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Federal Communications Commission

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Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of Cable Act Reform Provisions) CS Docket No. 96-85
of the Telecommunications Act of 1996)
)

REPORT AND ORDER

Adopted: March 25, 1999

Released: March 29, 1999

By the Commission: Commissioners Furchtgott-Roth and Powell approving in part, dissenting in part and issuing separate statements; Commissioner Tristani issuing a separate statement.

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I. INTRODUCTION

1. This *Report and Order* adopts final rules regulating cable television service and cable system operators pursuant to Sections 301 and 302 of the Telecommunications Act of 1996 ("1996 Act").¹ The 1996 Act amended or deleted numerous provisions of Title VI of the Communications Act of 1934, as amended, ("Communications Act"),² and added new provisions affecting cable television. Many of these changes consisted of clear, self-effectuating revisions to pre-existing federal statutory provisions. To the extent these self-effectuating statutory changes required amendments to our rules, we implemented them in the order section of the *Order and Notice of Proposed Rulemaking* in this docket.³

2. Regulations to implement other provisions of the 1996 Act required notice and comment to be fully and finally implemented.⁴ We initiated that process in the *Notice* portion of the previous item. Many of the statutory provisions that required implementing rules and were the subject of the *Notice* were effective upon enactment of the 1996 Act on February 8, 1996. The public interest thus necessitated that we adopt interim rules effectuating these provisions pending the adoption of final rules pursuant to the *Notice*.⁵ We now adopt final rules and eliminate the interim rules.⁶

II. EFFECTIVE COMPETITION

A. Background

3. The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), amended Section 623 of the Communications Act by establishing a pervasive scheme of rate regulation for cable operators not subject to effective competition.⁷ Amended Section 623 requires the Commission to ensure that rates are reasonable and that subscribers are protected from rates for the basic service tier ("BST") and cable programming service tier(s) ("CPST") that exceed the rates that would be charged if the cable system were subject to effective competition.⁸ A regulated cable operator must offer a BST that includes, at a minimum, all of the local broadcast channels carried on the cable system and

¹Telecommunications Act of 1996, Pub. L. No. 104-104 §§ 301, 302, 110 Stat. 56, 114-124 approved Feb. 8, 1996.

²47 U.S.C. §§ 151-614.

³11 FCC Rcd 5937, 5938 (1996). Hereinafter, we refer to the two portions of the previous item as the *Interim Order* and the *Notice*.

⁴*Id.*

⁵*Id.*

⁶We are retaining the definition of "affiliate" in the context of effective competition from a local exchange carrier as an interim rule. See para. 25 *infra*.

⁷Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 § 3(a), 106 Stat. 1460, 1464-71 (1992) ("1992 Cable Act § 3(a)"), 47 U.S.C. § 543.

⁸47 U.S.C. § 543(a)(2), (b), (c).

any public, educational, and government access ("PEG") channel required under the terms of a franchise agreement with the local franchising authority ("LFA").⁹ A CPST is any tier of programming offered by a cable operator, other than the BST and programming provided on a per channel or per program basis.¹⁰ Cable systems subject to effective competition are not subject to rate regulation,¹¹ including the uniform rate requirement.¹² The 1996 Act provides that all CPST rate regulation will end for services provided after March 31, 1999.¹³ Regulation of BST and associated equipment rates will remain in effect for systems not subject to effective competition. Rates for programming provided on a per channel or per program basis are not regulated.

4. Section 623(l) as amended by the 1992 Cable Act provides three tests for determining effective competition.¹⁴ A cable system is exempt from rate regulation if any of the following three tests is met:

- (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
- (B) the franchise area is-
 - (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
 - (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or
- (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.¹⁵

⁹47 U.S.C. § 543(b)(7).

¹⁰47 U.S.C. § 543(l)(2).

¹¹47 U.S.C. § 543(a)(2).

¹²A cable operator not subject to effective competition must maintain a rate structure that is uniform throughout its franchise area but may offer bulk discounts to multiple dwelling units. 47 U.S.C. § 543(d); 47 C.F.R. § 76.984.

¹³47 U.S.C. § 543(c)(4).

¹⁴47 U.S.C. § 543(l)(1)(A)-(C).

¹⁵*Id.* The test in paragraph A is referred to as the "low penetration test"; the test in paragraph B, as the "competing provider test"; the test in paragraph C, as the "municipal provider test." These tests were implemented in the Commission's rules at 47 C.F.R. § 76.905(b)(1)-(3).

5. The 1996 Act adds a fourth test to Section 623(l).¹⁶ Under the new test, a cable operator will be subject to effective competition if comparable video programming is offered to subscribers within the cable operator's franchise area by, or over the facilities of, a local exchange carrier ("LEC") or its affiliate.¹⁷ Section 623(l)(1)(D)¹⁸ ("LEC test") provides that effective competition exists when:

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

6. Because the new effective competition test became effective upon enactment of the 1996 Act, we amended our rules to incorporate the statutory language of the test, and adopted interim rules relating to certain definitions and procedures needed to properly implement the provision.¹⁹ We sought comment on proposed final rules. Our *Notice* specifically requested comment as to whether effective competition can be found under the LEC test if the LEC or its affiliate makes its service available only to a *de minimis* portion of the franchise area or whether the service must be offered to some larger portion of the franchise area.²⁰ Commenters were asked to consider what level of competition provided by a LEC or its affiliate is sufficient to have a restraining effect on cable rates. The *Notice* sought comment as to whether the definition of "comparable" programming suggested for the LEC test in the Conference Report should be adopted and, if so, how it should be implemented. Because that definition differs from the definition of comparable programming in our rules,²¹ the *Notice* sought comment as to whether we should adopt a uniform definition applicable in all cases.²² The *Notice* sought comment as to whether satellite master antenna television ("SMATV") service constitutes direct-to-home ("DTH") satellite service, as that

¹⁶1996 Act § 301(b)(3), 110 Stat. 115; 47 U.S.C. § 543(l)(1)(D); see 47 C.F.R. § 76.905(b)(4).

¹⁷ 47 U.S.C. § 153(26) defines a LEC as:
any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

¹⁸47 U.S.C. § 543(l)(1)(D).

¹⁹*Interim Order*, 11 FCC Rcd at 5938-45; 47 C.F.R. §§ 76.905(b)(4), 76.1401.

²⁰*Notice*, 11 FCC Rcd at 5962-63.

²¹See 47 C.F.R. § 76.905(g).

²²*Notice*, 11 FCC Rcd at 5961-62.

term is used in the new effective competition test.²³ The *Notice* solicited comment as to when a multichannel video programming distributor ("MVPD") should be deemed an "affiliate" of a LEC for purposes of this test. Finally, the *Notice* solicited comment on the standards for showing whether a competing MPVD is offering service in the franchise area.

B. Discussion

1. Offers services in the franchise area

7. To satisfy the new test for effective competition, a cable operator must show that a LEC or LEC-affiliated MVPD or an MVPD using the facilities of a LEC or its affiliate²⁴ "offers" comparable video programming services in the franchise area of an unaffiliated cable operator. The Conference Report provided that, "[f]or purposes of Section 623(l)(1)(D) of the Communications Act, 'offer' has the same meaning given that term in the Commission's rules as in effect on the date of enactment of [the 1996 Act]."²⁵ According to Section 76.905(e) of the Commission's rules in effect when the 1996 Act was enacted:

Service of a multichannel video programming distributor will be deemed offered:

(1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and

(2) When no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.²⁶

We adopted this definition of offer in the *Interim Order*.²⁷ We further provided that, in the interim, a cable operator attempting to prove effective competition will have to show that the competitor is physically able to offer service to subscribers "in the franchise area." Where the competitor's service area does not follow the borders of the local cable franchise area, we directed the operator to provide information about the extent of the overlap between its franchise area and the actual or planned service area of the competitor. We sought comment on whether we should follow these standards for purposes

²³*Id.* at 5962.

²⁴For the purpose of this discussion, the term "LEC" includes a LEC affiliate or an MVPD using the facilities of a LEC or its affiliate.

²⁵H.R. Rep. No. 458, 104th Cong., 2d Sess. 170 (1996) ("Conference Report").

²⁶47 C.F.R. § 76.905(e).

²⁷*Interim Order*, 11 FCC Rcd at 5941; *Notice*, 11 FCC Rcd at 5962.

of the permanent rule.²⁸ We also sought comment about how widely available a LEC's service should be in the franchise area to constitute effective competition and whether we should consider potential as well as actual pass rates in making the determination.

8. Commenters have divergent views about the extent to which a competing video programming service must be offered in the franchise area to satisfy the LEC test. Some commenters, primarily cable interests, argue from the "plain language" of the LEC test that the test is met when service is available to as few as two potential subscribers.²⁹ Others argue that consumers must have realistic or competitive choices before effective competition can be found.³⁰ To assure this choice, some advocate setting a threshold for effective competition on the basis of the percent of households in the franchise area to which the LEC can offer service or the percent of households in the franchise area subscribing to the LEC service, much like the thresholds in the competing provider test.³¹ No commenters other than those referencing the competing provider test offer insight into determining the level of LEC competition that would be sufficient to restrain cable rates, although the Massachusetts Cable Commission opines that the LEC's potential pass rate could be an important consideration.³² TCI argues that the 1996 Cable Act does not require consideration of whether the level of competition is sufficient to restrain rates.³³

9. We reject the argument advocated by cable interests that any service offering in the franchise area, no matter how minimal, should be sufficient for a finding of effective competition. As the New Jersey Ratepayer Advocate points out, so lenient a test "could have the unfortunate result of allowing a dominant cable company to raise rates, unabated by regulation or genuine competition, whenever a LEC delivers video signals to just one home in the franchise area."³⁴ The New Jersey State Board of Public

²⁸Notice, 11 FCC Rcd at 5962-63.

²⁹Fleischman and Walsh ("Fleischman") Comments at 9; Cablevision Systems Corporation ("Cablevision") Comments at 9; Cox Communications, Inc. ("Cox") Comments at 8-9; *see* Comcast Cable Communications, Inc. ("Comcast") Comments at 4 (statute places no minimum penetration or pass rate; SMATV competition is sufficient); Commonwealth of Massachusetts Cable Television Commission ("Massachusetts Cable Commission") Comments at 3 (subscriber interest generated by LEC service even on a limited basis may threaten operator's market share and restrain cable rates).

³⁰New York City Department of Information Technology and Telecommunications ("New York City") Comments at 6-7; New Jersey Division of the Ratepayer Advocate ("New Jersey Ratepayer Advocate") at 6.

³¹OpTel, Inc. ("OpTel") Comments at 3; New York City Comments at 8; New Jersey Ratepayer Advocate at 4; City of Indianapolis ("Indianapolis") Comments at 2; City and County of Denver ("Denver") Comments at 4.

³²Massachusetts Cable Commission at 4 (while not advocating standards, if Commission adopts any standards, it should consider the potential pass rate). *See* New York City Comments at 8 (commenting that a cable operator's response to a LEC competitor may depend upon potential as well as actual competition and advocating, therefore, that the LEC competitor meet the 50% offering test but not meet any penetration standards); *see also* OpTel Comments at 3 (Commission should use a relative measure of service availability and subscriber access, such as service to at least 15% of households served by incumbent cable operator).

³³Tele-Communications, Inc. ("TCI") Comments at 5.

³⁴New Jersey Ratepayer Advocate Comments at 5.

Utilities adds that deregulation of a cable operator's rates in an entire franchise area because of competition in a small portion of the franchise area "can lead to absurd results."³⁵ For example, a LEC's service area could encompass one franchise area but overlap only a small corner of an adjoining franchise area where no subscribers are served by the incumbent operator, or a cable operator's rates could be prematurely deregulated in a franchise area, allowing it to subsidize subscribers where it faces competition by charging higher rates to subscribers in the rest of the franchise area. The City and County of Denver point out that, "taken to its extreme, . . . effective competition could be claimed in a franchise area served by a LEC-based MVPD that actually represented no competition at all."³⁶ This is not what we believe Congress intended. The thrust of the 1996 Act is Congress' expectation that LECs will be robust competitors of cable operators because of their financial and technical ability and, as Cablevision points out,³⁷ their ubiquitous presence in the market.³⁸ "[C]ompetition is the best regulator of the marketplace. Until that competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage. Timing is everything. Telecommunications services should be deregulated after, not before, markets become competitive."³⁹

10. When written, the definition of "offer" presumed the widespread availability of competing service. Under the competitive provider test, at least 50% of the households in the franchise area must have access to competing service. Although we agree with commenters who argue that the LEC test is different from the competitive provider test,⁴⁰ nothing in the statute or legislative history suggests that, when incorporating the word "offer" into the LEC test, Congress intended that "offer" should lose its context of the widespread availability of the competing service. To the contrary, the expectation was that the LEC presence would be ubiquitous, and the intent repeatedly expressed in the floor debates was that "the people will get a choice in how they get their services."⁴¹ There is no choice where there is no

³⁵New Jersey State Board of Public Utilities ("New Jersey Board") Comments at 3-5.

³⁶City and County of Denver Comments at 5.

³⁷Cablevision Comments at 9.

³⁸See 141 Cong. Rec. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler: "Looming large on the fringes of the [video programming services] market are the telephone companies. The telephone companies pose a very highly credible competitive threat because of their specific identities, the technology they are capable of deploying, the technological evolution their networks are undergoing for reasons apart from video distribution, and, last but by no means least, their financial strength and staying power.") *But see* New York City Reply Comments at 7: "Great financial resources and marketing experience will not create effective competition if the LEC does not intend to service a substantial portion of the cable franchise area."

³⁹142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings explaining the thrust of the 1996 Act).

⁴⁰Once Congress amended the Communications Act to allow LECs to provide cable service in their local exchange areas, effective competition from a LEC could be evaluated under the competitive provider test. The LEC test provides an alternative way to evaluate competition from a LEC.

⁴¹142 Cong. Rec. S699 (daily ed. Feb. 1, 1996) (statement of Sen. Lott). *See, e.g.*, 142 Cong. Rec. H1149 (daily ed. Feb. 1, 1996) (statement of Cong. Fields) (looking for head-to-head competition from cable and telephone competitors); 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Cong. Dingell: "No longer will

service. We conclude, therefore, that to support a finding of effective competition under the LEC test, the LEC's service must substantially overlap the incumbent cable operator's service in the franchise area.⁴² Because the definition of "offer" does not include any requirement that consumers actually purchase the service, only that the service be available, we reject arguments that we should adopt penetration standards.

11. In the *Notice* we sought comment on whether a LEC's potential service area as well as the area where it actually offers service should be considered in determining effective competition under the LEC test.⁴³ The definition of "offer" incorporated into the LEC test requires that LEC service be both technically and actually available to households,⁴⁴ and does not provide for consideration of service planned for the future. However, in resolving individual cases under the LEC test in the interim, the Cable Services Bureau has found that a LEC's presence can have a competitive impact on a cable operator before the LEC finishes installing its plant or rolling out its service.⁴⁵ We see no reason from the record before us not to continue applying the LEC test in this way when the likelihood of impending competition throughout a substantial part of the incumbent cable operator's service area is established, the competitive service is commercially available, and potential subscribers in the franchise area served by the incumbent are reasonably aware that the service is either actually available to them or will be available within a reasonable time.⁴⁶ Views such as those expressed by Senator Hollings support this position. In his Additional Views appended to S. Rep. No. 23, Senator Hollings explained that "the bill changes the definition of 'effective competition' in the 1992 Act to allow cable rates to be deregulated as soon as a

consumers have just one company to choose from for the provision of local telephone or cable television service.").

⁴²See FCC Local State Government Advisory Committee: Advisory Committee Recommendation Number 13 ("LSGAC Recommendation 13"), Recommendation 13(C), Resolution on Effective Competition, filed in CS Docket No. 96-85 (Nov. 20, 1998), recommending that the Commission "[d]efine the term 'offer' in a manner that acknowledges that the geographic area in which services are actually available is critical to whether effective competition actually exists."

