our cost allocation requirements between tiers for external costs assures that only a reasonable portion of costs is allocated to the basic service tier. Thus, apart from cost-of-service showings, our framework for regulation of the basic service tier assures that only a reasonable portion of joint and common costs is assigned to the basic service tier. Accordingly, our regulations fully satisfy the statute in this regard.

consistent with the way the franchise fee is assessed by franchise authorities. We believe that this overall approach will minimize rate impacts that could otherwise occur if we adopt more definitive requirements at this time.

III. Further Notice of Proposed Rulemaking

560. As explained above, we have conducted an industry survey of cable systems subject, and not subject, to effective competition. That survey was based on data from systems subject to effective competition under each of the three independent statutory criteria that define effective competition.[1430] Among these criteria are cable systems operating in areas where fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system.[1431] As we explain in Appendix E, our survey specifically included a sample of systems in areas expected to have less than 30 percent cable penetration.[1432] The comparison of rates of systems subject to effective competition and those not subject to effective competition based on data from all these systems produces a competitive rate differential of approximately 10 percent.

561. It is possible, however, that exclusion from our sample of rates of systems in low penetration areas may produce a better measure of competitive rate differential. Thus, the low penetration of cable systems in some areas may be attributable to factors other than the presence of competing video distribution services. Cable systems may have low penetration, for example, because they are in the process of being constructed, because costs of providing service in the area are high, making service affordable to fewer potential subscribers, or because of poor business management decisions. In addition, the number of systems in low penetration areas is very small, but the rates of such systems are sufficiently different from the rates of competing systems to significantly affect the competitive rate differential and construction of the competitive benchmark. Thus, as we explain in Appendix E, our preliminary analysis reveals that exclusion from our analysis of rates of systems in low penetration areas would produce a competitive rate differential of approximately 28% percent. For these reasons, we seek comment on whether we should include within the data upon which the competitive rate differential is founded, only rates of systems that face effective competition in the form of competing multichannel service providers.

[1430] See paras. 39-49, supra, for a discussion of these statutory criteria.

[1431] Communications Act, § 623(l)(1), 47 U.S.C.§ 543(l)(1).

[1432] See Appendix E.

562. We solicit comment on whether we should in fact exclude or give substantially less weight to systems in low penetration areas in calculating the competitive rate differential. We seek comment on whether the rates of such systems provide an accurate measure of competitive rate levels. Given the inclusion of such systems in Section 623(l)(1) of the Communications Act, which identifies those systems exempt from rate regulation, we solicit comment on whether we may lawfully exclude the rates of such systems from our competitive rate calculations.

563. If the record demonstrates that excluding the rates of low penetration systems would better reflect competitive rates, and, if making such an exclusion is lawful under the Act, then we propose to further reduce rates. In that event, we seek comment on how we should give effect to the resulting competitive rate differential. Should we redefine the benchmark formula and per channel rate tables? Should the Commission require systems above a new benchmark to lower rates additional amounts to achieve a total rate reduction of approximately 28 percent from pre-regulated levels, and should we phase-in any further rate reductions? What would be the impact on consumers and the industry? We seek comment on whether we should apply any new competitive rate differential in a manner different than that selected in the Report and Order.

IV. Regulatory Flexibility Act Analysis

A. Final Regulatory Flexibility Act Analysis for the Report and Order

564. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C.§§ 601-612, the Commission's final analysis with respect to the Report and Order is as follows:

565. Need and purpose of this action: The Commission, in compliance with §§ 3 and 14 and those portions of § 9 of the Cable Television Consumer Protection and Competition Act of 1992 (the Act) pertaining to rate regulation, adopts rules and procedures intended to ensure cable subscribers of reasonable rates for cable services with minimum regulatory and administrative burden on cable entities.

566. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis (IRFA): The Chief Counsel for Advocacy of the United States Small Business Administration ("Office of Advocacy") offers several remarks in response to the IRFA. It reiterates its belief that the "vast majority" of cable operators offer good service at reasonable prices, and that despite its basic good intentions,

rate regulation will adversely affect small cable operators.[1433] Office of Advocacy notes the importance of considering the effect of regulation not only on small businesses but on small governmental jurisdictions, (i.e., any government of a city, town, township, village, school district or special district with a population of less than 50,000) and asked that the Commission respond to this concern in this Final Regulatory Flexibility Analysis. The Commission, as detailed below, has taken measures to alleviate regulatory burdens on small systems. With respect to burdens on local governments, we concur with the Office of Advocacy that, under the Act, if a franchising authority does not request certification, it is not required to regulate. Thus, a franchising authority has the flexibility to decline to seek certification and so avoid enforcing rate regulation. Moreover, the Commission will enforce local rate regulation at the franchising authority's request where the franchising authority lacks financial resources or the legal authority to regulate basic service rates. Similarly, the Commission alleviates some of the burden facing franchising authorities by providing that franchising authorities may rely on the presumption that the cable operator is not subject to effective competition unless they have actual knowledge to the contrary. Moreover, the Commission has endeavored to make the certification form local authorities must use as simple as possible. Finally, we have attempted to craft procedures for local authority review of basic service rates that allow local authorities sufficient time to make a meaningful decision and hence do not unduly strain their resources.

567. The Office of Advocacy agrees with the Commission's determination that cost-of-service rate regulation is a less desirable approach than establishing benchmark formulas for the basic service tier. However, it objects to the use of a single benchmark concerning both large and small systems. Office of Advocacy therefore favors an approach to basic service rates involving a series of benchmark formulas based on costs to similarly situated systems, and asks that a series of benchmark formulas be examined in this Final Regulatory Flexibility Analysis. Specifically, Office of Advocacy favors adoption of benchmark formulas relative to system characteristics, with adjustments for inflation based on either a general cost index; or a utility specific cost index. Similarly, Office of Advocacy favors a benchmark approach for non-basic cable service rates, and suggests that, in addition to the characteristics proposed in the Notice, program acquisition costs also be considered in

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[1433] The Office of Advocacy defines small cable system for purposes of its comments as "any system or systems with a total of less than 31,000 subscribers." Office of Advocacy Comments at fn. 14. Our definition of small system, however, is based on the 1992 Act's definition, a system serving 1,000 or fewer subscribers.

formulating benchmarks for both basic and non-basic services. Office of Advocacy suggests an alternative to a benchmark formula for non-basic services for certain small multiple system operators, which would examine the profit and loss of cable systems as a whole. Under this alternative, failure to find excessive profits under this proposal would be comparable to a finding that rates are not unreasonable. Office of Advocacy believes that this proposal would limit the paperwork burden facing smaller multiple operator systems who would have to calculate the benchmark for cable programming service for each individual system. Additionally, Office of Advocacy recommends that the Commission provide cable operators with the opportunity to show that the formula does not accurately reflect the costs of providing basic service.

568. Many of the issues raised by the Office of Advocacy are addressed by actions adopted in the Commission's decision. For example, once a benchmark has been established, increases in basic service rates regulated by local franchising authorities will be capped by a Commission-established price cap formula. Requested increases may not exceed the Gross National Product fixed weight price index, which reflects general increases in the cost of doing business and measures changes in overall inflation and external costs. This segment of the regulations corresponds with the Office of Advocacy's suggestion that a general cost index would more accurately reflect the changes in costs faced by cable systems. Additionally, cable operators will be allowed to increase rates exceeding the price cap if the increase is justified by a cost-of service showing. We will also permit adjustments for increases in programming costs that exceed inflation, and for retransmission consent fee increases after 1996.

569. While the Commission agrees with Office of Advocacy that it is important to consider the characteristics of individual systems in selecting benchmark formulas, we elect not to apply different cap structures to systems with different characteristics. We believe that the information compiled to date does not provide a sufficient basis for identifying characteristics (other than the number of subscribers, the number of channels and the number of satellite signals) that would warrant application of different cap structures. In addition, such an approach would add to the complexity and administrative cost of regulation. A benchmark approach based on selected industry characteristics, as well as on the number of subscribers, the number of channels, and the number of satellite signals, as opposed to the costs of individual systems, not only protects consumers from excessive rates and minimizes administrative and compliance costs, it provides an incentive for systems to be efficient by allowing low-costs systems to keep savings achieved through increased efficiencies. The industry benchmark is, however, based inter alia on the number of