

procedural posture merely because an effective competition showing is submitted in advance, as opposed to as a defense to a CPST complaint, in which case the Commission would be under a clear obligation to rule on such defense within the statutory 90-day period. Thus, if a cable operator's effective competition showing is not acted upon within 90 days, it should be deemed granted.

Cable operators also should have the option of seeking a finding of effective competition by petitioning the LFA, as is the case under the Commission's current rules.⁶⁶ However, the Commission's current procedures for LFA review of effective competition petitions are unduly cumbersome, time consuming and uncertain. In lieu of those procedures, the Commission should adopt rules similar to those proposed above under which the filing of the petition with the LFA alleging the existence of effective competition will trigger immediate deregulation as to both BST and CPST. As is the case under the Commission's current rules, oppositions to such petitions should be due within 15 days of public notice and replies should be due 7 days thereafter.

Furthermore, as is the case currently, the LFA should continue to be required to make a decision within 30 days of the end of the pleading cycle. However, in order to avoid uncertainty and prevent unnecessary delay, the Commission should specifically provide that public notice must be given within one week of the LFA's receipt of the petition and that the petition will be deemed granted if the LFA fails to act within the 30-day review period. If the LFA grants the petition, that decision should be deemed to be effective immediately without further

⁶⁶ See, 47 C.F.R. § 76.915.

Commission review.⁶⁷ Finally, if the petition is denied, there should be an expedited appeal process at the FCC. Under such an expedited process, the operator would have 15 days to file its appeal; the period for oppositions and replies, as well as for Commission action on the appeal, would be the same as described above for the initial LFA review.

Once effective competition has been established, neither BST nor CPST rate regulation should be subject to reinstatement if the LEC subsequently sells its interest in the competing MVPD. In such cases, regardless of the identify of the new owner, that successor MVPD competitor has enjoyed the benefits from LEC capital infusions, even where the LEC has subsequently disposed of its interest. The 1996 Act sunsets all CPST regulation as of March 31, 1999 in order to provide a smooth transition to deregulation.⁶⁸ Any reinstatement of regulation between now and that date, therefore, would be inherently disruptive. Even in cases where the LEC competitor ceases operations, any action previously undertaken by the cable operator while deregulation was in effect should not have to be reversed. The more likely benefit of meeting the new effective competition test is not the ability to increase rates, but rather the freedom from tier neutrality and service restrictions, all of which have nothing to do with higher overall rates. There is no basis for a reinstatement of the entire panoply of regulation in the brief period of time before the sunset of those regulations.

II. CPST RATE COMPLAINTS

Section 301(b)(1)(C) of the 1996 Act amends the 1992 Cable Act by providing that only franchising authorities can file CPST rate complaints with the Commission and that they can do

⁶⁷ Obviously, parties may appeal such an LFA decision but such an appeal should not stay the decision.

⁶⁸ 1996 Act at Section 301(b)(4). See Notice at ¶ 18; Rate Order at n.856.

so only after receiving subscriber complaints. Subscribers must file such complaints with an LFA within 90 days after a rate increase becomes effective.⁶⁹ Moreover, the Commission must “issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review.”⁷⁰ The Notice incorporates this provision, adopts interim procedures governing the filing of CPST rate complaints by LFAs,⁷¹ and proposes to adopt such interim rules as final.⁷²

A. Proposed Timetable.

A very important rate complaint issue not addressed by the 1996 Act is the length of time the LFA has, after receiving subscriber CPST complaints, to file a complaint with the Commission, and the LFA’s responsibilities in notifying the cable operator that it has received a complaint.⁷³ As the Commission has recognized, the filing of “stale complaints” by the franchising authority with the Commission should not be permitted.⁷⁴ Therefore, at the time the LFA receives a subscriber complaint, it should be required to supply a copy of the complaint to the affected cable operator within 10 days.⁷⁵ This is particularly important because any cable operator refund liability begins on the date that the first valid complaint is filed with the LFA.

⁶⁹ 47 U.S.C. § 553(c).

⁷⁰ 47 U.S.C. § 553(c).

⁷¹ *Id.* at ¶¶ 20-21.

⁷² *Notice* at ¶ 78.

⁷³ *See*, *Notice* at ¶ 79.

⁷⁴ *Rate Order* at ¶¶ 333, 334.

This will allow the operator to determine if the subscriber complaint is valid (e.g., whether it involves a CPST rate increase as opposed to a BST increase or a complaint about content, or whether such complaint has been filed by a current CPST subscriber).

