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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of: Revisions to Cable Television Rate Regulations	MB Docket No. 02-144
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	MM Docket No. 92-266
Implementation **of** Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	MM Docket No. 93-215
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service	CS Docket No. 94-28
Cable Pricing Flexibility	CS Docket No. 96-157

ERRATA TO REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; THE NATIONAL LEAGUE OF CITIES; THE MIAMI VALLEY CABLE COUNCIL; MONTGOMERY COUNTY, MARYLAND; AND THE CITY OF ST. LOUIS, MISSOURI

The Reply Comments submitted by the National Association of Telecommunications Officers and Advisors; the National League of Cities; the Miami Valley Cable Council; Montgomery County, Maryland; and the City of St. Louis, Missouri contained minor non-substantive typographical and textual errors. In particular, one footnote contained a mislabeled citation, and two pages contained typographical errors. In addition, the electronically filed **copy** did not note that Exhibit A was not available in electronic form, and the paper copy filed may contain some minor non-substantive typographical and textual errors which did not appear in the electronic copy. Accordingly, to correct the non-substantive errors and to eliminate **any** confusion within the record, counsel requests that the attached, complete and corrected copy be

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substituted for the paper and electronic December 4,2002 filing. In addition, please remove the paper and electronic versions **of** the December 4,2002 filing from the Commission's website.

Respectfully submitted,

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December 6, 2002

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December 4.2002

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SUMMARY

The fundamental criterion for evaluating a proposed rate regulation rule is: Does it help ensure reasonable rates for subscribers? The industry comments ignore this criterion. Every proposal in this proceeding must above all be tested against that congressional mandate.

Subscribers still lack the competition that would make regulation unnecessary. **As** both the FCC and the **GAO** have recognized, DBS "competition" does not in fact restrain cable rates. Thus, the industry's proposed reversal of the burden of proof for effective competition would expose subscribers to cable's market power, without ensuring the protection of a robust competitive market. The cable proposal would place the burden of proof on those least able to obtain the relevant information. Such a rule would not help ensure reasonable rates; on the contrary, it would promote evasions.

Nor may a claim of effective competition be based on mere buildout requirements and the initiation of service to a single subscriber. In today's strained communications market, such requirements may never be met. Indeed, incumbent cable operators may engage in anticompetitive practices to deter and delay competition. The Commission should actively investigate such anticompetitive practices.

The cable commenters seek to exempt fiom regulation equipment used for purposes other than basic service. Such a rule would simply serve to deregulate most equipment, without ensuring that subscribers are protected fiom unreasonable rates. Unreasonable rates for necessary equipment can make obtaining the service unreasonably expensive even if the service rate by itself is controlled.

Cable operators cannot be permitted to manipulate channel movement and channel counts to levy excessive charges on subscribers. When channels are removed from the basic tier, basic

tier subscribers should no longer have to pay for those channels. The industry comments create considerable confusion regarding this simple principle. For example, the arguments regarding "good-faith" grandfathering, the assumption that the "Mark-Up Method" must be preserved, and the suggestion that digital channels should be counted as if they occupied the same capacity as analog channels, favor evasion rather than reasonable rates.

The Commission should reject the various elements of cable's new deregulatory agenda, including each of the following:

- a time limit for LFA action on remand would enable evasions, rather than help to ensure reasonable rates;
- changing the current position on unbundling would enable cable operators to gain the sort of double recovery that the Commission has properly ruled out;
- initially regulated rates must be brought down to reasonable levels before the price cap rules can be applied;
- the 11.25% interest factor is out of step with the current market and provides incentives to underestimate costs;
- allowing operators to reduce refunds to a series of installments or to "in-kind" refunds would further limit subscriber choice;
- charges for tier changes should **not** be deregulated;
- the cable commenters have not shown that commercial subscribers are protected by market forces from unreasonable rates;
- the Commission should eliminate the Form 1210 quarterly filing option; and
- system-wide filings, or multi-year filings, would make it harder for communities to apply the Commission's rules correctly, impeding reasonable rates and fostering evasions.

Once again, the purpose of basic rate regulation is to protect subscribers by setting reasonable rates. All of the proposals above would undermine that goal.

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The National Association of Telecommunications Officers and Advisors; the National League of Cities, the Miami Valley Cable Council;[1] Montgomery County, Maryland; and the

[1] The Miami Valley Cable Council represents the Ohio communities of Centerville, Germantown, Kettering, Miamisburg, Moraine, Oakwood, Springboro and West Carrollton, in the negotiation and administration of cable television franchises, provides cable-related services on behalf of six of those member cities, and offers advice and services on matters of cable franchise administration to twenty affiliate member municipalities.

