Before the
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 any public, educational, and

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

[2]47 U.S.C. §§ 151-614.

[3]11 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.*

[6]We 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*.

[7]Cable 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.

[8]47 U.S.C. § 543(a)(2), (b), (c).

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]

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

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[9] 47 U.S.C. § 543(b)(7).

[10] 47 U.S.C. § 543(l)(2).

[11] 47 U.S.C. § 543(a)(2).

[12] A 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.

[13] 47 U.S.C. § 543(c)(4).

[14] 47 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).

[16] 1996 Act § 301(b)(3), 110 Stat. 115; 47 U.S.C. § 543(l)(1)(D); *see* 47 C.F.R. § 76.905(b)(4).

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 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.

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[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.

[18] 47 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.

[21] *See* 47 C.F.R. § 76.905(g).

[22] *Notice*, 11 FCC Rcd at 5961-62.

[23] *Id*. at 5962.

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 affiliate[24] "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 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

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

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

[26]47 C.F.R. § 76.905(e).

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

[28]*Notice*, 11 FCC Rcd at 5962-63.

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 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

[29]Fleischman 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).

[30]New 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.

[31]OpTel, 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.

[32]Massachusetts 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).

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

[34]New Jersey Ratepayer Advocate Comments at 5.

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

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 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.

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[36]City and County of Denver Comments at 5.

[37]Cablevision Comments at 9.

[38]*See* 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."

[39]142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings explaining the thrust of the 1996 Act).

[40]Once 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.

[41]142 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 consumers have just one company to choose from for the provision of local telephone or cable television service.").

[42]*See* 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."

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 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

[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*").

[45]*See 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.)

[46]*See* 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.

[47]S. 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).

mere *de minimis* LEC presence in the franchise area,[48] we find in such statements and their broader context[49] 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 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]

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[48]Commenters 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).

[49]For 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).

[50]In 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."

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

[52]When 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.

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 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

[53]47 C.F.R. § 76.906.

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

[55]The 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.

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 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

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[56]The 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.

[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

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 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

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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.

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

[62]47 C.F.R. § 76.905(g).

[63]Comcast Comments at 9 & n.25.

[64]Massachusetts Cable Commission Comments at 5.

[65]Denver 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).

[67]*See* 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).

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 Act[69] 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.

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 matters[73] 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

[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.

[69] *See 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*").

[71] *See Notice*, 11 FCC Rcd at 5962.

[72] *Id.*

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

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 "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"

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[74]BellSouth 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.

[75]US 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).

[76]Communications 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.

[77]1996 Act § 3(a) § 3(a), 110 Stat. 58, *codified at* 47 U.S.C. § 153(1).

[78]47 U.S.C. § 153.

[79]47 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).

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 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]

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[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.

[84]47 C.F.R. § 76.1401(b).

[85]*Notice*, 11 FCC Rcd at 5964.

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

[87]Massachusetts Cable Commission Comments at 7.

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

[89]State of New York Comments at 9.

[90]New York City Comments at 11-12.

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.

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.

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[91] *See infra* at para. 70.

[92] *Interim Order*, 11 FCC Rcd at 5944.

[93] *Id.*

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

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

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

[97] 47 C.F.R. § 76.906.

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 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 describers 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

[98]*See* 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).

[99]*See* 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.

[102]Report 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 Regulatory Review*.

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

[104]47 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.

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:

> 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

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[105] 47 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.

[107] 47 U.S.C. § 543(c)(3).

[108] *Rate Order*, 8 FCC Rcd 5840-5841.

[109] 47 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.*

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 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

[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.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Order* at 5992.

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 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

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

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

[123]*See* 47 C.F.R. § 76.910.

[124]New Jersey Ratepayer Advocate Comments at 12.

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

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

[127]Fleischman 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*

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]

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.

App. A.

[129]Fleischman Comments at 18-21.

[130]Time 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.

[132]CATA Comments at 3-4.

[133]*Id.*

[134]47 U.S.C. § 543(a)(2)(B), (c).

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 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]

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[135]Comcast 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).

[137]*See 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).

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

[139]GMCC Comments at 2-4.

[140]New York City Comments at 17-18.

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 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

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[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.*

[143] NCTA Comments at 26

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

[145] Massachusetts 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).

[146] Fleischman Comments at 19.