⁴³*Notice*, 11 FCC Rcd at 5962-63.

⁴⁴*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5656 (1993) ("Rate Order").

⁴⁵See *Time Warner Entertainment-Advance/Newhouse Partnership and Paragon Communications* (North and South Pinellas Counties, FL), 12 FCC Rcd 3143 (Cab. Serv. Bur. 1997) (effective competition found where LEC competitor completed 15% of service area and its franchise required completion throughout franchise area within three years; incumbent cable operator had lost subscribers and planned programming upgrades); see also *Comcast Cablevision of the South*, 13 FCC Rcd 1676 (Cab. Serv. Bur. 1997) (effective competition found where franchises authorize LEC service throughout franchise areas, LEC competitors began by using facilities constructed for video dialtone service through parts of the franchise areas, and incumbent cable operator had responded competitively in anticipation of the LEC competition.)

⁴⁶See Massachusetts Cable Commission Comments at 4 ("[A] LEC's potential pass rate may ultimately turn out to be a more meaningful measure of a LEC's competitive impact on a cable franchise than its actual pass rate at any given point in time. Such a standard would allow a [cable] operator the flexibility of 'looking ahead' to adjust its marketing, programming and rating strategies in advance of competition of a more substantive nature."); accord, New York City Department of Information Technology and Telecommunications Comments at 8; OpTel Comments at 3.

telephone company begins to offer competing cable service in a franchise area. Once consumers have a choice among cable offerors, the need for regulation diminishes."⁴⁷ While we disagree with commenters who argue that this and similar statements require cable rate deregulation on the basis of a mere *de minimis* LEC presence in the franchise area,⁴⁸ we find in such statements and their broader context⁴⁹ a reflection of Congress' intent that the Commission have the discretion to consider the likelihood and extent of impending competition when considering whether effective competition exists under the LEC test. Congress sought to restrain cable rates and stimulate quality cable services. Once the LEC's competitive presence is sufficient to achieve these goals, even if the LEC's buildout or roll out is not complete, the intent of the effective competition test has been met.

12. On the other hand, service offered only on a test basis, MMDS coverage limited by signal strength or terrain factors, or service only to a specialized or niche market or to a geographically limited market within the franchise area does not satisfy the test.⁵⁰ Nor is the test satisfied if the LEC does not have firm plans to build or market so as to offer service that substantially overlaps the incumbent cable operator's service in the franchise area, or the public is not reasonably aware of any such plans. To find effective competition when the LEC does not intend widespread service invites the problem that concerned Congress when it adopted the uniform rate requirement as part of the 1992 Cable Act; namely, a cable operator's ability to charge low rates in parts of the franchise area where it faces competition and charge higher unregulated rates in those parts of the franchise area where it does not face competition and has no reason to expect competitive repercussions from such pricing behavior.⁵¹ We do not believe that

⁴⁷S. Rep. No. 23, 104th Cong., 1st Sess. 152 1995 (additional Views of Sen. Hollings at 152) (emphasis added). Sen. Hollings' statement was repeated in the debate on S. 652, 141 Cong. Rec. S7896 (daily ed. June 7, 1995) (statement of Sen. Hollings).

⁴⁸Commenters relied heavily on statements made during the debate on the 1995 version of the Senate bill. During the floor debate on the Conference Report on the 1996 Act, Senator Kerry stated his view that the Conference Report is substantially better than the bill considered by the Senate the previous summer because the Senate bill, like the House bill, "deregulated cable monopolies before there was effective competition." 142 Cong. Rec. S699-70 (daily ed. Feb. 1, 1996) (statement of Sen. Kerry).

⁴⁹For example, Senator Hollings prefaced his additional views with the explanation that, "The basic thrust of the bill is clear: competition is the best regulator of the marketplace, but until that competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage." S. Rep. No. 23, 104th Cong., 1st Sess. 149 (additional views of Sen. Hollings).

⁵⁰In Reply Comments at 4, New York City expressed concern about a LEC proposal to offer a programming package tailored to the needs of the City's financial community. The service, including more than 12 channels of both broadcast and nonbroadcast services, will be transmitted to desktop personal computers, but only within the city's financial district. "[O]nly an extremely small group would have any use for the service. While the programming will be invaluable to stock market analysts, it will not be made available to the overwhelming majority of residential subscribers in the franchise area."

⁵¹S.Rep. No. 92, 102d Cong., 1st Sess. 76 (1992).

Congress intended for us to apply the LEC test so broadly that the protections Congress intended through the rate regulation system are lost to consumers without the prospect of competition.⁵²

13. A cable operator seeking to show effective competition from a LEC bears the burden of rebutting the presumption to the contrary that Congress left intact.⁵³ Because competitive service can be provided "by any means (other than direct-to-home satellite services)," the showing will necessarily vary somewhat, depending on the means employed. Basically, however, the incumbent cable operator must show that the LEC is technically and actually able to provide service that substantially overlaps the incumbent cable operator's service in the franchise area. If the LEC has not completed its buildout or roll out, the incumbent cable operator must establish that the LEC intends to do so within a reasonable period of time, that the LEC does not face regulatory, technical or other impediments to households taking service, that the LEC is marketing its service so that potential customers are reasonably aware that they will be able to purchase the service, that the LEC has begun actual commercial service, the extent of that service, the ease with which service can be expanded, and the estimated date for completion of the construction or rollout in the franchise area. If the LEC has not shown its intention to offer service that substantially overlaps the incumbent cable operator's service in the franchise area, we will entertain petitions for waiver showing that the extent of the LEC's presence is sufficient to have a direct impact on the cable operator's services throughout its service area, and particularly on the price. The presence of other competing MVPDs in the franchise area may be relevant in this regard.

14. Where the competition is from a wire or cable distribution system, the incumbent cable operator must show what commitments the LEC has made to serve that area, including the status of construction and the estimated completion date. If the LEC is franchised, a showing of the coverage and construction obligations in the franchise should be sufficient. If the LEC plans an open video system, the showing must establish the LEC's intent regarding the proposed area. Any contractual commitments for construction or service would be relevant as would any public representations the LEC has made to local officials and consumers; for example, through marketing and publicity regarding its plans. Documentation of actual commercial service must also be provided.

15. Where the competition is from an MMDS or wireless cable system, the incumbent cable operator must establish that a viewable signal can be received in an area that substantially overlaps the incumbent's service area by showing: (a) the franchise area lies within the MMDS interference-free contour; (b) the signal strength is adequate throughout the area; and (c) there are no terrain or other obstacles to line of sight service.⁵⁴ Because an MMDS operator is under no obligation to market its service throughout its service area and may target service to specific areas, the incumbent cable operator must show that the MMDS or wireless cable operator can and will provide service to an area that

⁵²When Congress clarified that the uniform rate requirement does not apply in competitive markets, it did not eliminate the requirement in markets not facing effective competition. It allowed operators to respond competitively to competition in MDUs, but it did not otherwise exempt operators from the uniform rate requirement when competition was present only in MDUs. We see no reason why limited LEC service should have a different impact on cable rate regulation than other competitive services that are limited to MDUs.

⁵³47 C.F.R. § 76.906.

⁵⁴Isolated, limited pockets of poor reception will not defeat a showing of effective competition.

substantially overlaps the area served by the incumbent within the franchise area.⁵⁵ This showing can be satisfied by showing that the MMDS operator has customers throughout the area and that the service is being marketed to the public at large. If service is being implemented on a rolling basis rather than offered throughout the service area, the incumbent cable operator should show that consumers in an area that substantially overlaps the incumbent's service area are reasonably aware the proposed service will be available to them.⁵⁶ Any public representations the LEC has made, for example through any marketing and publicity alerting consumers to the LEC's plans for the competitive service, would be relevant. Documentation of actual commercial service must also be provided.

2. "Comparable" Video Programming

16. Section 623(l) provides that the competitor must offer "comparable" programming services before effective competition can be found to exist in the franchise area under either the LEC or the competing provider test. In the process of implementing provisions of the 1992 Cable Act, including the competing provider test, the Commission adopted a definition of comparable programming. That definition involves the offering of at least twelve channels of programming, including at least one channel of nonbroadcast programming service.⁵⁷ In the present proceeding, the Commission proposed and adopted on an interim basis a different definition for purposes of the LEC effective competition test, which required that the competing provider's service consist at least in part in the distribution of broadcast station signals. This proposal was based on language in the legislative history of the 1996 Telecommunications Act purporting to follow the Commission's definition but referring to the competitor's service as comparable if it "includes access to at least 12 channels of programming, at least some of which are

⁵⁵The City of Los Angeles, National League of Cities, and National Association of Telecommunications Officers and Advisors ("Los Angeles, League of Cities, and NATOA") reports, for example, that a LEC affiliate there "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." Los Angeles, League of Cities, and NATOA Reply Comments at 3.

⁵⁶The Cable Services Bureau has denied petitions seeking a determination of effective competition where the LEC's intentions to offer service throughout the area were not clear and consumers in the area were not shown to be reasonably aware of the availability of the wireless service. Service was being rolled out on a low key, controlled basis and marketing was limited to very specific demographics. See, e.g., *Paragon Communications d/b/a Time Warner Communications and KBL Cable Systems of the Southwest* (Gardena, CA, et al.), 13 FCC Rcd 8675 (Cab. Serv. Bur. 1998), petition for reconsideration pending; *Charter Communications Entertainment II, L.P. and Long Beach Acquisition Corp.* (La Canada, CA, et al.), 13 FCC Rcd 8506 (Cab. Serv. Bur. 1998), application for review pending.

⁵⁷*Rate Order*, 8 FCC Rcd at 5666-67. In order to offer comparable programming within the meaning of this provision, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming. In passing the 1992 Cable Act, Congress explicitly rejected the standard previously used by the Commission when it redefined effective competition to cable systems in terms of over-the-air broadcast signal competition. The Commission had required that a competitor provide at least six broadcast signals in order to be considered comparable. *Id.* at 5667 n.128. In the *Rate Order*, the Commission concluded that a competitor carrying only broadcast signals should not be deemed to be offering programming comparable to that of an incumbent cable operator.

television broadcasting signals."⁵⁸ The Commission also proposed that a single definition be used for comparable programming as that term is used in various of the effective competition tests and sought comment as to whether the definition should be the interim one adopted for the LEC test.

17. Some parties responding to the request for comment on this issue support a definition requiring the inclusion of some broadcast signals.⁵⁹ Some, however, also argue that satellite delivered superstations should be treated as television broadcast signals if the interim definition is adopted.⁶⁰ Others point to ambiguity in the Conference Report as to what Congress intended and advocate applying the existing definition in Section 76.905(g),⁶¹ which requires the inclusion of at least one channel of nonbroadcast service programming.⁶² Comcast is concerned that adopting the interim definition as a single definition would preclude consideration of DBS as a source of effective competition to cable systems under the competitive provider test, in spite of Commission findings to the contrary.⁶³ The Massachusetts Cable Commission suggests that comparable programming services should be defined as 12 channels of programming, without regard to the breakdown between broadcast and nonbroadcast channels, contending that the Commission cannot at this time determine what specific channel lineups LEC affiliated entities will use to compete with cable.⁶⁴ Other commenters suggest that programming should not be deemed comparable unless it includes both broadcast and non-broadcast programming,⁶⁵ while still others argue that comparable video programming services must include some PEG channels.⁶⁶

18. Having considered all of the comments and the complexities of adopting alternative definitions of "comparable" for separate portions of the effective competition test, we now believe that

⁵⁸*Interim Order*, 11 FCC Rcd at 5942; *see* Conference Report at 170. Confusion was introduced because the Conference Report language differs from Section 76.905(g), but the language was followed by a citation to Section 76.905(g) that was introduced by the signal "See," a signal generally understood to mean support for a point rather than a distinction.

⁵⁹*See* Cable Telecommunications Association ("CATA") Comments at 2; Independent Cable and Telecommunications Association ("ICTA") Comments at 2; New York City Comments at 12-13; State of New York Department of Public Service ("State of New York") Comments at 5-6; US WEST, Inc. ("US WEST") Comments at 5-6; BellSouth Corporation ("BellSouth") Comments at 2.

⁶⁰*See* National Cable Television Association ("NCTA") Comments at 3; Fleischman Comments at 5; CATA Comments at 2; Comcast Comments at 10.

⁶¹Cole, Raywid & Braverman ("Cole Raywid") Comments at 5; Comcast Comments at 1-2; Cox Comments at 4.

⁶²47 C.F.R. § 76.905(g).

⁶³Comcast Comments at 9 & n.25.

⁶⁴Massachusetts Cable Commission Comments at 5.

⁶⁵Denver Comments at 3; Small Cable Business Association ("SCBA") Comments at 32-33; NCTA Reply Comments at 8-9.

⁶⁶*See* Indianapolis Comments at 1; Los Angeles Reply Comments at 7; LSGAC Recommendation 13(C).

the existing definition adopted in implementing the 1992 Cable Act should be used for both competing provider and LEC effective competition determinations. As a general matter of statutory interpretation, a term used repeatedly in the same connection should be given the same meaning unless different meanings are required to make the statute consistent.⁶⁷ Nothing in the statute requires a change in our definition. Although the Conference Report includes different language, it cites to our rule as support. We see no basis here for having inconsistent definitions.

19. We also note that the selection of which definition to use does not appear likely to have practical consequences in applying the LEC test in most instances. Under the *Interim Order*, MMDS service could meet the comparable programming requirement if the MMDS operator offered access to local broadcast stations by direct microwave delivery or through a separate antenna.⁶⁸ In effective competition petitions filed with the Commission to date, LEC MMDS operators cited as providing effective competition to cable have all delivered some television broadcast stations by microwave, and cable operators have not relied on integration of off-the-air delivery to show that the comparable programming requirement is met. The choice of definition also will not affect consideration of DBS under the LEC effective competition test, because the LEC test already specifically excludes "direct-to-home satellite services" as types of competitors that can be considered.

20. On the other hand, changing the definition of "comparable" as applied to the competing provider test could alter that test with respect to the treatment of DBS. DBS and other direct-to-home satellite services were specifically referenced as potential sources of effective competition in the legislative history of the 1992 Cable Act⁶⁹ and there is no indication in the history of the 1996 Act that Congress intended to alter the Commission's determination regarding the existing definition, which had been litigated and judicially affirmed in terms of the comparability test.⁷⁰ Rather, the LEC test was added to create an additional deregulatory effective competition test, not to alter the existing test. Application of the interim definition to the competing provider test would require that we decide whether a DBS operator's offering of "superstations" would satisfy the requirement that a competitor offer broadcast stations, or whether integration of satellite and off-the-air broadcast signals at the receiving location would be considered to be an offering of broadcast signals for the purpose of determining whether a DBS operator offers comparable programming.

⁶⁷See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and Rules or Canons about How Statutes are to be Construed*, reprinted in 2A Norman J. Singer, *Statutes and Statutory Construction* 539, 544 (5th Ed. 1992).

⁶⁸*Interim Order*, 11 FCC Rcd at 5943. The *Interim Order* concluded that a LEC MMDS operator not delivering broadcast stations by microwave would be deemed to offer broadcast stations if the subscriber could receive the stations without an A/B switch or similar device for switching between an off-the-air antenna and the microwave antenna. The *Interim Order* further provided that, if an A/B switch were required, the MMDS operator would be deemed to offer broadcast stations if it were responsible for installing the A/B switch.

⁶⁹See e.g. ___ Congressional Record S14253 (daily ed. Sept. 21, 1992) (discussion between Sen. Lieberman and Sen. Inouye of effective competition test, using DBS as a specific example of how provision was intended to function.)

⁷⁰*Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995) ("*Time Warner*").