City of St. Louis, Missouri (collectively, the Local Government Coalition) hereby submit the following reply comments in response to the Commission's above-captioned Notice of Proposed Rulemaking and Order, **12** FCC Rcd. 11,550, released June 19,2002 ("*NPRM&O*").[2]

I. INTRODUCTION

The lodestar that must guide the Commission's rate rules is the goal of ensuring reasonable rates for subscribers. This proceeding has raised numerous issues about the minutiae of regulation, often making it difficult to see the forest for the trees. And the comments filed to date have raised many arguments and considerations affecting the Commission's rules. But the fundamental criterion for evaluating a proposed change, the touchstone of whether a suggested rule is a good idea, must still be the question: Does it help ensure reasonable rates for subscribers?

This basic point is worth reemphasizing because it seems to have disappeared entirely from the cable industry's comments in this proceeding. The industry comments recommend to the Commission a number of goals and principles, such as reducing administrative burdens, helping cable operators to expand, and relying on the marketplace – all of which are good things.[3] Indeed, from the industry's comments one might suppose that the whole purpose of rate regulation was to help cable operators expand their systems and reduce their costs. Curiously,

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[2] In an Order under the same caption, 17 FCC Rcd. 15,974, released **Aug.** 14, 2002 ***("AmendingOrder"),*** the Commission revised paragraph 55 **of** the *NPRM&O*. Unless otherwise indicated, these Comments apply to the *NPRM&O* as amended.

[3] ***See,*** *e.g.*, Comments of Comcast Cable Communications, Inc. at 2 (filed Nov. 4, **2002)** ("Comcast Comments"); Comments of Cox Communications, Inc., at 2-3 (filed Nov. 4, 2002) ("Cox Comments"); Comments of Cablevision Systems Corporation at 5, 11 (filed Nov. 4,2002) ("Cablevision Comments") (stating stability in the rate-making process and accelerated deployment of advanced infrastructures as goals **of** the Commission).

however, the industry comments do not even once refer to the fact that the overriding goal of rate regulation, the point of the whole matter, is to keep subscriber rates to reasonable levels.

It is therefore **worth** recalling at the outset that Congress instructed the Commission to ensure that basic rates are reasonable:

> (1) Commission obligation to subscribers
>
> The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.[4]

Every proposal, therefore, even if it is put forward with claims of enhancing stability **or** network deployment, must first be tested against the fundamental goal **of** rate regulation: Does it help to ensure reasonable rates? Or, on the contrary, does it make reasonable rate-setting more difficult and provide additional opportunities for evasion?

These Reply Comments address certain of the key proposals advanced in the initial comments. As with the Local Government Coalition's initial comments: these Reply Comments do not attempt to provide an exhaustive analysis of every position or argument put forward. (Thus, it should *not* be inferred from the fact that a claim is not specifically opposed here that the undersigned agree with that claim.) Rather, these Reply Comments seek to focus on some of the proposals that seem most likely to undermine the central goal of rate regulation and to facilitate evasions

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[4] 47 U.S.C. § 543(b)(1).

[5] Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, and the Miami Valley Cable Council (filed Nov. 4,2002) ("Local Government Comments").

II. SUBSCRIBERS STILL LACK THE COMPETITION THAT WOULD MAKE REGULATION UNNECESSARY.

A. DBS "Competition" Does Not Restrain Cable's Market Power.

The cable commenters base much of their argument on the alleged "irreversible growth of competition from DBS and others," going so far **as** to say flatly that "[a]ll systems face competition."[6] Since there are still relatively few subscribers that are served by even as many as two actual wireline cable systems, the industry in fact rests its argument almost entirely on the presence of DBS.[7] On the strength of this alleged competition, the cable commenters argue that instead of requiring cable operators to show that there is effective competition, as the present rules provide, the Commission should presume that there *is* effective competition, at least in every community in states where DBS subscribers are alleged to exceed 15% on a *statewide* basis, and impose on local communities the burden of proving the contrary.[8]

Such a radical change in the Commission's rules would not help to ensure reasonable rates. The Local Government Comments have already pointed out that, as both the FCC and the **GAO** have recognized, DBS "competition" does not in fact restrain cable rates.[9] Thus, the

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[6] Comments of the National Cable & Telecommunications Association at 2, 18 **(filed** Nov. 4, 2002) ("NCTA Comments"). *See also* Cablevision Comments at 2, 15; Cox Comments at 2, 6, 21.

[7] The few claims of widespread non-DBS competition are unsupported: for example, the claim of "strong MVPD competition throughout the nation," NCTA Comments at 29.

[8] *See* NCTA Comments *at* 28-32; Comcast Comments at 35-42; Cox Comments at 18-21.

