Commission's rules.[152] The City and County of Denver pointed out that the use of Title VI would treat competing cable service providers the same and avoid unequal regulatory treatment.[153] Time Warner agrees that regulating OVS and cable operators the same makes sense so long as the policy objectives are consistent. As Time Warner noted in its comments, OVS operators are already subject to Title VI in certain areas, and the nondiscrimination requirement central to OVS is closely analogous to the policy underlying the 1992 Cable Act's channel occupancy restrictions,[154] i.e., to ensure that facilities operators affiliated with video programming "do not favor such programmers in determining carriage" on their facilities. Thus, both regulations should use the same definition of affiliate.[155] Similarly, since Congress eliminated the statutory cable/telephone cross-ownership ban, Time Warner believes the same affiliation test should apply to cable-telco buyouts as in the cable/broadcasting cross-ownership context.

Time Warner's reasoning for adopting a Title VI affiliate definition in the OVS and cable-telco context is different from certain other commenters. Two commenters suggested that Congress did not intend for another definition of affiliate to be applied to OVS.[156]

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[152] See BellSouth comments at 4; City and County of Denver comments at 5; GTE comments at 4; USTA comments at 10; Time Warner comments at 31. See also Bell Atlantic comments at 2 (the Commission should adopt a definition of affiliate which focuses on common ownership and control between the subject entities similar to Title VI).

[153] City and County of Denver comments at 5.

[154] Time Warner comments at 31.

[155] 47 U.S.C. § 533(f)(2)(B).

[156] BellSouth comments at 4; City and County of Denver comments at 5.

BellSouth argued that a Title VI definition of affiliate should be adopted because Congress did not change the definition of affiliate in Title VI when it added the definition of affiliate to Title I; therefore, Congress must have intended the Title VI definition of affiliate to apply to OVS.[157] The City and County of Denver asserted that Congress did not intend for more than one affiliate definition for cable service.[158] Time Warner believes that by adding a general definition of affiliate in Title I of the Communications Act,[159] while retaining a specific definition of affiliate in Title VI[160] and specifically stating in Title I that the new Title I affiliate definition applies "unless the context otherwise requires,"[161] Congress provided the Commission with the discretion to tailor definitions of affiliate to meet the varying policy goals in each context.[162]

Finally, Time Warner believes that the Commission should adopt the same affiliate definition in applying the program access requirements to both cable systems and LEC-

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[157] BellSouth comments at 4.

[158] City and County of Denver comments at 6.

[159] "The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent." 1996 Act, § 3(a)(2), to be codified at Communications Act, § 3(33).

[160] "The term '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." Communications Act, § 602(2)

[161] 47 C.F.R. § 153(33).

[162] See Time Warner comments at 31.

affiliated programmers.[163] Since Section 301(j) of the 1996 Act directly states that "any provision that applies to cable operators under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers" there is no reason to apply different definitions of affiliate to cable operators and LECs for program access purposes.[164] From the statutory language, Time Warner believes that Congress intended that the Section 76.1000 affiliation definition should apply to Section 301(j).

IV. UNIFORM RATE REQUIREMENT

The Commission's initial conclusion with regard to the new bulk discount exception to the uniform rate requirement that such exception

> does not permit a cable operator to offer discounted rates on an individual basis to subscribers simply because they are residents of a multiple dwelling unit, but rather requires a 'bulk discount[]' . . . that is negotiated by the property owner or manager on behalf of all of the tenants[165]

is only partially correct, and therefore should not be adopted wholesale. There is widespread support among the commenters for the conclusion that the bulk discount exception should apply only where there is a single discounted rate offered to the subscribers in an MDU (i.e., a "bulk" discount), rather than extending it to allow varied discounts to be offered to different residents living in the same MDU.[166] However, the offer of a bulk discount should not be contingent on 100% penetration of cable service in the MDU or on the manner

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[163] Time Warner comments at 33.

[164] 47 U.S.C. § 301(j).

[165] Cable Reform NPRM at ¶ 98.