Upon receipt of notice from the LFA of the receipt of two valid complaints, the FCC should encourage the cable operator to begin discussions with the LFA to assist in the LFA's determination as to whether to file a complaint. For example, the cable operator might voluntarily submit its rate justification forms or it might submit an effective competition defense. However, this should remain an informal process so as to minimize administrative burdens on all parties. In particular, the cable operator should not be required to submit its rate forms or any other information to the LFA.

At the close of the initial 90-day window following a CPST rate increase, if the LFA still believes that the rate increase is unjustified, the LFA should be required to file a complaint with the Commission within a prescribed timeframe. The Interim Order granting 90 additional days -- resulting in nearly half a year of uncertainty between a rate increase and a determination that no complaint will be filed -- is simply too long, given the previous 45 day window. NCTA would consider a filing within 105 days of the effective date of the rate increase (i.e., within 15 days after close of the 90-day window) to be reasonable in virtually all cases. Such a period is much longer than the current 45-day deadline (after a complainant receives a bill from the cable operator reflecting the increased rate at issue) for filing CPST rate complaints with the Commission.⁷⁵ The period will give LFAs adequate time to decide whether to file a complaint

⁷⁵ The Commission should continue to require that any subscriber complaints submitted to the LFA be on FCC Form 329 because this is a simple, easily understood format which will be easy to complete by subscribers and to review by all affected parties

⁷⁶ 47 C.F.R. § 76.953(b).

even in the very unlikely situation that the requisite subscriber complaints are filed on the 90th day after the applicable rate increase.

This proposed time period also gives LFAs ample time because the Commission, not the LFA, will be conducting the review of the cable operator's CPST rate increase. The LFA's task is to simply determine whether to file a complaint with the Commission. Thus, the Commission should make it clear that there is no tolling of the complaint period, no information requests beyond the rate forms, no hearings, or any other aspects of a BST rate review proceeding.

The Commission should dismiss the LFA's complaint if it is not accompanied by at least two valid subscriber complaints. Moreover, NCTA urges the Commission to clarify that an LFA has the discretion to establish a higher threshold to trigger its own process of determining whether to file an FCC complaint. If state or local entities believe, for example, that .001 percent of cable subscribers in a community should not be sufficient to trigger the initiation of the administrative process, such a determination should be endorsed by the Commission.

Similarly, the Commission should confirm in its order that under no circumstances is an LFA compelled to file a complaint with the agency, regardless of the subscriber complaints it has received, if the LFA is satisfied with the cable operator's response.

Finally, the cable operator should be permitted to submit an effective competition showing in lieu of a rate justification to the Commission. In such cases, unnecessary administrative burdens will be avoided by not requiring the operator to submit its completed rate justification forms along with its effective competition defense. Such filings should be required only if the Commission rejects the effective competition showing in its required 90-day review period. If submission of rate forms is subsequently required this would, of course, trigger a new

90-day period for FCC review.⁷⁷ Cable operator filings of an effective competition defense or the rate forms (if they were not already given to the LFA) in response to an LFA complaint should be made within 10 days thereafter.

B. Subscriber Bill Information.

NCTA also agrees with the Commission's proposal of "eliminating the requirement in Section 76.952 of our rules that operators must include the name, mailing address, and telephone number of the Cable Services Bureau of the Commission on monthly subscriber bills."⁷⁸ The only purpose of requiring such information was to help subscribers direct their complaints.⁷⁹ Since subscribers may no longer file complaints directly with the Commission, there is no need for cable operators to provide this information. Likewise, cable operators should no longer be required to print the LFA's name and address on each subscriber bill, as currently required by the Commission's customer service rules,⁸⁰ unless requested to do so by the LFA. Such information is only necessary on bills which reflect CPST rate increases subject to the complaint process.

⁷⁷ The election by a cable operator to submit an effective competition defense in lieu of a rate justification would be deemed to be an agreement to extend the review period for an additional 90 days, as contemplated by Section 623(c)(3) of the Communications Act, as amended by the 1996 Act.

⁷⁸ Notice at ¶ 90, citing Public Notice, Report No. CS 96-12 (February 27, 1996), which also stated that cable operators should no longer inform subscribers that they may file complaints directly with the Cable Services Bureau.

⁷⁹ See, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd. 4119 (1994) at ¶ 141.

⁸⁰ 47 C.F.R. § 76.309(c)(3)(i)(6).

III. SMALL CABLE OPERATORS

The 1996 Act exempts “small cable operators” from certain rate regulation provisions of the Communications Act in franchise areas where the operator serves 50,000 or fewer subscribers. The Act defines a small cable operator as “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”⁸¹

“Small cable operators” are exempt from rate regulation of their cable programming services tier(s) and are exempt from basic tier regulation (including regulation of equipment rates) if their basic tier was the only service tier subject to regulation as of December 31, 1994. While these provisions were effective upon enactment, the Commission has adopted a number of interim rules to implement these provisions and proposed final rules on the same subjects. We address the proposals below.