[9] *See* Local Government Comments at 8-9, 30-31. Commissioner Copps has acknowledged this: "Yet [cable] rates continue to climb, undisciplined by either the cable industry or, in fact, by satellite providers, who some thought would provide an external brake on rising cable rates." *Dissenting Statement of Commissioner Michael J. Copps on Applications for Consent lo Transfer Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.* in MB Docket No. 02-70 (Nov. 13, 2002). A recent study suggests that DE"

industry's proposed reversal of the current presumption would expose subscribers nationwide to the market power of cable operators, without ensuring the protection of a robust competitive market."

The industry's presumption ignores the finding of Congress (which Congress has not reversed) that the cable industry exercises market power.'' It also ignores the fact, acknowledged by NCTA, that applying such a reversal on a statewide basis, without regard to the level of competition (if any) in particular areas, would inevitably leave entire communities within the state at the mercy of that market power.[12] Moreover, the industry's proposed solution places the burden of proof on those entities (the local governments) that have least information about any system's subscribership and least ability to bear the cost of obtaining that information.

Even if DBS could be considered to provide significant competition to cable (and it does not), the industry's proposed reversal of the burden of proof would make it effectively impossible for a community to re-demonstrate the cable company market power that Congress

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market share has leveled off and hence that the situation with regard to competition from this quarter is unlikely to improve. ***See*** **Competition** to ***Cable,*** Warren's Cable Regulation Monitor, Nov. 11, 2002, at 10. See ***also*** Letter from Hon. John McCain, United States Senator, to Hon. David M. Walker, Comptroller General, U.S. General Accounting Office (April 16, 2002), ***available at*** http://mccain.senate.gov/cablerates02.htm (last visited 10/21/02) (***"McCain G.1O letter").***

[10] Some cable operators at times acknowledge their market power. Exhibit **A,** for example, is a letter from Time Warner to the Miami Valley Cable Council, indicating that the company feels it can raise CPS tier rates at will, undeterred by market forces, in such a way as to defeat the purpose of basic tier rate regulation. "If during the appeal process and prior to a final decision by the FCC, Time Warner Cable is required to implement the Rate Order, it is our intention to provide the ordered customer refund during 1 billing period. It is also our intention to adjust our CPST Service Tier price by a like amount during that 1 billing period ...." Exhibit A, Letter from Gerald DeGrazia, Time Warner Cable, to Kent Bristol, Executive Director, Miami Valley Cable Council (Nov. 5,2002) (Settlement Proposal omitted).

[11] See Local Government Comments at 4 & n.5.

found to exist. Indeed, as noted earlier, the SkyTrends data on which the industry relies is not even available to local governments.[13] @ne industry commenter kindly suggests that the Commission's rules be changed to require SkyTrends to make its data available to localities in the same way as it is now available to cable operators.[14] Since the same commenter complains three pages later that operators themselves have not been able to use the Commission's rules effectively to obtain competitive data, however,[15] it is clear that the effect of this proposed rule change would not be to make market evaluations easier. On the contrary, the cable commenters' attempt to push off the burden of proof onto those least able to bear it would make it far more difficult in practice to re-establish what Congress found and what cable subscribers already know – that the cable operator is as a rule the "only game in town."

The economic advantage enjoyed by cable operators in today's massive regional "clusters" should not be underestimated here. A contemporary MSO can pay SkyTrends' prices for DBS data for a vast area – say, an entire state – and spread the cost of this expense over an entire state's worth of subscribers. A given local community, however – particularly a small community[16] – serves only a relatively small number of subscribers, who (under the industry's proposal) would have to bear the cost of obtaining the necessary data to refute the operator's presumption. In other words, because local communities are broken up into smaller units than

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[12] ***See*** NCTA Comments at 29 ("It does not, of course, follow from the fact that statewide DBS penetration exceeds 15 percent that penetration exceeds 15 percent in *every* community").

[13] Local Government Comments at **31.**

[14] Comcast Comments at 39.

[15] Comcast Comments at 42 n.124

modem cable systems, the communities lack the efficiencies of scale of which cable operators can take advantage. Even if the communities could band together into consortia to bear the cost of the burden the industry wishes to impose, the transaction costs involved in effect make the process significantly more costly **for** local communities than for the industry.

The cable commenters suggest that the Commission amend the rate regulation rules to enable operators to frustrate the intent of Congress by continuing to take advantage of their size and financial resources to the detriment of consumers. For example, in several cases the comments propose that communities that fail to act within a few days' window should be permanently foreclosed from refuting the operators' claims." From an industry which claims that it cannot even implement refunds in less than sixty days," in the context of a process in which the dominant federal agency has often taken years to act on a petition," this eagerness to cut short local communities' deadlines simply represents an attempt to make the regulatory process as easy to avoid as possible.