[166] See ICTA comments at 9; U.S. Wireless Cable comments at 2; SBC Communications comments at 4; US West comments at 9; GTE comments at 5; NYCDOITT comments at 19.

in which MDU residents are billed for service.[167] In some cases, MDU owners or managers refuse to enter into bulk discount agreements premised upon 100% penetration of their tenants.[168] The bulk discount exception should not act to deny MDU residents discounted rates simply because not every tenant in the MDU chooses to subscribe to cable service. Moreover, the cable operator should be permitted to vary the discount based on the changing percentage of residents in the MDU who choose to subscribe to cable service.[169] Under such circumstances, all the subscribers in a given MDU would receive the same discount, but that discount might be greater as the percentage of subscribers in the MDU increased.

Time Warner, along with most of the commenters who addressed this question, asserts that the bulk discount exception should apply regardless of the method of billing.[170] Nothing in the statute precludes inclusion of bulk discounts that happen to be billed to individual subscribers rather than to the property owner or manager on behalf of all the subscribers in the MDU. In fact, the language of Section 301(b)(2) illustrates that Congress

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[167] See Adelphia comments at 31; Cablevision comments at 17-19; Cox comments at 11; NCTA comments at 45; Time Warner comments at 35

[168] See Cablevision comments at 17.

[169] See Adelphia comments at 31.

[170] See SBC Communications comments at 5-6; US West comments at 9-10; GTE comments at 5; Massachusetts Cable TV Commission comments at 9; NYCDOITT comments at 19-20; NYDPS comments at 31; Adelphia comments at 31; Cablevision comments at 16-17; Cole, Raywid and Braverman comments at 17-18; Comcast comments at 11-12; NCTA comments at 45; but see Allied Associated Partners comments at 3; ICTA comments at 9-10; OpTel comments at 6.

both recognized and condoned individual billing of bulk discounts. Section 301(b)(2) states that

> [b]ulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator . . . may not charge predatory prices to a multiple dwelling unit.[171]

Congress' reference to the prices charged to each individual unit in an MDU building shows that it did not intend to exclude individually billed bulk discounts from Section 301(b)(2). Thus, cable operators should be permitted to issue individual bills to units within an MDU building, as long as the prices charged on such bills are not predatory.[172]

Moreover, as various commenters explained, collective billing arrangements may be impractical where individual residents purchase premium services in addition to the services purchased under the bulk rate offering.[173] Many MDU owners or managers also prefer individual billing arrangements because they do not want to be responsible for serving as the billing agent for all the tenants who subscribe to MVPD services.[174] In such cases, the MDU owner or manager may not be inclined to enter into a bulk arrangement if the MVPD provider cannot bill the subscribers individually. Furthermore, the freedom of cable

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[171] 1996 Act, § 301(b)(2) (emphasis added).

[172] Contra WCA comments at 3-4.

[173] See NYCDOITT comments at 20; Cablevision comments at 16-17.

[174] See Cablevision comments at 16-17. Cablevision also cites specific examples of situations where Liberty Cable negotiated MDU bulk discounts with MDU managers following Liberty's guarantee that it would bill the MDU residents individually. The MDU managers simply did not want to be involved with MVPD service beyond the negotiation of the rates. If cable operators were unable to offer individual billing arrangements in MDUs, they would be at a competitive disadvantage with alternate MVPDs who are free to offer such billing arrangements. See id.

operators to lower their rates in order to compete for customers in MDUs should not be contingent on the willingness of the landlord to "negotiate" the bulk rate on behalf of the MDU residents. Indeed, in situations where the landlord has an existing contract with the unfranchised MVPD, the landlord may have no incentive to negotiate lower rates with the franchised cable operator. This result would hinder rather than promote competition and consumer choice in the MDU marketplace, and should not be countenanced.[175] Rather, the cable operator should be free to offer a lower rate structure to all residents of a particular MDU, so that the benefits of competition can flow to the actual end users.

The few commenters who oppose inclusion of individually billed bulk discounts in the exception to the uniform rate requirement have offered no tenable reasons for doing so.[176] The contention that allowing cable operators to bill bulk discounts individually to MDU residents will create a loophole that will allow cable operators to offer discounted rates on an individual basis is simply baseless.[177] Allowing cable operators to bill MDU residents individually, but uniformly with regard to the applicable bulk discount for that MDU, will not eviscerate the bulk discount exception to the uniform rate requirement. To suggest the opposite merely demonstrates some commenters' gross misunderstanding of the function of

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[175] See Cole, Raywid and Braverman comments at 18 (forcing cable operators into a "one size fits all" billing arrangement with all MDU residents derogates the customer choice the 1996 Act is designed to promote).

