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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215
	)	
and	)	
	)	
Adoption of a Uniform Accounting System for Provision of Regulated Cable Service	)	CS Docket No. 94-28

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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August 1, 1994

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The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its reply comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] The overwhelming majority of the comments filed in this proceeding call into serious question many of the tentative Commission decisions put out for comment in the Further Notice, including its proposals for incorporating a productivity offset into the cable price cap regime, for amending its recently-adopted affiliate transaction rules, for making its

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1 Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 93-215 and CS Docket No. 94-28, FCC 94-39, released March 30, 1994 ("Further Notice").

interim cost-of-service rules permanent, and for adopting its proposed cable uniform system of accounts ("USOA"). Accordingly, for the reasons stated in those comments and below, the Commission must should terminate consideration of a number of those ill-conceived initiatives and significantly revise its other proposals prior to adopting final rules in this proceeding.

I. INTRODUCTION AND SUMMARY

In its initial comments, NCTA first urged the Commission to promptly release an order withdrawing the proposed two percent "productivity offset" from further consideration because (1) there was no basis in the record for it, (2) it is inappropriate to apply such a telco-derived concept to the cable industry, and (3) a positive productivity offset is not supported by the limited amount of available data.[2] In support of the latter conclusion, NCTA submitted a report by Christensen Associates, leading experts in the field, showing that no positive productivity offset was warranted for the cable industry.[3]

NCTA next argued that the Commission should substantially revise its interim cost-of-service rules before making them permanent, particularly with respect to its original cost valuation methodology, its proposed 11.25% rate-of-return, and its treatment of so-called "excess acquisition costs," start-up losses beyond the first two years and certain intangibles.[4] NCTA urged

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2 Comments of the National Cable Television Association, Inc. in MM Docket No. 93-215 and CS Docket No. 94-28, filed July 1, 1994 at 6-23. ("NCTA Initial Comments").

3 Id. at Attachment B.

4 Id. at 23-49.

that rate base assets be valued at their competitive market value, that all pre-regulation acquisition costs be included in the rate base, that start-up losses beyond the first two years be included in the rate base, and that a rate-of-return greater than the proposed 11.25% be used in cost-of-service showings.

On other proposals put out for comment, NCTA asked the Commission (1) not to adopt a Uniform System of Accounts for the diverse cable industry or, in any event, to permit cable operators significant flexibility in ordering their business operations while operating with a more cable-oriented USOA;[5] (2) to defer consideration of rules for a permanent Upgrade Incentive Plan until it gains experience with experimental plans;[6] (3) to develop average cost schedules for use by all categories of cable systems for which data is available as long as the use of average cost schedules for rate-making purposes is optional, not mandatory;[7] and (4) to reject the proposed cable affiliate transaction rules which would limit the use of the "prevailing company price" approach in valuing affiliate transactions.[8]

Virtually all of the other comments filed in this proceeding echo the NCTA positions on these issues. In fact, the most substantive comments submitted-- and those buttressed by the most significant support -- were filed by cable industry parties[9] whose positions essentially mirror the NCTA

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5 Id. at 49-55.

6 Id. at 55-58.

7 Id. at 58-60.

8 Id. at 60-63.

9 Comments of Falcon Cable TV in Response to Further Notice of Proposed Rulemaking ("Falcon"); Comments of Tele-Media Corporation ("Tele-

Footnote cont'd.

views on most, if not all, of the issues put out for comment by the Commission. The other comments consist of relatively short filings by three telephone industry parties[10] and brief filings by a group of local franchising