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 compliant. 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 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

[147]GMCC Comments at 3.

[148]When 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.

[149]It 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.

[151]47 U.S.C. § 543(c)(3).

[152]*Id.*

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]

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.

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

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

[155] Fleischman Comments at n. 46.

[156] NCTA Comments at 28.

[157] New York City Comments at 18.

[158] *Id.*

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 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

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

[160]*Id*. at 12.

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

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

[163]47 C.F.R. § 76.951.

[164]TCI Comments at 25-27.

[165]*Id.*

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 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

[166]NCTA Comments at 26, n. 75.

[167]State of New York Comments at 17.

[168]*Id.*

[169]*Id.*

[170]47 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").

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.

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

[172] 47 U.S.C. § 543(m).

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

[174] *Id.* at 5948.

[175] *See 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.

1. 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 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

[178]*Id.* at 5965.

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

[180]SCBA Comments at 4.

[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.

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

[185]NCTA 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.

billing unit methodology.[187] Households used solely for seasonal, occasional, or recreational use should not be included in the customer count.[188]

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 rules[189] 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

[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).

[189]47 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.*

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 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

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[194]*Id.* at 5966-67.

[195]*Id.* at 5967.

[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.*

[198]Fleischman Comments at 23.

[199]SCBA Comments at 19.

[200]U.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.

[201]47 U.S.C. § 522(2).

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 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.

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

[203]NCTA Comments at 35-36.

[204]Cole Raywid Comments at 14-15.

[205]SCBA Comments at 14-17.

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

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

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

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 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

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[209]*Id.* at 4.

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

[211]We 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).

[212]Cole Raywid Comments at 10-11.

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 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

[213]Cole Raywid Comments at 10-11.

[214]C-TEC and Mercom Comments at 4-5.

[215]GE Capital Reply Comments at 6-7.

[216]BellSouth Comments at 4-5.

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

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

[219]SCBA Comments at 22.

aggregation under which the affiliated entity's revenues are applied toward the cap in proportion to the 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

[220] *Id.* at 22-23.

[221] Cole Raywid Comments at 15.

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

[223] LSGAC Recommendation 13(E).

[224] 47 U.S.C. § 543(m)(2).

[225] *See* NCTA Comments at 37; SCBA Comments at 20.

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

for small operator treatment is not in dispute.[227] Cable operators support simplified 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

[227]*Notice*, 11 FCC Rcd at 5969.

[228]NCTA Comments at 41.

[229]SCBA Comments at 28.

[230]Fleischman Comments at 25.

[231]NCTA Comments at 41; SCBA Comments at 28.

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

[233]47 U.S.C. § 543(m).

conclusion in this regard.[234] Operators claiming eligibility for 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

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

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

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

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

[238]NCTA Comments at 43.

[239]*Id.*

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

to the point of exceeding the $250 million threshold. They argue 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 regulations

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[241]Fleischman 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.

[242]CATA Comments at 7.

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

[244]Fairfield Comments at 3.

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

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

[247]The 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.

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 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.

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[248] *See 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).

[249] 47 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.

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 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

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[252] 47 U.S.C. § 543(d); *see* 47 C.F.R. § 76.984.

[253] 1996 Act, § 301(b)(2), 110 Stat. 115.

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

[255] *Notice*, 11 FCC Rcd at 5970-5971.

[256] *Id.*

[257] *Id.*

[258] *Id.*

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 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

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[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.

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

[263]*Rate Order*, 8 FCC Rcd at 5898.

[264]*Id*.

[265]*Implementation 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*").

[266]1996 Act § 301(b)(2), *amending* 47 U.S.C. § 543(d); *Notice*, 11 FCC Rcd at 5971.

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 rules[268] 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 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]

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

[268]New Jersey Ratepayer Advocate Comments at 17.

[269]According 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.

[270]ICTA Comments at 10; OpTel Comments at 6.

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

[272]*Id.*

[273]Cablevision Comments at 18.

[274]Comcast Comments at 12.

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

[276]Fleischman Comments at 30-31.

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 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 hamstrings 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

[277]Cole Raywid Comments at 17.

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

[279]Cole Raywid Comments at 18.

[280]Cablevision 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.

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

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

[283]Cox Comments at 10-11.

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

[285]Massachusetts Cable Commission Comments at 9-10.

[286]*Id.* at 10.