21. In light of our conclusion above, that the existing definition of comparable programming be applied under the LEC test as well as the competing provider test, we do not need to decide whether satellite-delivered superstations should be counted as broadcast stations outside their local service areas.⁷¹ We also do not need to address the questions posed in the *Notice* about whether a LEC MMDS operator will be considered to be offering effective competition if its subscribers receive television broadcast signals by means of an off-the-air antenna rather than as part of the operator's microwave offering.⁷² Our interim rules governing these matters⁷³ will cease to be effective on the effective date of this Report and Order.

22. Some commenters suggest that the video programming services of a competing provider can only be deemed comparable if the competitor has equal access to programming provided by the incumbent cable operator.⁷⁴ We do not believe such a requirement is warranted. As US West points out, the Commission's program access rules provide sufficient protection in this regard.⁷⁵ We see no evidence that Congress intended for us to impose additional program access requirements in this context. We also see no evidence that Congress intended to impose PEG access requirements at the federal level by incorporating them into the comparable programming requirement.⁷⁶

3. "Affiliate"

23. The LEC effective competition test applies when comparable programming is provided by a LEC or its affiliate. The 1996 Act amended Title I, Section 3 of the Communications Act by adding a definition of "affiliate":⁷⁷

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

⁷¹See *Notice*, 11 FCC Rcd at 5962.

⁷²*Id.*

⁷³*Interim Order*, 11 FCC Rcd at 5942-43.

⁷⁴BellSouth Comments at 2-3; United States Telephone Association ("USTA") Comments at 4 and Reply Comments at 2-4; Ameritech New Media, Inc. ("Ameritech") Reply Comments at 3-5; Los Angeles Reply Comments at 9.

⁷⁵US WEST Reply Comments at 6-7. See generally *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822 (1998) (amending program access rules to expedite the resolution of disputes and allow damages on a case-by-case basis).

⁷⁶Communications Act § 621(a)(4)(B), 47 U.S.C. § 541(a)(4)(B), gives franchising authorities the discretion when awarding a franchise to require assurance that a cable operator will provide adequate PEG access channel capacity, facilities, or financial support.

⁷⁷1996 Act § 3(a) § 3(a), 110 Stat. 58, codified at 47 U.S.C. § 153(1).

"own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

Although this definition applies "unless the context otherwise requires,"⁷⁸ the definition of "affiliate" in Title VI of the Communications Act concerning cable television was unchanged.⁷⁹ Unlike the definition in Title I, the Title VI definition does not establish a threshold for determining when an entity is owned by another entity.

24. Because the Title VI definition does not specify an ownership threshold, the *Notice* requested comment as to how "affiliate" should be defined for the purpose of the LEC test. In the interim, we adopted a rule that incorporated the 10% ownership threshold from Title I. We also stated that we would determine "on a case-by-case basis" when interests other than traditional equity investments constituted "the equivalent" of an equity interest.⁸⁰ We established that affiliation could be demonstrated through de facto control regardless of the actual ownership interest.⁸¹

25. The Commission recently initiated a more general review of the ownership attribution rules in CS Docket No. 98-82.⁸² There the Commission noted the pendency of the affiliate issues in this proceeding and solicited comment on whether and how changes in cable attribution rules should affect the various definitions of "affiliate" in the Commission's rules regarding cable television,⁸³ including the LEC test affiliation rule in Section 76.1401(b).⁸⁴ In light of that more general review of the attribution/affiliation issue, we will retain the interim rule in renumbered Section 76.1401(a) for the time being and address the LEC affiliate issue more fully in CS Docket No. 98-82. Relevant comments submitted in this proceeding will be considered in CS Docket No. 98-82.

26. One matter can be resolved in this proceeding, however. In the *Notice*, we solicited comment on whether we should aggregate the interests of various LECs when calculating ownership under the affiliation test.⁸⁵ Cable operators favor aggregation, arguing that the failure to aggregate could mean that an MVPD is majority owned by several LECs but deemed unaffiliated under the effective competition

⁷⁸47 U.S.C. § 153.

⁷⁹47 U.S.C. § 522(2): "[T]he 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". This definition is also codified at 47 C.F.R. § 76.5(z).

⁸⁰*Interim Order*, 11 FCC Rcd at 5944.

⁸¹*Id.*

⁸²*Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Review of the Commission's Cable Attribution Rules*, Notice of Proposed Rulemaking, 13 FCC Rcd 12990 (1998) ("*Cable Attribution Notice*").

⁸³*Id.* at paras. 9, 15 & n.52.

⁸⁴47 C.F.R. § 76.1401(b).

⁸⁵*Notice*, 11 FCC Rcd at 5964.

standard because no single LEC owns a cognizable equity interest. In their view, this would constitute an "absurd" result.⁸⁶ The Massachusetts Cable Commission favors aggregation, arguing that any LEC investment is motivated by a desire to profit from video service delivery.⁸⁷ SBC opposes aggregation, asserting simply that the ownership standard should apply to single LECs.⁸⁸ The State of New York argues that aggregation is appropriate because the statute does not limit the affiliation test to in-region LECs. Thus, it advocates that all LEC involvements should be counted toward the ownership threshold.⁸⁹ By contrast, New York City opposes aggregation, contending that small independent interests will not provide adequate incentives for investing LECs to act in a manner that restrains cable rates.⁹⁰

27. We will not aggregate the investment interests of LECs in a single MVPD to determine affiliation. Even if the aggregated investment interests of multiple LECs in a single MVPD constitute a majority ownership of the MVPD, it cannot be concluded from that fact alone that any one of the LECs would have the power or incentive to control the MVPD. Likewise, a single LEC could not be assumed to be able to control the actions of any other MVPD affiliated LEC(s). This is consistent with the statutory language which requires us to find that the MVPD in question is affiliated with a LEC. If a LEC's relationship with the MVPD, by itself, does not rise to the level of affiliation as defined above, that lack of affiliation is not affected by the fact that one or more other LECs also have invested in the MVPD. If none of the LECs has a sufficient interest in the MVPD to constitute affiliation, then the MVPD is not affiliated with a LEC, regardless of the aggregated interest of all the LECs. Our approach here is also consistent with our approach to aggregation in other contexts, such as that of small cable operators.⁹¹

4. Procedures

28. As of February 8, 1996, the date on which the 1996 Act was enacted, cable systems meeting all of the relevant criteria under the new effective competition test became exempt from rate regulation.⁹² We permitted operators seeking a determination of effective competition to file a petition with the Commission demonstrating the presence of effective competition according to our interim rules.⁹³ We believe our interim procedures should be incorporated into our final rules as discussed below.

⁸⁶NCTA Comments at 19; Cox Comments at 16; Time Warner Comments at 10-11.

⁸⁷Massachusetts Cable Commission Comments at 7.

⁸⁸SBC Communications Inc. and Southwestern Bell Video Services, Inc. ("SBC") Comments at 3.

⁸⁹State of New York Comments at 9.

⁹⁰New York City Comments at 11-12.

⁹¹See *infra* at para. 70.

⁹²Interim Order, 11 FCC Rcd at 5944.

⁹³*Id.*

29. Several cable commenters suggest that the Commission adopt rules whereby a cable operator will be deregulated upon simply filing a claim of effective competition.⁹⁴ They argue that systems taking advantage of this initial deregulation would still be subject to a subsequent determination by the Commission that effective competition does not exist, and that the Commission could order refunds as a remedy for any unjustified rate increases that may occur as a result of deregulation.⁹⁵ We do not agree. As Los Angeles, the League of Cities and NATOA state, providing for immediate deregulation upon the filing of an effective competition claim is tantamount to creating a presumption that effective competition exists.⁹⁶ Congress did not alter Section 76.906 of our rules which provides: "In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition."⁹⁷ A finding of effective competition must be made based on a record that demonstrates effective competition exists, not on a mere claim by the cable operator that it is subject to effective competition.

30. The Commission's rules allow cable operators to demonstrate that their systems are subject to effective competition under the definitions of effective competition adopted with the 1992 Cable Act by filing a petition for change in regulatory status with the appropriate franchising authority,⁹⁸ or by filing with the Commission a petition for reconsideration or revocation of the LFA's certification to regulate rates.⁹⁹ Our interim rules provide that LEC effective competition cases should be filed as petitions for determination of effective competition under Section 76.7 of our rules.¹⁰⁰ In the *Notice*, we proposed to adopt a uniform procedure applicable to all four tests for effective competition.¹⁰¹ In *1998 Biennial Regulatory Review -- Part 76 - Cable Television Service Pleading and Complaint Rules ("1998 Biennial Regulatory Review")*, we consolidated the procedures regarding petitions for effective competition to achieve a uniform procedure applicable to all petitions seeking a determination of effective competition, except petitions for reconsideration of the LFA's certification to regulate rates.¹⁰² Petitions for

⁹⁴Fleischman Comments at 3-4; NCTA Comments at 22.

⁹⁵Time Warner Cable ("Time Warner") Comments at 24.

⁹⁶Los Angeles, League of Cities, and NATOA Reply Comments at 5-6.

⁹⁷47 C.F.R. § 76.906.

⁹⁸See 47 C.F.R. § 76.915. This section further provides: "Cable operators denied a change in status by a franchising authority may seek review of that finding at the Commission by filing a petition for revocation." 47 C.F.R. § 76.915(e).

⁹⁹See 47 C.F.R. §§ 76.911, 76.914, 76.915(e).

¹⁰⁰*Interim Order*, 11 FCC Rcd at 5944 & n.28; 47 C.F.R. § 76.1401(c) (interim rule).

¹⁰¹*Notice*, 11 FCC Rcd at 5963.

¹⁰²Report and Order, FCC 98-348, 14 FCC Rcd ___ para. 10, 64 Fed. Reg. 6565 (1999). Several commenters in this proceeding have suggested that the Commission adopt various time limits for the filing of oppositions and replies, and for the resolution of claims based on the new effective competition test. See Fleischman Comments at 16-18; NCTA Comments at 22-24; New England Cable Television Association, Inc. ("NECTA") Comments at 16-17; Time Warner Comments at 25; U S WEST Reply Comments at 4. These views were considered in *1998 Biennial*

reconsideration of a local franchising authority's certification to regulate rates should continue to be filed pursuant to the Section 76.911 and Section 1.106, the Commission's rules setting forth the procedures for petitions for reconsideration.¹⁰³ All other effective competition cases should be filed with the Commission as petitions for determinations of effective competition under Section 76.7 of the Commission's rules and new Section 76.907, which describes the petitioner's burden and addresses the availability of evidence. We are eliminating Section 76.915 from our rules, so cable operators will no longer petition local franchising authorities for a change in regulatory status based on effective competition. Section 76.917 of our rules is not affected by this action.¹⁰⁴ Section 76.917 provides procedures by which a franchising authority certified to regulate rates may notify the Commission that it no longer intends to regulate basic cable rates.

III. CPST RATE COMPLAINTS

A. Sunset of CPST Rate Regulation

31. The 1996 Act provides that the Commission's authority to regulate CPST rates pursuant to Section 623(c) of the Communications Act will sunset "for cable programming services provided after March 31, 1999."¹⁰⁵ The *Interim Order* revised Section 76.950 of the Commission's rules to implement this provision.¹⁰⁶ We are further amending Section 76.950(b) to track the statutory language. Thus, we will continue to accept complaints filed pursuant to our complaint procedures regarding rates for services provided through March 31, 1999.

B. Background

32. Prior to passage of the 1996 Act, the Communications Act permitted any subscriber or LFA or other relevant state or local government entity to seek Commission review of a rate charged for the CPST by filing a complaint with the Commission within a "reasonable period" of time following a change in the CPST rates.¹⁰⁷ In implementing this provision we established a 45 day window following a CPST rate change as the reasonable period in which CPST rate complaints could be filed.¹⁰⁸ As amended by the 1996 Act, Section 623(c)(3) of the Communications Act now provides:

Regulatory Review.

¹⁰³See new Section 76.10 adopted in *1998 Biennial Regulatory Review*, App. A.

¹⁰⁴47 C.F.R. § 76.917. A franchising authority may notify the Commission at any time that it no longer intends to regulate basic cable rates.

¹⁰⁵47 U.S.C. § 543(c)(4), *as amended by* Telecommunications Act of 1996, Pub. L. No. 104-104 § 301(a)(1), 100 Stat. 115 (1996).

¹⁰⁶*Interim Order*, 11 FCC Rcd at 5957, 5986.

¹⁰⁷47 U.S.C. § 543(c)(3).

¹⁰⁸*Rate Order*, 8 FCC Rcd 5840-5841.

The Commission shall review any complaint submitted by a franchising authority after the date of enactment of the Telecommunications Act of 1996 concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.¹⁰⁹

In the *Interim Order*, we promulgated interim rules to govern the procedures by which LFAs would file CPST rate complaints pursuant to the 1996 Act.¹¹⁰

33. The interim rules require that, before filing a complaint with the Commission, the LFA must give the cable operator written notice of its intent to do so and allow the operator a minimum of 30 days to file with the LFA the relevant forms used to justify a rate increase.¹¹¹ Where appropriate the operator may submit to the LFA a certification that it is not subject to rate regulation, in lieu of the rate justification forms.¹¹² The interim rules provide that the LFA shall then forward its complaint and the operator's response to the Commission no more than 180 days after the rate increase becomes effective.¹¹³ If the operator fails to respond, the LFA may file its complaint with the Commission and specify that the operator has not filed a response.¹¹⁴ After we receive the complaint, we will decide the case based upon the information submitted. In addition to these changes, we eliminated the requirements that operators notify subscribers of their right to file complaints with the Commission and provide subscribers with the Commission's address and telephone number for purposes of filing rate complaints.¹¹⁵ We also proposed eliminating the requirement in 47 C.F.R. § 76.952 that operators include the name, mailing address, and telephone number of the Cable Services Bureau on monthly subscriber bills and solicited comment on this action.¹¹⁶

34. In addition, we noted that although Section 623(c)(3) permits the LFA to file a CPST rate complaint with the Commission only if the LFA has received subscriber complaints within 90 days of the effective date of a CPST increase, it specifies no deadline for the LFA to file its complaint with the

¹⁰⁹47 U.S.C. § 543(c)(3), as amended by Telecommunications Act of 1996, Pub. L. No. 104-104 § 301(a)(1), 100 Stat. 115 (1996).

¹¹⁰*Interim Order*, 11 FCC Rcd at 5946.

¹¹¹*Id.*

¹¹²*Id.* at n. 35. An operator might file such a certification if it is subject to effective competition, *see supra* at paras. 3-30, or is deregulated under the small cable operator provisions. *See infra* at paras. 61-89.

¹¹³*Interim Order*, 11 FCC Rcd at 5946.

¹¹⁴*Id.*

¹¹⁵*Id.* & n.34.

¹¹⁶*Notice*, 11 FCC Rcd 5964.

Commission.¹¹⁷ Accordingly, we sought comment on possible time limits for LFAs to file complaints with the Commission.¹¹⁸ We solicited comment on our proposal to adopt the interim rule requiring LFAs to file CPST rate complaints with the Commission within 90 days of the close of the window for subscribers to file complaints with the LFA (or 180 days after the rate becomes effective).¹¹⁹ Finally as part of revising our rules, we amended the Commission rate complaint form, Form 329,¹²⁰ and invited comments on those amendments.

B. Discussion

1. LFA Filing Deadlines

35. The amount of time an LFA should have to file a CPST rate complaint must account for an LFA's own procedures and any procedural requirements that we impose. Before turning to those procedures, we agree with commenters representing both the cable industry and LFAs that urge us to make clear that LFAs have discretion to decline to file a complaint with the Commission. NCTA and the Massachusetts Commission both request that the Commission state explicitly that LFAs have the discretion not to file a rate complaint even if the requisite number of subscriber complaints has been timely filed with the LFA.¹²¹ Other commenters suggest that the LFA or state authorities should have the prerogative to require a higher threshold of consumer complaints before filing than is prescribed by the statute.¹²²

36. An LFA may decide not to file a CPST rate complaint, based on its assessment of the validity of the underlying subscriber complaints or any other reason. There is nothing in the 1996 Act that suggests Congress sought to override the judgment of an LFA in this regard. An LFA should have the same absolute discretion in this context as it does when deciding whether to seek the Commission certification that is required before it may regulate BST rates.¹²³ We clarify that under our rules an LFA is not obligated to file a CPST complaint and may set standards it deems appropriate for deciding whether to file a complaint, as long as the minimum standards set forth in Section 623(c)(3) and our rules are satisfied.