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Media"); Comments of Rainbow Programming Holdings, Inc. ("Rainbow"); Comments of Viacom International Inc.("Viacom"); Comments of Discovery Communications, Inc. ("Discovery"); Comments of Tele-Communications, Inc. ("TCI"); Comments of Time Warner Entertainment Company, L.P. ("TWE"); Comments of Liberty Media Corporation ("Liberty Media"); Comments of Turner Broadcasting System, Inc. ("TBS"); Comments of the Cable Telecommunications Association ("CATA"); Comments of Comcast Cable Communications, Inc. ("Comcast"); Comments of Jones Education Networks, Inc. ("JEN"); and Comments of Continental Cablevision, Inc., Crown Media, Inc., Jones Intercable, Inc., KBLCOM, Inc., Scripps Howard Cable Co., Telecable Corporation, Greater Media, Inc., Rifkin & Associates, Inc., TCA Cable, Inc., Western Communications, Allen's TV Cable Service, Inc., American Cable Entertainment, Benchmark Communications, Brownwood Television Cable Services, Inc., CableAmerica Corp., CableSouth, Columbus Television Cable Corp., Daniels Cablevision, Inc., Gilmer Cable Television Co., Halcyon Communications, Inc., James Cable Partners, OCB Cablevision, Inc., Sjoberg's Inc., Starstream Communications, United Video Cablevision, Zylstra Communications Corp., Cable Television Association of Georgia, Cable Television Association of Maryland, Delaware and the District of Columbia, New Jersey Cable Television Association, South Carolina Cable Television Association, Tennessee Cable Television Association, and Texas Cable TV Association Regarding the Interim Cost-of-Service Rules and the Further Notice of Proposed Rulemaking ("Continental et al.").

10 Comments of Bell Atlantic; Comments of GTE; Comments of BellSouth. The telephone company commenters, led by Bell Atlantic, once again make their pitch for "regulatory parity" -- an argument which we have shown before is unwarranted, not to say disingenuous. Bell Atlantic at 1-2; GTE at 6-10; BellSouth at 1-2. Rather than burden these reply comments with a response to those redundant -- and previously rejected -- arguments, we incorporate by reference and attach hereto as Attachment A a copy of the NCTA June 16, 1994 Opposition to Petition for Partial Reconsideration filed by Bell Atlantic in MM Docket No. 93-215 and MM Docket No. 92-266, which most recently dealt with the "regulatory parity" issue.

authorities and a consulting firm.[11] These latter comments support -- to one extent or another -- the imposition of additional burdens on the cable industry.[12] As we have shown, and show again below, those positions are without merit.

II. THE COMMENTS CONFIRM THAT THE PROPOSAL FOR A PRODUCTIVITY OFFSET HAS NO LEGAL OR ECONOMIC BASIS AND MUST BE SEVERED PROMPTLY FROM THIS PROCEEDING

In our comments we demonstrated that the proposed telephone company-derived productivity offset is inappropriate for use in price cap regulation of the cable industry which is not a utility.[13] Moreover, we showed that there was -- and is -- no evidence supporting imposition of the proposed two percent productivity offset.[14] One reason for the paucity of information is that "productivity" is difficult to measure in the context of the cable industry. Nevertheless, we demonstrated through submission of a study by leading experts in the field of productivity analysis that, to the extent "productivity" in the cable industry can be measured at all, the data provide no evidence to support a two percent -- or any other -- positive

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11 Comments of the National Association of Telecommunications Officers and Advisors and the City of New York ("NATOA"); Comments of Fred Williamson & Associates ("FW&A").

12 As discussed below, however, BellSouth vigorously and correctly argues that the proposed cable affiliate transaction rules are burdensome and unnecessary. See BellSouth at 2-10.

13 NCTA Initial Comments at 19-22.

14 Id. at 11-13.

productivity offset.[15] Accordingly, the available data indicate that there is no basis for incorporating the proposed productivity offset into the cable price cap calculation. Because of the cloud which the Commission's proposal has cast over the cable industry, we urged the Commission to promptly sever this issue from this proceeding and terminate consideration of a productivity offset for the cable industry.

The commenters who addressed the issue were virtually unanimous in opposing the proposed productivity offset.[16] Indeed, only three commenters -- GTE, Bell Atlantic, and FW&A -- urged adoption of a productivity offset for cable. However, none of those commenters offered any record evidence to support its position. Indeed, GTE cites what it calls the New Jersey "study" upon which the Commission based its proposal,[17] ignoring the fact that no such "study" existed. As a number of commenters noted, the "New Jersey Comments" cited by the Commission consisted of only an unsupported suggestion in one paragraph of the comments filed by the staff of the New Jersey Board of Regulatory Commissioners.[18]

Despite this lack of record support, GTE (at 14) argues that "the productivity factor for cable should be based on TFP [Total Factor Productivity] and should be similar to that of the telephone industry."

