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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	**MM Docket No. 92-266**
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

PETITION FOR RECONSIDERATION

Booth American Company
Cablevision Industries Corporation
Cox Cable Communications,
  a division of Cox Communications, Inc.
First Carolina Communications, Inc.
Jones Intercable, Inc.
Marcus Cable Company, L.P.
Mid-Coast Cable Television, Inc.
Service Electric Cablevision, Inc.
Sonic Communications
Southwest Missouri Cable TV, Inc.
Summit Communications Group, Inc.
US Cable Corporation
Vista Communications, Inc.

Brenda L. Fox
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SUMMARY

The Commission should reconsider several aspects of its rate regulations in order to properly realize the Congressional mandate of the 1992 Cable Act and comply with judicial precedent and constitutional principles.

Basic versus Cable Programming Regulation. The Commission should not regulate basic and cable programming services in the same manner. The 1992 Cable Act and its legislative history distinguish between the regulatory schemes for both categories of service; basic service rates must be "reasonable" while cable programming service rates must be reviewed only when "unreasonable." Further evidence of this distinction lies in the differing statutory criteria the Commission must use in evaluating rates for basic and cable programming services. The Commission's rate regulations place unwarranted reliance on the effective competition factor, while ignoring the importance of the various other factors. The 1992 Cable Act requires the Commission to take into account all enumerated factors, including effective competition, but there is no evidence that Congress intended the Commission to give effective competition greater weight than any other factor in establishing a rate regulation scheme. Finally, the Commission applies tier neutrality in its benchmark scheme evidently to discourage operators from "stripping" basic service. This concern, however, is unwarranted; there is no specific evidence that operators will strip the basic service tier, and tier neutrality will prevent operators from offering low-cost basic service and discourage cost-based pricing.

Opportunity to Earn a Reasonable Profit. Not only does the 1992 Cable Act specifically require the Commission to permit operators the opportunity to earn a reasonable profit, long-standing Supreme Court precedent requires agencies to account for this factor

when regulating rates. However, the benchmark system denies operator's the opportunity to earn a reasonable profit. The benchmark rates were based on average rates charged by systems subject to effective competition; the Commission should look to the highest rates charged by systems subject to effective competition because these rates are presumptively reasonable. Additionally, the benchmark scheme does not provide operators with incentives to add new programming services and invest in new facilities because it does not permit operators to recoup costs associated with adding new facilities and services.

This problem permeates other aspects of the Commission's rate regulation scheme. The Commission's price cap mechanism does not account for a reasonable profit in permitting pass throughs of exogenous costs. Similarly, the Commission's equipment rules prevent operators from recovering certain costs and making a reasonable profit because required if a reasonable return on an investment is jeopardized or if the property right affected is an expectancy of income. Thus, the Commission is obligated to modify its procedural requirements with regard to ratemaking hearings to afford operators an opportunity to respond to ratemaking concerns through a formal hearing.

Procedurally, the Commission's rules will be difficult to administer. Despite the statutory mandate that the Commission "seek to reduce the administrative burdens" on interested parties, the Commission has adopted regulations scheme that effectively require operators to submit cost-of-service showings rather than submit rate schedules within benchmark levels. Thus, the Commission should revise its benchmark mechanism to encourage operators to chose benchmark over cost-of-service regulation.

Rate Increase and Price Cap Procedures. The Commission's procedure for rate information to determine whether effective competition exists in order to challenge a franchising authority's certification. Since competitors may be reluctant to cooperate, constructing enforcement procedures would facilitate efficient resolution of challenges to certification based on the existence of effective competition. The Commission should also permit a franchising authority to decertify and terminate local regulation if doing so would be in the best interests of the community, particularly where the cost of regulating rates is greater than the savings that would accrue to subscribers by deregulating. In such instances, the Commission would not assume regulatory jurisdiction under the same economic rationale; the franchising authority could always choose to request the Commission to assume jurisdiction at a later date.

Issues Requiring Clarification. The Commission should clarify several regulatory issues in reconsidering its Order. First, the Commission should specify that it may not exercise a franchising authority's jurisdiction over basic rate regulation if the authority is not certified for failure to adopt regulations pursuant to the certification rules. Second, the Commission should clarify that a franchising authority cannot request disclosure of proprietary information unless it is analyzing an operator's cost-of-service showing. Third, the Commission's rules regarding changes in service should properly apply only to regulated services. Fourth, the Commission should permit operators to negotiate individual bulk accounts with owners of multiple dwelling units by removing the requirement that operators maintain a uniform rate structure for such subscribers. The Commission should grandfather existing arrangements so as not to undermine previously negotiated contracts.