37. The New Jersey Advocate suggests that where an LFA opts not file a complaint with the Commission despite having the grounds and authority to do so, individual subscribers or consumer advocacy groups should have the right to appeal this omission to the Commission.¹²⁴ Rather than giving

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Order* at 5992.

¹²¹NCTA Comments at 27; Massachusetts Cable Commission Comments at 16.

¹²²Massachusetts Cable Commission Comments at 8; NCTA Comments at 27.

¹²³*See* 47 C.F.R. § 76.910.

¹²⁴New Jersey Ratepayer Advocate Comments at 12.

subscribers the right to appeal an LFA's decision not to file, the 1996 Act eliminated provisions of the Communications Act that had recognized the authority of subscribers to initiate Commission review of CPST rates.¹²⁵ As amended, Section 623(c)(3) does not permit the filing of CPST rate complaints with the Commission by any entity other than the LFA. Congress thus entrusted the decision whether to file a complaint to the sole discretion of the LFA. Adopting the New Jersey Advocate's suggestion would be inconsistent with the statute.

38. A number of cable operators contend that the LFA should notify the operator each time a subscriber complaint is received. Fleischman proposes that LFAs be required to provide cable operators with copies of written CPST rate complaints within 10 days of receipt of such complaints from subscribers.¹²⁶ According to Fleischman, this requirement would allow the operator to determine the validity of the complaint and place the operator on notice of its potential refund liability.¹²⁷ Fleischman notes that under the 1996 Act's new CPST rate review process, refunds begin to accrue as soon as the LFA receives a valid subscriber complaint, not when a Form 329 is filed with the Commission.¹²⁸ Fleischman argues that cable operators must be given notice of their potential refund liability as soon as possible. Fleischman proposes that after two valid subscriber complaints are filed with the LFA and forwarded to the operator, the operator would then be required to submit its rate justification, or any other defense it deemed appropriate, to the LFA within 30 days. After receiving the response from the cable operator, Fleischman suggests that the LFA have 30 days to file Form 329 and the operator's response with the Commission.¹²⁹ Time Warner proposes a similar procedure, except that under its plan the LFA would have 120 days from the effective date of the CPST rate increase in which to file a complaint with the Commission.¹³⁰

39. These proposals would place unnecessary burdens on both LFAs and cable operators. We will not require an LFA to notify the cable operator of every CPST rate complaint the LFA receives from a subscriber, particularly since the LFA may choose not to file a complaint. We acknowledge that a cable operator may have a legitimate interest in learning of subscriber complaints, even if the LFA does not elect to pursue the claim with the Commission. There is no indication in the 1996 Act or its legislative history, however, that Congress sought to impose additional burdens on LFAs in this regard. We presume that subscriber complaints are matters of public record that are accessible under state or local laws. We will, however, retain the requirement adopted in the *Interim Order* that an LFA copy the cable operator with the complaint package it files with the Commission and certify that it has done so on Form 329.¹³¹

¹²⁵See 1996 Act, § 301(b)(1)(A), 110 Stat. 115.

¹²⁶Fleischman Comments at 19. *Accord* NCTA Comments at 25.

¹²⁷Fleischman Comments at 19.

¹²⁸*Id.* See 47 U.S.C. 543(c)(1)(C) ("refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority . . . "); 47 C.F.R. 76.961(b) as amended herein, *infra* App. A.

¹²⁹Fleischman Comments at 18-21.

¹³⁰Time Warner Comments at 26-27. See NCTA Comments at 26.

¹³¹*Interim Order*, 11 FCC Rcd at 5946; 47 C.F.R. §§ 76.951(b)(6), 76.1402.

40. CATA asserts that LFAs should act as a filter for subscriber complaints rather than simply acting as a passive conduit.¹³² CATA suggests that an LFA should be required to include with each filing an affirmative statement that it believes the rates in question do not conform with the Commission's rules.¹³³ We disagree. Under the Communications Act, the Commission, not LFAs, has the responsibility and authority to determine the reasonableness of CPST rates.¹³⁴ Still, Congress presumably did not intend an LFA to pass along to the Commission subscriber complaints that the LFA knows to be invalid. The LFA should not file a complaint with the Commission that is based on subscriber complaints concerning the BST or premium services. Furthermore, the LFA must determine that it has received more than one complaint per community unit served by the operator before filing a complaint against the operator's rates in that community unit. Beyond measures such as these, which merely ensure that the LFA's complaint is not procedurally defective under Section 623(c)(3), we see nothing in the 1996 Act that imposes on LFAs any requirements with respect to substantive review of CPST rates.

41. Some commenters suggest that we abandon our interim procedure of requiring an LFA to file its complaint and the cable operator's response simultaneously.¹³⁵ These commenters recommend that we direct the LFA to file its complaint with the Commission when it serves the operator with the complaint, after which the operator would file its response directly with the Commission, with a copy to the LFA. We will retain the interim procedure in the final rules. Allowing the LFA to consider both the subscriber complaints and the cable operator's rate justification will enable the LFA to make a more informed decision as to whether or not to file a complaint with the Commission. Furthermore, the 90 day window for the Commission to consider a rate complaint is triggered when the complaint is filed. We do not believe the Commission should begin its proceeding with less than a complete record. As noted elsewhere, the rules we are adopting here impose no obligation on the LFA to file a complaint, nor do they require the LFA to perform any in-depth analysis. Rather, they allow LFAs an opportunity, consistent with Congressional intent, to participate in the rate regulation process to the degree they choose to do so.

42. In our interim rules, we found it appropriate to allow an LFA 180 days from the effective date of a CPST rate increase to file a complaint with the Commission. Assuming the LFA received subscriber complaints on the 90th day following the rate increase, it would have another 90 days to give the required notice to the cable operator, obtain the operator's response, and file a complaint and the response with the Commission. Some LFAs and consumer advocacy groups argue that no time frame is set out in the 1996 Act and that no firm deadline should be established.¹³⁶ According to these

¹³²CATA Comments at 3-4.

¹³³*Id.*

¹³⁴47 U.S.C. § 543(a)(2)(B), (c).

¹³⁵Comcast Comments at 17-20; Cox Comments 16-18; U S WEST Reply Comments at 7-9; National League of Cities ("League of Cities") Reply Comments at 10-11.

¹³⁶*See e.g.*, William Cook Comments at 1; GMCC Comments at 2-4; New York City Comments at 16-17. *But see* Massachusetts Cable Commission Comments at 7-8 (supporting the proposed 90 day window for LFAs to CPST rate complaints with the Commission).

commenters, the proposed deadline risks imposing an unwarranted burden on the LFAs.¹³⁷ The League of Cities and NATOA argue that such a deadline only serves to restrict the access of subscribers to legitimate rate relief.¹³⁸ The Greater Metro Cable Consortium ("GMCC") contends that the cable operator would not be prejudiced by the absence of a filing deadline because the rate increase could go into effect while the LFA decides whether it can and should file a complaint.¹³⁹ In the event the complaint is granted, the operator would refund only those amounts that it was never entitled to in the first instance. New York City contends that no deadline is warranted, but as an alternative suggests that operators be required to submit a rate justification to the LFA 30 days prior to the effective date of the proposed rate increase.¹⁴⁰

43. We will adopt our interim rule as our final rule. A limited time frame is required if the ratemaking process is to have any closure or finality. Shortly before enactment of the 1996 Act, this factor persuaded us to discontinue the practice of reviewing a cable operator's entire rate structure when a CPST rate complaint is filed.¹⁴¹ At that time we observed that the uncertainty created by the lingering potential of refund liability "may generally discourage investment, without which operators may lack the resources to upgrade their networks, add new programming services, and provide new and innovative services."¹⁴² For the same reasons, we will not subject cable operators to potential liability indefinitely under the revised CPST rate complaint procedure. LFAs are not prejudiced by the establishment of a reasonable deadline since they retain unfettered discretion to invoke the rate review process, assuming they have received subscriber complaints within the 90-day period mandated by Congress.

44. We reject New York City's proposal that would require an operator to provide the LFA with a rate justification in advance of the rate increase. Section 623(c)(3) precludes LFA involvement in the CPST rate review process until it has received subscriber complaints following a CPST rate increase.

45. The cable industry generally favors an abbreviated deadline for LFA rate complaints filed with the Commission. NCTA suggests that LFAs be required to file a complaint within 105 days of the effective date of the rate increase, thus giving the LFA 15 days beyond the close of the 90 day window

¹³⁷See e.g., William A. Cook, Jr. ("William Cook") Comments at 1; Greater Metro Cable Consortium, Metro Denver, CO, ("GMCC") Comments at 2-4. See also New Jersey Ratepayer Advocate Comments at 11 (arguing that the LFA must have a minimum of 90 days from the close of the subscribers 90 day window to file a CPST rate complaint with the LFA but that the Commission must allow for an extension for good cause).

¹³⁸National League of Cities and National Association of Telecommunications Officers and Advisors ("League of Cities and NATOA") Comments at 12-13.

¹³⁹GMCC Comments at 2-4.

¹⁴⁰New York City Comments at 17-18.

¹⁴¹*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 451 (1995) ("*Thirteenth Order on Reconsideration*").

¹⁴²*Id.*

for subscriber complaints.¹⁴³ Other commenters suggest that LFAs be allowed 135 days from the effective date of the CPST rate increase in which to file a complaint with the Commission.¹⁴⁴ The Massachusetts Cable Commission and the New Jersey Board agree that 180 days is reasonable.¹⁴⁵ Fleischman and NCTA express concern that the 180 day deadline undermines the Form 1240 annual rate adjustment methodology.

46. We believe the proposals to shorten the 180 day window are unrealistic. The time period for the filing of a complaint by the LFA should not begin to run before the 90th day after a rate increase, since the underlying subscriber complaints may not be received until that day. Conceivably, we could start the time period as soon as the number of subscriber complaints reaches some numerical threshold, as suggested by Fleischman, even if that occurs within a few days of the rate increase.¹⁴⁶ It is clear, however, that Congress believed it reasonable that subscribers take up to 90 days to complain to the LFA. Since subscriber complaints are the linchpin for LFA complaints to the Commission, an LFA should be permitted to take account of the number of subscriber complaints filed within 90 days in deciding whether to pass those complaints on to the Commission. This means that the time period for LFA complaints should not begin to run until 90 days after the rate increase.

47. After the 90th day, the cable operator is given 30 days to respond to the LFA's notice, since that is the standard period for rate justifications. In addition, the LFA must be afforded sufficient time after the initial 90-day period to decide whether to give the cable operator notice of its intent to file a complaint, to give such notice and review the operator's response, and determine whether to file the complaint with the Commission. Importantly, this process must accommodate any state and local requirements that govern LFA procedures. We recognize that such local procedures may differ substantially among jurisdictions.¹⁴⁷ Sixty days is not an excessive period of time to accomplish these responsibilities.

48. We note that both the LFA and the cable operator can expedite the process. The LFA may give notice of its intent to file a complaint with the Commission as soon as it receives two subscriber complaints, and need not wait until after the 90-day period for subscriber complaints has passed. Similarly, the cable operator need not take the full 30 days to respond to the LFA's notice of intent to file a complaint. We note, however, that the cable operator must file its rate justification with the LFA and cannot simply refer the LFA to a form previously filed with the Commission.¹⁴⁸ If the operator certifies

¹⁴³NCTA Comments at 26

¹⁴⁴See *e.g.*, Comcast Comments at 17-20; Cox Comments 16-18; US WEST Comments at 7-9.

¹⁴⁵Massachusetts Cable Commission Comments at 7-8; New Jersey Board Comments at 6. See also Indianapolis Comments at 3 (90 days is a reasonable time frame for the LFA to file a rate complaint on behalf of the subscribers who have already filed them with the LFA).

¹⁴⁶Fleischman Comments at 19.

¹⁴⁷GMCC Comments at 3.

¹⁴⁸When filing the relevant forms needed to justify a rate increase, we expect such justification to fully comply with our rules. See 47 C.F.R. § 76.956.

that it is not subject to rate regulation, it must accompany the certification with supporting evidence.¹⁴⁹ We encourage LFAs and cable operators to attempt to resolve rate disputes expeditiously, as that is in all parties' interests. Once the LFA receives the cable operator's rate justification and believes the complaint meritorious, it should forward the complaint and the justification to the Commission promptly. As stated in the *Interim Order*, after the Commission receives the complaint, we will decide the case based upon the information submitted.¹⁵⁰ Insufficient or incomplete cable operator responses may result in our finding that the rate increase is unreasonable. Consistent with the statute, the Commission is required to issue a final order within 90 days of receiving a complaint.¹⁵¹ The statute also provides that the parties may agree to extend the Commission's 90 day review period.¹⁵² We would anticipate an LFA and a cable operator agreeing to such an extension in the case of, for example, new information regarding a change in a cable operator's circumstance during the pendency of the Commission's review of the complaint. LFAs and operators agreeing to an extension of the 90 day review period must do so in writing and specify the period of time for which the extension is granted.

49. Therefore, we affirm our original proposal to require LFAs to file rate complaints with the Commission within 180 days of the effective date of the CPST rate increase, in accordance with the procedures described above. We find that this reconciles the operators' need for speedy resolution of complaints against its rates and the LFAs' need to accomplish any steps necessary before filing a complaint with the Commission.

2. *Bill Enclosure Information*

50. Since subscribers may no longer directly file rate complaints with the Commission, the *Interim Order* eliminated the requirement that cable operators include the name, telephone number and address of the Cable Services Bureau on all subscriber bills.¹⁵³ Cable operators generally support this proposal and point out that given the relevant amendments of the 1996 Act, this information is no longer necessary and is potentially confusing to subscribers.¹⁵⁴ Fleischman further suggests that operators no longer be required to list the LFA name and address on each subscriber bill, as currently required.¹⁵⁵ Fleischman asserts that such information is only necessary on bills which reflect CPST rate increases subject to the complaint window. NCTA agrees and further suggests that such information should only be included if requested by the LFA.¹⁵⁶

¹⁴⁹It should include evidence of a claim of effective competition or refer to a pending petition for such a finding. If the operator is small, it should include evidence that the operator meets the definition.

¹⁵⁰*Interim Order*, 11 FCC Rcd at 5946.

¹⁵¹47 U.S.C. § 543(c)(3).

¹⁵²*Id.*

¹⁵³*Interim Order*, 11 FCC Rcd at 5946.

¹⁵⁴See e.g., Cox Comments at 18; NCTA Comments at 28; Time Warner Comments at 29.

¹⁵⁵Fleischman Comments at n. 46.

¹⁵⁶NCTA Comments at 28.

51. Other commenters suggest that subscribers continue to need ready access to the Cable Services Bureau and that the name, address and telephone number of the Bureau should continue to be provided as part of the bill. New York City notes that while the Cable Services Bureau no longer accepts CPST rate complaints directly from subscribers, it remains responsible for other matters.¹⁵⁷ Consequently, New York City recommends that we continue to require operators to include this information on subscriber bills.¹⁵⁸

52. We adopt our proposal to discontinue requiring operators to include the name, address and telephone number of the Cable Services Bureau in each bill. Initial review of both the BST and CPST rates is left to the discretion of the LFA. In the case of CPST rates, however, this discretion can be exercised only if the LFA receives subscriber complaints within the 90-day statutory deadline. Given the critical role played by the LFA and the time sensitivity of consumer CPST rate complaints, we find that subscribers may be harmed if we continue to require subscriber bills to include the Cable Services Bureau information. If bills continued to include this information, subscribers might mistakenly direct CPST rate complaints to the Commission as opposed to their local franchising authority, and may consequently fail to meet the 90-day statutory deadline for LFA receipt of subscriber complaints. We will continue to require operators to include the LFA's name, address and telephone number because this information will generally assist subscribers in exercising their statutory right to file a CPST rate complaint with the LFA. However, because LFAs interact regularly with subscribers, we believe they are better positioned to evaluate the needs of subscribers and the means to serve those needs. We will therefore permit LFAs the discretion to allow operators to omit this information.

