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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of)
)
Implementation of Section 301(j))
of the Telecommunications Act of 1996)
)
Aggregation of Equipment Costs)
By Cable Operators)

CS Docket No. 96-57

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The National Cable Television Association ("NCTA") hereby submits its comments in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

Congress established the equipment averaging provision to reduce the cost of advanced technology for consumers and to promote the development of a broadband, two-way telecommunications infrastructure.² It recognized that the current equipment regulations, if applied to advanced equipment, could produce rates that are "too expensive for most consumers"³ and that this, in turn, would hinder the development of broadband networks.

¹ In the Matter of Implementation of Section 301(j) of the Telecommunications Act of 1996, Aggregation of Equipment Costs By Cable Operators, Notice of Proposed Rulemaking, CS Docket No. 96-57, FCC 96-117 (Released March 20, 1996)("Notice").

² H.R. Rep. 204, 104th Cong., 1st Sess. at 107 ("House Report").

³ Id. at 108.

The Commission can best achieve Congress's intended consumer benefits by providing cable operators maximum flexibility to average equipment in ways that reduce the cost of new technology. Flexibility is justified because cable operators have a strong economic incentive to find efficient averaging strategies. Doing so will enhance operators' ability to put new equipment in consumers' homes, a necessary predicate to offering consumers advanced services.

Moreover, flexibility is necessary because the consumer equipment business is highly dynamic. Neither the Commission, the cable industry, nor equipment manufacturers can predict the manner in which consumer equipment will develop. Flexible rules will accommodate technological change by allowing new, advanced customer equipment to be averaged in existing broad categories, thereby producing the lower consumer prices envisioned by Congress. In short, dynamism and regulatory flexibility are symbiotic counterparts.

Pursuant to these goals, NCTA recommends the following approach to equipment averaging:

- The Commission should adopt the "broad categories" test set out in Section 301(j) of the 1996 Act. This test will achieve Congress's goal of reducing consumer rates for advanced equipment and, as a practical matter, corresponds to the Commission's three existing equipment categories -- converters, remotes, and inside wiring. By contrast, the proposed "primary purpose" test will create uncertainty and engender disputes about the "primary" purpose of multi-function equipment.

- The Commission should allow installation costs to be averaged in the same manner as equipment costs. It is both inconsistent and inefficient to require installation costs to be averaged on a different geographic basis than equipment costs.
- The Commission should clarify that the "basic-only" limitation applies to subscribers, not to equipment. Thus, a cable operator may average equipment used by a non-basic-only subscriber, even if the same equipment is used by basic-only subscribers. In addition, cable operators should be permitted to geographically average the costs of equipment used by basic-only subscribers.
- As in the Social Contract context, the Commission, and not the individual LFAs, should perform the Form 1205 review of an operator's equipment averaging. The cross-jurisdictional issues implicated by equipment averaging will be more efficiently resolved at the Commission level.

II. CATEGORIES OF EQUIPMENT

A. Congress Has Mandated That The Commission Allow Averaging According To A "Broad Categories" Test

The equipment averaging provision directs the Commission to "allow cable operators ... to aggregate ... their equipment costs into broad categories, regardless of the level of functionality of the equipment within each such broad category."⁴ Thus, Congress established within the Act itself a "broad categories" test for averaging equipment costs. Moreover, under this test, the question of which equipment may be included in a broad category for averaging purposes must be completely removed from any inquiry into the "level of functionality" which any particular piece of equipment is capable of providing.

Congress provided one example of equipment averaging under this broad categories test -- operators must be allowed to average the costs of all converters.⁵ In short, the broad

⁴ 47 U.S.C. § 543(a)(7)(A).

⁵ See 47 U.S.C. § 543(a)(7)(A) ("cable operators [may] aggregate ... their equipment costs into broad categories, such as converter boxes") (emphasis added). See also House Report at 107 (digital and analog boxes may be averaged).

categories test requires that as long as all the equipment is of the same type, such as converters, the cable operator must be allowed to average the costs of that equipment. Commission rules currently recognize three types of customer equipment -- converters, remotes, and inside wiring.⁶ Thus, at a minimum, the Commission has been specifically directed to allow averaging within these types of equipment, regardless of functionality.

It is essential that the Commission adhere to the "broad categories" test if Section 301(j) is to have its intended effect. Any regulation that limits the breadth of permissible equipment categories necessarily undermines congressional objectives. This is because more narrowly defined equipment categories mean less equipment can be averaged and, as a result, the price for any particular piece of new customer equipment will be higher. Only if equipment can be averaged based on broad categories will the full price-reducing effects of averaging be realized.