A. National Subscriber Count.

Since only operators serving fewer than 1 percent of all cable subscribers in the United States are eligible for small cable operator relief, the Commission proposes to determine the total number of subscribers using “the most reliable” subscriber figures from industry groups, trade journals and others, or an average of these figures. It proposes to establish such a number on an annual basis.⁸² For its interim rules, the Commission used the figure (61,700,000) included in its Second Annual Report on the Status of Competition in the Market for the Delivery of Video

⁸¹ 47 U.S.C. § 623(m).

⁸² Notice at ¶¶ 80-81.

Programming.⁸³ That figure was derived from material published by Paul Kagan Associates, Inc.

NCTA agrees that the national subscriber count number should be established on an annual basis and that this number should serve as the basis for determining the one percent eligibility limitation for small cable operator relief for the following calendar year. There are a number of sources which could be used to determine the annual subscriber count contemplated by the Commission. For instance, NCTA's "Cable Television Developments" includes estimates of basic cable households from both the A.C. Nielsen Company and Paul Kagan Associates. While the Commission could use figures from either of these sources (or an average of them) to determine the national subscriber count, the Commission could also use the figure which it includes in its annual Reports to Congress on the status of competition in the video programming marketplace pursuant to Section 628(g) of the Communications Act of 1934, as amended. Those reports are generally released in the fall of each year and the Commission could allow operators to rely on the figure provided in each year's report as the national subscriber count figure for the following calendar year.

B. Definition Of Affiliate.

Eligibility for small cable operator relief hinges on whether an operator, either directly or through its affiliates, serves fewer than one percent of the cable subscribers in the nation. In addition, the gross annual revenues of entities affiliated with the cable operator must be calculated to determine whether the operator exceeds the \$250 million gross revenue limitation

⁸³ CS Docket No. 95-61, FCC 95-491, App. G (rel. Dec. 11, 1995).

on small cable operator eligibility for deregulation. Therefore, the definition of affiliate is a critical element in determining who is eligible for deregulation.

In its interim rules, the Commission adopted the same 20 percent affiliation standard that it has applied to rules implementing small system and small cable business rate relief since the onset of such rate regulation.⁸⁴ This definition is based on the definition of “affiliate” found in Title VI.⁸⁵ Under the interim rules, an entity is deemed affiliated with a small cable operator if that entity has a 20 percent or greater equity interest (active or passive) in the operator or holds *de jure* or *de facto* control over the operator.⁸⁶

In the Notice, the Commission proposes to adopt this “20 percent” interim rule as a final rule for determining whether an entity is affiliated with a small cable operator.⁸⁷ In support of this proposal, the Commission concludes that it has the discretion to establish a percentage ownership threshold other than the 10 percent threshold set forth in Title I of the 1996 Act.⁸⁸ The Commission also observes that the purposes underlying the rule warrant adoption of the 20 percent threshold.⁸⁹

⁸⁴ See Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd. 4119, 4173, n.157 (1994) (“Second Order on Reconsideration”); Sixth Report and Order and Eleventh Order on Reconsideration, MM Docket No. 92-266, 93-215, 10 FCC Rcd. 7393, n.88 (1995) (“Small System Order”).

⁸⁵ Notice at ¶ 83.

⁸⁶ Id. at ¶ 26.

⁸⁷ Id. at ¶ 83.

⁸⁸ Id. at ¶82.

⁸⁹ Id. at ¶83.

Because as demonstrated above the affiliation definition of Title I does not need to govern Title VI regulation, NCTA supports the Commission's interpretation of its authority to establish a different affiliation standard, premised on Title VI principles. As the Commission correctly notes, the Communications Act permits the Commission to exercise discretion in defining "affiliation" for the purposes of small cable operator rate relief, and to adopt a standard pursuant to the Title VI definition of "affiliate."⁹⁰

As discussed below, the Commission has consistently found that, in the context of Title VI rate regulation, a special affiliation standard is necessary for small cable systems and operators to take account of their limited financial resources and the difficulties they encounter in obtaining access to capital. A broader standard serves the public interest by enhancing the ability of small operators to attract capital, enabling them to compete more effectively as they seek to upgrade their networks and provide new services to consumers.⁹¹

The Commission reiterated this rationale when it determined that a 20 percent affiliation standard should be applied to its streamlined cost-of-service relief for small systems and small cable companies at the same time as Congress was considering the legislation which was to become the 1996 Act.⁹² In the Small System Order, the Commission "acknowledge[d] that a large number of smaller cable operators face difficult challenges in attempting to provide good service to subscribers, to charge reasonable rates, to upgrade networks, and to prepare for

⁹⁰ Title VI provides that "affiliate," "when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person." 47 U.S.C. § 522(2).