3. *Threshold for Subscriber Complaints*

53. In our interim rules, we determined that for purposes of triggering the LFAs' authority to file a CPST rate complaint with the Commission, Congress intended to require at least two subscriber complaints be properly filed for each community unit before the LFA filed a complaint with the Commission. C-TEC Cable Systems, Inc. and Mercom argue that members of the franchising authority such as the mayor or a city council member, should not be counted toward the two subscriber threshold required for an LFA to file a complaint with the Commission.¹⁵⁹

54. We reject C-TEC and Mercom's argument that members of the franchising authority should not be counted toward the two subscriber threshold. C-TEC and Mercom cites no authority for its position. To the extent that these individuals are cable subscribers, they have the same rights as other cable subscribers.

55. Similarly, C-TEC and Mercom urge the Commission to require all subscriber complaints to the LFA to be in writing if they are to count toward the two subscriber threshold.¹⁶⁰ Other commenters

¹⁵⁷New York City Comments at 18.

¹⁵⁸*Id.*

¹⁵⁹C-TEC Cable Systems, Inc. and Mercom, Inc. ("C-TEC and Mercom") Comments at 6.

¹⁶⁰*Id.* at 12.

suggest that complaints to the Commission be dismissed if they are not accompanied by two written subscriber complaints or if the underlying subscriber complaints are subsequently withdrawn.¹⁶¹

56. We will not dictate to the LFAs the manner in which they deal with their own constituencies. We will continue to allow the LFA to use the records maintained in accordance with its regular business practices to establish that it has received the requisite subscriber complaints within 90 days of a rate increase. We will, however, condition the filing of a CPST rate complaint upon the LFA's certification that it has received two or more subscriber complaints about CPST rates during the 90 day period after the rate became effective.¹⁶²

4. *FCC Form 329*

57. Our rules require that CPST rate complaints be filed with the Commission using the standard rate complaint form, FCC Form 329.¹⁶³ TCI advocates that the Commission require LFAs filing rate complaints to use Form 329 with appropriate revisions.¹⁶⁴ According to TCI, continued use of an amended Form 329 will ensure that valid complaints are resolved quickly and invalid complaints are weeded out expeditiously.¹⁶⁵ NCTA urges the Commission to continue requiring subscribers to use Form 329 when filing CPST rate complaints with the LFA. NCTA argues that Form 329 provides a simple, easily understood format that can be completed by subscribers and reviewed by affected parties.¹⁶⁶

58. The State of New York suggests several changes to the Form 329. It recommends that references in the form to the complainant should be to the "franchising authority" and not to the "local franchising authority" for consistency with the statute and Commission rules.¹⁶⁷ The State of New York also cites to language in paragraph 1 of page 2 of the form. The State of New York suggests that language in the Form 329 asking the LFA to certify that it has received subscriber complaints "within 90 days of the increase first appearing on the subscriber's bill" be amended to "within 90 days of the effective date of the rate increase" in order to conform with the statute, the rules and the balance of the form.¹⁶⁸ In addition, the State of New York notes that as proposed, Form 329 states that "[i]ncomplete filings cannot be processed and will be returned" even though the form requires "in detail" specific information which may not be readily available to the franchising authority without the cooperation of the cable operator. The State of New York expresses concern that as the form currently reads, the operator would control the LFA's ability to file a valid complaint. Accordingly, the State of New York suggests that the

¹⁶¹NCTA Comments at 27; Time Warner Comments at 28.

¹⁶²FCC Form 329 currently requires LFA certification that it has received complaints.

¹⁶³47 C.F.R. § 76.951.

¹⁶⁴TCI Comments at 25-27.

¹⁶⁵*Id.*

¹⁶⁶NCTA Comments at 26, n. 75.

¹⁶⁷State of New York Comments at 17.

¹⁶⁸*Id.*

form should indicate that if the cable operator has not responded in a timely manner to the notice of intent to file a complaint, the LFA need only use reasonable efforts to obtain and provide the information requested on Form 329.¹⁶⁹

59. We agree that LFAs should continue to use Form 329 to file CPST rate complaints with the Commission. As with our proposed rule, LFAs should use Form 329 to serve notice on the operator of its intent to file a CPST rate complaint with the Commission.¹⁷⁰ When providing the operator of notice of its intent to file a complaint, the LFA also should indicate the date by which the cable operator must respond. The response date must be no less than 30 days from the date the notice of intent to file a complaint is received by the cable operator. The notice and the draft Form 329 should be sent to the cable operator simultaneously using a delivery service that can establish the date of receipt through routine business documents.

60. We see no need to require that subscribers use Form 329 when filing complaints with the LFA. Subscriber complaints to the LFA can be received in any form acceptable to the LFA. We will, however, condition the filing of a CPST rate complaint with the Commission upon the LFA's certification that it has received two or more subscriber complaints about CPST rates during the 90 day period after the rate became effective. Consistent with the statutory language, subscriber complaints filed with the LFA prior to the effective date of the rate increase may not be counted toward the subscriber complaint threshold for filing a complaint with the Commission.¹⁷¹ Because subscriber notice of a planned rate increase by a cable operator may not in every case result in an actual rate increase, consideration of only those subscriber complaints filed with the LFA on or after the effective date of a rate increase will prevent unnecessary investigations of rate increases that were not in fact implemented.

IV. SMALL CABLE OPERATORS

A. Background

61. Section 301(c) of the 1996 Act amended Section 623 of the Communications Act to exempt small cable operators from rate regulation requirements. New Section 623(m) of the Communications Act defines a small cable operator as "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁷² The exemption applies to cable programming services or a basic service tier that was the only service tier subject to regulation as of December 31, 1994 in any franchise area in which that operator services 50,000 or fewer subscribers.

¹⁶⁹*Id.*

¹⁷⁰47 C.F.R. 76.951(a), (b)(6).

¹⁷¹*See* 47 U.S.C. § 543(c)(3)(an LFA may not file a complaint "unless, within 90 days after such increase becomes effective it receives subscriber complaints").

¹⁷²47 U.S.C. § 543(m).

62. The *Interim Order* treated an operator serving fewer than 617,000 subscribers as a small operator if its annual revenues, including revenues of affiliated entities, do not exceed the \$250 million revenue ceiling.¹⁷³ The interim rules defined an affiliate as an entity having a 20% or greater equity interest in the operator (active or passive) or exercising de jure or de facto control over the operator.¹⁷⁴ This definition of "affiliate" mirrors the definition of affiliate under our pre-existing small system cost-of-service rules governing rates charged by certain small systems that are not exempted by the statute.¹⁷⁵ The *Interim Order* also established interim procedures for asserting small operator eligibility.¹⁷⁶

63. The *Notice* solicited comment on several issues. The issues raised are the methodology that should be employed to determine the subscriber threshold under the statute; our proposal to implement as a permanent rule a definition of affiliate that would establish affiliation when an entity owns an active or passive equity interest of 20% or more in the cable operator or holds de facto control over the operator; the calculation of "gross annual revenues" counted toward the \$250 million threshold; procedures for determining eligibility for small operator treatment; and the treatment of operators that lose eligibility for small operator relief and become subject to regulation.¹⁷⁷

B. Discussion

I. Subscriber Count

64. The *Notice* proposed that the national subscriber threshold in Communications Act Section 623(m) should be determined annually, using the most reliable means available from industry groups, trade journals or other sources.¹⁷⁸ Commenters generally support this proposal.¹⁷⁹ SCBA however, contends that the Commission is obligated to seek approval from the Small Business Administration ("SBA") before promulgating a final rule implementing the statutory definition of small operator set forth in the 1996 Act.¹⁸⁰ SCBA argues that the Small Business Act requires all agencies, including the Commission, to

¹⁷³*Interim Order*, 11 FCC Rcd at 5947.

¹⁷⁴*Id.* at 5948.

¹⁷⁵See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7412 n. 88 (1995) ("*Small System Order*"); 47 C.F.R. § 76.934(a); FCC Form 1230 Establishing Maximum Permitted Rates for Regulated Cable Services on Small Cable Systems (Aug. 1995).

¹⁷⁶*Interim Order*, 11 FCC Rcd at 5948-50.

¹⁷⁷*Notice*, 11 FCC Rcd at 5965-68.

¹⁷⁸*Id.* at 5965.

¹⁷⁹NCTA Comments at 29-30; CATA Comments at 5; Massachusetts Cable Commission Comments at 8.

¹⁸⁰SCBA Comments at 4.

obtain approval from the Administrator of the SBA before it can "prescribe a size standard for categorizing a business concern as a small business concern."¹⁸¹

65. We disagree with SCBA's contention. Congress has defined a small cable operator in the 1996 amendments to the Commission's governing statute as an operator that serves fewer than 1% of all subscribers in the nation and is unaffiliated with entities whose gross annual revenues exceed \$250 million. By selecting sources from which to estimate the national subscriber base, the Commission is not "prescribing a size standard" for small operators.¹⁸² The Commission is merely implementing the specific terms of the statute. Accordingly, we will determine the subscriber count on a periodic basis using the most reliable sources publicly available. The SBA Assistant Administrator for Size Standards supports this approach.¹⁸³

66. As proposed in the *Notice*, we will apply the small operator definition to qualifying systems serving 50,000 or fewer subscribers on an individual franchise area basis. We will not aggregate subscribers in adjoining franchise areas, even though they might be served by a common head end or be part of a common system. The explicit terms of the statute provide for the exemption "in any franchise area" and require this interpretation.¹⁸⁴ Commenters addressing this issue generally agreed.¹⁸⁵ In addition, each separately billed or billable customer will count as a household subscribing to the cable operator's cable service. As proposed in the *Notice* and supported by commenters,¹⁸⁶ subscribers in MDUs should be counted by using the equivalent billing unit methodology.¹⁸⁷ Households used solely for seasonal, occasional, or recreational use should not be included in the customer count.¹⁸⁸

¹⁸¹*Id.* (quoting 15 U.S.C. § 632(a)(2)(C)).

¹⁸²*See* 15 U.S.C. § 632(a)(2)(C).

¹⁸³*See* U.S. Small Business Administration, Assistant Administrator for Size Standards, Comments at 2.

¹⁸⁴Communications Act § 623(m), 47 U.S.C. § 543(m).

¹⁸⁵NCTA Comments at 38; Fleischman Comments at 26; National Telephone Cooperative Association ("NTCA") Comments at 3. *But see* LSGAC Recommendation 13(E), recommending that the Commission count all franchise territories operated by a single system if the system is held by a multiple system owner.

¹⁸⁶*See Notice*, 11 FCC Rcd at 5967; NCTA Comments at 38.

¹⁸⁷*See* Public Notice: Questions and Answers on Cable Television Regulation, pp. 1-2 (released July 27, 1994). Under the EBU methodology, subscribers to bulk-rate services are calculated by dividing the annual bulk-rate charge by the basic annual subscription rate for individual households. The specific individual household rate that is used should correspond to the level of service received by the bulk rate customer.

¹⁸⁸*See generally* 47 C.F.R. § 76.905(c) (counting subscribers for the purpose of the effective competition tests).

2. Definition of "affiliate"

67. In the *Interim Order*, we determined that applying the definition of "affiliate" used in our small system cost-of-service rules¹⁸⁹ to implement Section 623 (m) on an interim basis was reasonable because the small system rules and the small cable operator provisions of the 1996 Act have similar objectives of minimizing regulation and enhancing the capital attractiveness of small cable entities, while ensuring that the benefits of small system regulation are not extended to larger entities where such relief is unnecessary and inappropriate.¹⁹⁰ We also concluded that we could depart from the definition of "affiliate" set forth in Title I of the Communications Act because Title VI, where the small cable operator provisions arise, contains its own definition of "affiliate."¹⁹¹ We therefore implemented a definition of "affiliate" that conformed to the policy objectives of the small operator provisions of the Communications Act.

68. With respect to the 1996 Act's \$250 million gross revenue threshold, the *Interim Order* adopted the gross revenue definition used to determine eligibility for certain frequencies devoted to personal communications services ("PCS"). Under that definition, gross revenue includes "all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period."¹⁹² We determined, however, that audited quarterly financial statements would not be required to verify these amounts, although we requested comment regarding methods to verify gross revenue figures for natural persons.¹⁹³ In addition, the *Interim Order* tentatively concluded that the statute requires aggregation of the revenue of all affiliates toward the \$250 million threshold.¹⁹⁴ We sought comment on whether the operator's own revenues and non-cable revenues of affiliates should be counted toward the \$250 million threshold.¹⁹⁵

69. We will adopt the 20% ownership standard to determine affiliation under Section 301(c) of the 1996 Act. As noted in the *Interim Order*, we adopted the 20% ownership standard in the course

¹⁸⁹47 C.F.R. § 76.934(a).

¹⁹⁰*Interim Order*, 11 FCC Rcd at 5948.

¹⁹¹*Notice* at 5965. The Title VI definition provides: "[T]he 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." 47 U.S.C. § 522(2).

¹⁹²*Id.* at 5966 (citing 47 C.F.R. § 76.720(f)). In determining whether the \$250 million threshold has been crossed, we will evaluate revenues according to the fiscal year of the entity holding the ownership interest in the small cable operator.

¹⁹³*Id.*

¹⁹⁴*Id.* at 5966-67.

¹⁹⁵*Id.* at 5967.

of our earliest efforts to establish a separate regulatory scheme for smaller cable systems.¹⁹⁶ We explained that the 20% threshold served as the point where a large entity "will have a significant enough stake that it will be likely to extend financial resources to the small operator should that operator face financial difficulties."¹⁹⁷ As a general matter, commenters in this proceeding support the 20% threshold although they raise concerns regarding the types of investment interests applicable to the 20% test. Fleischman states that Congress was aware of the 20% ownership test at the time it adopted the 1996 Act. Hence, Congress's decision to leave the 20% test in effect as a small system affiliation standard suggests legislative acceptance of the 20% threshold.¹⁹⁸ On the other hand, the SCBA argues in favor of a "safe harbor" rule that would ensure that a holder of a 20% voting interest (or less) would not be deemed affiliated with the small operator, and that a holder of a 20% to 50% voting interest would be allowed to make an affirmative showing of non-affiliation based on the absence of control.¹⁹⁹ The SBA Office of Advocacy encourages the Commission to model its rules after the SBA's affiliation rules to avoid discouraging inherently passive investment.²⁰⁰

70. In adopting the 20% threshold as a permanent rule, we adhere to our prior conclusion that investments at this level provide sufficient incentive for the affiliated entity to provide financial support to the smaller cable entity. The affiliation definition set forth in Title VI of the Communications Act recognizes that affiliation can be demonstrated either by an ownership interest or by control.²⁰¹ The standard proposed by the SCBA, requiring the absence of control for voting interests of 20% to 50%, would eviscerate the ownership standard as an independent basis for affiliation. Moreover, we believe the absence of legislative action to change the standard in the 1996 Act is some indication that Congress did not object to the 20% test or the balance it strikes between supporting the capital attractiveness of smaller systems and the consumer protection objectives of Title VI. Accordingly, we will maintain the 20% ownership test as a final rule. If two or more unaffiliated entities hold an equity interest in the small cable operator, we will not aggregate the equity interests of the entities. For example, if two unaffiliated entities each held a 15% interest in the cable operator, neither would be deemed affiliated with the small cable operator.

71. Commenters also address whether the Commission should articulate distinctions between active and passive investment when determining whether an entity is affiliated with a cable operator. Cable operators argue that many smaller operators depend upon substantial passive equity investments and

¹⁹⁶*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4173 n.157 (1994) ("Second Reconsideration Order").*

¹⁹⁷*Id.*

¹⁹⁸Fleischman Comments at 23.

