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

To: The Commission

OPPOSITION OF TIME WARNER ENTERTAINMENT COMPANY, L.P. TO PETITIONS FOR RECONSIDERATION

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List A B C D E

TABLE OF CONTENTS

Page

SUMMARY iv

DISCUSSION 1

I. THE BENCHMARKS SHOULD NOT BE REVISED TO MAKE THEM EVEN MORE RESTRICTIVE 1

A. The Record Does Not Support Further Decreases In The Benchmarks Established By The Commission 2

B. "Menu" Channels Should Receive The Same Treatment As Other Channels For Benchmark Purposes 3

C. The Commission Should Not Accelerate The "Initial Date Of Regulation." 3

II. THE COMMISSION SHOULD PERMIT FLEXIBLE IMPLEMENTATION OF THE BENCHMARK SCHEME. 5

A. Different Per-Channel Rates Should Be Allowed For Each Cable Programming Service Tier As Long As The Average Rate Does Not Exceed The Mandated Benchmark 5

B. The Commission Should Permit Informal Rate Settlement Agreements Between Cable Operators And Local Franchising Authorities. 6

C. The Commission's Authority To Regulate Basic Rates Should Be Strictly Construed. 7

III. THE COMMISSION SHOULD NOT PERMIT FRANCHISE AUTHORITIES TO INITIATE COST-OF-SERVICE PROCEEDINGS . . 9

Suspension Authority 12

Refund Authority 12

Rate Prescription Authority 13

B. The Commission Should Not Force Cable Operators To Elect Cost-Of-Service Proceedings For Both The Basic Service Tier And Cable Programming Services 13

V. PROPOSED LIMITATIONS ON EXTERNAL COSTS WOULD SACRIFICE QUALITY AND DETER INVESTMENT 14

A. The Limitation On Pass-Through Of Increases In Affiliated Programming Costs Should Not Be Exacerbated 15

B. Programming Costs And Franchise-Related Fees And Costs Are Proper External Costs 15

C. Franchise-Related External Costs Should Be Passed-Through In Accordance With Generally Accepted Accounting Principles 17

D. The Commission Correctly Directed Cable Operators To Allocate PEG Costs To The Basic Service Tier 18

VI. THE THIRTY-PERCENT PENETRATION STANDARD SHOULD BE MEASURED ON A FRANCHISE-AREA BASIS 19

VII. SMATV AND TVRO SERVICES SHOULD BE PRESUMED TO MEET THE "50 PERCENT OFFERED" COMPONENT OF THE HEAD-TO-HEAD COMPETITION TEST 20

VIII. THE COMMISSION SHOULD NOT MAKE THE DEFINITION OF COMPARABLE PROGRAMMING ANY MORE RESTRICTIVE 21

IX. THE COMMISSION SHOULD NOT ALTER ITS REVOCATION PROCEDURES 23

X. EXISTING FRANCHISE AGREEMENTS ARE PROPERLY PREEMPTED TO THE EXTENT THEY MANDATE SERVICES ON

XI. THE COMMISSION SHOULD CLARIFY ITS RULES REGARDING

SUMMARY

A number of petitioners, including Time Warner, have urged the Commission to reconsider certain aspects of the rules it adopted in implementing the rate regulation provisions of the 1992 Cable Act. As Time Warner argued, the Commission's Order contains a number of substantive errors which are at odds with the plain language of the 1992 Cable Act and threaten to undermine the financial stability of the cable industry. Yet, certain petitioners seek to further distort the Act, and ask the Commission to impose even more burdensome and costly requirements.

For example, King County argues that the benchmarks, already suspect due to flawed methodology, should be revised downward. This request ignores the weighty evidence in the record, presented by Time Warner and others, demonstrating that further rollbacks cannot be justified. King County, along with NATOA, also seek to exclude "menu" or "barker" channels when calculating rates. Because the Commission's benchmark approach does not differentiate among channels based on cost, this suggestion is inappropriate. In addition, King County and NATOA ask the Commission to accelerate the initial date of regulation for both basic and cable programming service tier rate proceedings. While Time Warner continues to take exception to the Commission's tier neutral approach, the Commission was correct in determining that at a minimum, the Act imposes different procedural requirements on basic and cable programming service tiers. Thus, contrary to these petitioners' assertions, different initial starting dates are indeed appropriate.

