

exceeds the eligibility criteria for deregulation (e.g., the national subscriber threshold), the deregulated status of eligible franchise areas should be grandfathered. This approach seems particularly appropriate given that a key goal of deregulation is to encourage small operator growth.

Only one commenter -- the City of Fairfield, California -- recommends “instant” reregulation when a small operator exceeds the subscriber or revenue thresholds for small system relief.⁷² Fairfield argues that only a short transition period should be permitted and that rate refund liability, if any, should extend back to the date the statutory maximum was exceeded. Fairfield asserts that subscribers will find rate reregulation less disruptive than rate deregulation, that operators which have been rate regulated under the 1992 Act have found sufficient economic incentives to grow their subscriber base, and that it is unlikely that regulation will be a disincentive to small operator responsiveness.⁷³

Fairfield’s conclusions, however, are directly contrary to the Commission’s findings regarding small systems and small cable operators. The FCC recognized in the Notice the substantial drawbacks to customers and operators that could result from reregulating systems that remain below the 50,000 subscriber threshold. Specifically, the Commission suggested that “an instantaneous shift from complete deregulation to full regulation may not be in the public interest because it could be disruptive to consumers and operators” and noted that “[t]he addition of subscribers by a system or operator would seem to indicate that the company is

⁷² Comments on Proposed Rulemaking on Small Cable Operator Rate Deregulation by the City of Fairfield, California at 2.

⁷³ Id. at 1.

responding to consumer demand. We would not want to discourage such responsiveness on the part of cable operators.”⁷⁴

The Commission previously took these precise concerns into account when it adopted its small system cost-of-service rules. In adopting those rules, the Commission recognized the policy benefits of grandfathering rate relief for a “small system” when the company owning the system exceeds the relevant size cap, whether through normal growth or as a result of being purchased. In grandfathering the status of such systems, the Commission noted that allowing the small system to benefit from rate relief would increase the value of the system in the eyes of operators and, more importantly, lenders and investors, strengthening the system’s viability and actually increasing its ability to remain independent if it so chooses.⁷⁵ These same policy concerns underlie the small operator rate deregulation rules mandated by the 1996 Act. Therefore, the Commission should apply a grandfathering policy here similar to the one adopted for its small system cost of service rules.

V. UNIFORM RATE REQUIREMENT

A. Bulk Billing

NCTA’s initial comments urged that the Commission adopt rules that implement Congress’ intent to provide cable operators flexibility to compete for subscribers residing in Multiple Dwelling Units (“MDUs”).⁷⁶ There is no reason, either based in the statute or in the public interest, to impose artificial restraints on cable operators’ participation in the MDU

⁷⁴ Notice at paras. 93-94.

⁷⁵ Small System Order, 10 FCC Rcd. at 7413.

⁷⁶ 1996 Act, Section 301 (b)(2).

market. But a few commenters, seeking to use the FCC's regulations as a shield against competition, urge the Commission to adopt new impediments to a cable operator's ability to directly bill MDU residents or provide discounts directly to those customers.

For example, Wireless Cable Association ("WCA") argues that the bulk rate exception to the uniform rate requirement should only apply where a cable operator negotiates a single "bulk" sale with the MDU property owner or manager, and not where the operator offers discounted rates on an individual basis to residents of an MDU.⁷⁷ ICTA similarly claims that Section 301(b)(2) "does not permit a cable operator to offer discounted rates on an individual basis directly to subscribers simply because they reside in an MDU.... ICTA also agrees that bulk discounts do not include discounts billed individually to and paid for by MDU residents."⁷⁸ ICTA claims that because its members "routinely" follow the practice of entering into a single contract with the property owner or manager on behalf of all tenants, operators should be forced to follow this arrangement.⁷⁹

There is no support in the statute for reading such unwarranted restrictions into the bulk discounts provision of the law, which would only serve to protect MMDS and SMATV operators from fair competition at the expense of customers residing in MDUs. It would solely protect competitors, not competition. As the Massachusetts Commission's Comments explain, "[o]perators should be permitted to offer discounted rates to subscribers regardless of the existing billing arrangements between the parties. If a competitor attempts to offer video

⁷⁷ WCA Comments at 3.