¹⁹⁹SCBA Comments at 19.

²⁰⁰U.S. Small Business Administration, Office of Advocacy, Ex Parte Submission (filed Nov. 12, 1996). The Office of Advocacy advises that the SBA's affiliation rules in 13 C.F.R. § 121.103 distinguish between different types of investors and focus on the amount of voting stock held by the investor and de facto control. The SBA Assistant Administrator for Size Standards also notes the SBA definition of affiliation in his Comments at 3.

²⁰¹47 U.S.C. § 522(2).

that allowing such investments to constitute affiliation would detrimentally affect the operators' ability to maintain their current operating structures. They claim that passive investments by financial institutions fail to provide technical resources or operating efficiencies to small operators and thus revenues from these passive investments should be excluded from the ownership test.²⁰² In the alternative, NCTA argues for either a more liberal threshold when passive investment is involved or the adoption of a procedure to enable small operators to request waiver of the affiliate standard when other attributes warrant small system regulatory relief.²⁰³ Citing the "small business" definition in the broadband C Block rules for PCS, Cole Raywid argues that passive investment should not be counted until it exceeds 50% ownership of the small operator.²⁰⁴ SCBA seeks a control-oriented test for investments counted toward the ownership threshold, arguing that passive investment is important to small operators and that its inclusion toward the threshold would shrink the number of small operators qualifying for regulatory relief.²⁰⁵ If passive investment is excluded, the SCBA argues that limited investor oversight of the operator should not disqualify the investment from passive treatment.²⁰⁶

72. Investment firms also seek the exclusion of passive investments from the affiliation test. General Electric Capital Corporation claims that passive investors do not seek day-to-day management of the enterprise and would seek only to engage in limited oversight to ensure compliance with ownership and attribution rules. Thus, it argues for a passive/active distinction to ensure that investors do not shy away from cable operators when greater investment would fail to maximize the revenue advantages that stem from small operator status.²⁰⁷ Similarly, J.P. Morgan and other investment banks contend that small operators pose capital risks that underscore the importance of maximizing revenue potential. Accordingly, these investors assert that they would not risk losing such advantages by taking their investment beyond the 20% threshold.²⁰⁸ In addition, these institutions emphasize that their passive investments are conducted on behalf of investor-clients, and their primary allegiance is to these individuals rather than to the cable operator receiving the capital investment. Thus, passive investment does not afford operational advantages to the cable operator.²⁰⁹ Local regulators take the opposite view, arguing for inclusion of both active and passive interests. They emphasize that a 20% investment, active or passive, is a substantial enough investment to justify a finding of affiliation. In their view, the 20% threshold itself accommodates the

²⁰²NCTA Reply Comments at 22; CATA Comments at 4; Falcon Holding Group, L.P. ("Falcon") Comments at 5.

²⁰³NCTA Comments at 35-36.

²⁰⁴Cole Raywid Comments at 14-15.

²⁰⁵SCBA Comments at 14-17.

²⁰⁶SCBA Reply Comments at 10. *See also* FrontierVision Operating Partners, L.P. Comments at 6.

²⁰⁷General Electric Capital Corporation ("GE Capital") Reply Comments at 2-4.

²⁰⁸J.P. Morgan & Co., Brown Brothers Harriman & Co., Olympus Partners, and First Union Capital Partners, Inc. Reply Comments at 3.

²⁰⁹*Id.* at 4.

more limited nature of passive investment, recognizing that any investment at such levels will justify a determination that the interests of the affiliated entities are aligned.²¹⁰

73. We will exclude truly passive investments when determining whether an investor's interest in a cable operator exceeds 20% for purposes of small cable operator deregulation. The record in this proceeding demonstrates that the typical smaller operator is likely to depend upon passive equity investment from large financial institutions that have annual revenues in excess of the \$250 million cap established by Congress. A large investor with more than \$250 million in revenues may be reluctant to take the investment beyond a 20% ownership interest if that added investment jeopardizes more favorable regulatory treatment. Counting truly passive investment toward the 20% affiliation standard could punish a large number of operators that presumably were the intended beneficiaries of the small operator provision of the 1996 Act. Only truly passive investments will be excluded for these purposes.²¹¹ A cable investor that takes an equity interest in the cable operator goes beyond passivity when the investor places its own representative on the cable operator's board of directors or on an advisory committee or in any other manner has its representatives involved in the operation of the business. Likewise, an investor will not be deemed passive if it retains the authority to approve or disapprove the cable operator's standard business transactions. In these cases, the investor is taking an active role in the operation of the cable system and thus should be deemed affiliated with the operator, if the investment meets the 20% threshold. We recognize that this approach is different than that used in many other areas where the Commission addresses "attribution" or affiliation issues. We believe it is appropriate here because the concerns that are being addressed are not the usual issues of program content influence or anticompetitive economic incentives. Here the concern is to limit the class of operators to whom this exemption applies while not cutting off investments that will aid in system growth and modernization.

74. The affiliation test of Section 301(c) also depends upon whether entities affiliated with the small operator generate at least \$250 million in annual revenue. A number of commenters expressed concern regarding the revenue sources that might be included in this statutory formula for affiliation. Cole Raywid, for example, argues against the inclusion of non-cable revenues in calculating gross revenues, suggesting that the potential field of small cable investors could be affected significantly by a broad definition of applicable revenue sources.²¹² Moreover, Cole Raywid suggests Congress may have intended the \$250 million figure as a "backstop" to determine the propriety of small system relief when an operator moves above the one percent subscriber limit, because \$250 million is roughly what an operator would

²¹⁰Michigan, Illinois and Texas Communities Reply Comments at 13.

²¹¹We note that both active and passive investments are counted toward the affiliation standard set forth in the *Small System Order*. 10 FCC Rcd at 7412 n.88. Unlike the *Small System Order's* affiliation inquiry, however, the affiliation test in the context of the \$250 million revenue threshold focuses on access to financial resources rather than the expertise and efficiencies associated with access to a wider subscriber base. We further note, however, that even in the context of the *Small System Order*, the Commission has indicated that it may discount the impact of purely passive investment in its affiliation inquiry. See *Insight Communications Company, L.P.*, 11 FCC Rcd 1270, 1271-73 (1995) (cable operator whose passive owner held 34% interest was allowed small system rate relief).

²¹²Cole Raywid Comments at 10-11.

generate with a one percent share of the national subscriber market.²¹³ C-TEC and Mercom make a similar argument.²¹⁴

75. GE Capital also contends that non-cable revenues should be excluded from the \$250 million revenue cap. According to GE Capital, the Commission should limit the cap to cable revenues because those revenues indicate whether the large affiliated entity can provide practical assistance to the small operator, including operational expertise, administrative economies of scale and discounts on programming or equipment.²¹⁵ Telephone companies have also opposed counting non-cable revenues. BellSouth asserts that non-cable revenues should not count toward the cap because only large operators with revenues above the cap have the resources and expertise to ease regulatory burdens on small operators.²¹⁶ USTA asserts that inclusion of non-cable revenues would impair small cable operator access to capital needed to compete in a competitive video services market.²¹⁷ On the other hand, local regulatory authorities argue for the inclusion of all revenues, cable and non-cable, because Congress decided against limiting the sources of applicable revenue in the statute itself.²¹⁸

76. We also conclude that non-cable revenues should be counted toward the \$250 million cap. In determining whether the \$250 million threshold has been crossed, we will evaluate revenues according to the fiscal year of the entity holding the ownership interest in the small cable operator. The language of the statute describes the \$250 million cap in general terms and we believe a reasonable construction of the statute includes non-cable revenues toward the cap. We believe that Congress, in establishing the revenue cap, presumed that capital access is enhanced through affiliation with an entity that generates substantial revenues. Whether the revenues derive from cable or non-cable enterprises, the existence of a large revenue base was deemed sufficient to increase the affiliated operator's access to capital sources. Given the range of current and potential investors in the cable industry, Congress could have limited estimations of the revenue cap to cable revenues. It did not do so. We will therefore include non-cable revenues when determining whether an operator is affiliated with an entity generating \$250 million in annual revenues.

77. Finally, we must also consider whether multiple equity stakes in a small operator can be accumulated toward the \$250 million threshold. SCBA urges the Commission to resist aggregation based on language in the Joint Committee Report that seems to limit the small operator's ability to affiliate "with any entity" whose annual revenues exceed the cap.²¹⁹ In the alternative, SCBA advocates a proportional aggregation under which the affiliated entity's revenues are applied toward the cap in proportion to the

²¹³Cole Raywid Comments at 10-11.

²¹⁴C-TEC and Mercom Comments at 4-5.

²¹⁵GE Capital Reply Comments at 6-7.

²¹⁶BellSouth Comments at 4-5.

²¹⁷United States Telephone Association ("USTA") Reply Comments at 11.

²¹⁸Massachusetts Cable Commission Comments at 9; Michigan, Illinois and Texas Communities Reply Comments at 16.

²¹⁹SCBA Comments at 22.

equity proportion it holds in the small operator.²²⁰ Cole Raywid also opposes aggregation, contending aggregation will impair the ability to raise capital.²²¹ NCTA and the Michigan, Illinois and Texas Communities argue that aggregation is appropriate because the statutory language clearly requires it.²²² The FCC Local State Government Advisory Committee recommends that the Commission adopt a broad definition of affiliate that counts all systems operated by a multiple system owner and its subsidiaries.²²³

78. We agree with those commenters who contend that the statute requires aggregation in this context. Section 623(m)(2) of the Communications Act states that a small operator seeking regulatory relief pursuant to that provision cannot be affiliated "with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²²⁴ The explicit language specifies that revenues are calculated "in the aggregate" and we will implement this provision accordingly. In calculating the gross revenue cap, we will not require entities to submit audited quarterly financial statements if such entities do not routinely generate them.²²⁵ Rather, a small operator can provide published financial data of its affiliated entities or provide declarations of affiliated entities describing their interest in the small operator. If such materials do not provide adequate information regarding affiliation, we will consider other evidence of affiliation as we deem appropriate on a case-by-case basis.

3. Procedures

79. The interim rules set forth a procedure that enables operators to assert eligibility for small operator treatment. For cable operators that offered only a single tier of service as of December 31, 1994, eligibility for small operator treatment can be established through a certification application to the LFA. The LFA is obligated to act upon the request within 90 days and appeals from the decision may be filed with the Commission. Also, qualifying systems with more than one tier of service as of December 31, 1994, may assert deregulated status in response to notice from the LFA that it intends to file a CPST rate complaint. The operator's certification of eligibility for small operator treatment serves as the response to the complaint.²²⁶

80. We solicited comment on our proposal to adopt the procedures set forth in the interim rules on a permanent basis. We also sought comment regarding alternative mechanisms or approaches that would further minimize the administrative burdens on operators and franchising authorities in cases where eligibility for small operator treatment is not in dispute.²²⁷ Cable operators support simplified

²²⁰*Id.* at 22-23.

²²¹Cole Raywid Comments at 15.

²²²NCTA Comments at 37; Michigan, Illinois and Texas Communities Reply Comments at 15.

²²³LSGAC Recommendation 13(E).

²²⁴47 U.S.C. § 543(m)(2).

²²⁵See NCTA Comments at 37; SCBA Comments at 20.

²²⁶*Interim Order*, 11 FCC Rcd at 5949.

²²⁷*Notice*, 11 FCC Rcd at 5969.

procedures for asserting eligibility for small operator treatment. NCTA urges the Commission to clarify that certifications need not be filed unless and until the LFA regulates BST rates.²²⁸ The SCBA argues that a simple declaration of eligibility should be sufficient and that the LFA's failure to act on the certification declaration within 60 days would render the certification effective.²²⁹ Fleischman supports filing certification requests directly with the Commission to obviate multiple filings with several LFAs having jurisdiction over the system.²³⁰ Both NCTA and the SCBA request rules that would allow operators to appeal to the Commission when information requests made by LFAs are considered unduly burdensome.²³¹

81. Subject to one modification, we will adopt the procedures set forth in the *Interim Order*. We believe they are sufficiently streamlined to minimize administrative burdens on operators while enabling LFAs a reasonable opportunity to address the merits of the operator's assertions. Under the 1996 Act, operators qualifying for small operator treatment are exempt from certain regulatory provisions on the date of enactment. Operators claiming entitlement to such treatment may operate accordingly. We believe, however, that LFAs must have the opportunity to assess the circumstances of each case. The 90-day response period allows LFAs sufficient time to determine eligibility for small operator treatment. Because LFAs initiate the CPST rate complaint process and address BST rate issues, certification requests should be addressed at the LFA level subject to Commission review, and can be filed at any time. We will allow operators to appeal to the Commission when information requests from LFAs are deemed too burdensome and the LFA refuses to drop or modify the information request in response to the operator's challenge. As stated in the *Interim Order*, an LFA may request that an operator seeking certification identify in writing all of its affiliates providing cable service, the total cable subscriber base of itself and each affiliate, and the aggregate gross revenues of all its cable and non-cable affiliates.²³²

82. With respect to small operators with only one tier of service subject to regulation as of December 31, 1994, we will adhere to our tentative conclusion that such operators are deregulated on all tiers of service if they otherwise qualify for small operator treatment. A system that now offers more than one tier of service but had only one tier subject to regulation on December 31, 1994, would now be deregulated on its BST as well as its CPST(s) if it meets the relevant numerical thresholds and limits of the statute. The statute states that its deregulatory provisions apply to small operators with respect to "a basic service tier that was the only tier subject to regulation as of December 31, 1994."²³³ Commenters agree with the Commission's tentative conclusion in this regard.²³⁴ Operators claiming eligibility for

²²⁸NCTA Comments at 41.

²²⁹SCBA Comments at 28.

²³⁰Fleischman Comments at 25.

²³¹NCTA Comments at 41; SCBA Comments at 28.

²³²*Interim Order*, 11 FCC Rcd at 5948-49.

²³³47 U.S.C. § 543(m).

²³⁴State of New York Comments at 28; National Telephone Cooperative Ass'n ("NTCA") Comments at 4; NCTA Comments at 39.

deregulatory treatment based on this aspect of the small operator provision may assert such eligibility consistent with the procedures established in this Order.

4. *Transition From Small Operator Treatment*

83. In the *Notice*, we requested comment regarding the implementation of a transition process for operators that lose eligibility for small operator treatment and become subject to regulation. We tentatively concluded that an instantaneous shift from deregulation to full regulation could prove disruptive to consumers and operators. We also noted that the potential imposition of regulation simply because subscribers have been added to the system could discourage operators from providing the quality of service that expands the operator's customer base.²³⁵

84. Cable operators advocate a transition rule similar to the rule applied in the *Small System Order*.²³⁶ Under the *Small System Order*, a small system (no more than 15,000 subscribers) affiliated with a small cable company (no more than 400,000 subscribers) may set rates in accordance with the small system cost-of-service rules. The transition rule has two components. First, a small system that establishes its eligibility for the small system cost-of-service rules retains that even if the parent cable company subsequently exceeds the 400,000 subscriber threshold, or the small system is acquired by a separate cable company that exceeds that threshold.²³⁷ Second, when the system itself exceeds the 15,000 subscriber limit, it can continue to charge the last maximum rate it was able to justify while it still qualified under the small system rules, although subsequent rate increases must be justified under our standard benchmark or cost-of-service rules applicable to cable operators generally.

85. NCTA contends that application of the latter approach is consistent with the goal of increasing the value of smaller cable systems in the eyes of potential investors.²³⁸ In cases where a small operator exceeds the 50,000 subscriber ceiling in the franchise area, NCTA advocates maintenance of rates established while the operator was deregulated but allowing subsequent rate increases under applicable rate regulations.²³⁹ Other operators support a "snapshot" approach under which operators qualifying as "small operators" on the date of enactment of the 1996 Act can maintain their deregulated status regardless of events subsequent to that date.²⁴⁰ With respect to the \$250 million revenue threshold, for example, cable operators request a rule that would preserve an operator's deregulated status even if entities affiliated with the operator later increase their revenues to the point of exceeding the \$250 million threshold. They argue

²³⁵*Notice*, 11 FCC Rcd at 5969. *See also* SCBA Comments at 10-11.

