

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
Implementation of Cable Act )  
Reform Provisions of the )  
Telecommunications Act of 1996 )  
)  
)

CS Docket No. 96-85

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To: The Commission

**REPLY COMMENTS OF THE CITY OF LOS ANGELES, CALIFORNIA;  
NATIONAL LEAGUE OF CITIES; AND NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

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## SUMMARY

The Commission should confine its regulations to Congressional intent with respect to the Cable Act Reform provisions contained in the Telecommunications Act of 1996 ("1996 Act"). Thus, effective competition should be deemed to exist only in geographic regions where actual competition exists. In this way, the Commission's regulations will protect subscribers against unreasonable rates in areas lacking the competition necessary to keep rates in check, as Congress intended. Furthermore, effective competition can only exist if "comparable programming" includes PEG and broadcast channels, as well as access to comparable programming sources.

With respect to CPS tier subscriber complaints, the Commission's regulations should not impose additional administrative burdens on franchising authorities. Such additional requirements will not enhance the process and may actually obstruct the filing of legitimate complaints against unreasonable rates. Rather, the Commission should retain the original Form 329 complaint process with only those modifications specifically required by the 1996 Act.

The Act's small cable operator provisions should not be extended to previously small operators owned by large entities. Further, reasonable subscriber notice should include notice directly to subscribers or as otherwise provided under state and local law.

Franchising authorities may enforce the Commission's technical standards. The Act only limits the franchising authority's ability to create its own technical standards. Further, the Commission should reject some industry commenters' suggestion that § 624(e) impairs a franchising authority's right to negotiate cable system upgrades, a right which Congress has specifically preserved in the statute. The Commission's rules should recognize franchising authorities' right to establish facilities and equipment requirements that serve community needs and interests.

Finally, the term "affiliate" must be defined for OVS purposes to include all relationships exceeding the carrier-user relationship.

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TELECOMMUNICATIONS OFFICERS AND ADVISORS**

To: The Commission

The City of Los Angeles, California; the National League of Cities; and the National Association of Telecommunications Officers and Advisors, by their attorneys, hereby file the following reply comments in response to the Order and Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, released April 9, 1996, and to the initial comments filed in this docket.

- I. **THE AMENDED DEFINITION OF "EFFECTIVE COMPETITION" MUST BE CONSTRUED TO SERVE THE PURPOSE OF THE STATUTE IN PROTECTING SUBSCRIBERS FROM UNREASONABLE RATES.**
  - A. **A LEC "Offers" Service Only Where and When Subscribers Actually Have a Competitive Alternative.**

**1. The Commission's Regulations Should Recognize Effective Competition Only Where Subscribers Benefit From Actual Competition.**

Under a fourth test for effective competition created by the Telecommunications Act of 1996 ("1996 Act"), Congress provided that effective competition would be deemed to occur in those geographic areas where a LEC offers video programming services directly to subscribers in an unaffiliated cable operator's franchise area, but only if the services offered are comparable to those provided by the cable operator.<sup>1</sup> Not surprisingly, cable operators and others would have the Commission interpret this provision to result in effective competition if a LEC offers service in any tiny fraction of a franchise area, regardless of whether the LEC's offerings represent true competition to the cable operator.<sup>2</sup>

The cable industry's interpretation, however, would lead to absurd results. Under this interpretation, for example, a cable operator could argue that it is subject to effective competition throughout its entire franchise area if a LEC affiliate provides SMATV service only to a single apartment building in a huge metropolitan franchise area. Under such a scenario, the vast majority of subscribers would have no competitive alternative to

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<sup>1</sup> Section 301(b)(3) (adding new 47 U.S.C. § 543(1)(1)(D)). In the NPRM, the Commission specifically requested comment on the definitions of "offer" and "comparable programming." NPRM at ¶¶ 69, 72.

<sup>2</sup> See, e.g., Comments of Tele-Communications Inc. ("TCI Comments") at 5-6 (June 4, 1996); Comments of National Cable Television Association ("NCTA Comments") at 9-10 (June 4, 1996); Comments of GTE ("GTE Comments") at 2 (June 4, 1996).

the cable operator at all, yet they would nevertheless lose all protection from monopoly prices. And the cable operator would be free to lower its rates in the apartment building served by the LEC, but increase its rates throughout the rest of the franchise area. Such ersatz "competition" would fail to protect subscribers against unreasonable rates as the statute still requires (but the industry seems to forget).<sup>3</sup> Nor is this absurd result merely a theoretical possibility. In Los Angeles, for example, a Pacific Bell affiliate offers MMDS in a limited area, but for the vast majority of Los Angeles cable subscribers, cable remains the only source of multichannel video programming.