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[16] The Local Government Coalition reminds the Commission that it is required by law to take into account the effect of changes in its rules on small entities, including small local communities. ***See*** Local Government Comments at 13 n.27.

[17] ***See,*** *e.g.*, NCTA Comments at 31 ("binding presumption" that operators' zip code lists are correct after 20 days); ***id.*** (Commission should automatically grant unopposed effective competition petitions once the 20-day time period has elapsed); Cox Comments at 20 ("If an affected LFA chooses not to oppose the petition within thirty (30) days, the cable operator would be deemed to face effective competition in that franchise area").

[18] *Cf. In* ***re*** *TCI Communications, Inc. - Complaint Regarding Cable Programming* ***Services Tier*** *Rate Increase,* Order, 13 FCC Rcd. 2919, ¶ 16, at 2962 (1998) (sixty days allowed for an operator to provide subscriber refunds once an overcharge has been determined),

[19] *Cf.* Local Government Comments at 60 n.120.

In sum, the cable commenters' proposal to reverse the burden of proof is a recipe for evasion. Requiring local communities to prove what Congress has already found would merely turn cable operators loose to use their market power to set unreasonable rates.

B. A Competition Claim May Not Be Based On Mere Promises.

NCTA suggests that a local exchange carrier should be presumed to provide ubiquitous competition based merely on a "buildout requirement" and the bare commencement of operations." As the Local Government Comments showed, such an approach fails to protect subscribers against unreasonable rates.[21] The industry has offered no reason why, in the current bankruptcy-rich environment, the mere fact that a competitor is a LEC somewhere in the world should be assumed to guarantee such an immense competitive threat that the incumbent cable operator will necessarily reduce its rates to reasonable levels as soon as that competitor serves a single subscriber. Again, the touchstone is: Will the condition ensure reasonable rates? In any case where a subscriber does not actually have a selection of competitive alternatives to provide service, it must he assumed that the single incumbent can exercise market power. Thus, to suppose that a single LEC-served household can effect competition throughout an entire city is merely a way of evading the need to protect the rest of that city from unreasonable rates.

C. The Commission Should Actively Investigate Anticompetitive Practices.

As noted in the Local Government Coalition's initial comments, real competition (as distinct from the alleged competition touted by the cable industry) remains the best way of

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[20] NCTA Comments at 31.

[21] Local Government Comments at 35-37

ensuring reasonable rates.[22] The Local Government Comments recommended that the Commission take an active role in intercepting incumbent tactics that could stifle potential competition in its cradle.[23] In this proceeding at least one such competitor has also challenged the Commission's inaction in the face of such tactics.[24] Indeed, the Commission has found credible the suggestions of commenters on the AT&T-Comcast merger that the MSOs could be engaging in "questionable marketing tactics" that could harm consumers.[25] We urge the Commission again to take a close look at the methods incumbents use to fend off competition.

III. CABLE OPERATORS CANNOT BE ALLOWED TO EVADE THE EQUIPMENT REGULATION MANDATED BY CONGRESS.

The Commission found that the cost-based equipment regulation required by Congress should be applied to all equipment used to receive the basic service tier.[26] This approach properly applied the intent of Congress.[27] The potential for cable operators to use their market power to impose unreasonable rates on subscribers by manipulating equipment rates, rather than

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[22] Local Government Comments at 2.

[23] Local Government Comments at 25-26.

[24] Comments of Everest Midwest L.L.C. DB Everest Connections (filed Nov. 4,2002).

[25] Alicia Mundy, *Between the Lines*, Cable World, Dec. 2, 2002, at 5. *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp.. Transferors, to AT&T Comcast Corporation, Transferee,* Memorandum Opinion and Order, MB Docket No. 02-70, released Nov. 14, 2002, ¶ 120.

[26] *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, ¶ 282-83, at 5805-07 (1993).

[27] With minor exceptions. *See, e.g.*, *In re SBC Media Ventures, Inc. - Appeal of Local Rate Order of Montgomery County, Maryland,* Consolidated Order, 9 FCC Rcd. 7175, ¶ **17,** at 7180 (1994) (A/B switches not regulated, even though basic signals pass through them, on the ground that they are used *not* to receive basic service).

service rates themselves, was not affected by the fact that such equipment might be used to access other services as well.