⁹¹ See, e.g., Insight Communications Company, L.P., CSR No. 4559-D (rel. Nov. 13, 1995), at ¶¶ 16-17 ("Insight Order"); Small System Order, 10 FCC Rcd. at n.88.

⁹² See Small System Order.

potential competition.” The Commission found that “relaxing regulatory burdens should free up resources that affected operators currently devote to complying with existing regulations and should enhance those operators’ ability to attract capital, thus enabling them to achieve the goals Congress cited [in the 1992 Cable Act].”⁹³ To accomplish this goal, the Commission adopted the 20 percent equity standard for small system relief.⁹⁴

Congress echoed the Commission’s concerns when it enacted provisions deregulating small cable operator rates upon enactment. In adopting special protections for small cable operators, Congress “intend[ed] to provide regulatory relief to those companies that lack the capital and technical expertise necessary to comply with the Commission’s rate regulations and to survive the substantial rate reductions imposed by the rules.”⁹⁵

In this proceeding, the Commission has recognized that the rationale underlying the 1996 Act’s rate relief for small cable operators is the same rationale that lay at the heart of the Commission’s small system relief rules. Consequently, just as is the case with the small system rules, a standard derived from Title VI (rather than Title I) should be used to determine whether an entity is affiliated with a cable operator seeking relief under the 1996 Act’s small cable operator provisions.⁹⁶ With one modification, the Commission’s proposed 20 percent equity

⁹³ Id. at 7406.

⁹⁴ Id. at n.88. The Commission expressed similar concerns when it adopted its first streamlined rate rules for small systems and operators and the 20 percent equity affiliation standard. See Second Order on Reconsideration, 9 FCC Rcd. at 4119, 4225 n.295 (limiting small system administrative relief to companies that lack significant financial or other relationships with larger companies); id. at n.157 (observing that the Commission’s concern with small operators was aimed at those companies that do not have access to the financial resources or other purchasing discounts of larger companies).

⁹⁵ House Report at 110.

⁹⁶ Notice at ¶ 83.

affiliation standard should be adopted because it will encourage investment in small cable operators while limiting the statutory relief to operators that are independent and in need of relief.⁹⁷

Specifically, the Commission should modify its proposed rule to exclude purely passive investments from its affiliation standard. As the Commission has repeatedly acknowledged, small cable systems and companies need capital from institutional and other investors to compete, to rebuild their networks, and to offer customers new services. Yet small cable operators have encountered great difficulty in attracting and raising capital from these investors, largely because of regulatory burdens and constraints.⁹⁸ Including passive investment interests (e.g., nonvoting stock, insulated limited partnership interests) in the small cable operator affiliation standard will serve as a disincentive for investment in small systems, further exacerbating the difficulties small cable operators are now facing in attracting capital needed to compete, particularly against DBS and wireless operators in rural and smaller markets.⁹⁹

⁹⁷ Attribution of ownership interests in a cable operator that are held indirectly by any party through one or more intervening corporations should be determined by the use of a “multiplier.” See, e.g., 47 C.F.R. § 76.501, note 2(d).

⁹⁸ See Small System Order, 10 FCC Rcd. at 7396, 7406-07 (easing regulatory burdens should enhance small cable companies’ ability to attract financing to upgrade their networks, to provide new programming to subscribers, and to introduce new services that are now being developed); Insight Order at ¶¶ 18-22 (granting waiver of FCC’s affiliation standard where, *inter alia*, the small cable operator demonstrated that its affiliation with a large company did not relieve the operator’s difficulty in raising capital).

⁹⁹ The FCC and Congress have repeatedly recognized the difficulties small businesses have in seeking entry into the communications industry, particularly with respect to access to capital. See Notice of Inquiry, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, FCC 96-216, released May 21, 1996 at ¶¶ 8, 9, 17 and n.19 (detailing entry barriers, including dearth of capital, afflicting small businesses in telecommunications markets). See also, 1996 Act at §§257, 707.

In the past, the Commission has provided for more liberal attribution benchmarks for passive investors and non-attribution of non-voting shareholder and insulated limited partnership interests as a way to encourage investment in entities in need of capital.¹⁰⁰ In order to effectuate congressional intent with respect to small cable operators, the FCC should not include passive interests for the purposes of the small cable operator affiliation standard. At a minimum, the FCC should adopt a more liberal (*i.e.*, greater than 20 percent interest) affiliation standard for institutional investors, whose own revenues do not directly enhance the administrative and technical resources or operating efficiencies of the small operators in which they invest.