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PETITION FOR RECONSIDERATION

I. Introduction

Dow, Lohnes & Albertson, on behalf of the parties listed in Appendix A (the "Joint Parties,") hereby submits its petition for reconsideration of the Commission's order in the above-referenced proceeding.[1/]

II. The Regulations Impermissibly Fail to Distinguish Between Basic Service and Cable Programming Service.

The Commission determined that the same benchmark standards should apply to rates for both basic and cable programming services. The substantive rate rules adopted in the Order for both basic and cable programming services are contrary to the statutory mandate,

1/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Dkt. No. 92-266, FCC 93-177 (released May 3, 1993) (the "Order").

fail to take the specific factors designated by Congress into account and will result in economically irrational pricing for many cable systems across the country.

A. The 1992 Cable Act Requires the Commission to Differentiate Between Basic and Cable Programming Services.

Although the 1992 Cable Act differentiates between basic service and cable and the structure and language of a statute must be accounted for in any interpretation.[4/] Congress designed a statute that imposed different standards for basic and cable programming services. The Commission must give effect to that statutory design.

The evolution of the 1992 Cable Act also confirms the distinction between the regulation of basic and cable programming services. As the Conference Report explains, the Senate and House took different approaches to regulating basic and cable programming service rates.[5/] The Conference Committee clearly rejected the Senate's unitary regulation in favor of the House's bifurcated approach and adopted the regime that is now embodied in the 1992 Cable Act. Consequently, there can be no legitimate question that Congress specifically considered and rejected the unitary approach to regulation of basic and cable programming services that was adopted in the Order. Ironically, the only legislative history cited in the Order supports differentiating between permissible basic and cable programming service rates.[6/]

4/ Nat'l Bank of Oregon v. Insurance Agents, __ U.S. __, Nos. 92-484, 92-507, 1993 US LEXIS 3863 at *27 (1993), citing NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1991); see also Crandon v. U.S., 494 U.S. 152, 158 (1990) (Supreme Court looks to the "design of the statute as a whole"); 2A Southerland Stat. Const. § 46.06 ("A statute should be construed so that effect is given to all its provisions").

5/ H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 58-66 (1992) (the "Conference Report").

6/ Id. at ¶ 388 n.947 (quoting legislative history suggesting that Congress intended to reach only abusive practices).

The differences between basic and cable programming service regulation also are underscored by the differences in the statutory criteria for evaluating rates. Only two of the factors overlap, and there are considerable differences in the others.[7/]

Distinctions between basic and cable programming services also are justified by the economic differences between those services. Cable programming services are subject to greater competition and risk of failure than basic services. Likewise, the operator's investment in technical capacity and marketing activities to support those services is both risky and costly. A regulatory regime, as described by the Commission, that uses the same general standards to determine the rates for these two very different types of services which enjoy very different viewership patterns runs contrary to that economic reality.

B. Total Reliance on the Rates of Systems Subject to Effective Competition in Designing the Regulatory Scheme Is Unwarranted.

The starting point for interpreting a statute is the language of the statute itself.[8/] In this case, the language of the 1992 Cable Act provides a clear mandate to the Commission that it "shall take into account" and "shall consider" various factors in determining whether rates for basic and cable programming services are "reasonable" or "unreasonable." 47 U.S.C. § 543(b)(2)(C), (c)(2). Use of the word "shall . . . is the language of

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7/ Compare 47 U.S.C. § 543(b)(2) with 47 U.S.C. § 543(c)(2). It is significant, too, that the statutory factors to be considered with regard to basic rates are all-inclusive, not exemplary in nature. The contrary is true when it comes to cable programming services.

8/ Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); see also American Civil Liberties Union v. F.C.C., 823 F.2d 1554, 1568 (D.C. Cir. 1987), cert. denied 485 U.S. 959 (1989) ("it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself.").

command"[9] and an agency is not free to ignore the "unambiguously expressed intent of Congress."[10] The Commission, however, finds that it is free to "place primary weight on the rates of systems subject to effective competition," apparently to the exclusion of other factors. Order at ¶ 179-80. Because the Commission's analysis departs from the statutory charge, the ratemaking scheme based on that analysis is deprived of all legitimacy.