⁷⁸ ICTA at 9.

⁷⁹ Id.

services to an MDU owner, the incumbent cable operator should not be prohibited from discounting the rate it charges to individual tenants simply because of the uniform rate requirement. Prohibiting the cable operator from providing such a discount not only hamstrings the operator's ability to compete with other providers, but also denies consumers who reside in buildings the resulting discount."⁸⁰

Contrary to ICTA's suggestion, moreover, bulk billing arrangements as described in its comments are hardly the industry norm. Cole Raywid's Comments note that "cable operators have a variety of billing arrangements with owners and residents of multiple dwelling units. Some provide all services to all residents in the development, and render a single bill to the development's owner or manager. Others 'bulk bill' only basic service, and individually bill premium or other optional services to the individual residents according to their individual desires. Over the past decade, there has been an increasing trend towards direct billing to the individual MDU resident in order to promote maximum flexibility and consumer choice."⁸¹

Limiting cable operators' ability to bill individually would not only constrain consumer choice in program packages. It would also severely hamper cable operators' ability to even attempt to serve most MDUs. As Cablevision Systems describes in its comments: "Based on Cablevision's experience, the management and owners of most MDUs that negotiate bulk discounts prefer to have the MVPD provider bill residents individually for service, because they

⁸⁰ Massachusetts Commission Comments at 9-10. New York State's Comments agree: "as the new exception from rate uniformity only has meaning as an opportunity for regulated cable operators 'to respond to competition at multiple dwelling units', it follows that the Commission's rules should recognize that the exception is available regardless of billing arrangements." New York State Comments at 31.

⁸¹ Cole, Raywid Comments at 18.

do not wish to be responsible for serving as the central billing agent for MVPD services. Indeed, the ability to offer such billing arrangements is a necessity in the increasingly competitive MDU market.”⁸² Under the WCA/ICTA approach, while competing MMDS and SMATV operators would be able to respond to the property owners’ and managers’ preferences for billing arrangements, a cable operator could not provide the desired service merely because of unnecessary and artificial regulatory restraints.

As a policy matter, ICTA and WCA provide no reason for allowing property managers or owners to act as a bottleneck through which all discounts must be negotiated and bills paid. Empowering property managers to interpose themselves as the sole means through which operators may enter into arrangements in MDUs would only serve to deny subscribers the right to obtain cable service that they may desire. This is not merely a theoretical concern. Landlords have resorted to a variety of arguments to preclude customers from a choice of video providers, not for the benefit of customers, but for their own economic enrichment.⁸³

There is no indication that in adopting the uniform rate provision Congress intended to enhance landlords’ control over their tenants’ choices of competitive providers or to limit the range of billing options or bulk pricing terms.⁸⁴ In fact, WCA’s and ICTA’s Comments point to nothing that indicates that Congress ever considered these issues at all. There is no reason for the Commission to hamper a cable operator’s ability to provide customers the full benefits of

⁸² Cablevision Systems Comments at 16.

⁸³ See NCTA’s Comments in CS Docket No. 95-184 (Mar. 18, 1996) at 15-21.

⁸⁴ Since Congress did not condition cable operators’ exercise of their right, the Commission cannot infer a limitation on that right. See generally Demarest v. Manspeaker, 111 S.Ct. 599, 604 (1991) (no need to inquire beyond statute’s clear terms); Railway Labor Executives’ Assoc. v. Nat’l Mediation Board, 29 F.2d 655, 670-71 (D.C. Cir. 1994).

price and service competition that Congress intended. Therefore, the Commission should allow operators to negotiate discounts with other than a landlord, and to provide individual bills to residents in MDUs.

B. Predatory Pricing

In freeing cable operators from regulatory impediments to their ability to compete for subscribers in MDUs, Congress in the 1996 Act allowed cable operators to charge non-uniform prices to MDUs, so long as those prices are not predatory. Where effective competition is present, Congress eliminated the applicability of the uniform pricing provision altogether.

