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Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
455 12<sup>th</sup> Street SW Portals II Building  
Washington, D.C.

RE: Docket No. 02-144

In the Matter of Revisions to Cable Television Rate Regulations

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of  
1992: Rate Regulation

Dear Ms. Dortch:

As Director of the New Jersey Office of Cable Television of the Board of Public Utilities, I hereby file answers to selected questions posed in the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking (NPRM), which addresses revisions to cable television rate regulations within the existing regulatory structure.

Pursuant to the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et. seq., the Office of Cable Television under the supervision of the Board of Public Utilities (NJBPU) is the franchising authority for cable television operators in the State of New Jersey. As of October, 1993, the agency was certified by the FCC to regulate basic rates and equipment and installation prices.

The FCC has requested comments on several specific areas of concern to the Office of Cable Television, which I address as follows:

**A) Deletions or modification of the rules that address Cable Programming Service Tier (CPST) rates.**

\* What rules generally should be changed or eliminated and are there linkages between CPST and BST (Basic Service Tier) rules?

I recommend to the FCC a rule structure that does not favor basic service tier (BST) channel reductions, discourages BST increases and delivers the greatest benefit to the subscribers who may least be able to afford it, the BST-only subscribers.

The rule to increase/decrease rates for programming costs in setting basic service tier maximum permitted rates should be maintained. The operator is entitled to recover real programming cost increases. I note that Office of Cable Television staff can and has been successfully contesting “real” programming costs by requiring the companies to provide programming contracts to validate those increases. Therefore that rule can be maintained.

## **B) Rate adjustments when channels are added or deleted from BST.**

\* Should rate increases caused by channel movement to the BST be kept in the FCC regulations?

As previously stated, programming costs permitted for basic tier channels already accomplish legitimate increases. Simply adding a channel should not hike the formula in a benchmark filing. This is a skewed, leftover formula component from the days when both BST and CPST tiers were regulated. By eliminating this archaic rule, it would in effect stabilize BST rates by eliminating generic rate increases based ONLY on channel counts. The rule had some meaning when the franchising authority regulated basic and the FCC regulated CPST. That was in the era of Forms 393 and 1200 setting initial rates. Now, with no governmental control over CPST rates, a channel addition per se should not exist as part of the formula to increase rates. As an example, if an operator selects to broaden the basic tier by adding a satellite channel to the tier, it should not automatically recover costs solely for that move. Rather, the operator can and does project programming costs for every channel on basic and accordingly sets its maximum permitted rate. The “Table Data” adopted in 1994 given CPST deregulation in 1999 is no longer appropriate and should be deleted from the regulations.

Conversely, the BST reduction for channel deletions should be maintained as it stabilizes rates by keeping an average \$.43 deduction in the basic rate formula and also discourages deletions from the basic tier. How can I justify this outcome? Deleting a BST channel often results in a migration of that channel to the CPST tier. Unregulated as the CPST is, the operator can price at will. Therefore, the channel deletion component should remain in the formula for setting basic rates, as relief for the operator is open ended on the CPST tier.

The following questions posed by the FCC and Office of Cable Television staff’s answers expand further on the formula for basic rate setting:

\* Should the rules continue to adjust BST rates for changes in the number of BST channels by adding or subtracting specific “external costs” associated with the channel additions and deletions and the 7.5% mark-up adjustment provided in section 76.922 (f)? Or, should rates be adjusted for changes in the number of channels by adding and subtracting the “per channel adjustment factor” from the table in section 76.922 (g)(2)?

My recommended approach is a hybrid of the Commission’s proposed solutions preserving external cost changes including the 7.5% mark-up, but eliminating the channel chart for BST channel additions, and sustaining the channel residuals method for deleted, but not moved, channels.