Although significant problems are associated with the Commission's tier neutral

permit different per-channel rates for each cable programming service tier, provided the average rate does not exceed the mandated benchmark. This would allow pricing to mirror both cost and demand, offering consumers more choices while maintaining applicable per-channel rates. Time Warner also agrees with those petitioners suggesting that informal rate settlement agreements between cable operators and franchising authorities, including agreements permitting above-benchmark rates (or subsequent price increases) without a cost-of-service showing, be permitted.

The Act permits the Commission to regulate basic service rates in only two limited circumstances. As such, and contrary to the position taken by the Commission, jurisdiction may not be assumed where a franchise authority claims it lacks the resources to regulate. However, if the Commission remains committed to accepting jurisdiction in such cases, it must have the power to require a showing of the inadequacy of local resources. Certain petitioners also assert that the Commission should permit a franchising authority to initiate cost-of-service proceedings. Such a ruling is unsupported by the Act, and would exact a significant financial toll on the cable industry. Nor should the Commission require cable operators to elect cost-of-service proceedings for both basic and cable programming service tiers on an "all or nothing" basis. Such a requirement ignores the differing cost structures among various tiers of service, and would unnecessarily increase the burdens on franchising authorities, the Commission, and cable operators.

Congress also made it clear that it did not intend to impose common carrier type regulation on cable operators. Thus, the suggestions made by several petitioners which would further implement this type of regulation must be rejected. Moreover, various

petitioners have proposed additional limitations on the ability of a cable operator to pass-through external costs absent a cost-of-service showing. The Act already lacks sufficient incentives for system upgrades and increased programming expenditures; imposing additional limitations will exacerbate this problem, further impairing the ability of cable operators to provide improved service to subscribers.

operators discretion to choose programming beyond the statutory minimum. Accordingly, agreements restricting this discretion are preempted. King County also misses the mark with respect to geographic price uniformity. The plain language of the Act and its legislative history make it clear that price uniformity rules apply only to regulated services within particular regulated franchise areas.

King County and the Michigan Communities seek clarification of the Commission's rules regarding the protection of proprietary information. Time Warner agrees, and joins these petitioners in asking that the Commission make clear that the requirements of Section 76.938 preempt state and local laws. Resolving this issue will avoid potentially expensive and time consuming litigation.

Certain petitioners urge the Commission to reconsider various aspects of its Order relating to leased access. For example, although rate differentiation through categorization is not authorized by the Act, SUR and others advocate the creation of even more categories. As Time Warner has argued, content based regulation such as this is inconsistent with Congressional intent and is unlikely to survive strict scrutiny. Nonetheless, if the Commission retains the current categories and its implicit fee model, rates charged should be deemed reasonable where an operator already carries a category of leased access programming. Moreover, Time Warner agrees with other petitioners that the Commission must provide a mechanism whereby operators may show, on an individualized basis, the validity of fees higher than those that the highest implicit fee formula generates. Similarly, an across-the-board national maximum fee standard, as suggested by some petitioners, fails to account for particular characteristics of individual systems, and must be rejected.

Calculations for part-time leased access, on a pro rata basis, do not adequately account for administrative and technical costs, and should be revised. Time Warner suggests that as long as an operator's revenues from a channel do not exceed the total monthly maximum implicit fees per subscriber, the operator's rates should be deemed within the maximum for that channel. Time Warner concurs with other petitioners who note that, with

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A. The Record Does Not Support Further Decreases In The Benchmarks

differential." Mechanical adjustments to the benchmarks, especially adjustments lowering them, simply cannot be supported.

B. "Menu" Channels Should Receive The Same Treatment As Other Channels For Benchmark Purposes.

Time Warner disagrees with King County and NATOA that "menu" or barker channels should not be included in determining the number of channels for purposes of calculating the benchmark rate.[5] Although the programming costs associated with menu channels may be below the average cost for programming networks, this cannot be used as a reason to exclude them for purposes of computing the benchmark rate.[6] The Commission's benchmark approach to rate regulation does not differentiate among channels based on cost of programming. Plainly, the per channel rate is an inadequate proxy of the cost of some programming -- it is by definition an average. There is no basis for converting price measures into cost measures.

C. The Commission Should Not Accelerate The "Initial Date Of Regulation."

NATOA and King County urge the Commission to accelerate the "initial date of regulation" for both basic and cable programming service tier rate proceedings. According to NATOA, the initial date of regulation of basic and cable programming service tier rates should be the earlier of (1) the date on which a cable operator receives notice from the

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[5]King County at 11; Petition of NATOA, et al. at 33-34 ("NATOA").