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[15] Id. at 13-17 and Attachment B (Christensen Associates, "Productivity Growth in the Cable TV Industry," June 1994)("Christensen Report").

[16] See CATA at 8-9; TCI at 50-54; TWE at 28-34; Comcast at 13-17 Continental et al. at 52-56; Viacom at 18-20; Discovery at 9; Liberty Media at 22-24.

[17] GTE Comments at 12-15.

[18] See NCTA Initial Comments at 12. See also Comcast at 16-17; TCI at 50-51; TWE at 31.

Similarly, Bell Atlantic makes a half-hearted effort to support imposition of a productivity offset on cable, but the thrust of its effort is primarily directed at advancing its "regulatory parity" agenda.[19] But, as NCTA and others have shown, there is no reason to incorporate a productivity offset into the cable price cap regime merely because one is used in the context of the telephone industry's price cap regulation.[20] Such an offset is inappropriate for the cable industry, which is not a utility. There is no meaningful analogy between the telephone and cable industries that can be advanced in support of applying a telco-derived productivity offset to cable; and, in any event, Congress explicitly cautioned the Commission not to regulate cable as a utility or a Title II common carrier.[21]

Finally, there is no record evidence to support the proposed two percent -- or any other positive -- productivity offset, as NCTA and others demonstrated in their initial comments.[22] NCTA's initial Comments were

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[19] Bell Atlantic at 3-6 ("[T]he Commission should adopt a productivity offset for cable that is at least equivalent to the offset that is ultimately adopted for local telephone companies in the ongoing price cap review proceedings."). The FW&A Comments on this issue are essentially limited to the unsupported remark that "[o]perations and procedures of cable companies are essentially identical to telephone companies and therefore the ongoing productivity offset should be identical in form and application to cable operators." FW&A at 3 (unnumbered; footnote omitted).

[20] See NCTA Initial Comments at 19-22; CATA at 9; TCI at 50-54; TWE at 29-30; Comcast at 13-16; Continental et al. at 55-56.

[21] See 47 U.S.C. § 541 ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.") and H.R. Rep. No. 628, 102d Cong., 2d Sess. 83 (1992).

[22] See NCTA Initial Comments at 11-19; TCI at 50-53; TWE at 31-34; Comcast at 14-17; Viacom at 19.

supported by the Christensen Report, which directly measured cable's productivity, and by an indirect productivity study conducted by Economists Incorporated ("EI"). Both studies demonstrated that no positive productivity offset is warranted for the cable industry.[23] The only party which even attempted to provide support for the Commission's proposal -- Bell Atlantic -- submitted with its comments a Declaration from Dr. Robert Harris which purportedly supports the view that the Commission should adopt comparable productivity offsets in the telephone and cable industries.

But most of the Harris Declaration is irrelevant to the productivity offset issue; rather it is another effort to support the Bell Atlantic "regulatory parity" theme. The Harris Declaration, of course, ignores the fact that Congress has warned the Commission not to regulate cable as a utility or as a Title II common carrier. Moreover, to the extent both the Bell Atlantic Comments (at n.16) and the Harris Declaration (at 7 and n.5) (as well as the GTE Comments (at n.23)) cite to productivity studies done for the telephone industry by Christensen Associates, it is telling that Christensen Associates, leading experts in measuring productivity, in this proceeding prepared a report supporting NCTA's comments.

Significantly, the Harris Declaration (at 7) states that "[t]he best indicator of future productivity gains is historical experience, over a sufficiently long period to reduce anomalous yearly fluctuation." As noted above, the Christensen Report showed that, to the extent cable industry

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[23] See NCTA Initial Comments at Attachment B (Christensen Report) and Attachment C (Economists Incorporated, "A Comparison of Real Rates Charged by Competitive Cable Franchises in 1986 and 1993 Based on the 1994 FCC Cable Rate Rules", June, 1994).

productivity is capable of measurement by historical experience, no positive productivity offset is appropriate for the cable industry. Thus relying on its own productivity experts and Harris's own indicator of productivity, Bell Atlantic has shown what NCTA has demonstrated: the historical evidence supports no productivity offset for cable. A supplemental reply by Christensen to Harris's Declaration, attached to these Reply Comments, explicates this view.