Congress established a number of factors for the Commission to incorporate into its regulatory scheme, one of which was the rates for cable systems, if any, that are subject to effective competition. It is evident from the use of the term "if any" and the identification of other factors that Congress knew that rates of systems subject to effective competition could not serve as the sole guide to finding "reasonable" rates for basic service and identifying "unreasonable" rates for programming services. By giving no priority to any one factor Congress clearly demonstrated that the other enumerated factors were equally as important. Thus, for benchmark regulation to be valid, the Commission must take into consideration the other criteria enumerated in Sections 623(b)(2) and 623(c)(2). The Commission's rate survey, which serves as the foundation of the benchmark scheme, simply did not address these other statutory factors and is therefore invalid.

The Order declares that the benchmarks are based "primarily" on the rates of systems subject to effective competition. In reality, the Order relies solely on those rates, and

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9/ MCI Telecommunications v. F.C.C., 765 F.2d 1186, 1191 (D.C.Cir. 1985) ("MCI v. F.C.C." citing Escoe v. Zerbst, 295 U.S. 490,493 (1935); see also Crockett Telephone Co. v. F.C.C., 963 F.2d 1564, 1570 (D.C. Cir. 1992) ("'shall' imposes an obligation to act.")

10/ Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984); see also Illinois Bell Telephone Co. v. F.C.C., 966 F.2d 1478, 1481 (D.C. Cir. 1992); Wolverine Power Co. v. F.E.R.C., 963 F.2d 446, 449-50 (D.C. Cir. 1992).

discounts (to the point of eliminating) all other factors. The Commission states "[w]e explain in later sections of this Report and Order how we take into account other statutory factors for the basic service tier," but there is no substantial discussion of the other factors or any indication that its analysis comports with the statutory task Congress set for the Commission.[11/] Although the Order "explains" in a single sentence that all seven statutory factors for determining basic rates are balanced "effectively" by the benchmark/price cap rules, it makes no attempt to describe how this is accomplished.

To the extent that these specific statutory factors are mentioned by the Commission, it is obvious that these were not considered in designing the benchmark/price cap regime.[12/] For example, the only discussion of the reasonable profit factor, is in the context of cost-of-service showings.[13/] The Order also misinterprets the statutory language in its discussions of two factors to be considered in determining whether cable programming service rates are unreasonable. The description of how "rates for similarly situated cable systems" were included in the regulatory calculus shows that only rates for systems subject to effective

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11/ Id. at ¶ 180; see supra part II.B.

12/ Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 43 (1983) ("State Farm") (an agency decision must provide a "rational connection between the facts found and the choice made.")

13/ Id. at ¶ 264. This discussion reveals that the ability to obtain reasonable profits was not considered in designing benchmarks. Relegating the ability to earn reasonable profits to cost-of-service showings is utterly inconsistent with the 1992 Cable Act's mandate to "seek to reduce administrative burdens" on both cable operators and franchising authorities. 47 U.S.C. § 543(b)(2)(A). If the only opportunity to obtain a reasonable profit is through cost-of-service showings, then operators will be forced to follow this cumbersome, complicated course as a matter of routine. Moreover, a regulatory scheme that utterly forgoes consideration of the financial viability of the regulated entity is unjust and unreasonable, and in violation of the U.S. Constitution. See Hope, 320 U.S. 591.

competition were considered, not the rates for similar systems.[14/] Similarly, the history of a cable system's rates apparently is considered only for the time period from September 30, 1992 to the date of the Order, if at all.[15/]

Further, the Commission's rate survey did not include sufficient information to account for the other statutory factors in the benchmarks. The survey provides information only about rates and provides no information on franchise or programming costs or, most important, on profits. It might be possible to conjecture, without evidence, that there are similarities in some of these factors, such as the cost of complying with franchise requirements;[16/] however, the Commission is in no position to reach any conclusions about profits, because none of the data it received in its rate survey have any bearing on system profits.[17/] This is particularly important both because the statute requires profits to be

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14/ Order at ¶ 387 n.946. When considering the rates for similarly situated systems offering comparable cable programming services the Commission must take into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors. Quite clearly, Congress directed the Commission to compare rates of systems to one another without regard to whether the systems faced effective competition. Otherwise, there would have been no reason for Congress to require the Commission to consider rates for similarly situated systems.