This approach would maintain BST price stability for the small percentage of BST-only subscribers and discourage large removal of channels while not encouraging price increases merely due to a generic channel addition. While it might also be a disincentive to add BST channels, the BST-only subscriber is likely looking not for extra services but for the cable equivalent

of POTS (plain old telephone service), without paying for extra services not requested. If a cable system wishes to place a channel on the BST other than a must carry or required PEG access channel, the flexibility gained from CPST deregulation could provide the missing channel chart value. This idea may seem to promote a CPST “subsidizing” but is merely a reflection of a practice presently employed by cable operators.

Preserving the BST rate adjustments for BST channel count changes by adding or subtracting the specific “external” costs associated with the channel additions and deletions and the 7.5% mark-up adjustment for programming costs associated with the affected channels provided in Section 76.922(f) is appropriate and should be maintained. An example of “external costs” would be when a municipality in its ordinance requires an Institutional Network linking 50 municipal sites. That is an external cost that can legitimately be recovered in the basic rate. An example of the adjustment for programming costs provided for in this section would be the introduction or maintenance of a regional channel such as CN8 or NEWS 12 New Jersey.

The FCC has some concern that a company might remove a large number of channels from the BST. This is a remote possibility. Many BST channels are must carry channels and cannot be removed due to the FCC regulations or franchising mandates. Also, since most subscribers purchase both the BST and CPST, deleted BST channels would likely move to the CPST resulting in the same total channel line-up. When both tiers were regulated and tier growth was expanding, cable systems had incentives to add or move channels. Now that tier growth has been achieved, and the CPST is deregulated, the need for such incentives has diminished. Furthermore, cable systems are less likely to instigate and invite the regulatory challenges and scrutiny arising from large removals in the BST. Cable systems have and will continue, in my opinion, to bypass the BST and use the unregulated CPST for large-scale service and channel changes.

The bottom line is that the original channel addition table, once designed for cable systems to achieve growth and for the added services that such growth can provide, has outgrown any usefulness in the formulaic benchmark regulation. Without CPST regulation, the integrity of the previous system of channel changes is greatly impaired. For these reasons, undertaking to restore incentives solely for channel additions, by burdensome, exhaustive efforts to establish new benchmarks, revise tables and residuals, or even by simple formula, is not worth the endeavor. Accordingly the channel addition factors should be eliminated.

Additional and specific questions and answers related to these issues are outlined and answered as follows:

\* The Commission asks if it should establish new BST per channel values through new benchmarks based on updated comparison of BST rates charged by competitive and non-competitive systems?

If a “per channel” value approach would be maintained, reprising a new benchmark system is probably the best approach to achieve proper values. But it would also be the most burdensome and time-consuming method with no known advantage to subscribers or franchising authorities. In light of the limited nature of the BST rate regulation, the growth and maturity of cable programming services, and the deregulation of CPST, the effort wouldn’t produce material changes. Accordingly, BST per channel addition incentives should not be restored for this and all previously argued reasons.

\* If the Commission does institute a per channel approach, should it only look at the cable system rates, or should they also consider the rates of alternate providers such as DBS?

If the Commission should proceed with creating a new per channel values, it should only look at cable system rates. DBS-BST rates may differ greatly, are not regulated and could distort the result.

- \* Could a simple formula be developed?

Possibly, but only after a burdensome, exhaustive inquiry, examination and calculation. Accordingly, as stated before, this is not a worthwhile endeavor especially given the unlimited pricing power of the cable operator with the total deregulation of the CPST.

- \* Should the FCC allow channels added to the CPST pursuant to the caps method to be moved to the BST.

Consistent with previous procedure and in light of the above arguments, even if a per-channel approach were to be adopted, channels added to the CPST pursuant to the caps methodology may be allowed but the residual should not be permitted to be moved as it is a hold over from the era of regulated CPST's.

### **C) Headend Upgrades**

- \* The FCC plans to modify §76.922 (g)(7) to reflect the sunset of the opportunity for single tier small system to make upgrade adjustments. In New Jersey, small systems are not part of a major system operator and, therefore, qualified in 1995 for deregulatory status.