Including purely passive interests in the small operator affiliation standard would also be largely superfluous given the other factors the Commission proposes to consider in ascertaining whether an entity is affiliated with a small cable operator. The Commission's rule already proposes to take the question of "control" into account through its 20 percent active equity interest rule, since that rule proposes to consider a company to be affiliated with the small cable operator where that company exercises *de jure* control (such as through a general partnership or majority voting shareholder interest), or *de facto* control.¹⁰¹ To the extent an investor in a small cable operator exercises *de facto* control over the operator, such control would make the operator an affiliate of the investor for purposes of the small cable operator rules. The general purpose of the Title VI affiliation standard (*i.e.*, to recognize relationships of influence or control) will therefore be met by an affiliation rule which includes a *de facto* control standard but does not

¹⁰⁰ See, e.g., Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 97 FCC 2d 997, 1013 (1984).

¹⁰¹ Notice at ¶ 83.

include purely “passive” investment interests. We urge the Commission to revise its proposed rule accordingly.¹⁰²

Finally, consistent with the small system cost of service order and the policies underlying small cable operator rate relief, the Commission should adopt a liberal waiver procedure so that an otherwise ineligible operator could demonstrate that it has “other attributes” that warrant small cable operator rate relief, “notwithstanding the percentage ownership of the affiliate.”¹⁰³ In recently granting such a waiver to Insight Communications under its small system cost-of-service rules, the Cable Services Bureau set forth the factors it would consider in deciding whether to waive the otherwise applicable affiliation standards.¹⁰⁴ We urge the Commission to explicitly repeat and adopt those and other factors in establishing criteria for waivers of the affiliation standard adopted in this proceeding.

C. Definition Of Gross Revenues.

In order to determine if a cable operator satisfies the “gross revenues” test of the small cable operator definition, the Commission proposes to use the definition of “gross revenues” adopted in the personal communications services (“PCS”) context for determining eligibility for certain PCS auctions¹⁰⁵ -- with one notable exception. Unlike the PCS requirement, the

¹⁰² This is readily distinguished from telephone company involvement in providing video programming through affiliated entities. There, even a passive investment by a telco provides the substantial financial benefit that Congress intended to take into account in finding that competition from telcos was sufficient to trigger deregulation.

¹⁰³ Small System Order, 10 FCC Rcd. at 7412.

¹⁰⁴ Insight Order at ¶¶ 15-25.

¹⁰⁵ See 47 C.F.R. § 24.720(f) (“Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.”)

Commission does not propose to require that all entities produce audited financial statements to evidence the income and deductions which constitute the gross revenue under the PCS definition. We agree with the Commission that if it uses this standard, it should not require quarterly financial statements. The Commission was correctly sensitive to the needs of small cable operators who may not have their financial statements audited on a quarterly (or longer) basis as required by the PCS rule.

The Commission also asks how revenues of natural persons should be measured and verified under the small cable operator rules.¹⁰⁶ Presumably, the natural persons whose revenues would be at issue would be individual owners of small cable systems -- the cable operators themselves. The short answer to the Commission's query is that there is no need to measure or verify the revenues of natural persons because it is only the revenues of "any entity or entities" (not natural persons) affiliated with the operator which are to be counted toward the \$250 million limitation. Therefore, the plain meaning of the statutory provision dictates that the revenues of natural persons would not be counted.¹⁰⁷

Finally, we agree with the Commission that the statute appears to require aggregation of the gross annual revenues of all entities affiliated with the cable operator to determine if the cable operator is eligible for small cable operator relief.¹⁰⁸ In this regard, the Commission tentatively concludes that if the gross revenues of all affiliates (as defined by the Commission)

¹⁰⁶ Notice at ¶ 85.

¹⁰⁷ Moreover, since the Communications Act includes a definition of "person" which includes partnerships, corporations and other such entities, Congress' decision to use the term "entity" (as opposed to "person") in the small operator provision in the 1996 Act makes clear that natural persons were not intended to be included in that term. See 47 C.F.R. § 153 (32).

¹⁰⁸ Id. at ¶ 86.

when aggregated exceed \$250 million, the operator does not qualify as a small cable operator even if no single affiliate has revenues in excess of that amount.

D. System And Franchise Area Subscribers.

The 1996 Act, by its terms, applies small cable operator relief “in any franchise area in which that operator serves 50,000 or fewer subscribers.” The Commission tentatively concludes that “deregulation under this provision of the 1996 Act appears to be determined on a franchise area-by-franchise area basis, without regard to the total number of system subscribers.”¹⁰⁹ This is clearly the intent of Congress and is inherent in the plain meaning of the statute. Accordingly, the Commission correctly concludes that system size is irrelevant for purposes of this provision.