Thus, the Christensen report (and the indirect productivity study conducted by EI) constitute the only evidence in the record that meets the Harris criterion; all of it points to no positive productivity offset for cable.

For the reasons stated by the overwhelming majority of commenters, the Commission should promptly terminate its consideration of the productivity offset issue.

III. BECAUSE THERE IS NO RECORD SUPPORT -- OR LEGAL BASIS -- TO ADOPT THE PROPOSED AFFILIATE TRANSACTION RULES, THE COMMISSION IMMEDIATELY SHOULD TERMINATE CONSIDERATION OF THAT PROPOSAL

The Commission sought comment on a proposed revision of its just-adopted rules governing affiliate transactions in the cable industry, which were based on similar rules for the telephone industry.[24] The proposal would limit the use of the "prevailing company price" approach for valuing affiliate transactions to situations in which the non-cable affiliate sold more than 75% of its product to non-affiliates. As demonstrated in our comments, there is no reason to impose on the cable industry (which has not even had an

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[24] Further Notice at ¶¶ 309-313.

opportunity to operate under the just-adopted affiliate transaction rules) even more stringent rules proposed to be applicable to the quite different telephone industry (with its history of affiliate transaction abuses).[25]

The Commission's proposal to apply telco-like affiliate transaction rules to cable has generated virtually unanimous -- and well-founded -- opposition. Indeed, not only do cable programmers and operators uniformly oppose the Commission proposal,[26] but also BellSouth devotes the bulk of its entire filing to attacking the proposal.[27] As BellSouth states: "[T]he existing asset transfer rules applicable to cable operators go beyond what is necessary to provide adequate consumer protection."[28] It then concludes: "The limited additional protection that the public would derive from the proposed rules does not begin to justify the massive additional burden that the proposed rules would impose."[29]

Despite the nearly unanimous opposition to the Commission's proposed affiliate transaction rules, GTE supports the proposal. In doing so, GTE simply states that the proposed rule is "necessary to prevent cable

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25 NCTA Initial Comments at 60-63.

26 See e.g. Discovery at 2-7; Rainbow at 1-8; TBS at 1-16; Liberty Media at 18-22; JEN at 1-11; TCI at 45-50; and TWE at 22-28.

27 BellSouth at 2-10.

28 Id. at n.7.

29 Id. at 4. BellSouth also notes that the proposed rules will "impose substantial new costs on the Commission and the public." Id. at 7. In its comments, Bell Atlantic concedes that "there are strong arguments for less restrictive requirements," but it argues that "whatever rules are ultimately adopted for telephone companies should apply equally to cable as well." Bell Atlantic at 10-11.

operators from manipulating transactions with nonregulated affiliates in order to justify higher rates."[30] But GTE offers no past evidence or predictive support for that position, nor does any exist. As a number of commenters observed,[31] in contrast to the massive record developed over a number of years which supported adoption of telephone company affiliate transaction rules, no such record has been compiled to support application of similar rules to the cable industry. Nor has there been evidence of conduct suggesting the need for a prophylactic rule.

To the contrary, the record clearly establishes that the Commission's proposed modification to its cable affiliate transaction rules should not be adopted. As NCTA and others have demonstrated, the cable industry has not been subject to the same history of cross-subsidy abuses to which the telephone company affiliate transaction rules are addressed.[32] Adoption of the proposed rules would be inconsistent with (i) the Congressional mandate not to impose common carrier regulation on the cable industry, (ii) Commission policy to provide incentives for the development of cable programming and (iii) Commission decisions rejecting unwarranted limits on the amount of vertical integration in the cable industry.[33] And the proposed

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[30] GTE at 12. FW&A states its support for the proposal without any further analysis. FW&A at 3 (unnumbered) ("We support the Commission's proposal and further applaud their efforts to refine these rules as applied to the telephone companies.").

[31] See Liberty Media at 3; TCI at 46, n. 73.