Fortunately, the 1996 Act does not require these absurd results. The Commission can and should recognize effective competition only in those areas where it actually exists, as we show below.

**2. Effective Competition Should Be Deemed to Exist Only In Geographic Regions Where Actual Competition Exists.**

To give the statute a reasonable meaning, the Commission should define the term "offer" as proposed by the State of New Jersey, by focusing on whether effective competition exists in smaller "geographic regions" rather than entire franchise or service areas.<sup>4</sup> Such an interpretation would avoid the

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<sup>3</sup> 47 U.S.C. §§ 543(b)(1), (c)(1).

<sup>4</sup> Comments of the New Jersey State Board of Public Utilities ("New Jersey Comments") at 3-5 (May 29, 1996).

nonsensical results described above in a way consistent with the language of the statute. Thus, for example, if a cable operator were subject to effective competition only in a small part of its franchise area, the operator would be exempted from rate regulation only in that smaller area, not over the entire franchise area, where most of its subscribers would see no benefit of competitive rates.<sup>5</sup> This approach would be consistent with the language added in Section 301(b)(2) of the Act, which lifts the uniform rate requirement in "geographic areas" where effective competition exists.<sup>6</sup>

**3. Effective Competition In One Franchise Area Should Not Be Stretched To Cover Neighboring Areas Lacking Actual Competition.**

Cablevision argues essentially the reverse of the above point, expanding rather than removing the absurdity. Cablevision believes that it should be exempted from rate regulation in geographic areas larger than a franchise area if it is subject to effective competition in at least 50% of the franchise areas

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<sup>5</sup> As New Jersey points out, if the cable operator faced effective competition in only a very tiny portion of its franchise area, subscribers in the remaining area would not be protected from unreasonable rates. Indeed, cable operators would have an incentive to raise the rates in those portions of their franchise areas not subject to actual competition, in order to subsidize their lower rates in the area of actual competition. See New Jersey Comments at 4.

<sup>6</sup> See New Jersey Comments at 5.

served by a cable system.<sup>7</sup> This proposal would not be consistent with the intent of Congress — to keep rates reasonable by relying on competition wherever possible, and regulating rates elsewhere — because it would leave some subscribers unprotected either by competition or by regulation. The Commission should therefore reject Cablevision's proposal.<sup>8</sup>

The Commission should rule that "effective competition" exists only in those geographic areas of actual competition — areas that typically will be smaller, not larger, than a cable operator's franchise area. And in any event, if the Commission were to conclude that it must extend "effective competition" on the basis of any larger geographic area, such an extended exemption should be permitted only as long as a cable operator certifies that it charges uniform rates throughout the affected area.

**4. The Statute Does Not Support Time Warner's Request for a Presumption of Effective Competition.**

The Commission must reject Time Warner's brazen proposal to lift rate regulation at the time the cable operator files its

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<sup>7</sup> Comments of Cablevision Systems Corporation ("Cablevision Comments") at 14 (June 4, 1996).

<sup>8</sup> If the Commission were to accept Cablevision's proposal (and it should not), such a ballooning rate exemption should be allowed only as long as the operator charges uniform rates throughout all of the affected franchise areas. Indeed, Cablevision agrees that the Commission could establish such a requirement. See Cablevision Comments at 14 n.32. If its rates are not uniform, an operator cannot plausibly argue that effective competition in one area will automatically force rates down to reasonable levels in other areas.

petition claiming effective competition, effectively creating a presumption of effective competition.<sup>9</sup> This proposal is flatly contrary to the statute. Congress found in the 1992 Cable Act that cable operators were not generally subject to effective competition, and thus wrote the 1992 Cable Act to permit exemption from rate regulation only upon a finding of effective competition by the Commission, not upon a unilateral declaration by the party requesting the finding.<sup>10</sup> For this reason, the Commission clearly rejected such a presumption at the inception of rate regulation.<sup>11</sup> Since the relevant language in the 1992 Cable Act was not altered by the 1996 Act, there is no reasoned basis for shifting the presumption.