While eligibility must be based on the number of subscribers in a franchise, the Commission observes that, in other contexts, it has developed methods of measuring subscribership to take account of various circumstances, such as in vacation areas that experience seasonal shifts in population or to count subscribers in multiple dwelling units (“MDUs”).¹¹⁰ In determining the subscriber count in a franchise area for purposes of small operator relief, the Commission should apply the equivalent billing unit methodology to count subscribers in MDUs where actual subscriber counts are unavailable. This approach is consistent with that employed for completing Form 1200 and other FCC forms.¹¹¹ Moreover, consistent with Commission precedent, the subscriber count should not include subscribers who

¹⁰⁹ *Id.* at ¶ 87.

¹¹⁰ *Id.* at ¶ 88.

¹¹¹ *See*, 47 C.F.R. § 76.905(c); *See also*, Questions and Answers on Cable Television Regulation, July 27, 1994, at 1-2.

reside in “dwellings that are used only for seasonal, occasional, or recreational use,” as that term is defined by the U.S. Census Bureau.¹¹²

E. BST And CPST Deregulation.

The statute states that the eligible systems of small cable operators are exempt from rate regulation with respect to their CPS tiers or “a basic service tier that was the only service tier subject to regulation as of December 31, 1994.”¹¹³ The Commission seeks comment as to whether a system which had only a single tier as of December 31, 1994, but which subsequently established separate basic and cable programming service tiers, can be deregulated as to both its BST and CPST. The Commission tentatively concludes that “the scope of deregulation depends solely upon the number of tiers that were subject to regulation as of December 31, 1994.”¹¹⁴ Therefore, “a system currently offering two or more tiers would be deregulated on all tiers if the BST was the only tier subject to regulation as of December 31, 1994, but would be deregulated only on its CPST(s) if it had more than one tier[s] subject to regulation as of December 31, 1994.”¹¹⁵

This conclusion is consistent with both the statutory language and legislative intent. The Commission should make clear, however, that in cases where both the BST and CPST are deregulated, rates for equipment are also deregulated. The Commission’s authority to regulate equipment rates derives from Section 623(b) of the Act and Section 623(c). Since neither of

¹¹² 47 C.F.R. § 76.905(c).

¹¹³ 47 U.S.C. § 623(m)(1)(B).

¹¹⁴ Notice at ¶ 90.

¹¹⁵ Id.

these sections apply to eligible small cable operators under the 1996 Act, the equipment offerings of those operators are deregulated when their BSTs are deregulated.

F. Procedures.

The Commission has adopted interim rules to implement the small cable operator provisions of the 1996 Act and, in the Notice, it proposes to make those rules permanent. As a general matter, NCTA endorses those certification procedures, which reduce administrative burdens and compliance costs consistent with the 1992 Cable Act¹¹⁶ and appropriately place the burden on those who would challenge an operator's eligibility for small cable operator relief under the 1996 Act. We do, however, urge the Commission to adopt the following modifications:

First, in the case of complaints filed before the effective date of the 1996 Act -- February 8, 1996 -- that are currently pending at the Commission against eligible small cable operators, the Commission should make clear it will dismiss those complaints upon the filing of the appropriate certification with the Commission. Moreover, in the case of a small cable operator with only a BST in a particular franchise area, the Commission should direct the affected LFA to dismiss any pending rate proceeding against such an operator upon the filing of an appropriate certification with the LFA. This is similar to the approach taken when the Commission adopted its new small system definitions and rules.¹¹⁷

Second, as of February 8, 1996, all cable operators meeting the statutory criteria are deregulated as to their CPSTs and, in cases where only one tier existed on December 31, 1994,

¹¹⁶ 47 U.S.C. §§ 534, 543(i).

¹¹⁷ Small System Order, 10 FCC Rcd. at 7428.

as to their BST (and any subsequently-created CPST). Therefore, the Commission should make clear that the proposed certification procedure is optional and eligible operators need not affirmatively file certifications with their local franchising authorities unless and until the LFA attempts to assert regulatory jurisdiction over the operators' rates.¹¹⁸

Third, the operator's initial certification should consist of a short and simple declaration that the operator meets the small cable operator definition and (if relevant) that it had one tier of service subject to regulation as of December 31, 1994. Only if the LFA (or the Commission in the case of an operator's filing in response to a CPST complaint) challenges the certification should the operator be required to provide additional information regarding its subscriber counts, its affiliates and their revenues. A "good faith basis" for an LFA's request for additional information should be required. Following such a request, the operator should be permitted to submit a certification by an independent third party auditor if its initial certification is challenged, in lieu of commercial or financial documentation.