### **D) Digital broadcast television rate adjustments.**

- \* Should there be rate adjustment for carrying digital broadcast services on a rate- regulated tier?

In its DTV Must Carry First Report and Order in CS Docket No.98-120, the FCC discussed issues associated with the carriage of a broadcaster's digital television signal, amended its rules to allow recovery of headend equipment costs necessary for the carriage of DTV signals as an external cost in Form 1240 and allowed cable operators to recover costs of improvement necessary for carriage of digital signals through the network upgrade surcharge in Form 1235. The suggestion here by the Commission on proposing a clarification on these adjustment methods is a good one allowing operators to use one form, not both, for adjusting their rates in order to avoid recovering more than once for the same costs.

The Commission proposes to allow operators, adding digital broadcast signals to their channel line-ups, to increase rates for each 6 MHz of capacity devoted to such carriage. It was concerned that operators have sufficient incentives to add digital television signals, particularly during the transition from analog to digital. There is concern by the Commission that subscribers should bear a fair share of the costs associated with carrying digital signals relative to the system's overall capacity and that the rates be reasonable. Office of Cable Television staff agrees that the subscribers should bear the costs of transmission for either digital or analog programming, but believes that the subscribers should not subsidize the cost of channels they do not receive. As long as the operators offer both analog and digital services, the costs of programming will differ. In order to assure that the subscribers are paying for the applicable service, the rates can be calculated independently of one another on the annual Form 1240. Much like the suggestion by the NJBPU in 1994 to FCC Cable Service Bureau Chief Meredith Jones to do away with quarterly 1210 filings in favor of an annual form 1240, a similar adjustment to one consolidated filing will cut down on the burden for franchising authorities.

### **E) Initial Regulated Rates**

- \* How should initial rate levels be determined for systems first becoming subject to regulation?

When an unregulated operator is brought under rate regulation, the franchising authority must be able to review the rates back to the date that the system first became regulated. The initial rate filing should reflect the basic rate that was charged on the first day of regulation on Line A1 of the 1240 Form and should not include franchise fees or other regulatory fees. The problem with this method of testing the reasonableness of the rate would occur in Module D and the components that would be reflected there to calculate the base rate on Line D8. When a system is not subject to regulatory review, it does not rely on inflation or external cost components to come to a maximum permitted rate. Therefore, attempting to reconstruct the breakdown of an unregulated rate presently being charged in order to conform to a Form 1240 is burdensome for all parties. Although the Form 1200 first used for this purpose in 1994 would need some revision, it probably is the best litmus test available to calculate the proper rate for basic service for any system becoming subject to regulation.

## **F) Uniform Rates**

- \* Are other changes in the Commission's rules useful to create greater flexibility in rate structures or more uniform regional rates while continuing to maintain rules designated to keep basic rates reasonable?

At the present time, four of the seven cable operators that provide service in New Jersey have uniform rates that span several rate districts/municipalities in at least one of their systems. To date, there has not been a problem with reviewing the rate filings for these companies since all of the affected rate districts are located within the State of New Jersey. However, my staff and I fear that the aggregation of basic rates involving other states or franchising authorities will limit its ability to assure the reasonableness of rates for New Jersey subscribers. Several of the operators who serve the state, have systems located in other states that are in close proximity to New Jersey and the fear is that the operators combining them for uniform regional rates, as some have done with their equipment and installation rates, could have a compromising effect on basic rates.

Whether the component would be a higher cost of living factor or basic rates unregulated by any appointed authority, New Jersey subscribers should not suffer from aggregated costs that are not monitored or challenged as they are in New Jersey.

## **G) Rates for Commercial Subscribers**

- \* To what extent Section 623 intended to apply to commercial rates?

Section 623(a)(2)(A) provides that rates charged by an operator for basic service "shall be subject to regulation," making no exception for service provided to commercial entities. Section 623, in fact, makes only one exception regarding the regulation of BST rates, which is at 623(a)(2) and provides that "if the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such a system shall not be subject to regulation by the Commission or by a state or franchising authority under this section."