[6]To differentiate menu channels for benchmark purposes would further involve the Commission in content-based regulation. Unless all channels are treated similarly, the Commission will have to determine which channels should be included in the computation of the benchmark rate and which should not, based on program content or governmentally sanctioned "merit."

franchising authority that the basic tier is subject to rate regulation or (2) the date on which a complaint is filed with the Commission challenging the reasonableness of an operator's cable programming service tier rates.[7]

Time Warner agrees with the Commission that the Act,[8] at a minimum, imposes different procedural requirements on basic and cable programming service tiers.[9] According to the Commission's interpretation of the 1992 Cable Act, the "initial date of regulation" differs for basic and cable programming rates; basic rates will be reviewed before they become effective while cable programming rates will be reviewed after they become effective and only upon a subscriber complaint.[10] Thus, contrary to NATOA's view, Congress did not intend that the same procedures should apply to both basic and cable programming services. Different starting points are therefore appropriate.

NATOA's stated reason for accelerating the initial date of regulation is to ensure that future rate increases for basic and cable programming services would be subject to regulation pursuant to the Commission's price cap formula.[11] But if the rates themselves are not

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[7]NATOA at 36.

[8]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) ("Act" or "1992 Cable Act").

[9]Order at ¶ 389.

[10]Id.

[11]NATOA at 35-39; King County at 19. Time Warner also agrees with those parties urging the Commission to allow rate increases outside the annual price cap adjustment to reflect other types of cost increases, such as system upgrades and new programming

regulated, either because no complaint has been filed or because the local authority has not chosen to assert jurisdiction, then it is neither rational nor lawful to try to regulate increases for those unregulated rates.

II. THE COMMISSION SHOULD PERMIT FLEXIBLE IMPLEMENTATION OF

pricing cable programming service tiers according to demand and cost characteristics even though demand and cost vary among different programming service tiers. Thus, subscribers who desire a slimmer, less expensive service tier may need to subscribe and pay for "fatter," more expensive cable programming tiers, contrary to the Act's unbundling policy.

Allowing cable operators to apply different per-channel rates to all regulated cable service tiers would allow pricing to mirror both cost and demand. Such flexibility would benefit consumers by offering consumers more choices while keeping the total weighted average rate for all regulated cable programming services within the applicable per-channel rate.

B. The Commission Should Permit Informal Rate Settlement Agreements Between Cable Operators And Local Franchising Authorities.

Second, the Commission should reconsider its prohibition of informal negotiation and rate settlement agreements between cable operators and local franchising authorities. Both cable operators and franchise authorities recognize that such informal procedures can create a more efficient process for resolving disputes, thereby reducing delay and expense, as well as resort to the Commission and the courts.[14] In many other areas, such as enforcement actions, the Commission has heavily relied on informal procedures, and it has worked well. Given the widespread support for such informal dispute resolution, there is no reason to refuse to allow franchising authorities and the cable operators to participate in such arrangements here.[15]

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[14]See, e.g., King County at 21-23.

[15]The Commission could provide for reporting of informal resolutions to it for summary review to the extent it is concerned about the adequacy of such agreements.

Time Warner further agrees with Booth American Company that local authorities should be free to authorize above-benchmark rates (or subsequent price increases) without a cost-of-service showing. Numerous reasons may be accepted by local authorities -- such as the area is a high cost area to serve, the cable operator has made recent network upgrades and improvements, etc.[16] A simplified opportunity for such showings will reduce the number of cost-of-service proceedings, while at the same time assure that cable operators and franchising authorities comply with the substantive requirement of the 1992 Cable Act for reasonable rates.

C. The Commission's Authority To Regulate Basic Rates Should Be Strictly Construed.

Third, the Commission should reconsider its decision to exercise basic rate regulation on behalf of franchising authorities that request the Commission to do so. The 1992 Cable Act expressly prohibits the Commission from regulating cable rates except as provided in Sections 623 and 612 (commercial leased access).[17] With respect to basic rates, Section 623(a)(2)(A) specifically provides that the Commission may undertake rate regulation in lieu of local officials only "if the Commission exercises jurisdiction pursuant to Section 623(a)(6)." Because § 623(a)(6) quite clearly limits the Commission's jurisdiction over basic rates to circumstances in which a local certification has either been revoked or

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[16]Booth at 21-23.