[32] NCTA Initial Comments at 60,62; TCI at 45-48; TWE at 22-25; Discovery at 4-5; TBS at 4, 13-14; Liberty Media at 4-13; Rainbow at 6-7; JEN at 5-7.

[33] NCTA Initial Comments at 63; Discovery at 5-7; Rainbow at 5-6; Liberty Media at 2-4, 18-22; JEN at 7-10; TBS at 4-8; TCI at 49-50; TWE at 25-27.

rules, in conjunction with the Commission's sweeping definition of "affiliate," will be extremely burdensome, if not unworkable, in practice.[34]

As BellSouth concluded, the proposed rules "would require cable operators to incur massive new administrative costs that would not result in any increase in output. Hence, they would reduce the productivity of cable operators and increase their costs without any noticeable consumer benefit."[35] Accordingly, there is nothing in the record to support adoption of the proposed affiliate transaction rules.[36] They must be promptly rejected.

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[34] NCTA Initial Comments at 62; Liberty Media at 14-28; TCI at 49; TWE at 27-28; BellSouth at 7.

[35] BellSouth at 7.

[36] GTE argues that the proposed rules "are consistent with Section 616 of the Communications Act," claiming that "Congress specifically found that cable operators frequently act in ways that favor affiliated program distributors and stifle programming distribution." GTE at 12. But, as TWE has observed (at 25, n. 40), the concern reflected in program access legislation regarding cable affiliate transactions is that "prices available from cable programmers to their cable operator affiliates may be preferentially low, rather than artificially high" -- and it is the latter concern which is addressed by the proposed affiliate transaction rules. In any event, to the extent Congressional concerns are legitimate, the Commission's rules implementing Section 616 addressed those concerns. See Second Report and Order in MM Docket No. 92-265, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, FCC 93-457, released October 22, 1993.

IV. THE COMMENTS DEMONSTRATE THAT THE COMMISSION MUST MAKE SUBSTANTIAL CHANGES IN ITS INTERIM COST-OF-SERVICE RULES BEFORE MAKING THEM PERMANENT

In our comments, we demonstrated that the Commission must revisit and revise the fundamental bases of its "interim" cost-of-service decisions before making them permanent. In particular, we showed that it must reconsider its decisions (1) to value all rate base assets at original cost and to presumptively exclude from the rate base all acquisition costs in excess of the original cost of the assets;[37] (2) to presumptively exclude from the rate base start-up losses beyond the first two years of operation as well as other intangible assets;[38] and (3) to use a uniform 11.25% rate-of-return for the entire cable industry.[39]

We also showed that the Commission should reconsider the "presumptions" it established against inclusion of certain intangibles in the rate base, particularly its requirement that, to rebut those presumptions, operators must show that the resulting rates will not exceed levels in purportedly "competitive" markets.[40] As we stated in our comments, the Commission's determination of what are "competitive" levels is fundamentally flawed, which renders the "presumptions" based on those purportedly "competitive" rate levels meritless.[41]

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37 NCTA Initial Comments at 25-33.

38 Id. at 33-35.

39 Id. at 40-49.

40 Id. at 35-40.

41 Id. at Attachment H (Arthur D. Little, Inc., "Evaluation of FCC Methodology for 1994 Rate Order," June 1994).

The vast majority of the commenters in this proceeding agree with the NCTA position that substantial revisions in the Commission's "interim" cost-of-service rules must be made before they are made permanent.[42] In contrast, only two parties -- Bell Atlantic and GTE, both of whom focus primarily on the proposed 11.25% rate-of-return -- voice more than cursory support for making the "interim" rules permanent.[43] In this regard, GTE, again crying "regulatory parity", urges the Commission to adopt a rate-of-return for cable operators "that is consistent with the rate-of-return applied to telephone companies."[44] Bell Atlantic makes a similar contention, devoting the entire five paragraphs of its argument to the claim that cable companies do not face greater business risks than telephone companies.[45]

But, as NCTA[46] and others[47] have shown, a unitary rate-of-return applicable to the diverse cable industry is inappropriate. And, in any event,

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[42] See TCI at 3-20; TWE at 1-22; Comcast at 1-13; Continental et al. at 1-52; Discovery at 7-9; Viacom at 1-17; Telemedia at 1-5. Indeed, TWE and TCI make a compelling case that the cost-of-service rules proposed by the Commission cannot be adopted as a matter of law (because they are contrary to the "Congressional mandate against common carrier regulation and administrative complexity") and as a matter of policy (because the primary objective of the rules is impermissible -- to achieve regulatory parity with the telephone industry). TWE at 4-15. See TCI at 3-17.