²³⁶NCTA Comments at 43; Cole Raywid Comments at 16.

²³⁷*Small System Order*, 10 FCC Rcd at 7413-14.

²³⁸NCTA Comments at 43.

²³⁹*Id.*

²⁴⁰Fleischman Comments at 29; Time Warner Comments at 44.

that the threat of losing regulatory relief based on expanded affiliate revenues would discourage investors from affiliating with small operators.²⁴¹

86. CATA advocates an extended transition period of two years to ensure the operator's financial stability.²⁴² On the other hand, the City of Fairfield, California ("Fairfield") argues that the statute mandates regulation when an operator loses small operator eligibility.²⁴³ According to Fairfield, subscribers should not lose the benefits of regulation during a transition period. It argues that rate refund liability should extend back to the date that small operator eligibility was lost. Moreover, Fairfield contends that operators have increased their subscriber totals under regulation and will continue to have incentives to do so when small operator status is terminated.²⁴⁴

87. As recognized in the *Notice*, the language of the 1996 Act requires regulation to commence once an operator no longer qualifies for small operator treatment under the governing statute's subscriber or revenue criteria.²⁴⁵ Before the 1996 amendments, the Communications Act did not give us the discretion "totally to exempt small systems, even those very small systems with under 400 subscribers, from rate regulation"²⁴⁶ The 1996 Act now mandates such an exemption for small cable operators in franchise areas where they serve fewer than 50,000 subscribers but, with respect to operators that do not meet these criteria, gives us no more discretion than we had before. When a system no longer meets the small cable operator criteria for deregulation, the statute imposes rate regulation.²⁴⁷

88. At the same time, we recognize that a sudden transition to regulation upon the loss of small operator treatment could prove disruptive to consumers and operators. Accordingly, we will implement a transition approach that is conceptually similar to the approach used pursuant to the *Small System Order* but cognizant of the statutory obligations to protect consumers under Section 623.

89. We will allow small operators that lose eligibility for small operator treatment to maintain the rates that prevailed prior to the loss of eligibility. After a cable operator loses eligibility under the small operator provisions of the statute, subsequent rate increases will be subject to generally applicable

²⁴¹Fleischman Reply Comments at 14; Time Warner Reply Comments at 57; Cole Raywid Reply Comments at 7; NCTA Reply Comments at 25; US WEST Reply Comments at 5.

²⁴²CATA Comments at 7.

²⁴³City of Fairfield, CA ("Fairfield") Comments at 2-3. *See also* Los Angeles, League of Cities, and NATOA Reply Comments at 14.

²⁴⁴Fairfield Comments at 3.

²⁴⁵*Interim Order*, 11 FCC Rcd at 5969.

²⁴⁶*Rate Order*, 8 FCC Rcd at 5922 (footnote omitted).

²⁴⁷The transition rules established under our *Small System Order*, which temporarily maintain rate relief for systems that lose their technical eligibility for small system relief, are not a good analogy because those rules simply provide for transition from one form of rate regulation to another. Systems covered by those rules are always subject to some form of regulation, as required by the statute.

regulations governing increases.²⁴⁸ BST rates that were subject to small cable treatment will not be subject to full benchmark review. Our objectives are to minimize disruption to newly regulated operators and to assure operators that successful subscriber growth will not subject them to burdensome regulation. We do not want our regulations, however, to act as an incentive for an operator to raise rates dramatically as a means of protecting those rates from regulatory review, when it becomes apparent that the operator is about to lose its deregulatory status. In order to carry its rates over into regulation, an operator must demonstrate that it has had such rates in effect three months prior to the loss of small operator eligibility. Although some reasonable variation in rates over the preceding three-month period would not disqualify an operator from transition treatment, a substantial spike in rates during the three-month period would indicate that rates were increased primarily to ensure that higher rates carry over into the regulated environment.

V. DEFINITION OF "AFFILIATE" IN THE CONTEXT OF CABLE-TELCO BUY-OUTS

90. Section 302 of the 1996 Act added Section 652 to the Communications Act. Section 652 provides in relevant part:

(a) Acquisitions By Carriers. No local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area.

(b) Acquisitions By Cable Operators. No cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area.²⁴⁹

91. In the *Interim Order*, we implemented Section 652 by adopting its terms into our rules. In the *Notice*, we solicited comment regarding the definition of "affiliate" as that term is used in the context of the cable-telco buy-out provision.²⁵⁰ Subsequent to the *Notice*, we released the *Cable Attribution Notice* initiating a broad review of the attribution/affiliation issue as it pertains to cable.²⁵¹ As we are doing with the LEC affiliate definition raised in the effective competition context in this

²⁴⁸See *Thirteenth Order on Reconsideration*, 11 FCC Rcd at 451 (operators not previously subject to CPST rate regulation will not face Commission review of entire rate structure if a complaint is filed).

²⁴⁹47 U.S.C. § 572.

²⁵⁰*Notice*, 11 FCC Rcd at 5970. The *Notice* also solicited comment regarding the definition of affiliate in the context of open video systems. That issue was addressed in *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20230-37 (1996), and may be revisited in *Cable Attribution Notice*, 13 FCC Rcd at 12998-99 para. 15 & n.52.

²⁵¹*Cable Attribution Notice*, 13 FCC Rcd at 12998-99 para. 15 & n.52.

proceeding, we are referring the definition of "affiliate" in the context of buy-outs to the *Cable Attribution Notice* proceeding. Relevant comments submitted in this proceeding will be considered in CS Docket 98-82.

VI. UNIFORM RATE REQUIREMENT

A. Background

92. Section 623(d) of the Communications Act requires that: "A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."²⁵² The 1996 Act clarifies that the uniform rate requirement does not apply where the cable operator is subject to effective competition and does not apply to programming offered on a per channel or per program basis. The 1996 Act also exempts bulk discounts to multiple dwelling units ("MDUs") from the uniform rate requirement, and prohibits a cable operator from charging predatory prices to an MDU. The amendment provides:

This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.²⁵³

93. The *Interim Order* amended Section 76.984 of our rules to conform with the new statutory language.²⁵⁴ The *Notice* sought comment on several aspects of this amendment. We tentatively concluded that the bulk rate exception does not permit a cable operator to offer discounted rates on an individual basis to subscribers simply because they are residents of an MDU, but rather requires a bulk discount agreement negotiated by the property owner or manager on behalf of all of the tenants.²⁵⁵ We sought comment as to whether the bulk discount exception applies where MDU residents are billed individually, or only where the discount is deducted from a bulk payment paid to the cable operator by the property

²⁵²47 U.S.C. § 543(d); see 47 C.F.R. § 76.984.

²⁵³1996 Act, § 301(b)(2), 110 Stat. 115.

²⁵⁴*Interim Order*, 11 FCC Rcd at 5951.

²⁵⁵*Notice*, 11 FCC Rcd at 5970-5971.

owner or manager on behalf of all its residents.²⁵⁶ We also sought comment on the meaning of the term "multiple dwelling units."²⁵⁷

94. We proposed that allegations of predatory pricing be made and reviewed under principles of federal antitrust law as interpreted and applied by the federal courts.²⁵⁸ We requested commenters to address what standards should be applied to determine whether a complainant has made out a prima facie case "that there are reasonable grounds to believe that the discounted price is predatory"²⁵⁹ Because complaints in this connection could involve some measure of discovery, we proposed adopting the procedures set forth in our rules for adjudication of program access complaints.²⁶⁰ We sought comment as to whether the program access procedures or some modified version of those procedures, should apply on a permanent basis.²⁶¹

B. Discussion

1. Bulk Discounts

95. Congress established the uniform rate requirement in the 1992 Cable Act "to prevent cable operators from having different rate structures in different parts of one cable franchise . . . [and] to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."²⁶² In implementing the 1992 Cable Act, the Commission concluded that, consistent with the requirement of a uniform rate structure, a cable operator could establish some differences in rates between separate categories of subscribers. We found, for example, that nonpredatory bulk discounts to multiple dwelling units ("MDUs") were permissible if offered on a uniform basis.²⁶³ We explained: "[W]e . . . are mindful that all multichannel distributors can realize significant efficiencies and cost savings by service [to] multiple dwelling units and other high-occupancy buildings, and we do not wish to foreclose the prospect that those savings might be passed on to consumers in those dwellings."²⁶⁴ Later, we clarified that cable operators could offer different rates to MDUs of different sizes and could set MDU rates based on the duration of the access agreement with the property owner or manager, provided that the operator could demonstrate that its cost of serving MDUs varied with the size of the building and the duration of

²⁵⁶*Id.*

²⁵⁷*Id.*

²⁵⁸*Id.*

²⁵⁹*Id.* at 5971-72, citing Communications Act § 632(d), 47 U.S.C. § 543(d).

²⁶⁰*See* 47 C.F.R. § 76.1003.

²⁶¹*Notice*, 11 FCC Rcd at 5972.

²⁶²S. Rep. No. 92, 102d Cong., 1st Sess. 76 (1991).

²⁶³*Rate Order*, 8 FCC Rcd at 5898.

²⁶⁴*Id.*

the agreement.²⁶⁵ However, we found that bulk arrangements on a variable basis between like MDUs were specifically prohibited by the 1992 Cable Act.

96. The 1996 Act retains the uniform rate requirement for cable operators not subject to effective competition but authorizes affected cable operators to deviate from their uniform rate structures in response to competition at MDUs.²⁶⁶ The House Commerce Committee proposed the statutory change because the Commission's former regulations did "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."²⁶⁷ The New Jersey Ratepayer Advocate's argument for uniform discounts much like the uniformity required by the Commission's former rules²⁶⁸ does not reflect the change effected by the 1996 Act. As the State of New York points out, the bulk rate exception only has meaning if it provides regulated cable operators with an opportunity to respond to competition at MDUs.²⁶⁹ Allowing cable operators to respond to competition in individual MDUs gives consumers the benefit of lower prices from incumbent cable operators.

97. The record in this proceeding reflects disagreement as to what qualifies as a bulk discount. SMATV and wireless cable operators argue that "bulk discount" is widely understood to mean a negotiated agreement with an MDU owner or manager that reflects the efficiencies of rendering one invoice and achieving 100% penetration of the MDU.²⁷⁰ These commenters contend that a true "bulk discount" exists only if the property owner or manager pays the discounted rate directly to the MVPD, and does not include an arrangement where subscribers are billed individually.²⁷¹ An individually paid "bulk discount" is an oxymoron, according to ICTA.²⁷²

98. Cablevision argues that the discount should not have to be negotiated with the property owner because such negotiations enhance the power of the landlord over the residents and makes the

²⁶⁵Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, 9 FCC Rcd 4316, 4326 (1994) ("Third Order on Reconsideration").

²⁶⁶1996 Act § 301(b)(2), amending 47 U.S.C. § 543(d); Notice, 11 FCC Rcd at 5971.

²⁶⁷H.R. Rep. No. 204(1), 104th Cong. 1st Sess. 109 (1995) (emphasis in original).

²⁶⁸New Jersey Ratepayer Advocate Comments at 17.

²⁶⁹According to the State of New York, the bulk rate exception only has meaning if it provides regulated operators with an opportunity to respond to competition at MDUs. State of New York Comments at 31. See Cablevision Comments at 15.

²⁷⁰ICTA Comments at 10; OpTel Comments at 6.

²⁷¹WCA Comments at 3; OpTel Comments at 6; Allied Associated Partners, LP and Geld Information Systems Comments at 3.

²⁷²*Id.*

landlord the gatekeeper of price competition.²⁷³ Comcast argues that some operators may not need agreements to gain access to buildings and, therefore, would have no need to negotiate with the building's owner or management.²⁷⁴ Some cable operators explain that their MDU service agreements do not always guarantee 100% penetration.²⁷⁵ Fleischman argues that a cable operator should not be discouraged from offering bulk rates to MDU residents simply because the residents have the option not to subscribe.²⁷⁶

99. Cable operators explain that they have a variety of billing arrangements with owners and residents of MDUs. In some instances, the operator provides services to all the residents in the building and renders a single bill to the property owner or manager.²⁷⁷ Other operators bill the owner or manager at a bulk rate for basic service to all residents and bill subscribers individually for premium or other optional services they order.²⁷⁸ According to Cole Raywid, there has been an increasing trend toward direct billing to the individual MDU resident to promote maximum flexibility and consumer choice.²⁷⁹ Cablevision states that some MDU managers and owners negotiating bulk discounts prefer to have the MVPD provider bill residents individually and may make the billing arrangement a consideration in deciding to accept a provider's services.²⁸⁰ Some cable operators assert that the method of billing should not be a reason for disallowing a discounted rate that would otherwise be permissible.²⁸¹ Cox suggests that as long as MDU residents are able to obtain service at a reduced rate, a bulk discount exists.²⁸² Cox argues that there is no practical or economic difference between serving an MDU by offering services under a rate negotiated with the owner or manager of the development or by simply offering service to all residents of the MDU.²⁸³ Cox also argues that concern regarding predatory pricing does not warrant restrictions on bulk discounts because the statute allows aggrieved parties to file a predatory pricing

²⁷³Cablevision Comments at 18.

²⁷⁴Comcast Comments at 12.

²⁷⁵Cox Comments at 10-11; Time Warner Comments at 35. *See also* Comcast Comments at 11; NCTA Comments at 45.

²⁷⁶Fleischman Comments at 30-31.

²⁷⁷Cole Raywid Comments at 17.

²⁷⁸*Id.* at 17-18; *see* Fleischman Comments at 31 n.63.

²⁷⁹Cole Raywid Comments at 18.

²⁸⁰Cablevision Comments at 16. According to Cablevision, services from a competitor in its New York and New Jersey franchise areas have been accepted in MDUs following the competitor's guarantee that it would bill residents individually and solicit newly arrived residents. *Id.* at 16-17.

²⁸¹GTE Comments at 5; Cole Raywid Comments at 17; Time Warner Comments at 35-36.

²⁸²Cox Comments at 10-11; *see also* Comcast Comments at 11.

²⁸³Cox Comments at 10-11.

complaint with the Commission.²⁸⁴ The Massachusetts Cable Commission opposes any restrictions that would prevent cable operators from offering discounts to individual MDU residents.²⁸⁵ According to the Massachusetts Cable Commission, restricting the cable operator's ability to offer discounts hampers the operator's ability to compete with other providers and denies consumers who reside in the building the resulting discount.²⁸⁶ U.S. Wireless and Wedgewood, on the other hand, advocate requiring that bulk discounts be offered only when property owners negotiate the rate and pay the operator directly, in order to prevent discrimination among tenants.²⁸⁷ The Wireless Cable Association is also concerned about non-uniform discounts and advocates limiting bulk discounts to true "bulk" sales to MDUs.²⁸⁸

100. For the purpose of the 1996 Act, a bulk discount is a volume discount, available to all residents of the MDU. Although we tentatively concluded in the *Notice* that a bulk discount must be negotiated with the MDU owner or manager before the exemption from the uniform rate requirement can apply, we share Cablevision's concern that mandating negotiations would make the MDU owner or manager the gatekeeper of competition, potentially regulating the operator's discounts and affecting the operator's ability to respond to competition. We also are concerned that a requirement of negotiated discounts applicable only to cable operators may limit the cable operator's ability to respond to competition. We conclude that Congress' objective, that cable operators have the flexibility to offer discounts to MDUs, is satisfied if the discounted rate is offered to all residents of the MDU. Negotiation about the discounted rate with the MDU owner or manager is not required.²⁸⁹

101. In the *Notice*, we tentatively concluded that the bulk discount must be negotiated on behalf of all the residents in the MDU. Upon further consideration, we conclude that bulk discounts should not be premised on a cable operator's exclusive access to all residents or its level of penetration of the MDU. While bulk discounts must be offered to all residents in order to avoid rate discrimination among the cable operator's subscribers within the MDU, we are also mindful that Congress enacted the bulk discount exemption in anticipation of price competition within MDUs. We also see no statutory or policy reason for disallowing variances in a bulk discount to reflect introductory offers or promotions, and we see no reason why a bulk discount cannot be adjusted to reflect increases in penetration levels as long as changes based on penetration levels are uniformly applied within the MDU.