Based on the plain reading of the language, Congress intended that the Commission's rate regulation would apply in all circumstances except where there is a finding that a system is subject to effective competition. The Commission is urged to expeditiously resolve this issue with the plain meaning of Section 623.

In response to the query on how commercial rates should be defined in the cable context, I believe that commercial rates are those rates applied to any for-profit entity with the exception of

those entities that provide temporary or permanent housing. More specifically, commercial establishments which primarily offer retail or entertainment services would be included in this category while those establishments which may be run by for-profit entities such as nursing homes or hospitals but also provide temporary or permanent housing would not fall into this category.

While in some instances market forces will control rates to commercial establishments, it is far less likely in many urban and suburban areas, such as in New Jersey, because of several factors. Among these are: (1) the likelihood that commercial establishments in urban centers are located on the lower levels of multi-story structures, which in many cases prevents an unobstructed view of the satellite(s) necessary to secure such service; (2) the inability to place a dish or other type of antenna on the roof of the building to overcome obstruction due to technical limitations (as a result of the increased distance of cable runs on taller structures); and finally, (3) the obstacles which need to be overcome by commercial tenants in securing access to the roof of a taller structure where lower levels are leased and the roof is considered a "common area."

Summarily, I would urge the Commission to establish a mechanism to develop reasonable commercial rates, either by requiring that commercial rates for the BST match those developed for residential subscribers, or by initiating a separate inquiry to establish a competitive differential applicable to commercial establishments and applying the result to commercial rates.

#### **H) System Rates**

\* The FCC seeks comment pertaining to the streamlined rate regulations for setting initial small system rates under the Form 1230.

Since there are no regulated small systems in New Jersey and likely will not be, I would not comment on this section.

#### **I) Cost of Service**

\* Is the cost of service process necessary due to the demise of CPST rate regulation in 1999?

The Office of Cable Television has received only a limited number of cost of service filings as the majority of operators opt to justify rates under other available options.

While it is increasingly unlikely that any New Jersey MSO will file a cost of service rate case, the rules should nonetheless be retained for limited circumstances. These include where a cable system must derive its revenue from the BST alone (such as system with a collapsed tier) and no other regulated revenue source exists or will exist to meet annual revenue requirements and attract additional capital for system improvements. Another example arguing for retention of the cost of service option would be those systems with mandated must carry additions which may need to recover costs using this methodology.

#### **J) Form 1235 Abbreviated Cost of Service**

\* Does the abbreviated cost of service Form 1235 still meet a need?

Those systems with one large collapsed tier and no other revenue sources may need to continue to utilize some modified version of the Form 1235 to recover network upgrade investments from the BST absent the introduction of new, unregulated services and revenue streams.

Where this is the case, operators should be allowed to continue to utilize the abbreviated cost of service process if investments cannot properly be recovered under any other mechanism, as long as the operator can certify to the franchising authority that (1) the investments offer tangible

improvements in service quality and reliability, and result in mandated channel additions, and (2) the system either has no plans to introduce new unregulated services as a result of a network upgrade, or can substantiate to the franchising authority that it is making a proper allocation to unregulated and regulated services by submitting revenue projections subject to franchising authority review for comparison to actual revenue over time.

### **K) Rate of Interest**

\* Should the Commission revise the rate of interest in the form and the instructions for Form 1240 and should the rate of interest be fixed in the rules and rate form calculation or tied to some other kind of indicator? Also, should the interest rate be used for the interest on franchise fee refunds owed by the franchising authority to the cable operator?

The interest rate should definitely be revised to reflect a more realistic return. At present, the interest rate is 11.25% and is higher than any other form of return or borrowing during the period Form 1240 has been in effect (1996-present). Over the past six years, when refunds were ordered as a result of settlements, the interest calculated on the subscriber refund amount was based on Commission guidelines using the IRS rate, which is presently 6% (the highest was 9% in 2000).