**B. "Comparable Programming" Must Include PEG and Broadcast Channels, As Well As Access to Comparable Programming Sources.**

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<sup>9</sup> Comments of Time Warner Cable ("Time Warner Comments") at 24-25 (June 4, 1996).

<sup>10</sup> See Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, 106 Stat. 1460 (October 5, 1992) (most cable televisions subscribers cannot choose between cable operators since a cable system generally "faces no local competition"). The statutory language of § 543 requires that the Commission "finds that a cable system is subject to effective competition. . . ." in order to exempt such system from cable regulation. 47 U.S.C. § 543(a)(2) (emphasis added).

<sup>11</sup> "We will presume that the cable operator is not subject to effective competition." Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 at ¶42 (May 3, 1993).

**1. PEG Access Channels Should Be Included In the Determination of "Comparable Programming".**

We support the comments made by the City of Indianapolis pointing out that public, educational and government ("PEG") access channels, as well as broadcast channels, should be included in the determination of comparable programming.<sup>12</sup> Congress has long stressed the importance of PEG channels.<sup>13</sup> And in the 1996 Act, in Section 653, Congress reaffirmed the importance of PEG channels by extending PEG requirements to the newly-created "open video systems" ("OVS"). Congress required that an OVS, like a cable system, provide PEG access as part of "cable service."<sup>14</sup> Since Congress contemplated OVS as a competitor to cable, extension of PEG to OVS confirms that a cable competitor should not be considered to provide "comparable programming" unless its programming includes PEG channels.

**2. MDS Operators Must Physically Provide Broadcast Channels To Qualify as Effective Competition.**

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<sup>12</sup> Comments of City of Indianapolis ("Indianapolis Comments") at 1 (May 30, 1996). See also Comments of City and County of Denver, Colorado ("Denver Comments") at 4 (June 3, 1996) (comparable programming includes both broadcast and nonbroadcast programming services).

<sup>13</sup> Cable Communications Policy Act, H.R. Rep. No. 934, 98th Cong. 2d Sess. 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4667 ("[PEG channels] provide groups and individuals with the opportunity to become sources of information in the electronic marketplace of ideas ... contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work").

<sup>14</sup> See 1996 Act, Section 302 (adding new § 653).

Under the Commission's proposed rule, an MMDS operator would be deemed to provide comparable programming to a cable operator if the MMDS operator provide an A/B switch to make broadcast programming available to its subscribers, even if the MMDS operator carried no broadcast programming itself. The mere provision of a switch for over-the-air reception, however, would not make MMDS equivalent to cable service. After all, one of the primary purposes of cable systems — originally the only purpose — was to enable subscribers to obtain satisfactory broadcast channel reception that they could not obtain over the air.

This is still true today in many areas. As New York City points out, the A/B switch does not automatically guarantee that broadcast channels will be available to subscribers, particularly in many areas where off-air reception remains poor.<sup>15</sup> Certainly MMDS cannot be comparable for a given subscriber unless that subscriber can receive the same number and signal quality of broadcast channels over the air as provided by the cable operator, even if the MMDS operator provides an A/B switch.

The Commission should therefore consider MMDS operators as effective competition to cable only if the MMDS operator also physically provides broadcast channels to subscribers. But even if the Commission were to count over-the-air broadcast reception as part of an MMDS, it should not find effective competition

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<sup>15</sup> Comments of the New York City Department of Information Technology and Telecommunications ("NY City-DITT Comments") at 13 (June 4, 1996). Over-the-air antennas are largely ineffective in New York City and other areas where geography or other physical factors limit reception. Id.

unless the number of broadcast channels a subscriber can actually receive off the air in the relevant geographic area is equal to the number provided by the cable operator.

**3. Parity of Programming Access is Essential To Offering Comparable Programming.**

Some commenters point out that comparable programming cannot be offered without parity of programming access.<sup>16</sup> As USTA notes, a LEC will be greatly hampered in providing effective competition, and subscribers will lack a real alternative, if the LEC is denied access to the programming currently being provided by the cable operator.<sup>17</sup> Thus, a cable operator should not be considered to be facing "effective competition" unless its competitors have parity of programming access with the cable operator.