15/ Id. at ¶ 396 n.970. The Order states that the history of each system's rate increases is subsumed within its rates on September 30, 1992. Using the rates in effect on a single day considered in determining rates, and because there is considerable evidence that many systems subject to effective competition cannot sustain themselves long term.[18] Reliance solely upon the rates of surveyed systems subject to effective competition assured that one of the most important of the statutory criteria — and one that is constitutionally required — was not considered in designing the standards for permissible cable rates. Of course, the 1992 Cable Act requires the Commission to consider all of the factors described in the statute in designing rate regulations. The statutory language is not advisory; it is mandatory. The failure to consider and account for all the statutory factors renders the rate regulations defective as a matter of law.

C. There Is No Justification for Applying "Tier Neutrality" to Eliminate All Distinctions in Pricing Between Tiers.

benchmark prices on one tier of service when determining whether the prices for another tier are reasonable. Implementation of tier neutrality will prevent cable operators from reducing the price of basic service below the maximum that can be charged because it is impossible to make the difference up elsewhere.

Tier neutrality also prevents the operator from pricing services to reflect consumer demand or charging less than the benchmark price for a less costly tier and an above benchmark price for a more costly tier. The cable operator is then faced with the choice of constructing tiers consisting of channels with costs that "balance" each other or of letting subscribers purchasing less costly tiers subsidize those who purchase the more costly tier. Neither choice maximizes consumer welfare, and neither choice is economically rational for the cable operator.

These considerations also demonstrate why tier neutrality is inconsistent with the 1992 Cable Act's mandate to consider "the rates, as a whole" for the cable system when evaluating cable programming service rates. 47 U.S.C. § 543(c)(2)(D). In fact, the Order's conception of tier neutrality does exactly the opposite; it prevents the Commission from considering the rates for any tier of service but the one that is the subject of a complaint.

Finally, the Commission has offered no specific evidence, other than speculation, for its conclusion that elimination of tier neutrality would result in a "stripped down" basic service.[20] The rate regulation rules contain significant incentives to maintain basic service

20/ Order at ¶¶ 195-97. Indeed, the Commission has no authority to prohibit, directly or indirectly, a "stripped down" basic service because the statute itself mandates only a minimum level of basic service; any additional services may be added to the basic tier at the sole discretion of the operator, not the Commission. 47 U.S.C. § 543(b)(7); Order at ¶¶ 155-61.

at a level that is appropriate for the market in which a cable system operates, including the treatment of satellite channels for purposes of setting benchmarks. The onset of rate regulation will not have a significant effect on the factors that have led cable operators to offer the kinds of basic service they already offer today. It is highly unlikely that the elimination of tier neutrality would change the ways that cable operators decide which channels to put on various tiers. The ability of operators to package their services based on costs and consumer demand clearly outweighs any administrative benefit that the Commission may perceive from tier neutrality.

III. The Rate Regulations Deny Cable Operators the Opportunity to Earn a Reasonable Profit.

A. Benchmark Rates Deny Cable Operators the Opportunity to Make a Reasonable Profit.

It is undisputed that cable operators are permitted to make a reasonable profit.[21/] Of course, such a result is required by the Constitution. See, e.g., Hope, 320 U.S. 591. One stated goal of the 1992 Cable Act was to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems." 1992 Cable Act, § 2(b)(3). It follows that without the assurance that operators can achieve a reasonable profit, it is unlikely they will be able to fulfill the 1992 Cable Act's goal of improving and expanding the services enjoyed by subscribers. Moreover, because the benchmark methodology does not incorporate a "reasonable profit" factor, the benchmark scheme will require many operators to submit costly and burdensome cost-of-service

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21/ See Conference Report at 63 ("The conferees agree that cable operators are entitled to showings. This result is contrary to the congressional objective of minimizing regulatory burdens on franchising authorities, operators and the Commission.

This reasonable profit factor is especially critical given the evidence that systems subject to effective competition due to an overbuild generally do not make a "reasonable profit." As one commenter pointed out, these "competitive" systems often have rates that are artificially low due to "greenmail," a practice by which an operator undercuts the rates of an incumbent operator to force the incumbent to buy out the competitor. In these cases, rates are too low to realize any profit and, in fact, are too low to support cable operations for any extended period of time.[22/] By focusing on the rates charged by systems that are subject to effective competition, therefore, the Commission effects a double blow to the financial stability of operators, first by ignoring their ability to make a reasonable profit and then by focusing on a factor — rates for "competitive overbuilt systems — that virtually ensures they will not.