The purpose of the refunds is to make the subscriber whole, that is, return them to the position they would have been in if the proper rates had been charged. Therefore, all excess monies resulting from the incorrect rate being charged, including the 11.25% interest, should be returned one hundred percent to the subscriber. However, this is not the case when the Form 1240 reflects 11.25% and the refund interest (IRS based) is anywhere from 2% to 5% lower.

Summarily, the refund and under/over recovery interest rates should be identical to avoid any undue profits for any of the parties. Since the IRS rates are quarterly and available on a timely basis, it would be best to use them on all the Commission's Forms that reflect the 11.25% and for any franchise fee refunds due to the cable operator by the franchising authority.

### **L) Unbundling**

\* Should rules that require operators to unbundle equipment costs from programming rates when setting initial rates be continued?

I ask that the Commission retain these rules, which would apply in circumstances where a deregulated operator is subsequently re-regulated, which can occur where, among other possibilities, as operator is deregulated due to a determination that it is subject to effective competition, but the competitive entity later ceases operations removing effective competition from the town or system.

### **M) Refunds**

\* How should the Commission's rules, which address refunds of previously paid rates in excess of maximum permitted rate be updated?

47 C.F.R. § 76.942 (b) should be clarified to include refunds calculated from the effective date of the incorrect rate in instances where the valid rate order has been issued by the NJBPU or the Commission subsequent to the implementation of the rate in order for the subscriber to be made whole. The exception of the operator's non-compliance with the valid rate order should remain but begin at the effective date of the incorrect rate or the rate order, whichever is earlier, in calculating the refunds due the subscriber. The refund calculation, including interest, should continue until the operator complies with the order and all the refunds are completed.

As previously noted, if an operator collects 11.25% interest on underestimated costs, why should the current provision remain that provides for refunds to subscribers computed at applicable rates published by the Internal Revenue Service for tax refunds and tax payments? Certainly, the Commission should defer to the subscribers who have been overcharged and allow the interest calculation to be at the higher rate. It should not be tied to an indicator unless the FCC chooses the 11.25% operators currently collect with the presumption that the 11.25% does not change in the Commission's order issued as a result of this proceeding.

The Form 1240 yields a 11.25% interest but the refund based on the IRS schedule for subscribers who have been overcharged is anywhere from 2% to 5% below that!

The rate should, if fixed, be identical so as to avoid any undue profit from any party whether it is the cable operator collecting for under recovery, the subscriber collecting credit for over recovery or the municipality paying back the cable operator for franchise fees collected from rates ultimately found to be understated.

The remaining sections of this rule should remain unchanged.

#### **N) Reevaluation of the rate regulation process.**

\* The Commission is seeking comment as to whether there is another method for regulating basic service rates that would ensure reasonable rates through a simplified regulatory process, yet address the regulatory costs to operators and franchising authorities from implementing an alternative. How, if introduced, would the reasonableness of the franchising authority's rate action be reviewed and, if adopted, would it replace the traditional approach to rate regulation or be available as an alternative rate regulation method?

In response to the New Jersey cable television industry's request for changes in the time consuming litigious rate process, on January 12, 1996, the NJBPU approved an optional rate procedure with the intended purpose of enabling itself to grant uncontroversial rate adjustments on a significantly abbreviated time frame following a review and finding that such rate adjustments are reasonable under the FCC guidelines. The development of these Expedited Procedures has resulted in administrative and judicial economies as well as significant monetary savings for the State of New Jersey and has allowed reasonable rate changes to be finalized in a timely manner.

In addition, by not litigating these rate filings, these procedures allow the staff of the Office of Cable Television to directly negotiate and settle these filings without the need for counsel, thereby saving itself and the cable industry legal and case processing costs normally associated with fully litigated matters.