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<sup>16</sup> See Comments of United States Telephone Association ("USTA Comments") at 3-5 (June 4, 1996); Comments of BellSouth Corporation ("BellSouth Comments") at 2-3 (June 4, 1996).

<sup>17</sup> "Parity of access is an essential pre-condition to LECs' provision of meaningful and fair competition to incumbent cable operators, due to the concentration of control over vast portions of existing and newly produced commercial programming among a handful of vertically integrated cable operators. Lacking such parity, LECs' efforts to compete will be hindered and the conditions (i.e. 'comparable' programming) will not exist where cable operators can or should be subject to lessened regulation. Congress' goals will not be achieved and consumers will also suffer through higher prices, fewer services and less innovation. Only incumbent cable operators will benefit from such an outcome." USTA Comments at 4.

**II. THE PROPOSED RULE FOR CPS TIER COMPLAINTS IMPOSES ADDITIONAL ADMINISTRATIVE BURDENS ON FRANCHISING AUTHORITIES WITHOUT REASON AND WITHOUT JUSTIFICATION UNDER THE STATUTE.**

Under the pre-1996 Act rules regarding subscriber complaints, a local franchising authority submitted a Form 329 to the Commission and served the cable operator, which then filed such FCC forms as were necessary to justify its rates.<sup>18</sup> This straightforward approach, with only very minor changes, would clearly suffice under the 1996 Act.

The NPRM, however, proposes to impose a number of additional requirements which appear to be wholly unnecessary and without any statutory basis.<sup>19</sup> Indeed, many of these proposed requirements appear to serve no purpose other than to impose more burdens and expense on local franchising authorities and to make it more difficult for CPS complaints to be filed.<sup>20</sup> In particular, rather than simply requiring a cable operator to file its rate justification with the Commission upon complaint, the proposed new process would require a franchising authority to send its complaint to the cable operator, wait for the operator's response, and then forward that response to the Commission.<sup>21</sup>

The NPRM suggests no reason why this additional burden on the franchising authority, or the additional delay caused by this

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<sup>18</sup> 47 C.F.R. §§ 76.951, 956 (1995).

<sup>19</sup> See NPRM ¶ 19.

<sup>20</sup> These changes are particularly troubling from the standpoint of the requirements of the Regulatory Flexibility Act, which are addressed in a separate filing herewith.

<sup>21</sup> NPRM ¶¶ 21-22.

regulatory relay race, should be imposed. Not surprisingly, industry commenters leap at the NPRM's invitation to impose still more new requirements on franchising authorities, and again, these requirements seem to have no purpose but to discourage and encumber the filing of legitimate complaints against unreasonable rates.

The Commission has cited no evidence in the record indicating that its original Form 329 process was in any way inadequate for the submission of complaints to the Commission. The new requirements of the 1996 Act can be met simply by redesigning Form 329, as the Commission has done, to allow the franchising authority to certify that it has received subscriber complaints. The interests of subscribers will be best served if the franchising authority files Form 329 with the Commission and serves the operator, and the operator files its forms with the Commission, as before.

Since the franchising authority plays no substantive role in evaluating CPS complaints under the Cable Act and the Commission's rules, there is no point in delaying the complaint process to force a cable operator to submit its CPS rate filing to the franchising authority before it is filed with the Commission.<sup>22</sup> The Commission should reinstate its initial

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<sup>22</sup> For the same reason, CATA's position (Comments of Cable Telecommunications Association ("CATA Comments") at 3-4 (June 4, 1996)) advocating substantive review by the franchising authority prior to filing with the Commission is nothing but a ruse to deter CPS complaints. We are aware of no basis in the statute or legislative history for CATA's assertion that Congress intended that franchising authorities act as more than a "passive conduit"

process for filing of CPS complaints by franchising authorities (with the exception of the 45-day deadline, which is no longer applicable under the amended statute).<sup>23</sup>

The Commission's proposed rule would also create a 180-day deadline for a franchising authority to file its complaint. No such deadline is required or suggested by the statute. Much less does the Act contemplate the accelerated deadlines advocated by some cable operators, with no apparent purpose except to discourage, or avoid on procedural grounds, legitimate complaints against unreasonable rates.<sup>24</sup> Industry commenters (and at times the Commission) seem to forget that, unlike the industry, subscribers — and most franchising authorities — do not

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in addressing CPS complaints. CATA Comments at 3. See also Comments of New York State Department of Public Service ("NYPS Comments") at 16 (June 4, 1996).