[17]47 U.S.C. § 543(a)(1).

denied,[18] the Commission cannot lawfully regulate basic rates simply upon the request of a local franchising authority that it do so.[19]

If, nonetheless, the Commission decides to adhere to its broad interpretation of its authority to regulate basic rates in lieu of local officials, it is imperative that the Commission also adhere to its decision to require that local officials demonstrate that the franchise fees collected from cable operators do not adequately cover the cost of regulation. Although King County and NATOA argue that this requirement violates federal law restricting federal agencies from regulating the use of franchise fees,[20] Time Warner submits that the Commission's requirement is entirely lawful.

In particular, while Section 542(i) may prevent the Commission from directing local authorities to allocate funds from franchise fees for a particular purpose, neither the plain language of the provision nor its legislative history suggests that the Commission is prohibited from considering the consequences of that local allocation decision in determining how best to allocate federal resources. Because Congress directed the Commission to judge whether a local authority has the resources to regulate, the Commission must have the power

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[18]See 47 U.S.C. § 543(a)(6):

> [I]f the Commission disapproves a franchising authority's certification . . . or revokes such authority's jurisdiction . . . the Commission shall exercise the franchising authority's regulatory jurisdiction . . . until the franchising authority has qualified to exercise that jurisdiction.

[19]The Commission erroneously relies on Section 623(b)(1) in support of its decision. See Order at ¶¶ 54-55. That section instructs the Commission to ensure "by regulation" that basic rates are reasonable. It does not address, nor can it be read to extend, the jurisdictional grant contained in Section 623(a)(6).

[20]King County at 18; NATOA at 24-26.

to require a showing of the inadequacy of local resources when the local authority asks the Commission to regulate.[21]

III. THE COMMISSION SHOULD NOT PERMIT FRANCHISE AUTHORITIES TO INITIATE COST-OF-SERVICE PROCEEDINGS.

Recognizing the infirmities inherent in cost-of-service regulation, the Commission determined not to use it as the primary basis of regulating cable service rates.[22] Instead, the Commission properly attempted to balance the dual statutory goals of minimizing administrative burdens and protecting consumers by adopting a price cap/benchmark mechanism.[23] This attempt at balance will collapse if, as urged by King County, the Commission reverses its determination that franchising authorities may not initiate cost-of-service proceedings.[24]

Allowing 33,000 local franchising authorities to initiate cost-of-service proceedings would subject cable operators to common carrier regulation in its purest form. This is exactly the type of onerous burden Section 621(c) of the Communications Act was meant to

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[21] A showing regarding the availability of franchise fee funds also is the only practical solution to the potential free rider problem that would otherwise result. Many local regulators would choose not to assume the cost and administrative burden of regulation if they could simply ask the Commission to regulate in their place. In turn, the money saved by avoiding local regulation could be used to enrich the local community. However, the societal effect of this behavior is to foist the cost of local regulation on the federal government while the local community receives the benefit. To counter free rider problems, the Commission wisely requires that, before it will assume the position of the local regulator, the franchising authority must show that the franchise fee money does not meet the costs of regulating cable service.

[22] The infirmities of cost-of-service regulation are discussed in Time Warner's Comments at 14-20. See also, Order at ¶ 183, 186.

[23] Order at ¶ 262.

[24] See Order at ¶¶ 189-191; King County at 1-3.

prevent. Cost-of-service proceedings exact a tremendous financial and administrative toll on the regulated entity.[25] This toll is sufficiently high to prevent cable operators from initiating frivolous cost-of-service proceedings.[26] Franchising authorities do not operate under precisely parallel constraints. While a cost-of-service hearing would, to be sure, deplete regulatory resources, there remain powerful economic and political incentives for a franchising authority to initiate cost-of-service proceedings if given the opportunity to do so. Moreover, the mere threat of such proceedings (where the franchising authority would act as prosecutor, judge and jury) could be used to coerce cable operators to reduce their basic tier rates below the benchmarks in order to avoid a cost-of-service proceeding.

The infirmities of cost-of-service proceedings are so significant that a host of petitioners have questioned their efficacy as a "safety valve" in situations where the benchmark rates do not cover an operator's costs and provide a reasonable profit.[27] The Commission should not propagate those infirmities and impose common carrier regulation on cable operators by allowing franchising authorities to initiate cost-of-service regulation.

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[25]Allowing franchise authorities to initiate cost-of-service proceedings would also exponentially increase the Commission's administrative burdens since cost-of-service determinations are appealable to the Commission. See Order at ¶ 272.