[176] See Allied Communications comments at 3; ICTA comments at 9-10; OpTel comments at 6.

[177] See OpTel comments at 6; ICTA comments at 9-10.

individual bills.[178] Whether a subscriber receives an individual bill for cable service, or the MDU owner or manager receives one master bill for all subscribers in the MDU, the bulk discount is the same amount per subscriber. Thus, the method of billing should not matter for purposes of the bulk discount exception to the uniform rate requirement.

Most commenters who addressed the question of redefining the term "multiple dwelling units" agree that that term should be construed to correspond to the expanded private cable exemption to the definition of a cable system.[179] The few parties who oppose changing the definition of MDU argue generally that the definition should not be altered because it is a definition that has stood for over 20 years, and Congress did not intend to alter that definition when it expanded the private cable exemption.[180] The fact that mobile home parks, private housing developments, and other similar dwelling unit communities have been excluded from the definition of "MDU" in the past is not, in itself, a compelling reason for the continuation of such exclusion. The 1996 Act is causing many changes in the regulation of the communications industry, and the definition of MDU is not immune from such change. Furthermore, the Commission has already defined MDUs, in the rate uniformity context, as including "apartment buildings, hotels, condominium associations,

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[178]For example, ICTA's misunderstanding of permitting individual billing for bulk discounts is clearly evidenced by its statement that "individually-paid bulk discount" is an oxymoron. ICTA comments at 10.

[179]See NYDPS comments at 31; Adelphia comments at 31-32; Cole, Raywid comments at 18-19; Comcast comments at 12-13; Cox comments at 12; NCTA comments at 45-47; TCI comments at 23-25; Time Warner comments at 36; see also Cable Reform NPRM at ¶ 99

[180]See ICTA comments at 11; OpTel comments at 7; WCA comments at 4-5; U.S. Wireless comments at 4-5; GTE comments at 6

hospitals, universities, and trailer parks."[181] It is evident that the Commission has always intended the rate uniformity provisions to apply in any area which is capable of being served without closed transmission paths occupying public rights-of-way.[182]

The commenters who oppose providing freedom from rate uniformity in competing with any private cable system overlook the fact that, under the expanded private cable exemption, private cable operators are not subject to 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.[183] Given that this is the situation for private cable operators, the franchised cable operator should at least be allowed to compete for subscribers in such dwelling units by offering bulk discounts.[184] Allowing cable operators the freedom to meet the competition from unregulated private cable operators was the *quid pro quo* in the 1996 Act for freeing private cable operators from the obligation to obtain a franchise if service is provided without the use of closed transmission paths that occupy public property. Thus, the definition of MDU should be amended, if the Commission finds that the current definition is at odds with the expanded private cable exemption, so that it correlates with the expanded private cable exemption, providing

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[181] Report and Order in MM Docket 92-266, 8 FCC Rcd 5631, ¶ 423 (1993); see also TCI comments at 23-24.

[182] See TCI comments at 24.

[183] See 47 C.F.R. § 76.5(a)(2) (1996); see also Adelphia comments at 32; NCTA comments at 47; Time Warner comments at 37.

[184] See Adelphia comments at 32; NCTA comments at 47; TCI comments at 24-25; Time Warner comments at 37.

franchised cable operators with the ability to compete with private cable operators in such MDU communities in accordance with Congress' intent.[185]

The Commission also 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, and whether procedures used in the adjudication of program access complaints should be adopted in the context of predatory pricing complaints as well.[186] Again, most commenters, including Time Warner, who addressed this issue agree with the Commission that allegations of predatory pricing should be informed by principles of federal antitrust law as applied and interpreted by the federal courts.[187] In so doing, however, the Commission's procedures should not displace any remedies available to allegedly aggrieved parties under the antitrust laws.[188] Similarly, the Commission should

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[185]OpTel's assertion that changing the definition of MDU to correspond to the private cable exemption would have an adverse effect on competition in the MVPD market because private cable operators and other new entrants in the MVPD marketplace would not be protected against anticompetitive pricing by franchised cable operators is groundless. See OpTel comments at 7. If pricing by cable operators is truly predatory, competitors will have recourse through Commission procedures and through the courts. However, these competitors must keep in mind that antitrust law is "meant to protect the competitive process, not competitors." California Computer Products, Inc. v. IBM, 613 F.2d 727, 742 (9th Cir. 1979).