[43] FW&A supports the proposed 11.25% rate of return but suggests a number of revisions to the interim rules. FW&A at 2-3 (unnumbered) and Attachment A. BellSouth simply states it "supports the hierarchy adopted by the Commission for the regulation of the cable television industry." BellSouth at 1.

[44] GTE at 6-10.

[45] Bell Atlantic at 7-8.

[46] NCTA Initial Comments at 41-47.

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cable operators face significantly more business risk than telephone companies which warrants a cable rate-of-return higher than the 11.25% applicable to telephone companies. That circumstance and others ignored by the Commission must be factored into any cable rate-of-return calculation. For these reasons, the Commission must revisit its determination that 11.25% is an appropriate cable rate-of-return before making its "interim" rules permanent.

As for rate base issues, as did NCTA, a number of cable parties take serious issue with the Commission's decisions about what assets may be included in the rate base and related issues. Only GTE voices support for the Commission's decision on these issues, but offers nothing more than conclusory statements to support its view.[48] For this reason, the Commission should take heed of the other comments -- supported as they are with substantial data and serious arguments -- and revisit the rate base determinations at issue.

In particular, the Commission should (1) permit operators to value their rate bases at something greater than "original cost," such as competitive market value;[49] (2) allow all pre-regulation acquisition costs in the rate base or, in any event, allow greater recovery of those costs than

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[47] See e.g., TCI at 35-42; Comcast at 3-13; Continental et al. at 45-52; Viacom at 13-17; Telemedia at 1-5; Discovery at 7-9.

[48] GTE at 5.

[49] See NCTA Initial Comments at 25-28; Viacom at 5-8;

currently proposed;[50] (3) allow recovery for start-up losses beyond the first two years;[51] (4) allow operators to include in their rate bases newly-constructed capacity that will be used beyond the current one year limitation;[52] and (5) clarify a number of issues relating to rate base, cost allocation and tax issues as well as procedural matters pertaining to its cost-of-service regime.[53]

V. THE COMMENTS SHOW THAT THE COMMISSION SHOULD REVISIT ITS DECISION TO ADOPT A USOA FOR CABLE

The Commission set forth in Appendix C to the Further Notice a draft uniform accounting system for cable operators on which it sought comment, while indicating that it expected to conduct meetings with interested parties and eventually issue a Second Further Notice on a revised proposal.[54] The Commission noted that the proposed uniform system was adopted from the USOA for Class B telephone companies contained in Part 32 of the Commission's Rules, and from NARUC model cable accounting rules.

As we stated in our initial comments, the Commission should revisit its determination to impose a complex, uniform, telco-derived USOA on the quite different and diverse cable industry, which already maintains its financial records according to GAAP.[55] In this regard, we urged the

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[50] See NCTA Initial Comments at 29-33; TCI at 25-32; Comcast at 3 and Exhibit 1; Continental et al. at 11-26; Viacom at 8-11.

[51] See NCTA Initial Comments at 33-35; TCI at 32-33.

[52] See Viacom at 11-13.

[53] See Continental et al. at 26-45, 66-79; TCI at 43-45.

[54] Further Notice at ¶ 306.

[55] NCTA Initial Comments at 49-55.

Commission to offer the cable industry the maximum flexibility in organizing its accounts.[56] At a minimum, we argued that small systems and systems not electing cost-of-service should not be required to adopt a USOA.[57]

The comments of virtually all parties addressing the issue support the NCTA view that the Commission should reconsider its decision to adopt a uniform system of accounts for cable. Those comments demonstrate that not only is it inappropriate to impose the proposed USOA on cable, but also to do so would be inconsistent with the Commission's legislative mandate.[58]

Once again, only the telephone industry parties and FW&A[59] take a contrary position. GTE contends that "uniform accounting methods are an entirely typical and expected component of utility regulation."[60] But, in so arguing, GTE again ignores the fact that Congress mandated cable should not be regulated like a utility. Bell Atlantic -- limiting its comment to one paragraph -- argues that if the Commission maintains "a size dichotomy" requiring larger (Class A) telephone companies to use a more burdensome

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56 Id. at 54.