The industry would like to be able to exempt digital boxes from rate regulation.[28] The cable commenters suggest replacing the Commission's "used to receive basic" criterion with the far more indeterminate criterion "used primarily to access non-basic services," or possibly with the extreme criterion "destined for basic-only service."[29] The rationales for this proposed change seem to be that CPS tier regulation has now been eliminated (which is not relevant in any obvious way); that rate regulation is unnecessary to protect subscribers (applying the right criterion, but in a wholly conclusory fashion); and because cable operators have "made enormous investments" in new services (which again has no clear relevance to the need to protect subscribers).[30] However, it is significant that the cable commenters do not simply wish to have this new, expensive equipment deregulated. Rather, they wish to have ***discretion*** whether or not to include it in the aggregated pools of regulated equipment.[31] Such a discretionary approach would maximize opportunities for gaming the system.

Would the industry's proposal ensure that subscribers pay reasonable rates? There is no reason to think that this would occur. In fact, the Commission's "used to receive basic" criterion seems to be the only viable standard to achieve the objectives of Congress. **If** the Commission were to apply a "basic-only'' criterion, **or** even a "primarily" criterion, this would simply serve to deregulate almost all equipment, without ensuring that subscribers are protected from

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[28] ***See*** NCTA Comments at **23-26;** Comcast Comments at **43-35;** Cablevision Comments at 13-14; Cox Comments at 5-8.

[29] NCTA Comments at 24 (emphasis added).

[30] ***See*** NCTA Comments at 24; Comcast Comments at 44; Cox Comments at **6**

unreasonable rates. Cable operators are already phasing out basic-only converters in favor of more expensive set-top boxes that enable all subscribers to order more expensive services, whether the subscribers wish to do so or not. As **a** result, lifeline basic subscribers (among others) are being forced to pay for boxes with capabilities they may not want and do not use. Furthermore, Congress's intent in passing Section **624A** of the Communications Act was in part to enable consumers to receive cable signals without use of **a** set-top box.[32] The cable industry comments, and the actions to date of the cable industry-controlled Cable Labs, are part of a continuing pattern to frustrate this Congressional purpose as well.

In effect, moving from "used to receive basic" to a more restrictive criterion would enable operators to "bundle" basic service capabilities in the same piece of equipment with more expensive capabilities, which the subscriber cannot choose to forego. **As a** result, the basic subscriber would pay unregulated (monopoly) prices to receive regulated services. **Such an** arrangement makes possible **a** classic way to evade rate regulation: give the razor away, but charge heavily for the blades. Unreasonable rates for the necessary equipment can make obtaining the service unreasonably expensive even if the service rate by itself is controlled.

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[31] Comcast Comments at **45**

[32] 47 U.S.C. § 544a(a).

IV. CABLE OPERATORS CANNOT BE PERMITTED TO MANIPULATE CHANNEL MOVEMENT AND CHANNEL COUNTS TO LEVY EXCESSIVE CHARGES ON SUBSCRIBERS.

A. Channel Movement Rules Should Prevent Evasions and Protect Subscribers.

The cable commenters devote a surprising amount of verbiage to what initially appeared to be a simple issue: moving channels on or off the basic tier.[33] It appears that this level of interest may reflect a hitherto unsuspected potential for creating new evasions through the manipulation of the channel movement rules.

The underlying issue has been discussed in the Local Government Coalition's initial comments.[34] When channels are removed from the basic tier, basic tier subscribers should no longer have to pay for those channels. (Similarly, when channels are added to the basic tier, basic subscribers should be required to pay for those added channels.) The charge for such a channel is made up of two elements: channel-specific external costs (programming fees), and that channel's share of the total tier price aside from those external costs (the "residual"). Both of these charges must be removed from the basic rate if a channel is moved off the basic tier – otherwise, subscribers would continue paying at least part of the cost for a channel they no longer receive.[35]

This essentially simple issue has been subjected to considerable confusion in the industry comments. For example, NCTA professes to be unclear as to whether the residual still needed to

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[33] ***See*** NCTA Comments at 2-8; Comcast Comments at 18-28 and Appendix; Cablevision Comments at 4-7; Cox Comments at 8-15 and Appendix.

[34] Local Government Comments at 39-47.

[35] Some cable commenters recognize this principle. Comcast Comments at 24; Cox Comments at 12.

be dealt with after 1997.[36] Their confusion is illustrative, as we believe that no one could reasonably suppose that subscribers should continue to pay for a channel they no longer receive. Cable commenters also plead that any distortions or misinterpretations of the Commission's rules adopted "in good faith" by cable operators should be grandfathered.[37] **As** noted in the Coalition's initial comments, this fallacy is based on the mistaken notion that reducing rates to reasonable levels is a punishment for bad faith, rather than an economic adjustment that must (to implement the mandate of Congress) be applied whether or not the operator acted in good faith.[38]

A particularly significant confusion is created by the unstated assumption that the "Mark-Up Method" must be preserved.[39] This method allows cable operators to charge *more* than their actual costs when they add new programming to a tier. It was adopted by the Commission in 1994 in order to "help promote the growth and diversity of cable programming services."[40] Arguably, this cable operator bonus was improper and contrary to the mandate of Congress even when first introduced, because it allowed operators to charge subscribers unreasonable rates (rates exceeding those the FCC considered reasonable pursuant to its benchmark formulae) in order to achieve a separate policy goal – incentives for new programming. Certainly there is no

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[36] NCTA Comments at 4.