[186]Cable Reform NPRM at ¶ 100.

[187]Id.; see also Time Warner comments at 38; SBC Communications comments at 6; Adelphia comments at 32; Cole, Raywid and Braverman comments at 19-20; NCTA comments at 47; TCI comments at 18-19.

[188]See, e.g., 1996 Act, § 601(b)(1); NYDPS comments at 31-32. New York State Department of Public Service specifically asked the Commission to clarify that the holding of Total TV v. Palmer Communications, Inc., 69 F.3d 298 (9th Cir. 1995), is not preempted by the 1996 Act or its rules. The court in Total TV held that the 1984 and 1992 Cable Acts do

(continued...)

not impose rules that are inconsistent with existing federal antitrust law, or with requirements prescribed by Congress and the Commission, or which cause any preclusive effects in an antitrust action.[189] Generally, the parties who oppose applying federal antitrust principles to allegations of predatory pricing do so because they are concerned that application of antitrust principles would: (1) render meaningless the statutory provision prohibiting predatory cable pricing; and (2) require putting on a full-blown antitrust case before the Commission.[190] Neither of these concerns, however, would come to fruition if the Commission were to adopt a "quick look" approach to reviewing predatory pricing complaints.[191]

Time Warner proposes that the "quick look" procedure be based on the average "cash flow margin" for the cable industry as set forth in the Commission's annual report to Congress on the status of competition in the video distribution business.[192] A *prima facie* showing of predatory pricing might be found to exist in any case where a cable operator's MDU discount, compared to the retail residential rate, is greater than the average industry cash flow margin as reported by the Commission. Because the industry cash flow margin is

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[188](...continued)
not preempt the California Unfair Practices Act's prohibition against predatory pricing with the intent to destroy competition under the Cable Acts' preemption clauses.

[189]See 1996 Act, § 601(b)(1); Cablevision comments at 20-21.

[190]See ICTA comments at 13-15; OpTel comments at 8-9.

[191]See Time Warner comments at 38-40; see also NCTA comments at 48.

[192]See, e.g., First Report, CS Docket 94-48, 9 FCC Rcd 7442, n.44 (1994); see also Cole, Raywid comments at 20 (proposing use of alternative test that is also administratively feasible to conduct and oversee).

a reasonable surrogate for the amount that revenues exceed operating costs, any discount *less* than the industry average margin can reasonably be assumed not to be below cost. Because this involves no relevant market determinations, the Commission should make clear that the "quick look" procedure has no preclusive effect under state or federal law.[193]

In addition to the threshold showing requirement, a predatory pricing complainant should be required to demonstrate that the MDU in question is a matter of competitive significance in the cable operator's franchised territory.[194] As Time Warner has previously stated, such a requirement is consistent with federal antitrust laws that provide that predatory pricing, standing alone, is not actionable, but the overall impact on competition in the marketplace must be evaluated instead.[195]

This "quick look" approach advocated by Time Warner would free the Commission from trying to resolve all the intricacies of federal antitrust law that have plagued courts faced with predatory pricing cases. Rather than trying to apply all the tests of federal antitrust law, the Commission should enact simple rules that are designed to catch only the most egregious predatory pricing cases. In non-egregious situations, where there is no compelling evidence of predatory pricing, the complaint can always be brought in federal court for thorough analysis under the antitrust laws.[196]

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[193]Of course, even where a threshold showing has been made under this standard, the cable operator is entitled to prove that its rates are appropriate.

[194]See Adelphia comments at 34; Time Warner comments at 40-41.

[195]Adelphia comments at 34-35; Time Warner comments at 41.

[196]See SBC comments at 6; Time Warner comments at 39.

If a complainant has made a prima facie showing of predatory pricing under the "quick look" approach, the cable operator should be permitted to rely on a "meeting competition" defense, in accordance with principles of federal antitrust law.[197] The "meeting competition" defense allows a party accused of predatory pricing to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor. Such a showing is an absolute defense to an alleged showing of predatory pricing.[198] The "meeting competition" defense is consistent with the fact that federal antitrust law does not proscribe predatory pricing as such. Rather, it prohibits such conduct as an element of a Sherman Act Section 2 monopolization claim, which presupposes monopoly power or an imminent threat thereof.[199]

The commenters who oppose the application of federal antitrust principles to predatory pricing allegations have recommended that the Commission adopt much more complex standards for making a prima facie showing of predatory pricing.[200] For example, ICTA proposes a test based on price differentials in which a competitor must

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[197] See TCI comments at 19-23.