²⁸⁴Cox Comments at 11; *see also* Comcast Comments at 11.

²⁸⁵Massachusetts Cable Commission Comments at 9-10.

²⁸⁶*Id.* at 10.

²⁸⁷U.S. Wireless Cable, Inc. and Wedgewood Communications, Inc. ("U.S. Wireless and Wedgewood") Reply Comments at 2. *See* US WEST Comments at 9 (regardless of billing arrangement, all tenants should receive the same negotiated rate). ICTA argues that negotiating with the property owner is the industry practice and should not be changed. ICTA Comments at 9.

²⁸⁸Wireless Cable Ass'n International, Inc. ("WCA") Comments at 3.

²⁸⁹We do not mean to suggest that an owner or manager's control over access to the building is in any way altered by this rule.

102. We also see no statutory or policy reason for conditioning a bulk discount on any particular billing arrangement with the building owner or manager. Although as OpTel and ICTA argue,²⁹⁰ bulk discounts have been justified in the past by the efficiencies of rendering one invoice and achieving 100 percent penetration, the bulk rate exemption was codified to permit competitive responses as well as to reflect efficiencies in serving subscribers concentrated in an MDU.²⁹¹ Most commenters addressing this issue have argued that the billing arrangement should not determine whether a bulk discount can be offered.²⁹² To the extent that cable operators bill subscribers separately for optional and premium services, adding services covered by the bulk discount to the bill should not significantly affect the cable operator's costs. To the extent that billing arrangements affect access to buildings, as Cablevision argues, or have other competitive impact,²⁹³ we do not wish to create any competitive advantage or disadvantage or restrict consumer choice in services or service providers by imposing rules regarding the billing arrangements used by cable operators.

2. *Definition of MDU*

103. In the *Notice*, we sought comment on the meaning of MDU for the purpose of the bulk rate exception and specifically on whether the definition should be revised to correspond to the expanded "private cable" exemption to the definition of a cable system.²⁹⁴ In response to the *Notice* a number of parties urged a narrow definition of the exemption from the uniform rate requirement in the 1996 Act. GTE, for example, stated that Congress granted no authority for the Commission to expand the established definition of an MDU. To the contrary, Congress left the existing definition intact while it explicitly amended the definition of a cable system because it desired to effect a change.²⁹⁵ ICTA argues that altering the "widely understood definition [of MDU] would defy congressional intent by changing the ground rules absent any congressional directive to do so."²⁹⁶ OpTel argues that, because Congress continued to use the MDU limitation when describing those bulk discounts that are exempt from the uniform rate requirement, it intended to retain the limitation that it deleted from the definition of a cable system.²⁹⁷

²⁹⁰OpTel Comments at 6 n.13; ICTA Comments at 9-10.

²⁹¹Cablevision argues that an operator's ability to offer bulk discounts "stems from its ability to deliver service to a concentrated locus of subscribers." Cablevision Comments at 18 n.40.

²⁹²City of New York Comments at 19-20; New Jersey Ratepayer Advocate Comments at 17; State of New York Comments at 31; Massachusetts Cable Commission Comments at 9; NCTA Comments at 45; Fleischman Comments at 31; Cablevision Comments at 16; Comcast Comments at 12; Time Warner Comments at 36.

²⁹³For example, cable service may be bundled with the rent in some buildings.

²⁹⁴*Notice*, 11 FCC Rcd at 5971.

²⁹⁵GTE Comments at 6.

²⁹⁶ICTA Comments at 13; *see* OpTel Comments at 7.

²⁹⁷OpTel Comments at 7; *accord* WCA Reply Comments at 4-5.

104. Other parties urge that the Commission use a revised definition of MDU more closely tracking the 1996 Act's "private cable" exemption. Cole Raywid argues that this would "harmonize two provisions of the 1996 Act that further the same goal of replacing regulation with market competition."²⁹⁸ This revision, according to Cole Raywid, will unleash "fierce" competition at all properties that now can be served without a cable franchise.²⁹⁹ For this reason, it and other cable interests support a corresponding expansion in the definition of MDU that will allow cable operators to respond to competition by deviating from their uniform rate structure at such properties.³⁰⁰ Other cable parties point to the expanded understanding of MDU in the *Rate Order* implementing the uniform rate requirement in the 1992 Cable Act.³⁰¹ Comcast, TCI, and Time Warner urge that the *Rate Order* interpretation is entirely consistent with the 1996 Act's expansion of the private cable exemption.³⁰² Cox distinguishes service to the private and quasi-private developments listed in the *Rate Order* from service to single family homes, and argues that the 1996 Act simply expands the class to include all subscribers located wholly on private property, without regard to the nature or common ownership of the property served.³⁰³

105. We believe that following the 1993 *Rate Order*'s coverage is consistent with the 1996 Act exemptions from the uniform rate requirement. In the 1993 *Rate Order*, the Commission considered exemptions from the uniform rate requirement based on reasonable categories of customers and cable service rather than the definition of a cable system.³⁰⁴ The *Rate Order* took a more expansive view of MDUs than we had taken in the context of defining cable systems, and concluded that "bulk discounts to multiple dwelling units, including apartment buildings, hotels, condominium associations, hospitals, universities, and trailer parks, could form a valid basis for distinctions among subscribers" and would be consistent with the uniform rate requirement.³⁰⁵ Although the 1996 Act removed the Commission's requirement that bulk discounts be offered pursuant to a uniform rate structure, the Act does not broaden the class to which bulk discounts can be offered beyond multiple dwelling units and does not require a different interpretation of "MDU" from that in the Commission's *Rate Order*. We, therefore, conclude that the exemption from the uniform rate requirement should apply in situations such as those addressed in the *Rate Order*. We need not decide, and expressly do not decide, whether and how the definition of MDU corresponds to the private cable exemption under the 1996 Act.

²⁹⁸Cole Raywid Comments at 18.

²⁹⁹*Id.* at 19.

³⁰⁰*Id.* Accord Fleischman Comments at 31-32; TCI Comments at 24; Time Warner Comments at 37, Reply Comments at 48-49.

³⁰¹Comcast Comments at 12-13 citing *Rate Order*, 8 FCC Rcd at 5897-99; accord Cox Comments at 11-12.

³⁰²Comcast Comments at 12-13; TCI Comments at 24.

³⁰³Cox Comments at 11-12.

³⁰⁴*Rate Order*, 8 FCC Rcd at 5897-98.

³⁰⁵*Id.* at 5897.

3. *Predatory Pricing*

106. Congress provided for bulk discounts to MDUs in the context of its broader effort in the 1996 Act to create an environment that offered consumers the benefits of competition, including better quality service and lower prices. At the same time, Congress prohibited cable operators offering bulk discounts from charging predatory prices to an MDU. Congress further provided that, if a complainant makes a prima facie showing that there are reasonable grounds to believe that the discounted price is predatory, the cable operator has the burden of showing that the discounted price is not predatory. We believe that, by addressing predatory pricing in the context of the bulk discount exception to the uniform pricing requirement, Congress intended to make available a timely, cost effective review of predatory pricing complaints separate from the antitrust review available under federal or state antitrust laws or other state consumer laws.³⁰⁶ We conclude, therefore, that our consideration of predatory pricing complaints should be guided by principles of federal antitrust law,³⁰⁷ as proposed in our *Notice*, but should not replicate or replace antitrust litigation.

107. We disagree with those commenters who argue that Congress intended to provide video services competitors with a higher degree of protection than is provided by the federal antitrust laws.³⁰⁸ Nothing in the statutory language or the legislative history suggests that Congress wanted this Commission to limit price reductions arbitrarily if the discounts cable operators offered were otherwise not predatory. To paraphrase the Supreme Court, it would be ironic indeed if the standards for predatory pricing liability were so low that predatory pricing complaints themselves became a tool for keeping prices high.³⁰⁹

108. In considering how to address predatory pricing for the purpose of Section 623(d), we have looked for guidance to predatory pricing cases in other areas of the law, particularly judicial decisions relating to the Sherman and Robinson-Patman Acts. Under both the Sherman and Robinson-Patman Acts, the essence of a predatory pricing claim is a business rival's pricing of its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.³¹⁰ The test for predatory pricing, therefore, is: (1) whether the prices complained of are below an appropriate measure of the alleged predator's costs; and (2) whether the alleged predator had at least a reasonable prospect of recouping its investment in below-cost prices.³¹¹ A

³⁰⁶See 1996 Act § 601(b), 110 Stat. 143 (Act does not modify, impair, or supercede the antitrust laws).

³⁰⁷See NCTA Comments at 47; Fleischman Comments at 32; Cole Raywid Comments at 19-20; TCI Comments at 18; Time Warner Comments at 38; Comcast Reply Comments at 10; see U.S. Wireless Reply Comments at 3 (commenter supports using federal antitrust standards "so long as the cost analysis accounts for a cable operator's actual costs").

³⁰⁸ICTA Reply Comments at 13-16; OpTel Comments at 8-9; U.S. Wireless and Wedgewood Comments at 6-7; see New Jersey Ratepayer Advocate Comments at 17 (advocating lenient standards to determine when a complainant has made a prima facie case).

³⁰⁹*Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226-27 ("*Brooke*"), *reh. denied*, 509 U.S. 940 (1993).

³¹⁰*Id.* at 222.

³¹¹*Id.* at 222, 224.

complainant must make a prima facie case on both elements to substantiate its allegations.³¹² As commenters point out, there are differences among the federal circuit courts about what is the appropriate measure of cost in antitrust litigation. For the purpose of considering whether a bulk discount to an MDU is predatory, we will consider whether a cable operator's price to an MDU recovers at least the incremental costs of serving that MDU, including any new costs from constructing or upgrading its physical facilities in order to offer the bulk service agreed to with the building's owner or manager, and whether the cable operator has a reasonable prospect of recouping its investment in below cost prices in the MDU.

109. Many commenters expressed concern about the burden of filing and defending complaints, particularly if the adjudicatory process replicates antitrust litigation. To avoid this burden, several commenters support using some objective threshold or "quick-look" procedure for determining whether rate reductions are either presumptively permissible or whether the complainant has made a prima facie case, at least with respect to the pricing factor.³¹³ Commenters were not in agreement as to what the threshold should be, however. Cable commenters support a threshold based on the industry cash flow margin³¹⁴ as reported in the Commission's annual competition reports or specified in the Commission's cost of service rules.³¹⁵ ICTA, on the other hand, argues that if discounted prices vary among like MDUs by ten percent or greater, the price is predatory.³¹⁶ OpTel argues that discounts greater than 25 percent off rates to like MDUs should be deemed predatory.³¹⁷ U.S. Wireless argues that a 25% discount is far too great.

110. We are not persuaded that a ready mechanism exists for a quick look at a cable operator's bulk discount. Costs involved in serving a particular MDU are likely to vary considerably, depending on the location involved or the specifics of the MDU. We recognize, as some parties suggest, that the cash flow margin is likely to be a reasonable surrogate for an operator's fixed costs, so that any price reduction within the cash flow margin could be assumed to recover the operator's variable or incremental costs. Thus, although price reductions falling within the cash flow margin might be significant, they are not likely to be predatory. However, the data readily available in the Commission's annual competition reports for the cable industry reflect a national average and are not specific to individual markets or

³¹²See *PanAmSat Corp. v. COMSAT Corp. -- COMSAT World Systems*, 12 FCC Rcd 6952, 6957-59 (1997) ("*PanAmSat*") (the offense of predatory pricing has a pricing element and a recoupment element).

³¹³Fleischman Comments at 33-34; Cole Raywid Comments at 20; Time Warner Comments at 38; OpTel Comments at 9; ICTA Comments at 17; U.S. Wireless and Wedgewood Reply Comments at 4.

³¹⁴The cash flow margin is the ratio of cash flow to revenue. It is a commonly used financial analysis tool for determining an MSO's operating efficiency, profitability, and liquidity. See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034, 1054 para. 25 & n.65 (1998) ("*Fourth Annual Competition Report*").

³¹⁵Time Warner Comments at 40 (argues that a prima facie case might be made where the cable operator's bulk discount to an MDU, compared to the retail residential rate, is greater than the industry cash flow margin); Cole Raywid Comments at 20.

³¹⁶ICTA Comments at 17.

³¹⁷OpTel Comments at 9.

MDUs.³¹⁸ For this reason, the industry cash flow margin provides little basis for drawing conclusions about a particular discount. Recommendations that the Commission set the threshold at some percentage variation from rates of like MDUs neither include economic support for the percentages advocated nor take into account the fact that the 1996 Act ended any requirement of uniform rates for like MDUs. Accordingly, we are not adopting a quick look mechanism for determining whether a cable operator's discount is permissible.

111. A prima facie showing of predatory pricing under Section 623(d) has two essential elements. First, a complainant bears the burden of showing reasonable grounds to believe that the cable operator's discounted price does not recover the cable operator's incremental costs; namely, all non-fixed costs the operator incurs that are directly attributable to serving the particular MDU, but also including any new costs from constructing or upgrading its physical facilities in order to offer the bulk service for the MDU at issue. Second, a complainant must meet the recoupment requirement. It must present a plausible theory showing that the cable operator has a reasonable prospect of ultimately recouping its investment in below-cost prices, including the time value of the money invested in below-cost pricing.³¹⁹ Because Section 623(d) of the Communications Act addresses "predatory prices to a multiple dwelling unit," a complainant's showing should address recoupment of below-cost prices from future price increases in the same MDU. A complainant may also address additional profits from other MDUs where entry may have been discouraged by the same predatory pricing strategy.

112. Once a complainant has made a prima facie showing, the cable operator has the burden of showing that its discounted price is not predatory.³²⁰ The cable operator can meet its burden under the cost requirement by showing its price recovers the incremental costs of serving the particular MDU, including the cost of any new or upgraded facilities installed to provide the discounted service. The amount of any royalty or revenue sharing benefit that the MDU owner or manager receives from the cable operator should be taken into consideration, since this amount effectively reduces the rate paid.³²¹ A cable operator can meet its burden under the recoupment requirement by showing that there are no significant barriers to reentry or the appearance of new entrants and that it cannot raise prices sufficiently to recoup its investment in below-cost prices without creating opportunities for a competitor. The nature and duration of the cable operator's bulk rate agreement with the MDU would be relevant to this showing.

³¹⁸See *Fourth Annual Competition Report*, 13 FCC Rcd 1034, 1054 para. 25 & n.65, 1179 Table B-6. The data used in determining industry revenues and cash flow were from public filings with the Securities and Exchange Commission, press releases, and discussions with company personnel for cable firms with a subscribership of 500,000 or more. *Id.* at 1180. The 1996 industry cash flow margin reported in the *Fourth Annual Competition Report* was 45% after rounding to the nearest whole number. *Id.* at 1054, 1179 Table B-6. 1996 cash flow margins for the individual companies in the survey are shown in *Id.* at 1185, Table 7B. In *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report*, 13 FCC Rcd 24284 (1998), the Commission reported industry-wide figures in Table B-6 but did not determine firm-specific cash flow information. The cash flow figures used in the Fifth Annual Report differed somewhat from the figures used previously. The revised cash flow margin for 1996 in Table B-6 is 43% rounded to the nearest whole number. The cash flow margin for 1997 is 44%.

³¹⁹*Brooke*, 509 U.S. at 225.

³²⁰47 U.S.C. § 543(d).

³²¹See ICTA Comments at 17.