[37] NCTA Comments at 5. *See also* Cablevision Comments at 4-5.

[38] Local Government Comments at 45-46. Indeed, if good faith were an appropriate criterion, the same argument could just as well be used to show that the Commission should let stand all local franchising authorities' good-faith interpretations of FCC rules.

[39] *See* NCTA Comments at 6 (incorrectly supposing that the adjustment of the residual was an alternative to this mark-up); Comcast Comments at 19; Cox Comments at 8.

[40] *In re 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, ¶ 246 at 4242 (1994) ("Second Reconsideration Order").

contemporary evidence that operators need special add-on incentives in the current market to provide new programming. (And when such new programming is provided, it is likely to be on the now-unregulated CPS tiers, whose rates are unaffected by the Commission's rules.) **As** always, the Commission needs to apply to the industry's programming mark-up the basic criterion stated above: Would such a rule help ensure reasonable rates for subscribers?[41]

The cable commenters also advocate an apparently technical change whose effect would be to further diminish the effectiveness of the Commission's rules in achieving reasonable rates. This is the notion of eliminating consideration of CPS tier channels in computing the total number of channels for purposes of the channel movement adjustment.[42] The industry's proposal would not, however, reach an accurate result. The Commission's original analysis of the competitive differential, on which the adjustment tables were based, identified as a significant variable the total number of channels on ***all*** tiers, not merely on basic.[43] Thus, if the Commission were to adopt the cable commenters' suggestion of ignoring CPS tier channels, the Commission's only alternative would be to completely recalculate the competitive differential

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[41] One change that ***would*** help ensure reasonable rates would be to require cable operators to submit actual programming contracts along with their rate filings when they claim a change in programming costs. Recent disclosures by Comcast have suggested that at least some cable operators may be inflating their alleged programming costs on Form 1240 filings by not passing along corporate level volume discounts to individual systems. ***See*** Comcast Cable Communications, Inc., *Form* ***IO-K Annual Report Pursuant*** *to* ***Section*** *I3* ***or*** *15(d)* ***of the Securities Exchange Act of 1934 For the Fiscal Year Ended December*** *31,* ***2001,*** at 42 (tiled March 29, 2002) ***available at*** <http://www.sec.gov/Achives/edgar/data/1040573/000095015902000190/cable10k.txt>: "[O]n behalf of the company, Comcast secured long-term programming contracts . . . Comcast charged each of the Company' subsidiaries for programming on a basis which generally approximated the amount each subsidiary would be charged if it purchased such programming from the supplier . . . and did not benefit from the purchasing power of Comcast's consolidated operations."

[42] ***See*** NCTA Comments at 7; Comcast Comments at 25-26; Cablevision Comments at ***6;*** Cox Comments at 13.

and the adjustment tables in terms of basic channels alone. To follow the industry's suggestion of using the existing all-tier tables based only on basic-tier channels would be comparing apples and oranges with a vengeance. It would allow an evasion of the Commission's rules and permit unreasonable rates.

B. The Treatment of Digital Channels Must Be Consistent With the Commission's Other Rules.

The cable commenters also seek to shape the Commission's rules for counting channels in such a way that rates can be increased without corresponding increases in the underlying system costs. As noted above, the Commission's original rate formulae incorporated as one variable the capacity of the cable system, expressed in 6 MHz channels. Where digital compression is applied, channels of programming may be transmitted using much less than 6 MHz of capacity. It appears the industry would prefer to have each such compressed channel counted on the same basis as a 6 MHz analog channel for purposes of the rate rules.[44] This approach, however, would not be consistent with the Commission's original analysis. Because the Commission's formulae are calibrated in terms of 6 MHz channels, the industry's approach would skew the rate calculations.

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[43] ***See*** Second Reconsideration Order, Appendix C: Technical Appendix at 15-16.

[44] ***See*** NCTA Comments at 10-11; Comcast Comments at 28-29; Cablevision Comments at 7; Cox Comments at 15-17.