[198] See id.; see also ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 433 (N.D. Cal. 1978) ("company should not be guilty of predatory pricing, regardless of its costs, when it reduces prices to meet lower prices already being charged by its competitors"), aff'd per curiam sub nom., Memorex Corp. v. IBM, 636 F.2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 972 (1981).

[199] 15 U.S.C. § 2; see, e.g., United States v. Grinnel Corp., 384 U.S. 563, 570-71 (1966); Abcor v. AM Int'l, Inc., 916 F.2d 924, 926 (4th Cir. 1990).

[200] See, e.g., ICTA comments at 17-18; U.S. Wireless comments at 6-7; OpTel comments at 9-10.

establish that the discounted price as between "like MDUs"[201] in a franchise area varies by 10% or greater.[202] If a competitor made such a showing, the burden would then shift to the cable operator to prove an economic justification for the price differential.[203] Such a process is administratively burdensome, and would waste valuable time and resources by examining allegations of predatory pricing that are barely colorable, and most likely justifiable. Moreover, such a test is fatally flawed in that it attempts to reintroduce the "uniformity" requirement which Congress intentionally eliminated through its amendment to Sec. 623(d) of the Communications Act.

Similarly, OpTel urges the Commission to adopt an unreasonably low threshold for *prima facie* showings of predatory pricing so that "it will have an opportunity to address the wide range of franchised cable anticompetitive practices that occur in the market."[204] However, Congress did not direct the Commission to adopt regulations that provide protection above and beyond the protection offered by the federal antitrust laws, and the Commission lacks authority to enact rules that would "modify, impair, or supersede the applicability of any of the antitrust laws."[205] Moreover, OpTel's test, like ICTA's test, also essentially reintroduces the "uniformity" requirement by proposing that "any MDU bulk

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[201] ICTA further proposes that the term "like MDUs" be defined more strictly than it is under current Commission rules. See ICTA comments at 18.

[202] Id. at 17.

[203] Id.

[204] OpTel comments at 8.

[205] 1996 Act, § 601(b).

discount that is 'non-uniform,' as that term was understood under the Commission's former rules, should be *prima facie* evidence of predatory pricing."[206] Such a test is contrary to Congress' express elimination of the uniform rate requirement in MDUs.

U.S. Wireless contends that the Commission's review of predatory pricing allegations must consider the cost of programming because large cable operators may obtain substantial discounts on programming that are not legitimately available to private and wireless cable operators. Thus, large cable operators are able to set rates lower than their competitors and justify these rates based on lower costs.[207] U.S. Wireless seeks to have the Commission protect less efficient wireless and private cable operators by requiring cost calculations to be based on the small cable or private cable operator's costs.[208] Such rules would be in direct contravention of existing federal law, and should not even be considered.[209] In any event, any such claims are more properly considered under the Commission's existing program access rules.[210]

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[206] OpTel comments at 9.

[207] See U.S. Wireless comments at 6-7.

[208] Id. at 7.

[209] See, e.g., Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1055 (6th Cir. 1984) ("[i]f a producer has achieved greater efficiency due to his economies of scale, it would be contrary to the purposes of the Antitrust laws to require that he price his product at a level higher than what he requires to make a profit"), cert. denied, 469 U.S. 1036 (1984); California Computer Products, 613 F 2d at 742 ("the Sherman Act is meant to protect the competitive process, not competitors")

[210] 47 C.F.R. § 76.1000 et seq.