57 Id.

58 See e.g. TCI at 2-24; TWE at 19-22; Comcast at 3 and Exhibit 1; Continental et al. at 63-65; Falcon at 4-11.

59 As it does throughout its four-page filing, with respect to this issue FW&A merely restates the Commission's proposal and expresses its support for it. Here the sum total of its "comment" is as follows: "We generally support the Commission's proposal to establish a uniform accounting system for cable operators electing cost-of-service regulation, in that it is very similar to that currently in effect for telephone systems." FW&A at 3 (unnumbered; footnote omitted).

60 GTE at 11.

for cable."[61] Similarly, BellSouth simply endorses the FCC proposal in one sentence without further comment.[62]

The telephone industry commenters add nothing to the record to support the propriety or the legality of imposing a telco-oriented USOA on the cable industry. The other comments in this proceeding plainly demonstrate the need for the Commission to revisit its conclusion that its proposed cable USOA is appropriate -- or even permissible.

Should the Commission decide not to revisit that fundamental decision, its proposal to address in stages the need and scope of a cable USOA was well taken. The cable parties have shown that, if the Commission maintains its position that a cable USOA is warranted, substantial revisions to the Commission's proposal are necessary.[63] If the Commission persists in the view that a cable USOA is permissible, appropriate and warranted, it should proceed expeditiously to conduct meetings with interested parties to develop and put out for comment a more focused, cable-oriented USOA as it suggested it would do in the Further Notice.

VI. THE COMMENTS DEMONSTRATE THAT THE COMMISSION MUST BE FLEXIBLE IN ADOPTING RULES REGARDING NETWORK UPGRADES

The Further Notice sought comment on the Commission's proposed permanent Upgrade Incentive Plan and related issues (e.g., enrollment,

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61 Bell Atlantic at 11-12.

62 BellSouth at 8.

63 See NCTA Initial Comments at 53-55; Falcon at 11-18; TCI at 33-35.

local-federal coordination).[64] In our comments, we urged the Commission to refrain from adopting rigid rules for a permanent plan until it has gained meaningful experience under its experimental plans.[65] Moreover, we argued that any rules adopted must not restrict in any manner the ability of cable operators to recover the full costs of network upgrades or inhibit the upgrading of their networks.[66] In short, we argued that flexibility -- combined with the certainty that investments eventually will not be made worthless -- should be the touchstone of the Commission's Upgrade Incentive Plan.

The other cable industry parties who commented on this issue generally echoed the NCTA approach[67] while some also have offered a number of important additional suggestions with respect to the Commission's proposal for a permanent Upgrade Incentive Plan. In particular, NCTA urges the Commission to adopt the recommendation that the role of franchising authorities in conjunction with upgrade plans be limited solely to implementation of an FCC-approved plan in order to spur development of a truly National Information Infrastructure based on uniform federal guidelines and standards.[68] In addition, the issues raised by

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64 Further Notice at ¶¶ 324-329.

65 NCTA Initial Comments at 55-58.

66 Id.

67 See e.g. TWE at 36 ("Allowing cable operators to submit individualized proposals explaining how they would implement the Upgrade Incentive Plan allows customization of the programs to suit special needs and thus encourages investment and innovation of new services.").

68 Id.

CATA -- with respect to outstanding questions concerning the upgrade plan -- must also be addressed by the Commission.[69]

The non-cable parties -- FW&A, NATOA, and Bell Atlantic -- which commented on this issue also support adoption of a permanent Upgrade Incentive Plan although the latter two express some reservations. In this regard, NATOA urges the Commission to adopt "rules to ensure that such a plan would in no way result in diminution of service or increased rates on regulated tiers."[70] But NATOA offers no suggestions to achieve that result, demonstrating the wisdom of declining to adopt rigid rules until various experimental plans -- pursuant to which the Commission should allow operators maximum flexibility in addressing rate and service issues -- have been proposed, deployed and implemented.