Further, the Commission should not limit the equipment that can be placed into one of the existing broad categories to the particular equipment in existence today. Broadband technology is evolving rapidly, and cable operators will continue to be at the forefront of this innovation. For example, in the future, cable operators may need to provide consumers with new equipment to enable television sets to tune sophisticated interactive services. Including such equipment in an existing broad category will reduce the monthly lease charge for such equipment. By contrast, if operators are required to create a new category each time a new piece of equipment is introduced, consumers will be forced to pay higher than necessary rates for the new equipment, contrary to congressional intent.

⁶ 47 C.F.R. § 76.923(a).

Finally, the Commission should make clear that cable operators have the flexibility to average some equipment of the same type, but not all equipment of that type. For example, operators should be permitted to average addressable analog boxes with digital boxes, without also having to include standard, non-addressable analog boxes in that averaging process. Such flexibility is consistent with the fact that equipment averaging is optional -- the 1996 Act directs the Commission to "allow," not force, equipment averaging. In other words, Section 301(j) creates a ceiling for operator flexibility, not a floor. For the same reason, cable operators remain free to use the current methodology in setting equipment rates. The Commission has consistently recognized the need for such flexibility in other rate regulation contexts and should do the same here.⁷

B. The Commission Should Avoid Adopting A Potentially Restrictive And Inconsistent "Primary Purpose" Test

The Commission should not adopt the proposed "primary purpose" test. As more advanced and multi-function equipment is introduced, this test will create disputes about the "primary" purpose of a piece of equipment. Such disputes will engender uncertainty and potentially reduce the breadth of the categories of equipment that can be averaged, thereby hindering the deployment of new technology. Moreover, attempting to determine the "primary purpose" of a piece of equipment appears dangerously close to inviting an inquiry into "functionality", which is impermissible under the statute.⁸ Given the preexistence of the "broad

⁷ See, e.g., Thirteenth Order on Reconsideration, MM Docket No. 92-266, FCC 95-307 (released September 24, 1995)(allowing cable operators to submit annual rate increase filings but also permitting operators to continue using the previous Form 1210 filing methodology).

⁸ As noted, Congress specifically precluded an inquiry into functionality. See 47 U.S.C. § 543(a)(7)(A).

categories" test, the Commission should avoid the confusion and potential statutory conflict which an additional and superfluous "primary purpose" test could create.

III. GEOGRAPHIC AVERAGING

The Notice tentatively concludes that the Commission's rules should be amended to specifically permit customer equipment cost aggregation at the franchise, system, regional, or company level. In addition, the Notice proposes eliminating the requirement that operators only aggregate equipment costs in a manner consistent with the operator's practices on April 3, 1993. NCTA supports both of these measures as essential to the successful and efficient implementation of Section 301(j).

However, to complete this process, the Commission should also use its discretion to give operators the option of averaging installation costs at the same level that they are allowed to average equipment costs. The added burden of calculating multiple HSCs could reduce the administrative efficiencies associated with equipment averaging. If geographic averaging for installation costs is permitted to the same extent as geographic averaging for equipment costs, the cable operator will only have to file one Form 1205 for a wide geographic region. If, on the other hand, cable operators must still calculate franchise-specific HSCs, the cable operator would have to file a separate Form 1205 for each franchise area. Such a requirement would increase regulatory burdens on LFAs, the Commission, and cable operators.⁹

⁹ The Commission's proposal to allow cable operators to average "substantially similar" installation costs would not cure these problems. First, as noted, a geographic limitation would effectively limit the benefits of equipment averaging. Second, it would prevent cable operators from pricing their equipment at the same level as their costs are averaged. Finally, it would create uncertainty as parties dispute the definition of "substantially similar."

For these reasons, the Commission should give operators flexibility to average installation costs to the same extent as equipment costs.

IV. THE BASIC-ONLY LIMITATION

A. The Basic-Only Limitation Applies To Basic-Only Subscribers, Not To A Particular Type Of Equipment

The 1996 Act prohibits equipment averaging "with respect to equipment used by subscribers who receive only a rate regulated basic service tier."¹⁰ The Notice correctly concludes that this limitation was adopted for the sole purpose of ensuring that "basic-only subscribers not subsidize the costs of more sophisticated equipment used by subscribers taking services in addition to basic."¹¹

However, the Commission should clarify that this prohibition applies solely to basic-only subscribers, not to any particular piece of equipment that is used by basic-only subscribers.¹²

This clarification is necessary because in many cases, basic-only subscribers and non-basic-only subscribers use the same converter box in order to tune cable signals. Thus, a cable operator may average the costs of a particular piece of equipment used by non-basic-only subscribers, even though the same equipment also is used by basic-only subscribers.