Finally, the Commission should adopt the discovery procedures used in the adjudication of program access complaints.[211] These procedures are adequate and fair, and the Commission should not spend time drafting entirely new procedures for the adjudication of predatory pricing complaints. In addition to discovery procedures, the Commission should also implement a rule providing for the confidential treatment of a cable operator's financially sensitive cost information where submission of such information is required upon a finding of a prima facie showing of predatory pricing.[212] The Commission should also adopt a rule imposing sanctions for the filing of frivolous predatory pricing complaints.[213]

V. SMALL CABLE OPERATORS

Commenters have overwhelmingly supported the Commission's efforts to implement the 1996 Act provisions deregulating small cable operators. While rate regulation has had a significant adverse affect upon the cable industry generally in terms of its ability to attract capital for system upgrades and the introduction of new services, these problems are magnified tremendously when faced by small cable operators. Time Warner agrees that the Commission should be more concerned with implementing small system rate deregulation in a manner which will not unduly exclude legitimate small cable operators in need of

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[211] See WCA comments at 8-10; Adelphia comments at 35; NCTA comments at 48-49; Time Warner comments at 42.

[212] See Time Warner comments at 42-43; Adelphia comments at 35 (rebuttal showing should be submitted to Commission for in camera review); NCTA comments at 49.

[213] See 47 C.F.R. § 76.1003(q) (frivolous program access complaints subject to levy of appropriate sanctions); see also NCTA comments at 49; Time Warner comments at 43.

regulatory relief than with the application of rigid and narrow ownership and affiliation criteria.[214]

In particular, Time Warner urges the Commission to make clear that any system operated by a small cable operator which was deregulated under the 1996 Act remains eligible for deregulation even if the cable operator subsequently affiliates with a company whose growth annual revenues exceed $250 million or if the system is acquired by a company that exceeds the 1% subscriber limit. Such an approach would be entirely consistent with the deregulatory relief afforded to small operators under the Commission's existing rate regulations.[215] The imposition of reregulation upon a small cable operator, which had qualified previously for deregulation under the 1996 Act and subsequently fails to meet the statutory subscriber or revenue criteria as a direct result of acquisition by a larger company, would be entirely inconsistent with the existing streamlined rate relief which the Commission has provided for small cable operators in its rules.

In addition, in the event the Commission were to reimpose rate regulation upon small systems which no longer meet the ownership or subscriber limits contained in the statute, the Commission must allow the small system rate in effect upon acquisition by the larger operator to be grandfathered. Any future rate increases could be governed by the price cap methodology applicable to acquiring company. This approach is most consistent with

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[214] See, e.g., Cole, Raywid & Braverman comments at 8-9; CATA comments at 5-6; and SCBA comments at 5.

[215] See Sixth Report and Order and Eleventh Order on Reconsideration, MM Docket Nos. 92-266 & 93-215, 10 FCC Rcd 7393 (1995) at ¶ 73.

existing Commission policy applicable to small systems' streamlined cost of service showings.[216] Obviously, putting a small system's existing rate in jeopardy in cases where the system may be acquired by a larger operator serves only to create impediments and disincentives to the system growth and clustering which are necessary to allow cable operators to compete effectively with telephone companies and other large entities in the delivery of video and telecommunications services

VI. TECHNICAL STANDARDS

The 1996 Act amended Section 624(e) of the Communications Act to limit the ability of LFAs to regulate in the areas of technical standards, scrambling and other signal transmission technologies, and subscriber equipment utilized by cable operators. The amendments to the Communications Act embodied in Section 301(e) of the 1996 Act limit the authority of LFAs over technical standards and related issues in three specific ways. First, LFAs may no longer require, as part of the grant, modification, renewal or transfer of any franchise, provisions that allow them to enforce any technical standards applicable to cable television systems that are adopted by the FCC. Second, LFAs may no longer request that the Commission allow them to impose or enforce technical standards that are more stringent that the FCC standards. Third, no State or LFA may interfere with a cable operator's right to deploy any subscriber equipment or transmission technology that it deems appropriate, including scrambling or other forms of encryption. The statutory changes to Section 624 and the legislative history explaining those changes leave no doubt that Congress

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[216] Id.

intended to entirely preclude LFA and/or State involvement in the establishment or day-to-day enforcement of technical standards applicable to cable television systems and to prevent such entities from interfering with marketplace decisions to deploy new technologies and equipment.