B. The Benchmark Rates Were Set Incorrectly.

Service rates that exceed the system's benchmark level at the time regulation begins are presumptively unreasonable under the Commission's rules because they exceed the average rates charged by systems subject to effective competition.[23/] However, there is no evidence offered by the Commission that the systems surveyed achieved adequate rates of return; and even if there were such evidence, the use of average rates from such systems as a

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22/ See National Cable Television Association Comments at 18-19.

23/ Order at ¶ 217; see also id., Appendix E at ¶ 33.

benchmark is problematic. The average rate, by definition, blends the rates of numerous systems subject to effective competition whose rates exceed the Commission's benchmarks with those that fall short of those levels. Thus, many of these above-benchmark systems subject to effective competition would be subject to rate rollbacks were they not exempt from regulation. In contrast, comparable systems that are not subject to effective competition will be forced to roll back rates even though their services are priced as though they were facing such competition. This is more than an anomaly; it is a basic flaw of the benchmark system as it has been implemented by the Commission.

The Order fails to acknowledge that all the rates charged by systems subject to effective competition are presumptively reasonable, including those above the average rate. The FCC's benchmarks ensure that some subscribers will pay rates lower than those paid by subscribers of comparable systems actually subject to effective competition and that the rates paid by subscribers in some areas with effective competition are higher than the benchmark rates. The Commission articulates no reason why the "average" rate is the appropriate level for setting benchmark rates. It is simply neither adequate nor reasoned decision-making to set benchmark rates based on a sample of systems subject to effective competition without being assured that the factors that Congress specifically enunciated in Sections 623(b)(2)(C) and 623(c)(2) were adequately accounted for in the benchmarks. The future of an industry should not hang in the balance while it must choose whether to reduce rates to unacceptable levels or face uncertain and unknown cost-of-service standards.[24/]

24/ Even if operators were aware of the criteria that would be used to establish cost-of-service standards, operators would still be forced to chose between unsatisfactory benchmarks and lengthy and costly cost-of-service proceedings.

Even if the Commission had established cost-of-service standards, putting an industry, the Commission, and franchising authorities through the rigors of cost-of-service showings is unfair and unreasonable when the alternative scheme designed by the Commission takes absolutely no account of the factors which Congress wanted the Commission to consider in determining whether rates were reasonable. It is not satisfactory to say that operators have an alternative in the guise of cost-of-service showings when the Commission and local authorities are ill-equipped to handle the numbers of cases which will result by default and by necessity if the benchmark system is not modified.

C. The Benchmark Scheme Does Not Create Incentives to Add New Facilities and Services.

One of the most damaging and disruptive effects of the benchmark scheme is that it does not provide operators with incentives to add new programming services and invest in new facilities. This is true for a variety of reasons, but most evident is that the benchmark scheme does not provide an operator with any means to recoup the costs associated with adding new facilities and/or services. The only choice available to an operator under the Commission's regulations is to submit a cost-of-service showing to substantiate the costs of adding new facilities and services. Given that virtually all cable systems are in various stages of upgrading their facilities or will be upgrading their facilities in the near future, many operators will unavoidably be forced into making cost-of-service showings.[25] This, of course, is precisely what the Congress and the Commission itself set out to avoid.

Franchising authorities and the Commission will undoubtedly be overwhelmed with cost-of-service submissions filed in support of an upgrade of facilities, which, in turn, will lead to inalterable delays in the provision of new services. Moreover, operators will not embark on upgrading facilities until it is certain that the proposed rate will not be disputed. This means that operators will not be able to commence an upgrade even after the 180 days in which a franchising authority has to act on a cost-of-service submission because the franchising authority has the ability to order refunds for up to a year and then adjust the operator's rate downward. 47 C.F.R. §§ 76.933(c), 942. Given these time frames, there is simply no way that the public will receive new services in a timely manner, and this is specifically a situation which Congress intended to avoid.