V. THE COMMISSION SHOULD REJECT CABLE'S NEW AGENDA OF EVASIONS.

A number of other proposals in the industry comments simply ask the Commission to sanction in advance new ways to evade the requirement of a true competitive price. Very briefly:

Remands of rate appeals. Comcast and Cox, in parallel comments, suggest that the Commission should require local franchising authority action within sixty days of a remand. This argument is based on vague general allegations of arbitrary behavior by local communities, for which the companies put forward exactly one example.[45] (Incidentally, the commenters' certificates of service provide no evidence that they notified the community involved.)[46] The Commission need not take this suggestion seriously, particularly given that Comcast offers it immediately following the contradictory point that local communities may find it difficult to determine the proper interpretation of "the Commission's admittedly complex rate regulations."[47] Such a time limit would invite cable operators to drag their feet in providing needed information on remand so **as** to "run out the clock" in local communities – particularly in the absence of effective and easily applied enforcement tools.[48] It would thus enable evasions, rather than helping to ensure reasonable rates for subscribers.

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[45] ***See*** Comcast Comments at 50-53; **Cox** Comments at 28-29.

[46] *Cf.* 47 C.F.R. § 1.1204(b) nt.

[47] Comcast Comments at 51. This difficulty has been noted in the Coalition's initial comments. It should be resolved, however, by making Commission guidance available *before* a rate order is issued, rather than by attempting to hurry up local governments after the fact. ***See*** Local Government Comments at ***52-53.***

[48] ***See*** Local Government Comments at 19-20.

Unbundling. Comcast and Cox argue that the Commission should forbid what they disparage as "strict historical linkage" of service tier and equipment costs.[49] Apparently the goal of this change would be to enable cable operators to gain the sort of double recovery that the Commission has properly ruled out in a number of past orders.[50] The cable commenters inaccurately describe the issue as if local communities had raised the issue of reclassifying costs, when in each of these cases it was the cable operator who created the issue by seeking to shift existing costs into the equipment basket (without removing them from the service basket) years after the beginning of rate regulation. Even the cable commenters reluctantly acknowledge that the practices involved "may, under certain circumstances, have constituted evasion."[51] The industry proposal here should be rejected because it would enable just such evasions.

Initializing regulated rates. The cable commenters suggest that if rate regulation is imposed in a community for the first time, existing rates should be allowed to stand as a starting point, because it would be too much trouble for the cable operator **to go** back to the Form 1200 calculations.[52] The industry's approach is not viable, however, because it would not ensure reasonable rates: there would be no opportunity to apply the 17% competitive differential the

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[49] Comcast Comments at 13-18; Cox Comments at 22-26.

[50] ***See, e.g.,*** *In* ***re Suburban Cable TV, Inc.*** *(Northampton)* ***- Complaint Regarding Cable Programming Services Tier Rates and Petitions for Reconsideration,*** Order on Reconsideration and Rate Order, 12 FCC Rcd. 23,862, ¶¶ 9-10, at 23,865 (1997); *In* ***re TCI Cablevision*** *of St.* ***Louis,*** *Inc.-Appeal of* ***Local Rate Order of the City*** *of St.* ***Louis, Missouri,*** Memorandum Opinion and Order, 12 FCC Rcd. 15,287 (1997); ***In re Suburban Cable TV, Inc. (Doylestown) - Complaint Regarding Cable Programming Services Tier Rates and Petition for Reconsideration,*** Order **on** Reconsideration and Rate Order, 13 FCC Rcd. 13,111, ¶¶ 8-10, at 13,113-14 (1997); *In* ***re TCI Cablevision of Oregon, Inc.-Appeal of Local Rate Orders,*** Memorandum Opinion and Order, **DA** 99-2227, ***available at*** 1999 WL 958605, ¶¶ 6-8 (Oct. 21, 1999).

[51] Comcast Comments at 16; Cox Comments at 24.

[52] NCTA Comments at 12-13; Comcast Comments at 5-9; Cablevision Comments at 7-8.

Commission found necessary to arrive at reasonable rates. Certainly there **is** no reason to assume that existing rates are *ipso facto* reasonable, **as** the cable commenters would prefer." However, if there are other valid ways to arrive at a competitive rate, such methods might be used in place of a Form 1200 calculation: for example, comparison with nearby rates under actual head-to-head competition.[54]

Interest rates. **As** the Massachusetts Department of Telecommunications and Energy has pointed out, the 11.25% factor used in the Commission's original calculations is out of step with the current market, and in fact provides an incentive for cable operators to underestimate costs so as to profit from a high-interest true-up later."