Despite the fact that Congress could not have more clearly stated its purpose in amending Section 624(e) of the Communications Act, a number of LFAs have asked the Commission to ignore the statutory amendments and allow LFAs to be the primary enforcers of cable technical standards. The main argument of the LFAs who support continued local involvement in technical matters essentially boils down to this: because Congress did not take any action to expressly prohibit LFA involvement in technical standards, no such prohibition was intended.[217] While this argument might have some superficial attractiveness when considered in a vacuum, its main flaw lies in the fact that it asks the Commission to focus on actions that Congress did not take and on speculation as to the reasons which Congress chose not to take those actions. In doing so, it also requires the

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[217] See, e.g., New Jersey comments at 7-8; Kramer, Monroe and Wyatt at 7-8; City and County of Denver at 7; and Denver Metro Cable Consortium at 7. But see also, however, Massachusetts Cable Television Commission comments at 10 (restriction on LFA authority to enforce technical standards has little impact on LFAs' general franchising authority under the Act since technical standards and non-compliance issues are rarely triggered in the context of franchise renewals or transfers); NYCDOITT comments at 20-21 (acknowledging that § 301(e) of the 1996 Act prohibits States and LFAs from regulating in the areas of technical standards, customers equipment and transmission technology); and the NYDPS comments at 24-25 (acknowledging that changes to § 624(e) of the Communications Act vest the FCC with exclusive authority to impose penalties and corrective actions for non-compliance with technical standards).

Commission to entirely ignore the statutory amendments that Congress did enact and Congress' stated reasons for taking those actions.

There simply is no way to know why Congress did not adopt language expressly prohibiting LFAs from engaging in technical standards enforcement on a day-to-day basis. Neither the statute nor the legislative history discusses Congress' failure to adopt such language. We do know, however, that Congress expressly deleted existing statutory language which formerly gave LFAs the authority to enforce FCC mandated technical standards. In doing so, the House Report accompanying the House version of the telecommunications legislation clearly indicates that deletion of the subject language was intended to accomplish one of the overriding purposes of the telecommunications legislation. The House Report states:

> Subsection (j) [now section 301(e)] amends section 624(e) of the Communications Act by prohibiting State or franchising authorities from regulating in the areas of technical standards, customer equipment, and transmission technologies. The Committee intends by this subsection to avoid the affects 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.[218]

Throughout the 1996 Act, Congress evidenced a substantial concern that undue regulation not be permitted to interfere with the implementation and deployment of new technologies and services in the technology-driven telecommunications sector. For example, in connection with the 1996 amendments to Section 624A of the Communications Act dealing with equipment compatibility, Congress expressly limited the FCC's authority to mandate

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[218] H.R. Rep. No. 204, 104th Cong., 1st Sess. 110 (1995).

standards for compatibility and interoperability. The amendments to Section 624A reflect a Congressional finding that compatibility among televisions, video cassette recorders and cable systems can be assured with "narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other product and service options for selection through open competition in the market."[219]

In circumscribing the Commission's authority to adopt equipment compatibility regulations in this manner, Congress clearly indicated its concern that unwarranted governmental intrusion into this area could have an adverse effect on the development of new technologies and services. The Conference Report accompanying Section 301 states:

> The conference agreement also adopts the House provision on cable equipment compatibility. . . . the conferees intend that the Commission should promptly complete its pending rulemaking on cable equipment compatibility, but not at the risk that premature or overbroad Government standards may interfere in the market-driven process of standardization in technology intensive markets.[220]

The degree to which Congress desired to minimize governmental intrusion in the area of technological development and technical standards was further underscored during the Senate debate on the Conference Report accompanying passage of the 1996 Act. During that debate, Senator Ford made the following statements reflecting Congress' desire to minimize

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[219] 1996 Act at § 301(f)(1) amending § 624A of the Communications Act.

[220] Conference Report at 170-71.

unwanted and unwarranted governmental intrusion that could stifle the deployment of new technology and the development of new services:

> Mr. President, as I have mentioned, this Conference Report includes important changes to our telecommunications law which enable the development of new technologies. . . . Section 301(f) of the bill provides the FCC may only set minimal standards for cable equipment compatibility, to maximize marketplace competition for all features and protocols unrelated to descrambling of cable programming, and to ensure that the FCC's cable compatibility regulations do not affect computer network services, home automation, or other types of telecommunications equipment. In short, this section keeps the government out of setting high technological standards and prevents the FCC from setting standards for computer and communications services of the future.
>
> I believe that this section is a small but important aspect of this historic bill to embrace the future by allowing new technologies to flourish with minimal government interference. . . . Section 301(f) ensures . . that the FCC's technical standards are kept to a minimum
>
> I think this is an important policy. The risk associated with wide regulatory powers over technological issues in a time when we are seeing rapid technical change is that the premature or overbroad FCC standards may interfere in the market-driven process of standardization or impede technological innovation itself. . . .
>
> I believe that the inclusion of Section 301(f) continues that tradition and will permit the industry to set the standards, not the FCC. That is in keeping with the nature of this legislation as a whole.[221]