The Commission has given operators no guidance as to how they will recoup the costs of new facilities and services. Presumably an operator seeking to add channels and services will be able at some time to charge for additional channels and pass on the costs of the new programming. Even then, however, the Commission has given no indication as to how an operator can ensure that it will recoup in a timely fashion its capital and operating costs, including a reasonable profit, for the new services. An operator that is not able to recoup its costs from the additional per channel charge would presumably be able to recoup its costs by

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25/ This problem is particularly severe for operators scheduled to commence a rebuild during the rate freeze. For these operators, whether to commence the upgrade is plagued with uncertainty given the freeze in cable rates, now extended until November 15, 1993. The uncertainty will likely delay service to the public and adversely affect the growth of new and existing programming services.

passing through the exogenous costs that exceeded inflation. However, absent a cost-of-service showing, there is no means for an operator to achieve a reasonable profit on the new service given the benchmarks have no relationship to the costs of doing business. Moreover, there is no means by which an operator can recoup its external costs between the effective date of the rules and the date the system is subject to regulation or within 180 days from the effective date of the Commission's regulations.

The benchmark methodology, as currently established actually creates a disincentive to add new facilities and services and additionally drives operators to make cost-of-service showings, results which are wholly inconsistent with congressional and Commission intent. Therefore, the benchmark approach should be modified to account more accurately for operators' costs, profits and the other statutory factors listed in the 1992 Cable Act.

D. Rates for Service on Additional Outlets Should be Value-Based.

The Order misapplies Congress' penchant for cost-based equipment rates as having equal force with respect to programming provided on additional outlets. Nowhere does the statute indicate these programming rates are to be strictly cost based. Indeed there is no regulatory treatment of this programming mandated. There is no support in the statutory language or the legislative history for the conclusion that the "monthly use" of additional connections was intended to cover anything more than a lease of the equipment necessary for the additional outlet. Rather than a rigid cost-based approach, the Commission should permit operators to charge subscribers for the value inherent in the availability of service to an additional outlet.[26]

Having additional outlets in a household is purely discretionary; the demand for such service is more elastic than service to the initial outlet. Different subscribers will place different values on having the option of simultaneous viewing of different cable services on two or more different television sets. The subscriber is the best judge of whether a particular operator's fee for second-set service is appropriate. Congress evidenced concern that cable rates be subject to regulation in the absence of competition. Pay-per-view and per-channel programming is not subject to regulation in any event; neither should programming on second outlets. If the price for additional services is nonetheless to be regulated, the cost-based standard adopted for equipment is particularly inappropriate.

An analogy can be made with respect to an additional telephone line in a household. The ratepayer is charged for each additional line based on the averaged cost of providing telephone service, not the much smaller incremental cost associated with the actual provision of that service. From the ratepayer's point of view, the decision to purchase the additional line is based on the value of that additional service. Like an additional telephone line, an additional cable outlet provides the consumer with exactly the same functionality as the original (or first) outlet. Additional outlet charges based on incremental costs of equipment do not even begin to reflect its value to the consumer.

26/ Charges for programming on additional outlets play a significant role in guarding against theft of service. Fees beyond the cost of equipment discourage subscribers from "lending" equipment to neighbors to facilitate their receipt of unauthorized services.

E. The Price Cap Rules Prevent Full Recovery of Costs and a Reasonable Profit.

Under the price cap rules, operators will be unable to recover operating costs plus a reasonable profit or above-inflationary costs incurred since September 30, 1992. Additional restraints are placed on operators that purchase programming from affiliated programmers, and generally, the rules discourage operational efficiency.

1. The Pass-through of External Costs That Exceed Inflation Does Not Include a Reasonable Profit.

The 1992 Cable Act requires the Commission to ensure that operators make a reasonable profit on all regulated programming services.[27/] The price cap regulations, however, permit operators to increase rates only to the extent that exogenous cost increases surpass inflation, with no provision for the effect that these cost increases have on profits.[28/]

The rules ignore the economic costs of retaining working capital to cover ongoing expenses. The cost of maintaining capital to pay for operating expenses, including so-called external costs, is a real, measurable cost, and one that is universally accounted for in rate

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27/ See supra part II.B. In determining whether rates for cable programming services are unreasonable, the Commission must consider, inter alia, capital and operating costs of the cable system, both of which include a profit component. 47 U.S.C. § 543(c)(2)(E).

28/ 47 C.F.R. § 76.922(d). The Commission's definition of exogenous costs is too limited and needs to be expanded to include other costs that are beyond the operator's control, including e.g., increases in pole attachments rates, increases in labor contracts, etc. Significantly, the rules seem to suggest that only franchise fee increases would escape the rule limiting per channel adjustments to cost increases that exceed inflation; the text of the