Fourth, as is the case with Form 1230 justifications, and to guard against burdensome and unnecessary data requests from LFAs, the operator should be permitted to appeal promptly to the Commission LFA requests for additional information. In addition, an adverse LFA decision as to an operator's eligibility for small operator relief should be appealable promptly to the Commission and the operator's deregulated status should continue unless and until the LFA's decision is affirmed.

¹¹⁸ This approach seems to be inherent in the interim rules which state that the operator may make its certification to the LFA "at any time." Notice at ¶ 28.

Fifth, if a small cable operator which has a single tier in a particular franchise area has established its eligibility for deregulation, the LFA should be required to recertify itself at the Commission with respect to that cable operator if it subsequently wants to challenge the deregulated status of the operator's system.

G. Transition Issues.

The Commission seeks specific comment on the approach to take for systems that *qualify for deregulation at one time, but later exceed the subscriber or revenue eligibility thresholds*. The Commission tentatively concludes that, upon exceeding the statutory thresholds, a deregulated system would become subject to regulation and the transition to regulation should begin as soon as the system no longer qualifies for small cable operator treatment.¹¹⁹ In this regard, the Notice cites the transition mechanism adopted in the context of the Commission's small system streamlined cost-of-service rules under which a no longer eligible system may maintain its then current rates but is subsequently subject to standard rate rules and cannot seek an increase until such an increase would be permitted under the rules.¹²⁰

A small cable operator can exceed the eligibility standards in a number of ways: (1) it can exceed the 50,000 subscriber ceiling in the deregulated franchise area; (2) it may be acquired by a company whose subscribers or revenues would make the operator ineligible for relief; (3) it or companies with which it is affiliated may subsequently exceed the relevant (1%) nationwide subscriber total; or (4) entities which hold attributable interests in it may subsequently exceed the \$250 million revenue limitation.

¹¹⁹ Notice at ¶ 93.

¹²⁰ Id. at ¶ 94.

Only where the number of subscribers in a previously deregulated franchise area exceeds 50,000 should a small cable operator again become subject to regulation in that franchise area.¹²¹ And, as to those areas, the affected operators should not be penalized for succeeding in their business. For this reason, a system no longer eligible for relief should be permitted to maintain its then-existing rate and service offerings and to adjust its rates in the future pursuant to the rate regulation rules (including use of Form 1230 if the operator is eligible for its use) to reflect external costs, channel additions and inflation.¹²²

But in the other three scenarios described above, the small operator relief should be grandfathered for systems which have been deregulated, just as is the case with the small system rules. As long as the cable operator continues to serve 50,000 or fewer subscribers in the franchise area in which it has been deregulated, it should remain eligible for that status in that area regardless of whether it is acquired by a company whose attributable subscriber or revenue totals would otherwise make the small operator ineligible for relief. This approach is consistent with the Commission's treatment of systems qualifying under its small system rules. That approach was adopted to "increase the value of the system in the eyes of operators and, more importantly, lenders and investors. The enhanced value of the system thus will strengthen its viability and actually increase its ability to remain independent if it so chooses."¹²³

¹²¹ In such cases, an operator should be permitted to petition for continued deregulated treatment just as an operator may do under the current small system rules. Small System Order, 10 FCC Rcd. at 7412.

¹²² In any event, since all CPST regulation sunsets as of March 31, 1999, it would be impractical, administratively burdensome and inherently disruptive to customers to reinstate regulation for previously deregulated small cable operators for the short period of time until CPST regulation ends.

¹²³ Small System Order, 10 FCC Rcd. at 7413, 7427-28. See Insight Order at ¶ 38-42.

Similarly, if a small cable operator's own national subscriber total (including those of its affiliates) exceeds the relevant limitation as a result of natural growth or if the revenues of companies that have attributable interest in it exceed the \$250 million limitation, its systems of fewer than 50,000 subscribers should remain unregulated. Any other result would provide a disincentive for operator growth and would make the small operator's system less attractive to potential buyers.