As the foregoing demonstrates, Congress intended to severely limit involvement by government at any level in the development and deployment of new technologies. This includes not only severely curtailing the manner in which the FCC carries out its statutory mandate to ensure equipment compatibility and establish cable system technical standards, but

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[221] 142 Cong. Rec. S. 704-05 (February 1, 1996).

also prohibiting any local and state interference in the areas of technical standards and technology deployment.

In light of the foregoing, and in the face of comments filed in this proceeding by State and local regulatory authorities indicating their belief that they may continue to regulate cable technical standards and technology deployment, the Commission should reiterate that any State or local involvement in this area has been statutorily preempted by the 1996 Act.

VII. ADVANCED TELECOMMUNICATIONS INCENTIVES

In order to effectuate Congress' intent to promote the development of advanced interactive telecommunications services, some commenters advocate that universal service be expanded to encompass cable service and other interactive services provided over cable systems. Indeed, the State of New York and others recognize the potential of cable distribution infrastructures for delivery of advanced interactive broadband services.[222] While Time Warner applauds these commenters' recognition of the value and potential of cable networks, it is simply not the appropriate proceeding to decide whether such services should be included in universal service policies.

Instead, the best way for the Commission to implement Congress' intent is simply to create incentives for new broadband entrants to deploy their own advanced networks, and at the same time create incentives for incumbent providers to continue to upgrade their networks. Accordingly, the Commission should require new broadband providers to install and upgrade their own broadband distribution facilities wherever possible rather than to

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[222] See NYDPS comments at 33-34; People for the American Way and Media Access Project comments at 3.

merely "piggy-back" on the existing facilities of incumbent providers. SMATV, OVS, DBS, and MMDS providers must be encouraged to develop and offer advanced communications services, and the Commission's rules must create incentives for each of these providers to build and upgrade their own distribution systems in order to provide for such advanced network capabilities.

Such incentives are at stake in CS Docket No 95-184, where the location of multiple dwelling unit ("MDU") cable demarcation point is a central issue. If the MDU demarcation point were altered to preclude cable operators from continued use of a crucial portion of their MDU distribution infrastructure, their ability to offer voice telephony, data service and Internet access, as well as to raise significant capital necessary to compete with incumbent local exchange carriers, would be greatly impaired to the detriment of MDU residents. Moving the broadband demarcation point or allowing building owners or competing providers the right or ability to expropriate cable operator MDU wiring would extinguish cable operators' incentives and ability to further upgrade their facilities. Cable operators simply cannot reasonably be expected to invest in advanced networks if the ultimate effect of such investment will be to provide a massive subsidy to their competitors.

Cable operators such as Time Warner have demonstrated a commitment to providing advanced communications capabilities over their networks. Cable operators have over the past several years engaged in expensive upgrades of their distribution networks in order to provide their customers with a vast array of advanced services in addition to multichannel

video programming.[223] Congress, in implementing the 1996 Act, clearly intended to promote, not destroy, such investment. Simply put, the Commission's policies, consistent with Congressional will that advanced telecommunication networks be promoted and widely available, must not in any way discourage the further deployment of advanced technology.

CONCLUSION

Time Warner urges the Commission to implement the cable reform provisions of the 1996 Act expeditiously and in accordance with the principles described above so that Time Warner and other cable operators will be better able to respond to the increasing competitive

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[223]In addition, as the Denver Metro Cable Consortium comments at 6-7 recognizes, cable operators such as Time Warner have demonstrated a commitment to local government and schools through voluntary contributions of cable service. Time Warner believes that without changes in any of the Commission's rules, such contributions will continue. Commission intervention that would coerce or force cable operators to contribute such services is simply not needed. In addition, Time Warner believes that the Commission should take no steps that would encourage LFA's to require such contribution as a condition of franchising or renewal.

onslaught while at the same time upgrading their facilities to provide competition in other sectors of the telecommunications arena.

Respectfully submitted,

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