The Commission proposes to rely on federal antitrust standards in reviewing allegations of predation.⁸⁵ Many commenters agree with this approach.⁸⁶ However, ICTA proposes that because the antitrust laws continue to apply to cable operator pricing, Congress did not intend to “merely parrot antitrust prohibitions.”⁸⁷ It therefore urges that the Commission not rely on federal standards for determining predation, and instead proposes that the Commission continue to rely on its existing rules regarding MDU pricing.⁸⁸

⁸⁵ Order at ¶100.

⁸⁶ See, e.g., TCI Comments at 17-19; Time Warner Comments at 37-38; F&W Comments at 32-34.

⁸⁷ ICTA at 14.

⁸⁸ ICTA at 15 n.9. (“Indeed, a good case can be made that Congress simply meant to codify and thus endorse the Commission’s own decision in the wake of the 1992 Act to create an exception for MDU bulk discounts as long as MDUs of similar size and with a similar contract duration were treated the same and as long as cost savings of volume offerings were actually passed on to the subscribers affected.”) OpTel’s proposal would have the same effect. OpTel argues that “any bulk discount that is non-uniform’, as that term was understood under the Commission’s former rules, should be prima facie evidence of predatory pricing.” OpTel Comments at 9. But that is merely an argument for ignoring the changes Congress made in 1996 -- in which it eliminated the requirement to charge uniform prices to MDUs. Acting in accordance with this new standard cannot mean that a prima facie case of predation follows.

ICTA's suggested reading of the statute would eviscerate its intent. Congress specifically rejected the Commission's prior regime for regulating MDU pricing, explaining: "current Commission regulation requires that if a cable operator offers a lower rate in one MDU it must offer the same low rate to MDUs across the franchise area. The Committee finds that this regulation does not serve consumers well by effectively prohibiting cable operators from offering lower prices in an MDU even where there is another distributor offering the same video programming in that MDU."⁸⁹

ICTA's alternate proposal should fare no better than its attempt to read the new provision out of the Act. ICTA urges that a competitor's prima facie showing need only establish "that the discounted price as between 'like MDUs' in a franchise area varies by ten percent or greater."⁹⁰ The burden then would shift to a cable operator, who would have a narrowly circumscribed range of acceptable economic justifications.⁹¹ The ten percent discount has apparently been plucked from thin air. It has no relationship to concepts of predatory pricing⁹² and much more to do with unreasonably tying cable operators' hands when they attempt to fairly compete for MDU customers.

⁸⁹ House Report at 109 (emphasis supplied).

⁹⁰ ICTA at 17.

⁹¹ Id.

⁹² As TCI's Comments explain, the principles of federal antitrust law expressly recognize a "meeting competition" defense to predatory pricing discrimination claims. TCI Comments at 19. And as Time Warner suggests in its Comments, the Commission also should consider adopting a test based on the average "cash flow margin" for the cable industry as set forth in the Commission's annual competition report to Congress. Time Warner Comments at 40. Cole Raywid also proposes that the Commission allow a complainant to shift the burden where MDU prices are less than comparable single family home prices by more than the usual ratio of revenue to cash flow. CRB Comments at 20.

Other commenters, such as WCA, urge the Commission to rewrite section 301(b)(2) in different ways.⁹³ It asserts that the Commission should “avoid any confusion” by striking the language in the statute that limits the predatory pricing provision to cable systems not subject to effective competition. WCA’s proposal would go well beyond eliminating any alleged confusion to rewrite the statutory provision. It would turn it upside down. For the language of Section 301(b)(2) only applies to cable systems that do not face effective competition. In those cases, competitors making out a prima facie showing may seek redress at the FCC.⁹⁴ But this additional avenue for relief is not available to competitors in cases where operators do face effective competition -- in those cases competitors are limited to traditional antitrust forums. The Commission should decline WCA’s invitation to rewrite the statute and thereby to become a forum for all MDU predatory pricing allegations, regardless of whether the operator faces effective competition.

VI. TECHNICAL STANDARDS

Many state and local governments filing in this proceeding seek creative ways in which to interpret Congress’ deletion of their authority to enforce cable technical standards or dictate transmission technologies.⁹⁵ Essentially, they urge the Commission to continue to give them free reign to conduct business as usual. For example, Denver claims that “Congress intended for franchising authorities to continue to be the primary enforcers of CATV technical standards,

⁹³ WCA Comments at 7.