Similarly, we reject C-TEC's attempt to limit which subscribers can complain about CPS rates (Comments of C-TEC ("C-TEC Comments") at 6 (June 4, 1996)). Such a rule has no basis in the statute and would clearly create serious First Amendment problems.

<sup>23</sup> A number of commenters suggest numerous additional and senselessly burdensome requirements, such as rules that would require franchising authorities to record elaborate information regarding complainants. See, e.g., C-TEC Comments at 5-6. Surely the cable operator has no legitimate interest in determining exactly which of its subscribers made the complaints that triggered a rate review. The Commission's redesigned Form 329 takes a more reasonable approach in accepting a simple certification by the franchising authority regarding subscriber complaints. See Comcast Cable Comm., Order, DA 96-967, Complaint Regarding Cable Programming Services Tier Rate Increase, Ellicott City, MD, at n. 6 (June 19, 1996).

<sup>24</sup> See, e.g., Comments of U S West ("U S West Comments") at 7 (June 4, 1996); Time Warner Comments at 27. The Act requires only that the franchising authority act on the basis of complaints received within 90 days of the rate increase.

intimately follow the Commission's rules and rulemakings, and cannot be expected to be familiar with every convoluted procedural nuance and hurdle that the Commission may adopt here concerning CPS rate complaints.

**III. THE SMALL CABLE OPERATOR PROVISIONS OF THE ACT ARE INTENDED TO PROTECT GENUINELY SMALL OPERATORS, NOT MSOs THAT CONTROL SMALL SHELL ENTITIES.**

The Commission requests comments on the regulatory relief provisions for smaller cable companies authorized by Section 301(c) of the 1996 Act. Congress instituted such an exemption to protect truly small cable operators who, by virtue of their size, may have difficulty meeting normal regulatory requirements.<sup>25</sup> However, the Commission's regulations should therefore distinguish between truly small cable companies and mere shell companies that are but tools of large MSOs or other large companies. Such shell companies do not face the cost and scale handicaps of true small cable operators and should not be treated as such. For this reason, as indicated in our initial comments in this docket, we support a broad definition of "affiliate" that will prevent MSOs from evading rate regulation by creating "small operator" shells and thus subjecting subscribers to unreasonable rates.<sup>26</sup>

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<sup>25</sup> NPRM ¶ 26.

<sup>26</sup> See Comments of the National League of Cities and the National Association of Telecommunications Officers and Advisors (June 4, 1996).

In addition, we agree with the comments of Fairfield, California, that the Commission should not permit grandfathering for small systems purchased by MSOs. To suggest otherwise is nothing short of Orwellian. A previously small operator purchased by a large MSO should no longer be considered a small operator. The purpose of the small operator provisions of the Act was to lessen regulatory burdens on small cable operators, not to provide windfall regulatory investments for large cable MSOs. Thus, no transition period is necessary or appropriate.

**IV. REASONABLE SUBSCRIBER NOTICE SHOULD INCLUDE NOTICE DIRECTLY TO SUBSCRIBERS.**

Section 301(g) of the 1996 Act allows cable operators to give notice to subscribers of rate and service changes using "any reasonable written means."<sup>27</sup> In its interim rule, the Commission provides that written notification provided in newspapers and on the cable system is sufficient for purposes of Section 301(g).<sup>28</sup> But the Commission should not assume that such notice is necessarily reasonable.<sup>29</sup> On the contrary, it is difficult to see why such a "tombstone" newspaper notice — usually required

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<sup>27</sup> 1996 Act, Section 301(g) (adding new 47 U.S.C. § 552(c)).

<sup>28</sup> **NPRM** ¶ 39.

<sup>29</sup> Thus, while a cable operator may be permitted to include notice in a newspaper, assessing the placement and format of such notice (e.g., section, page, font size) will be essential in determining whether such notice is a reasonable way of providing actual notice to subscribers of changes affecting their service.

when the parties' whereabouts are unknown — is reasonable at all. A cable operator knows the whereabouts of its subscribers, and has no difficulty sending each subscriber a monthly mailing — the subscriber's bill. Surely it is reasonable to expect a cable operator to give direct notice to its subscribers in their bills.