Since its inception in 1996, these procedures have saved the State of New Jersey over \$11 million in the 266 filings that have been settled using this process. At present, all regulated cable companies in the state have elected to file their rate cases under the procedures guidelines. Ratepayers also share in the savings, as attorney fees otherwise incurred by the operator are not passed on to them in the form of higher rates. Therefore, the Office of Cable Television has served the needs of all participants in the ratemaking process in a more flexible, responsive and unique way while protecting the public interest, the validity of which can be measured in actual dollars.

#### **O) Equipment and Inside Wiring Regulation**

\* The Commission asks for comments on three specific areas. First, the Commission seeks advice on the scope of equipment covered under its regulations, whether it is possible, or may become so, to rely on market forces to ensure rates are kept reasonable, whether categorization should be reconsidered and whether a process should be established so that when a competitive

market for equipment and wiring can be demonstrated that governmental rate setting should cease.

First, I support the tentative conclusion that the introduction of new services, particularly digital service tiers, has necessitated a different view of the scope of equipment covered under the rules.

Since the Commission's rules permitting the aggregation of high and low cost devices for rate setting purposes, sharp increases have taken place in equipment lease rates on an annual basis by some operators. The effect, perhaps unintended by Congress and the Commission, of aggregating sophisticated and expensive subscriber terminal equipment used primarily for the reception of newly introduced digital service tiers, has been an upward spiraling of rates to subscribers who in many cases do not select the new services. Newer digital terminals can cost as much as five times that of a standard converter. The inclusion of more of these devices in the equipment basket, over time, results in lease rates closer to that which would be applicable to the higher cost equipment, if calculated separately, and, as fewer subscribers are left with the older equipment, they begin to assume a greater burden of this cost.

I again would urge the Commission to modify its rules to reflect that these devices are primarily used to provide unregulated services and as such should be separated from the other equipment categories for the purpose of determining lease rates. Not to do so will have the unfortunate consequence of placing a burden of subsidizing the additional costs on those customers that elect not to subscribe to the new services associated with them, rather than through the rates for the newer unregulated services as well as unregulated pay-per-view and premium services, where they properly belong. The separation of costs should be mandatory and not at the operators' discretion as is currently the case.

The Commission's request for comments regarding the different processes, based on actual cost standards where a competitive market for equipment or wiring can be demonstrated, is a good concept but has several problems associated with practical application. First, the competitive availability of standards-based, interoperable de-scrambling equipment has not come to be. It has been nearly ten years since comments were initially sought by the Commission in its compatibility proceedings but we are yet to see this type of equipment offering by any cable operator in the State. There are problems as well concerning the determination that a product is available commercially and thus offered competitively. While not a problem in some states, in the metropolitan area, the WIZ, one of the largest consumer electronics chains, is owned by a cable operator that has nearly 50% of the subscriber market in New Jersey. An offering of equipment through this retail chain, while giving the illusion of being a competitive offering, may be without substance, absent any requirement that the equipment be made available at other competitive retail outlets unaffiliated with the cable operator.

Therefore, if the Commission does craft rules which encourage the competitive availability of formerly regulated equipment, it should proceed carefully and carve out exclusions applicable to those companies which control any retail consumer electronic operations that could therefore exert undue market power over its competitors.

\* Can the Form 1205 be simplified to ease the burden on companies and regulators?

Possibly, by offering an alternative pricing mechanism based on establishment of a rate mutually agreed upon by both parties or developed in Form 1205 adjusted for inflation or documented cost increases.

#### **P) Recovery of Lost Revenue in Reversal of Rate Orders**

\* Is there a mechanism for recovery of lost revenue for equipment and installations due to subsequently reversed rate orders?

In the Office of Cable Television's experience, operators have either arrived at settlement prior to issuance of refunds or have opted to wait until a final decision by the Commission on an appeal before making payment with interest to the subscribers.

If such a case were to occur, I would not oppose a phased-in mechanism spread out over a period of time in order to avoid subscriber rate shock.