[26]The possibility that a cost-of-service proceeding may result in the establishment of below-benchmark rates also serves as a disincentive to a cable operator initiating a cost-of-service proceeding. See Order at ¶ 272.

[27]See, e.g., Petition for Reconsideration of the Community Antenna Television Association at 14; Petition for Reconsideration of Century Communications Corp. at 13-15; Booth at 34.

IV. CABLE OPERATORS CANNOT BE REGULATED UNDER THE ACT AS COMMON CARRIERS.

A number of petitions contain proposals that would exacerbate a fundamental problem with the Order, that is, the extent to which the regulatory scheme follows a common carrier regulatory model. Notwithstanding a clear legislative proscription against regulating cable systems as "common carriers," the Order establishes a series of notice, approval, prescription, and refund procedures lifted directly from Sections 201 through 205 of Title II of the Act. The Order goes so far in this regard that Bell Atlantic's Petition for Reconsideration praises it as an "important step" toward "parity of regulatory treatment."[28]

"Parity of regulatory treatment" is flatly prohibited by Section 621(c) of the Communications Act, which states:

> Any cable system shall not be subject to regulations as a common carrier or utility by reason of providing any cable service.[29]

Although it was not Congress' intent "to replicate Title II regulation,"[30] that is precisely the result of the scheme established by the Order. The implementation and enforcement of benchmarks alone is virtually identical to that used by the Commission to determine the reasonableness of common carrier rates.

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[28]Bell Atlantic Petition for Limited Reconsideration at 1 ("Bell Atlantic").

[29]The Commission relies generally upon Section 623(b) of the Act to justify various of its proposed rate enforcement mechanisms. Order at ¶¶ 137, 141. Because Section 621(c) of the Communications Act was left intact by the Act, the Commission is constrained from exercising its powers under Section 623(b) in a way that constitutes regulating cable operators as common carriers or utilities.

[30]H.R. Rep. No. 628, 102d Cong., 2d Sess. 83 (1992).

A. The Commission Should Reconsider Those Aspects Of The Rate Order That Mimic Common Carrier Regulation.

A host of policies and procedures contained in the Order closely track Title II regulatory provisions. The Commission should reconsider these provisions in light of § 621(c) of the Communications Act. Among these provisions are:

- **Rate Review Requirements.** A cable operator is required by the Order to publish and file its "schedule" of rates, and any proposed increases, before they can be effective. The rule is indistinguishable from Title II provisions pursuant to which common carriers are subject to rate publication requirements subject to prior review by the Commission.[31]

- **Suspension Authority.** The Order authorizes the local franchising authority to "toll the effective date" of a cable operator's proposed rates for up to 90 days. This authority to suspend a cable operator's proposed rates or rate increases is equivalent to the Commission's authority under Title II to suspend common carrier tariffs pending review and investigation of their lawfulness.[32]

- **Refund Authority.** A local franchising authority is purportedly given the power to order refunds if it finds that a cable operator has unreasonable rates. To carry out its refund authority, the local regulator may order that the cable operator keep "accurate account of all amounts received by reason of the proposed rate and on whose behalf such amounts are paid."[33] The local regulator's refund authority is again indistinguishable from

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[31]47 U.S.C. §§ 203-204.

[32]47 U.S.C. § 204.

[33]See Order at ¶ 119.

the Commission's accounting order and refund authority pursuant to Section 204 and is expressed in nearly identical language.[34]

- **Rate Prescription Authority.** The Commission vests local regulators with the authority to order prospective rate reductions and to prescribe reasonable rates.[35] These powers are the same as the Commission's authority with respect to common carriers.[36]

Under the guise of "enforcement authority", the Commission has authorized franchising authorities as well as itself to regulate cable operators as common carriers. Rate filing requirements, reviewing rates for reasonableness, and rate prescription constitute pure common carrier regulation. Therefore, in light of Section 621(c) of the Communications Act, the Commission should reconsider imposition of these regulations. Moreover, the Commission should reject Bell Atlantic's entreaty to go further down the road to complete common carrier regulation by recrafting other provisions of the Order to impose on cable operators "regulations that parallel those that apply to local telephone companies."[37]

B. The Commission Should Not Force Cable Operators To Elect Cost-Of-Service Proceedings For Both The Basic Service Tier And Cable Programming Services.

The infirmities of cost-of-service regulation should also lead the Commission to reject NATOA's suggestion that cost-of-service proceedings should be available to cable operators

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[34]47 U.S.C. § 204(a)(1).

[35]See Order at ¶¶ 136, 138.