In addition, we support those comments that request the Commission to clarify that § 301(g) does not preempt state or local notice requirements.<sup>30</sup> The Commission should also modify the language of § 76.964(b) to make clear that any notification to subscribers thereunder must be in writing, as required by the statute.

**V. THE TECHNICAL STANDARDS AMENDMENT DOES NOT PRECLUDE COMMUNITIES FROM ENFORCING FEDERAL STANDARDS OR FROM EXERCISING THEIR FRANCHISING AUTHORITY REGARDING FACILITIES AND EQUIPMENT.**

**A. Franchising Authorities May Enforce the Commission's Technical Standards.**

In the 1996 Act, Congress amended § 624(e) of the Cable Act to read "No State or franchising authority may prohibit, condition, or restrict a cable system's use of the type of subscriber equipment or any transmission technology."<sup>31</sup>

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<sup>30</sup> NYPS Comments at 14-15.

<sup>31</sup> 1996 Act, Section 301(e) (amending 47 U.S.C. § 544(e)). The provision also deleted the following language from the Cable Act:

A franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A

Cable operators, however, seek to interpret the revised language of § 624(e) as a broad preemption of a franchising authority's ability to enforce the technical standards established by the Commission.<sup>32</sup> Such a reading would go far beyond the actual language of the statute. As a number of commenters point out, the language limits the franchising authority's role only with respect to "subscriber equipment and transmission technology," not to technical standards in general.<sup>33</sup> There is no reason for the Commission to create a rule any broader than the language of the statute. But there are good reasons not to do so.

While the 1996 Act indicates that a franchising authority may not create its own standards for subscriber equipment and transmission technologies, it does not prohibit the Commission from relying on the franchising authority to enforce the Commission's own cable technical standards.<sup>34</sup> In fact, the Commission has long relied on franchising authorities to enforce its technical standards. As the Commission has itself previously

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franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection.

<sup>32</sup> Comments of Comcast Cable Communications, Inc. ("Comcast Comments") at 20 (June 4, 1996); Adelphia Communications Corporation et. al. ("Adelphia Comments") at 37 (June 4, 1996); Small Cable Business Association ("SCBA Comments") at 38-39 (June 4, 1996).

<sup>33</sup> See, e.g., Comments of Kramer, Monroe & Wyatt, LLC ("Kramer Comments") at 3 (May 27, 1996); NYPS Comments at 24-26.

<sup>34</sup> See Kramer Comments at 3.

recognized, franchising authorities are in the best position to monitor and enforce these rules, given their extensive knowledge of and proximity to the local system.<sup>35</sup> And the Commission simply lacks the resources to monitor and enforce its technical standards itself. Thus, the cable industry's broad interpretation would hamstring the application of the Commission's technical standards as a practical matter.<sup>36</sup>

There is no evidence that Congress intended the far-reaching interpretation of § 624(e) urged by the industry. Rather, as some commenters have pointed out, the most reasonable interpretation of the amendment to § 624(e) was that Congress intended to prevent local franchising authorities from adopting their own standards regarding subscriber premises equipment such as converter boxes used to descramble cable signals. The statute merely clarifies that franchising authorities' still-broad authority over cable system facilities and equipment does not extend to specifying particular subscriber premises equipment (such as converter boxes) or the transmission technology (scrambling or trapping) used to secure the operator's signals.<sup>37</sup> The provision was evidently a response to the controversy over Time Warner's earlier plans to force subscribers to lease more

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<sup>35</sup> See 7 FCC Rcd 2021 at ¶ 12 (1992). See also Denver Comments at 8; Kramer Comments at 2.

<sup>36</sup> See Kramer Comments at 6-7; Denver Comments at 13; and Comments of Greater Metro Cable Consortium, Metro Denver, Colorado at ¶ 5 (June 4, 1996).

<sup>37</sup> Kramer Comments at 5.

expensive converters simply to continue receiving CPS tier programming.<sup>38</sup> Thus, the revised provision should be read narrowly. As is pointed out in the following section, the structure of the statute requires such a narrow reading.