¹⁰ 47 U.S.C. § 543(a)(7)(A).

¹¹ Notice at ¶ 13.

¹² In addition, the Commission should clarify that the term "basic-only" means that the subscriber receives only the basic tier of service, as defined by 47 U.S.C. § 543(b)(7). Any purchaser of premium or pay-per-view services, whether or not they subscribe to a cable programming services tier, a migrated product tier, or a new product tier, must be excluded from this definition.

B. Cable Operators Should Be Allowed To Geographically Average Equipment Used By Basic-Only Subscribers

The Commission has correctly noted that the Act does not prohibit cable operators from averaging the costs of equipment used by basic-only subscribers on a geographic basis.¹³

Geographic averaging of such equipment costs will greatly increase the efficiencies of the Form 1205 filing process. By eliminating the need to calculate a franchise-specific rate for equipment used by basic-only subscribers, the operator will be able to file a single Form 1205 for an entire geographic area (including nationally), rather than hundreds of separate forms.

In addition, the uniform equipment rates that would result from such geographic averaging would produce the same marketing and administrative benefits that the Commission has recognized in proposing uniform service rates across broad geographic areas.¹⁴ The ability of a cable operator to promote and advertise a uniform equipment and service rate over a large geographic area will both enhance subscriber knowledge and minimize subscriber confusion regarding basic cable prices. In addition, such uniform pricing will add to the administrative and regulatory savings described above by reducing billing, advertising, and subscriber notice costs.¹⁵ The Commission has recognized these benefits in approving Social Contracts that permit operators to average equipment on a geographic basis.¹⁶ NCTA requests that the

¹³ Notice at ¶ 13.

¹⁴ See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, Uniform Rate-Setting Methodology, CS Docket No. 95-174, FCC 95-472 (released November 29, 1995)(proposing uniform cable service rates for the purpose of facilitating wider marketing, improving subscriber price awareness, and realizing administrative savings).

¹⁵ Id. at ¶ 12.

¹⁶ See Social Contract for Continental Cablevision, FCC 95-335, ¶¶ 30-33 (released August 3, 1995)("Continental Social Contract Order"); Social Contract for Time Warner, FCC 95-478, ¶ 37

Commission reaffirm those benefits in this proceeding and allow geographic averaging of equipment used by basic-only subscribers on an industry-wide basis.

V. JURISDICTION AND REVIEW PROCEDURES

While the Notice states that LFAs will continue to review the equipment rates and supporting aggregated cost data as part of the cable operator's rate justifications for basic rates,¹⁷ it also asks whether "there is an alternative that could be more administratively efficient"¹⁸ NCTA submits that a more efficient method is to have the cable operator file its Form 1205 directly with the Commission. The Commission would then review the Form 1205 and determine the reasonableness of the operator's averaging methodology and the resulting rates. This approach is fully consistent with the Commission's jurisdiction under the Communications Act and is equally justified as a policy matter.

A. Direct Commission Review of FCC Form 1205 Is Fully Consistent With the Commission's Statutory Authority

Direct Commission review of FCC Form 1205 is wholly within the Commission's discretion under the Communications Act and does not impermissibly transfer jurisdiction over equipment and installation rates from the LFAs to the Commission.

The 1992 Cable Act gives LFAs primary jurisdiction to enforce the Commission's rate

(... continued)

(released November 30, 1995)("Time Warner Social Contract Order") (both orders allow the cable operator to average equipment rates over interstate regions).

¹⁷ See Notice at ¶ 14.

¹⁸ Id.

standards with respect to "basic cable service."¹⁹ "Basic cable service," in turn, is defined in the Act as "any service tier which includes the retransmission of local television broadcast signals."²⁰

When the FCC established rate regulation rules in 1993, it could have assigned itself equipment rate regulation responsibility. Section 523 (1)(2) defines "cable programming services" as including both the programming delivered on a nonbasic service tier as well as "installation or rental of equipment used for the receipt of such programming." The FCC is charged with regulation of CPS tier rates and it logically followed, then as now, that FCC jurisdiction was appropriate for nonbasic equipment under the 1992 Act. The equipment aggregation provision of the 1996 Act, with its permissible nationwide aggregation of nonbasic equipment, adds a policy argument for proceeding at the FCC to the statutory basis enunciated in the definition of cable programming service in Section 523 (1)(2).