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.

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

[287]U.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.

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

[289]We 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.

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

[291]Cablevision 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.

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]

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

[292]City 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.

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

[294]*Notice*, 11 FCC Rcd at 5971.

[295]GTE Comments at 6.

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

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

[298]Cole Raywid Comments at 18.

[299]*Id.* at 19.

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.

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

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

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

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

[303] Cox Comments at 11-12.

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

[305] *Id.* at 5897.

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 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.

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

[307]*See* 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").

[308]ICTA 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.

[312]*See 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).

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 margin[314] 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 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

[313]Fleischman 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.

[314]The 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*").

[315]Time 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.

[316]ICTA Comments at 17.

[317]OpTel Comments at 9.

[318]*See 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%.

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. The cable operator can also show that below-cost prices are justified by some economic efficiency, such as promotional pricing. For example, low prices accompanying new product introductions and temporary price promotions to induce future sales have not been viewed as predatory, even though they might have been below an appropriate measure of cost.[322] In addition, the cable operator can show that differences in prices result from conduct undertaken in good faith to meet an equally low price of a competitor.[323]

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[319]*Brooke*, 509 U.S. at 225.

[320]47 U.S.C. § 543(d).

[321]*See* ICTA Comments at 17.

[322]*PanAmSat*, 12 FCC Rcd at 6962, *citing Vollrath Co. v. Samni Corp*., 1990-91 Trade Cases (CCH) ¶ 68955 at 63133 (C.D. Cal. 1989).

[323]*See Brooke*, 509 U.S. at 220, *citing Standard Oil Co. v. FTC*, 340, U.S. 231, 250 (1951); *Great Atlantic & Pacific Tea Co., v. FTC*, 440 U.S. 69, 80 & n.13 (1979); *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63, 74 (1953). In its Comments at 19-23, TCI advocated that a "meeting competition" defense be recognized. *See* State of New York Comments at 31 (bulk rate exception only has meaning if the operator can respond to competition). *But see* U.S. Wireless Reply Comments at 6 (opposing a "meeting competition" defense); ICTA Reply Comments at 8-9

113. Time Warner has asked that MDU rates based on regulations promulgated under the 1992 Cable Act not be made subject to new provisions.[324] We agree that bulk discounts permissible under the standards in effect when they were implemented should not become impermissible because the standards changed subsequently.[325] However, any contractual changes or renewals after the 1996 Act must conform to Section 632(d) as amended by the 1996 Act.

4. Other Issues

114. Because predatory pricing complaints are likely to involve some measure of discovery, the *Notice* asked for comment on adopting the procedures of the Commission's program access rules in Section 76.1003.[326] Commenters generally agree with this proposal.[327] Some commenters are also concerned about protections against disclosure of proprietary information,[328] a matter also addressed in our program access rules.[329] Subsequent to our proposal, we have streamlined our procedural rules by specifying general procedures for discovery in Section 76.7(f) of our rules and by specifying general procedures governing the confidentiality of information in new Section 76.9 of our rules.[330] Complaints about predatory pricing should be filed pursuant to the general filing procedures in Section 76.7 of our rules.[331] Discovery and confidential proprietary information shall be handled as they are under the Commission's Freedom of Information Act rules[332] and Sections 76.7(f) and 76.9 of our rules.[333]

115. Section 76.7(f) of our rules provides that Commission staff, in its discretion, may order discovery limited to specific issues specified by the Commission. In addition, Commission staff has the discretion to direct parties to submit discovery proposals, together with a memorandum in support of the

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(a "meeting competition" defense is inconsistent with *Time Warner*, 56 F.3d at 191-92). The court in *Time Warner*, however, held only that the Commission did not act arbitrarily or capriciously in denying a "meeting competition" defense when applying the language of the 1992 Cable Act. 56 F.3d at 191-92.

[324]Time Warner Comments at 42.

[325]*See generally Third Order on Reconsideration*, 9 FCC Rcd at 4326 para. 22 (grandfathering bulk discounts in effect when Commission implemented uniform rate requirement of the 1992 Cable Act).

[326]47 C.F.R. § 76.1003.

[327]*See* NCTA Comments at 48; Fleischman Comments at 35; Time Warner Comments at 42; WCA Comments at 8-10.

[328]*E.g.*, Fleischman Comments at 30-35; Time Warner Comments at 42-43.