Bell Atlantic's comments on this issue focus exclusively on its plea to remove the introduction of new telephone services from the telephone price cap regime under which it operates.[71] It argues that "it would be unreasonable to give cable companies the benefit of an incentive upgrade plan without extending similar relief to telephone companies."[72] As NCTA and others have shown, the Commission's proposal is a good first step, but

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[69] See CATA at 4-8.

[70] NATOA at 3 ("[O]perators should not be able to pass along costs of additional services or upgrades to basic subscribers unless all subscribers benefit from such services or upgrades.").

[71] Bell Atlantic at 12-13.

[72] Id. at 13. To the extent telcos are granted upgrade incentives in the video dialtone proceedings, Bell Atlantic's argument would apply equally to cable company upgrades.

needs substantial improvement based on the experience gained from the experimental upgrade incentive plans.

In a related area, several parties commented on the Commission's recently-adopted streamlined cost-of-service showings for "significant" network upgrades.[73] As NCTA observed with respect to the proposal for a permanent Upgrade Incentive Plan, cable operators should be given appropriate incentives to upgrade their networks.[74] The same holds true for the so-called streamlined cost-of-service showings permitted for significant network upgrades. Therefore, NCTA supports the views expressed by some commenters that the Commission expeditiously clarify procedures and develop forms for streamlined cost-of-service showings,[75] and permit "anticipatory rate increases" to recover the costs of planned or required upgrades.[76]

VII. TO THE EXTENT DATA IS AVAILABLE, THE COMMISSION SHOULD PERMIT -- BUT NOT REQUIRE -- THE USE OF AVERAGE COST SCHEDULES IN CABLE RATE PROCEEDINGS

The Further Notice requested comment on whether the use of average cost schedules in cable rate-making proceedings should be available to all operators or only small systems.[77] As we stated in our comments, the Commission should permit -- but not require -- all systems to take advantage

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[73] See CATA at 2-4; TCI at 54-55; TWE at 34-47; Continental et al. at 57-63.

[74] NCTA Initial Comments at 57-58.

[75] See TCI at 54-55; Continental et al. at 57-58.

[76] See Continental et al. at 58-62; CATA at 4.

[77] Further Notice at ¶ 333.

of average cost schedules once they are developed.[78] In developing those schedules, and in conducting cost studies, the Commission should do so in a manner that is least intrusive into the daily operations of the subject cable systems, by, for example, limiting the cost studies to selected companies or types of companies, rather than imposing them on the entire industry.[79]

It appears that only NCTA and FW&A commented on the Commission's average cost schedule proposal. In its terse comment, FW&A supported the Commission's proposal, but suggested that only "single-owned systems" having 1,000 or fewer subscribers be permitted to use average cost schedules in their rate filings.[80] There is no support for the FW&A position to so limit the use of average cost schedules, and FW&A offers none. To the extent the use of average cost schedules can relieve burdens on operators and the appropriate regulatory authority, all operators should be permitted to use them. Accordingly, the NCTA position regarding the optional use of such schedules by any and all operators should be adopted.

CONCLUSION

For the reasons stated above and in our initial Comments, the Commission should:

- Promptly release an order withdrawing the proposed productivity offset and affiliate transaction rules from further consideration;

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[78] NCTA Initial Comments at 58-60.

[79] Id. at n.122.

[80] FW&A at 4 (unnumbered).

- Substantially revise its cost-of-service interim rules, particularly with respect to its original cost valuation methodology, its treatment of so-called "excess acquisition" costs, start-up losses beyond the first two years and certain intangibles and its proposed 11.25% rate-of-return;

- Reject the notion that a USOA is necessary for the cable industry or, in any event, permit cable operators significant flexibility in ordering their business operations while operating with a USOA;

- Defer consideration of a permanent Upgrade Incentive Plan until it gains experience under its newly-adopted experimental Upgrade Incentive Plan, but clarify its procedures for streamlined cost-of-service showings for significant upgrades; and

- Develop average cost schedules for use by all categories of cable systems for which data is available as long as the use of average cost schedules for rate-making purposes is optional, not mandatory.

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