[36]47 U.S.C. § 205. Indeed, the Commission itself notes the comparison between the two provisions. See Order at ¶ 139.

[37]Bell Atlantic at 2.

only on an "all or nothing" basis.[38] NATOA's argument ignores the fact that cost structures differ among the various tiers of service. One tier, for example, may be more costly to provide than another. Thus, a cable operator may find it necessary to submit a cost-of-service showing for the costlier tier and rely on the benchmark scheme for the other tier. To require an operator to submit a cost-of-service showing for all tiers will unnecessarily increase the burdens on franchising authorities, the Commission, and the cable operators, as well as delay the resolution of rate disputes. Moreover, NATOA's approach will not result in the uniformity NATOA seeks since two separate cost-of-service showings, before two different regulatory bodies, will still be required. Finally, NATOA's argument ignores the fact that Congress contemplated and intended different regulatory schemes for basic cable services and cable programming services.

V. PROPOSED LIMITATIONS ON EXTERNAL COSTS WOULD SACRIFICE QUALITY AND DETER INVESTMENT.

Various petitioners have suggested that the Commission impose further limitations on a cable operator's ability to pass-through external costs without resorting to a cost-of-service showing. These limitations (which are discussed briefly below) would without exception impair the performance of cable operators. Time Warner respectfully submits that one of the major shortcomings of the regulatory regime set forth in the Order is its relative lack of incentives for upgrades and programming expenditures. The Commission should not exacerbate this problem by imposing further limitations on the pass-through of external costs.

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[38]See NATOA at 38-39.

A. The Limitation On Pass-Through Of Increases In Affiliated Programming Costs Should Not Be Exacerbated.

A host of other petitioners have urged the Commission to reconsider its limitation on the pass-through of increases in programming costs of affiliated programmers to the lesser of the actual increase or inflation.[39] Time Warner agrees. There is no question but that this limitation will discourage cable operators from carrying certain programming and investing in new programming ventures.

The limitation on the pass-through of affiliated programming cost increases is a "cure" in search of a disease. NATOA urges the Commission to make that cure all the more lethal by requiring cable operators to reduce rates to the extent that affiliated programming costs increase at a rate that is less than the inflation rate. NATOA's suggestion would not only create a powerful disincentive to cable operator investment in program development, but would also penalize operators that reined in programming cost increases.[40]

B. Programming Costs And Franchise-Related Fees And Costs Are Proper External Costs.

The Commission appropriately allowed cable operators to pass-through programming costs and franchise-related fees and costs as external costs outside of the cable operators'

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[39]See Petitions for Reconsideration, filed June 21, 1993, of Black Entertainment Television, Inc. at 1-2, 4-12, Booth at 22-23, Cablevision Systems Corp. at 16-22, Colony Communications, Inc., et al. at 11-12, Continental Cablevision, Inc. at 9-10, Discovery Communications, Inc. at 7-8, Liberty Media Corp. at 14-18, Tele-Communications, Inc. at 22-24, and Turner Broadcasting System, Inc. at 2-6.

[40]The Commission has yet to release the forms and instructions relevant to the price cap adjustment. The unavailability of this information precludes full discussion (and thus the required opportunity to comment and to seek reconsideration) at this time.

control.[41] Pass-through of these costs will, as the Commission notes, "assure the continued growth of programming"[42] and fulfill its statutory mandate to take such costs into account in imposing rate regulation. The assertion by King County that programming and franchise-related fees and costs are in the control of cable operators is specious.[43] The ability to bargain with programmers and franchising authorities in an attempt to hold down costs does not demonstrate cable operator control over the outcome. In fact, the notion that cable operators "bargain actively"[44] over franchise requirements and programming costs proves that the very "control" King County claims cable operators possess is in fact lacking.

Franchising authorities impose a variety of obligations on cable operators as part of a franchise or as a condition of renewal or transfer. These obligations and the costs they engender often range well beyond "direct monetary costs specifically enumerated by a stated dollar amount in a franchise agreement . . ."[45] Accordingly, the Commission should reject NATOA's recommendation that the above-quoted language be substituted for the Commission's definition of "costs of franchise requirements." Otherwise, cable operators will be forced to incur the time and expense of cost-of-service hearings in order to recover indisputable direct and indirect costs related to the franchise.

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[41]See Order at ¶¶ 249-254.

[42]Id. at ¶ 252.

[43]King County at 3-9.

[44]Id. at 4.

[45]NATOA at 4.