Refunds. The industry proposes to reduce subscriber refunds to a series of installments or to "in-kind" refunds.[56] It has not, however, been shown that cable operators are suffering any hardship from being required to give back to subscribers immediately what they never should have collected in the first place (particularly when one recognizes that "immediately" really means the end of a rate review that may take up to a year). Even less fair to subscribers **is** the notion that a required refund could be paid, for example, in the form of a coupon for additional cable operator services. Such an approach would further limit consumer choice, rather than enhancing it: the operator takes money the subscriber should not have had to pay in the first

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[53] The Commission should reject the industry's assumption that communities which were deterred from entering upon the elaborate and extensive rate review process necessitated by the Commission's rules thereby agreed that existing rates were reasonable. ***See*** Local Government Comments at 12-13.

[54] ***See*** Local Government Comments at 20-23.

[55] ***See*** Comments of the Massachusetts Department of Telecommunications and Energy at ***6***. *See also* NCTA Comments at 19. Comcast refers to a different standard, that of IRS interest rates, in the context of its own refunds. Comcast Comments at 49.

place and could have used for other purposes (including "competitive" purposes such as DBS subscription or video rental), and forces the subscriber to dedicate that money to the cable operator in one form or another.

Tier changes. The cable commenters wish to be able **to** charge subscribers without limit for tier changes that require no more than a simple computer entry, without a truck roll.[57] This revision would not help ensure reasonable rates. The $1.99 charge allowed by the Commission's rules is already considerably more than "nominal." And if anything, improved technology is likely to have made these automatic changes even less expensive for cable operators since 1993. The Commission should reject Comcast's curious statutory argument, *i.e.*, that tier change charges are not subject to regulation because the Cable Act authorized only charges for changes in service and equipment that are themselves regulated.[58] On the contrary, since all subscribers receive basic service, tier changes clearly fall within the category **of** installation activities involving reception of basic service.

Commercial rates. As shown in the Coalition's initial comments, there is no reason to distinguish commercial from residential rates for the same service.[59] NCTA focuses on certain types of "commercial" customers, such as bars and restaurants, to suggest that such establishments might derive financial benefits from the same sort of service provided to homes.[60] This argument, even if relevant, fails to recognize the different sorts of subscribers that might be

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[56] NCTA Comments at 20.

[57] ***See*** NCTA Comments at 27; Comcast Comments at 46-47; Cox Comments at 30

[58] Comcast Comments at 46-47.

[59] Local Government Comments at 56-59.

[60] NCTA Comments at 16.

classed by the operator as "commercial," as pointed out in the Local Government Comments. Comcast argues that certain references to "households" in the Cable Act must be read to exclude commercial establishments from protection against unreasonable rates.[61] Both claim that cable companies face competition for commercial subscribers.[62] Neither, however, has shown that the market sufficiently protects non-residential subscribers to ensure that there is no danger of unreasonable rates. In fact, marking out a special category for commercial subscribers would not help ensure reasonable rates. On the contrary, creating the special commercial category that cable commenters desire would lend itself to evasions, since neither the NPRM nor the industry commenters offer any definition of "commercial" that would distinguish a sports bar from a dentist's office (or from a home office generally).

Quarterly rate filings. Comcast argues at some length that the Commission should "harmonize" its procedural rules for annual and quarterly filings.[63] This bid for procedural change highlights the fact that the earlier Form 1210 method, used by relatively few modem cable operators, is essentially a vestigial process with no significant advantages over the annual Form 1240 method. It would be preferable for the Commission to streamline its rules by eliminating the quarterly method altogether and standardizing regulated systems on the annual method.[64]

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[61] Comcast Comments at 32-34

[62] NCTA Comments at 16-17; Comcast Comments at 34

[63] Comcast Comments at 9-13.

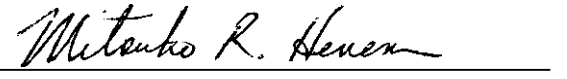
[64] The preservation of Form 1210 after the industry's almost unanimous migration to Form 1240 is an example of the sort of pointless multiplication of options referred to in the initial comments. *See* Local Govemment Comments at 12.

System-wide filings. NCTA and Cablevision seek a right to avoid making individual franchise filings and instead to submit only system-wide filings throughout a region." Similarly, Cablevision wishes to make multi-year rather than annual filings for equipment rates.[66] As with cable operators' implementation of equipment aggregation, discussed in the Coalition's initial comments, this sort of geographic or chronological aggregation would merely make it easier for cable operators to "hide the ball" and harder (more time-consuming and expensive) for local communities to determine the correct data for use in the FCC's rate formulae.[67] These proposals are thus tools for evasion and would not help to ensure reasonable rates.

VI. CONCLUSION

For the reasons indicated above, the Commission should revise and enforce its rate rules as recommended in the Local Government Comments and herein

Respectfully submitted,



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[65] NCTA Comments at 14-15; Cablevision Comments at 9-10

[66] Cablevision Comments at 14-15.

[67] *See* Local Government Comments at 47-54.