### **Q) Charges for Change in Tiers**

\* What has been the effect of the end of CPST rate regulation on the regulated rates for service tier changes initiated by subscriber, downgrades or upgrades? Should the sections of the rule addressing a nominal fee for changing tiers, be changed to allow operators to establish a higher rate for subscribers changing tiers more than twice in a twelve month period and no additional charge for changing tiers within 30 days after notice of retiering or rate increases has been provided. [47 C.F.R. § 76.980 (b), (d), and (f)]

The elimination of these sections is not in the best interest of subscribers. Presently, the charge for changing tiers solely by coded entry cannot exceed \$1.99. Allowing the operator to base a charge on the Hourly Service Charge (HSC) multiplied by the number of person hours needed to implement the same change has the potential of costing the subscriber considerably more money. In New Jersey, the average HSC is \$32.71, which translates into probable rate hike for subscribers.

In addition, by eliminating the review by a franchising authority, the rate that an operator plans to charge a subscriber who changes tiers more than twice in twelve months, cannot be tested for reasonableness. Allowing an operator to arbitrarily increase this rate without governmental review would dilute the power of the franchising authority to regulate these rates and live up to its responsibility to maintain reasonable rates associated with the reception of basic cable.

Finally, the elimination of the 30-day "grace period" when an operator notifies the subscriber of a rate increase or a re-tiering that allows subscribers to change tiers at no additional charge is troublesome. Since deregulation in March, 1999, the CPST rates in New Jersey have increased over 59%. Many of the subscribers, especially those on fixed incomes, find that they cannot now afford the tiers of service they once enjoyed. The loss of the grace period, thereby, allows the operator to charge a downgrade fee that, in some cases, is almost as much as the CPST rate itself.

### **R) Effective Competition Showings**

\* Should procedures allow showings of effective competition to be other than on a community-by-community basis?

New Jersey is one of few remaining states where DBS penetration statewide is less than 15 percent. It is 10 percent according to comments filed prior to the issuance of the Commission's Eighth Competition Report. Even if a future Commission report were to show the statewide average DBS penetration in New Jersey had exceeded 15 percent, this would be the result of including areas with averages far exceeding 15 percent with those areas like New Jersey where penetration is well below that number.

The Commission should rely on the plain language of the Communications Act, which places the burden of proof on the operator petitioning the FCC for a determination that it is subject to effective competition.

There is no basis for relaxing the burden of proof or shifting it onto franchising authorities. In addition, I wish to note that in cases where the NJBPU has replied to petitions of this nature, franchising authorities are at a distinct disadvantage in refuting claims made by the cable operator, which are largely based on data provided by Sky Trends at a significant cost, or are under federal regulatory obligation to provide such data in return for deregulatory status. Franchising authorities have no such authority to request or review data from Sky Trends or the cable operators themselves. I urge the FCC to level the playing field in this regard.

### **S) Procedures for Commission Review of Local Rate Decisions**

\* Can the review of local rate decisions by the FCC be improved and should the deference given to the local rate decision be increased so that intervention by the Commission occurs only when there are significant deviations from the established rules?

When an operator appeals a rate order to the FCC, it affects all future filings of that operator while the parties await a decision from the Commission. In the meantime, the franchising authority must deal with a backlog of subsequent filings since the basic service rate remains unresolved because of the difference of opinion regarding what rate should be changed to the subscribers. Compromises between the parties are reached so that the subscribers will reap the benefits of rebuilds and lower rates in most cases.

However, even rates finalized through negotiated settlement leave outstanding issues that are the subject of the unresolved appeal. Until the Commission addresses them, these issues will remain open and can be the subject of future appeals adding to the regulatory backlog.

The Commission should allow the appeal of the franchising authority rate order at the local level (State Appellate Court). The result would relieve the Commission of the burdensome task of reviewing any appeals that in the past have caused undue delay and allow reasonable rates to be charged to the subscribers in a timely manner.

Respectfully submitted,

Celeste M. Fasone

Director  
New Jersey Office of Cable Television