More generally, the 1992 Cable Act leaves the precise level of local versus federal authority over equipment and installation rates to the Commission's discretion. Sections 623(b)(3) and (5) of the Communications Act support this interpretation. Section 623(b)(3) is a standalone subsection which addresses cable equipment and installation rates. It directs the Commission to prescribe cost-based regulations for equipment and installation separate and apart from basic cable service regulations. Furthermore, Section 623(b)(5) grants the Commission exclusive authority to determine the "standards, guidelines, and procedures

¹⁹ Section 3(a)(2)(A) provides, in relevant part, "the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6)" (emphasis added).

²⁰ 47 U.S.C. § 522(3) (emphasis added).

concerning the implementation and enforcement" of the equipment rate regulations (emphasis added). There is nothing in the Act that precludes the Commission from establishing procedures under which the Commission itself performs the review and enforcement functions with respect to equipment and installation rates.

Finally, Commission precedent already establishes that Commission review of the Form 1205 is fully consistent with the Communications Act. In both the Continental Cablevision and Time Warner Social Contracts, the Commission asserted its jurisdiction over equipment and installation rates and established itself as the sole point of review of FCC Form 1205 for the express purpose of implementing equipment averaging.²¹ In short, as the Commission has previously concluded, Commission review of averaged equipment and installation rates "does not violate any provision of the 1992 Cable Act."²²

B. Centralized Review of Operators' Forms 1205 Will Streamline the Review Process, Thereby Promoting Congress's Goal to Facilitate the Deployment of New Technology

As a practical matter, Commission review of Form 1205 is essential if the Commission is to achieve the goals set out by Congress in Section 301(j). In order to facilitate the deployment of new advanced technology, the procedures for the review of equipment and installation rates under an averaging methodology must be simple and streamlined. As the Commission has recognized, such efficiency could be impaired if LFAs are given independent authority to review and approve equipment rates based on averaged costs.²³ Even at the most basic geographic

²¹ See Time Warner Social Contract Order at ¶ 37; Continental Social Contract Order at ¶ 26.

²² Time Warner Social Contract Order at ¶ 41.

²³ See Notice at ¶ 14 (recognizing that "the review of aggregated cost data regarding equipment by each of the affected local franchising authorities could lead to varying analyses and potentially inconsistent orders regarding that data").

level, equipment costs will be averaged across multiple local jurisdictions. In such situations, it is critical that the cable operator not be forced to undergo separate reviews and obtain separate approvals from multiple LFAs before being able to implement a new equipment rate or new technology. If all LFAs were allowed to challenge the averaged rate on separate grounds in separate proceedings, the additional administrative burden of responding to each local authority, as well as the substantial delay created by such a process, would seriously frustrate Congress's goal of streamlining the deployment of new technology. It would also frustrate the company-wide averaging across the whole country contemplated by the statute. In short, the cross-jurisdictional issues implicated by equipment averaging will be more effectively resolved at the Commission level.

C. NCTA's Specific Proposal Regarding Review Procedures for FCC Form 1205 Under an Equipment Averaging Regime

To facilitate Congress's goals and to avoid the administrative and regulatory inefficiencies discussed above, NCTA recommends that the Commission adopt the following approach for reviewing and approving equipment rates based on averaged costs:

1. For each selected geographic region, the cable operator files a single Form 1205 at the Commission 90 days prior to the date the operator plans to implement the proposed equipment and installation rate changes.
2. The Commission reviews the Form 1205 to determine if the equipment averaging has been done in accordance with the Commission's rules and whether the resulting rate levels are reasonable.
3. Operators may implement the proposed rate changes 90 days after they file, unless the Commission issues a written rate decision within the 90-day period rejecting the proposed rates as unreasonable.

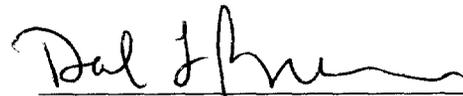
These procedures track the procedures which the Commission approved in the Time Warner and Continental Social Contracts for review of FCC Form 1205 under an equipment averaging

methodology.²⁴ As such, they represent a proven model which can be easily and efficiently implemented for all cable operators.²⁵

CONCLUSION

Based on the foregoing, NCTA respectfully requests that the Commission adopt equipment averaging rules consistent with the comments herein.

Respectfully submitted,



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²⁴ See, e.g., Time Warner Social Contract Order at ¶¶ 37-41. Although the Commission's review of the Form 1205 in the Social Contract context is limited to 30 days, NCTA recognizes that industry-wide application of equipment averaging may require more time for Commission review. Thus, NCTA proposes a 90-day review period.

²⁵ Indeed, combined, Time Warner and Continental Cablevision serve nearly 20% of the nation's cable subscribers. Thus, the Commission is already committed to using the above procedures on a broad scale. There is no reason why these procedures cannot work equally well for the rest of the industry.