IV. UNIFORM RATE REQUIREMENT

The 1996 Act provides that "bulk discounts to multiple dwelling units shall not be subject to [the uniform rate provision] except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit."¹²⁴ The Commission asks for comment on its tentative conclusion that the new bulk rate exception to the geographically uniform rate structure requirement of the 1992 Cable Act is limited to a "bulk discount" that is "negotiated by the property owner or manager on behalf of all of the tenants" of the MDU.¹²⁵ The Commission tentatively finds that the exception "does not permit a cable operator to offer discounted rates on an individual basis to subscribers simply because they are residents" of an MDU.¹²⁶

While the distinction being drawn by the Commission is stated somewhat obliquely, NCTA understands the Commission's tentative conclusion to mean that the bulk rate exception to the uniform rate requirement would not apply in the case of an MDU in which discounts are

¹²⁴ 1996 Act, Section 301 (b)(2).

¹²⁵ Notice at ¶ 98.

¹²⁶ Id.

offered to residents based on penetration within the MDU (i.e., where the amount of the bulk discount is based on the percentage of residents in the MDU who are subscribers). This proposed limitation is unwarranted and should not be adopted by the Commission. It is a common industry practice to offer bulk discounts in MDUs even without requiring 100% penetration in order to be eligible for such discounts. Residents of MDU buildings where offers of discounts are available for less than 100 percent penetration should be entitled to enjoy the benefits of competitive non-uniform pricing.

The Commission also has asked for comment regarding whether the bulk discounts permitted under the statute “include discounts offered to MDU residents who are billed individually, or should only be permitted where the discount is deducted from a bulk payment paid to the cable operator by the property owner or manager on behalf of all of its tenants.”¹²⁷ NCTA urges the Commission to include among the permitted discounts those offered to MDU residents who are billed individually for their cable service as well as discounts that are deducted from a bulk payment made by the MDU owner. The method of billing for cable service should not be a reason for excluding a bulk discount rate that otherwise would be included under Section 301(b)(2).

The Commission also has asked for comment on the meaning of the term “multiple dwelling units” as used in Section 301(b)(2).¹²⁸ NCTA supports construing the meaning of MDUs to correspond with the expanded private cable exemption to the definition of a cable

¹²⁷ Id.

¹²⁸ Id. at ¶ 99.

system.¹²⁹ The proposed definition will make the benefits of competition available not only to residents of apartment complexes, but also to persons who live in an area served by a MVPD that is not required to have a cable franchise under the revised definition of “cable system” in the 1996 Act.

The Commission’s long-standing definition of a cable system, as codified in the 1984 Cable Act, excluded facilities serving “only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management. unless such facility or facilities uses any public right-of-way.”¹³⁰ The 1996 Act revised the definition of a cable system by amending this provision such that it now excludes “facilit[ies] that serve[] subscribers without using any public right-of-way.”¹³¹ The new private cable exemption, therefore, includes “all facilities located wholly on private property, without regard to the nature or common ownership of the property served,” so long as no public rights-of-way are used to provide the service.¹³²

The effect of this expanded private cable exemption is that operators of unfranchised private cable systems (*i.e.*, SMATV systems) may serve mobile home parks and planned communities without being subject to cable regulations because their facilities may no longer constitute a “cable system.” In order to achieve consistency with regard to application of its rules, the Commission should construe the meaning of MDUs to correspond to this new, expanded private cable exemption to the definition of a cable system, thereby allowing cable

¹²⁹ Id.

¹³⁰ 47 C.F.R. § 76.5(a)

¹³¹ 47 C.F.R. § 76.5(a)(2) (1996); see also, Notice at ¶ 54.

¹³² Notice at ¶ 99.

operators to offer all subscribers living in dwellings located wholly on private property the same advantages of competition as would be available from an unfranchised SMATV operator. If private cable operators are to be free of any local franchise requirements in serving customers in mobile home parks, private housing developments, or other dwelling units where service does not require occupancy of public rights-of-way, then the franchised cable operator should be allowed to compete for such subscribers by offering bulk discounts.

Finally, the Commission has asked commenters to address the standards that should be applied to determine whether a complaint alleging the existence of predatory pricing has made out a “prima facie” showing for predatory pricing, and whether the procedures used in the adjudication of program access complaints should be adopted for predatory pricing complaints as well.¹³³ NCTA agrees with the Notice that allegations of predatory pricing “should be made and reviewed under principles of federal antitrust law as applied and interpreted by the federal courts.”¹³⁴

The courts have recognized that low prices are generally a benefit to consumers. Accordingly, the courts’ task has been to distinguish socially beneficial conduct (lower prices) from those rare instances where discounting may be socially harmful because it threatens the existence of competition itself. Thus, the federal courts have held that predatory pricing is of

¹³³ *Id.* at ¶ 100.

¹³⁴ *Id.* The only federal law that *directly* regulates pricing is Section 2(a) of the Robinson-Patman Act, which prohibits price discrimination in the sale of commodities of like grade and quality between similarly situated buyers. 15 U.S.C. §15(a).