⁹⁴ The new test, as Time Warner’s Comments point out, is not intended to displace any purportedly aggrieved competitors’ existing rights under the antitrust laws. Rather Section 301(b)(2) of the 1996 Act “is intended to provide an administrative procedure as an alternative to raise the issue.” Time Warner Comments at 38.

⁹⁵ 1996 Act, Section 301 (e).

even though it modified the 1992 Act language pertaining to enforcement provisions that ‘A franchising authority may require as part of a franchise.’”⁹⁶ But that reading simply cannot be squared with Congress’ determination to strip from the Communications Act a franchising authority’s ability to enforce compliance with technical standards or impose sanctions.⁹⁷ That responsibility now rests solely with the Commission.

This does not mean, however, that local governments have no role to play. Franchising authorities still may take into account compliance by an operator with the FCC’s technical standards in evaluating its renewal application. But they cannot use franchising or renewal proceedings as a back door to attaining the enforcement rights that the Act now denies.

Furthermore, in barring states or franchising authorities from prohibiting, conditioning, or restricting any cable system’s use of any type of subscriber equipment or any transmission technology, Congress did not leave states and LFAs unfettered authority to demand certain types of upgrades, as some government commenters allege.⁹⁸ Therefore, while LFAs may still seek

⁹⁶ Denver Comments at 7. See also Comments submitted by Kramer, Monroe & Wyatt, LLC. (“KMW Comments”); Comments of the New Jersey BPU at 8 (“[t]he substitution of language in Section 624(e) without a concomitant change to Sections 626 on franchising leaves the franchising process largely unaffected, except that any agreements of a technical nature may not be conditioned upon the use or exclusion of a particular type of equipment or technology.”); GMCC Comments at 8.

⁹⁷ Absent such express authority, an LFA has no right to impose such requirements, contrary to the claims of some commenters. See, e.g., KMW Comments at 8 (arguing that the deleted provision was mere “verbiage”, and that its deletion has no effect.) Franchising authorities are restricted under the Act from regulating “the services, facilities, and equipment provided by a cable operator except to the extent consistent with” Title VI. 47 U.S.C. §544(a) (emphasis supplied). Continued involvement in the day-to-day oversight of federal technical standards would be inconsistent with Title VI.

⁹⁸ See Denver Comments at 16-17. Denver therefore errs in alleging that it has the authority to order “certain types of technical architectures.” As the House Report explains, “The Committee intends by this subsection to avoid the effects of disjointed local regulation. The Committee finds that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today’s intensely dynamic technological environment.” House Report at 110.

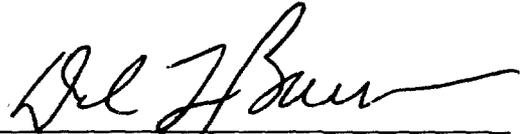
upgrades, dictating the type of technology used to achieve that upgrade -- such as the number of homes served per node, or use of digital, as opposed to analog, technology -- is no longer permitted. The Commission should adhere to Congress' intent by broadly prohibiting the types of franchise-by-franchise technological constraints that the Comments of several localities seek to continue to impose. As TCI's Comments explain, "[b]ecause prohibiting myriad, inconsistent local regulations is critical to technological development, the broad preemption under Section 624(e) is consistent with numerous recent decisions in which the Commission itself has attempted to foster the advancement of a national, broadband telecommunications infrastructure."⁹⁹

⁹⁹ TCI Comments at 30.

CONCLUSION

For the foregoing reasons, the Commission should adopt rules consistent with NCTA's initial comment and comments herein.¹⁰⁰

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¹⁰⁰ In Joint Comments, People for the American Way and Media Access Project attach the comments they filed in the Universal Service proceeding (CC Docket No. 96-45) and, citing Section 706 of the 1996 Act, urge the Commission to ensure, in the context of this proceeding, that schools and libraries will have affordable access to "advanced cable services." The broad issues raised in the Joint Comments are more appropriately addressed in the Universal Service proceeding or in specific proceedings pursuant to Section 706, rather than here. In those proceedings, the Commission will consider the obligations of specific providers of advanced telecommunications and information services as well as incentives for deployment of advanced telecommunications capability (as provided for in Section 706(a)).