**B. The 1996 Act Cannot Be Read to Impair a Franchising Authority's Right to Negotiate System Upgrades.**

Some cable operators seek to stretch the application of § 624(e) in still another direction, advocating a reading that would prohibit franchising authorities from establishing cable system requirements for facilities and equipment pursuant to § 624(b)(1).<sup>39</sup> Such a promiscuous application of § 624(e) would wildly exceed the actual language of the provision. Moreover, it would be flatly inconsistent with the structure of the Cable Act.

The industry's argument would effectively read § 624(b)(2) and large parts of § 626 out of the Cable Act. The problem, of course, is that these provisions are still in the Act, and the 1996 Act left them unchanged.

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<sup>38</sup> See, e.g., System Notes, Multichannel News, Feb. 13, 1995 at 30; Time Warner Retreats on Set-Top Requirements for Subscribers, Multichannel News, March 27, 1995 at 2. Cf. Committee on Science, Technology and Energy of the New Hampshire House of Representatives. Memorandum Opinion and Order, DA 96-260, (Feb. 29, 1996) (interpreting § 624).

<sup>39</sup> See, e.g., SCBA Comments at 37-39; TCI Comments at 27-32. Apparently such cable interests seek to rely on the reference to § 624 contained in § 626(b)(2) when they claim that the 1996 Act's change to 624(e) affects the rights of franchising authorities under § 626. As NYPS points out, however, the reference in § 626 relates to § 624(b), not to § 624(e). See NYPS Comments of NYPS at 23 (citing legislative history of Cable Communications Policy Act of 1984).

It is a settled canon of statutory interpretation that language must be interpreted so as not to conflict with other sections of the same statute.<sup>40</sup> The cable industry's suggested reading of § 624(e), however, would render meaningless the "facilities and equipment" language of §§ 624(b)(1) and 626(b)(2), which explicitly preserve local communities' authority to require cable system facilities and equipment in a franchise agreement. Congress did not amend, much less repeal, these sections when it amended § 624(e). Thus, the 1996 Act cannot be read to intend a broad prohibition on facilities and equipment requirements. Rather, Congress must be taken at its word. Section 624(e) refers only to franchising authority regulation of subscriber equipment and related, specific transmission techniques such as scrambling.

As noted above, when read in context, the amendment to § 624(e) was inserted to deal with a specific problem regarding converter boxes and scrambling. Nothing in the statute or the legislative history suggests any foundation for any broader interpretation. Thus, in casting about for a statutory basis, the industry can only argue that its interpretation would somehow advance a vague, general congressional intent to accelerate deployment of advanced telecommunications technologies on a

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<sup>40</sup> Indeed, this canon is cited by TCI in an attempt to claim that its favored interpretation is necessary to avoid making § 624(e) meaningless. See TCI Comments at 32 n.69. As shown above, however, § 624(e) is meant to refer specifically to converter scrambling issues, and thus represents only a specific, closely delimited exception to the general authority preserved in § 624(b)(1).

national level.<sup>41</sup> Yet in order to make this tenuous connection, cable commenters are forced to assume in effect that Congress's failure to eliminate the Cable Act's references to local authority regarding facilities and equipment was a mere oversight.<sup>42</sup> Such interpretive gymnastics reveal the incoherence of the industry's position.

Under the 1996 Act, § 626 and § 624(b)(1) remain intact and preserve the franchising authority's role in specifying facilities and equipment-related criteria for cable system franchises, both in initial franchising and in system upgrades at renewal. Such requirements are an integral part of the franchise granting and renewal process. The industry's attempt to eliminate the local community's ability to negotiate specific terms of a system upgrade within the initial franchise or renewal process would render virtually meaningless the determination of local community needs and interests, and the associated authority to reject a franchise on the grounds that the franchise proposal fails to meet local community needs and interests.<sup>43</sup>

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<sup>41</sup> See Comments of Cole, Raywid & Braverman at 21-23 (June 4, 1996) ("CRB Comments"); TCI Comments at 28-29.

<sup>42</sup> See CRB Comments at 23.

<sup>43</sup> See NYPS Comments at 23 (Section 626's reference to 624 does not limit the "fundamental authority to require channel capacity for the distribution of video programming"). Cable commenters strain mightily to convince the reader that they are preserving some empty shell of the authority to require system upgrades while gutting that authority by denying all authority over facilities and equipment. See TCI Comments at 28; SCBA Comments at 38-39. Yet in the end they are unable to make clear any concrete way in which local communities could require upgrades if shorn of the ability to negotiate detailed