[329]47 C.F.R. § 76.1003(h).

[330]*1998 Biennial Regulatory Review*, FCC 98-348 at para. 15.

[331]47 C.F.R. § 76.7.

[332]47 C.F.R. §§ 0.457, 0.459.

[333]47 C.F.R. §§ 76.7(f), 76.9, *as amended in 1998 Biennial Regulatory Review*, Appendix A, § 76.7(f), § 76.9.

discovery requested. While NCTA has suggested that discovery should be available only after a complainant has met the prima facie showing threshold,[334] our rules give Commission staff the discretion to permit discovery both preceding and after a prima facie showing has been made, as long as a complaint establishes a sufficient factual basis to proceed.

116. Cablevision encourages the Commission to make clear that states and LFAs may not impose uniform rate requirements that are inconsistent with federal law.[335] Citing the decision in *Time Warner*, Cablevision argues that allowing local authorities to adopt uniform rate requirements on unregulated services or in areas subject to effective competition would be not only inconsistent with the 1996 Act, but would also contravene the 1992 Act by imposing "a form of rate regulation" in circumstances where it is not authorized by federal law.[336] We agree. States and LFAs may not adopt uniform rate requirements that conflict or are in any way incongruent with the statutory provisions or our rules.

VII. TECHNICAL STANDARDS

A. Background

117. Pursuant to Section 624(e) of the Communications Act, the Commission adopted technical standards that govern the picture quality performance of cable television systems.[337] Prior to enactment of the 1996 Act, Section 624(e) provided, in part:

> A franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection.[338]

118. Section 301(e) of the 1996 Act amended Section 624(e) by replacing this language with the following:

> No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.[339]

119. In the *Interim Order*, we eliminated language in Note Six to Section 76.605 of the Commission's rules that permitted an LFA to apply to the Commission for a waiver to impose more stringent

[334]NCTA Comments at 49.

[335]Cablevision Comments at 19-20.

[336]*Id.*, citing *Time Warner v. FCC*, 56 F.3d at 191.

[337]*See* 47 C.F.R., Part 76, Subpart K.

[338]1992 Cable Act § 16(a), 106 Stat. 1490.

[339]1996 Act, § 301(e), 110 Stat. 116; 47 U.S.C. § 544(e).

cable technical standards than the standards prescribed by the Commission.[340] We replaced this language with the new language from Section 301(e) of the 1996 Act.[341]

120. Current Commission rules dictate specific technical standards and provide for enforcement by LFAs.[342] Upon request by an LFA, an operator must be prepared to demonstrate compliance with the Commission's technical standards.[343] In addition, the rules provide that, in some instances, an operator may negotiate with its LFA for standards less stringent than otherwise prescribed by the Commission's rules.[344] Section 76.607 of the Commission's rules requires an operator to establish a process for receiving signal quality complaints.[345] Subscriber complaints regarding compliance with the Commission's technical standards must be referred to the LFA and the operator before being referred to the Commission.[346]

121. In the *Notice*, we sought comment on the overall scope and meaning of Section 624(e) of the Communications Act, as amended by Section 301(e) of the 1996 Act. We inquired as to the effect of this provision on the rules cited above, and on the cable franchising, renewal and transfer processes. We noted that the 1996 Act did not amend the franchising or the renewal provisions of the Communications Act. Specifically, we observed that Section 626(b)(2) of the Communications Act provides that, "[s]ubject to Section 624" an operator's proposal for franchise renewal "shall contain such material as the franchising authority may require, including proposals for upgrade of the cable system."[347] In addition, Section 626(c)(1)(B) provides for LFA consideration of the "quality of the operator's service, including signal quality" during the course of a renewal under Section 626.[348] Section 621(a)(4)(C) provides, in part, that an LFA awarding a franchise "may require adequate assurance that the cable operator has the . . . technical . . . qualifications to provide cable service."[349]

B. Discussion

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[340]*See also Committee on Science, Technology and Energy of the New Hampshire House of Representatives*, 11 FCC Rcd 10250 (1996) ("*Committee on Science, Technology and Energy*"). In that item, the Cable Services Bureau concluded that state and local laws prohibiting the use of converter boxes were preempted by Section 301(e) of the 1996 Act.

[341]Note 6 to Section 47 C.F.R. 76.605 now reads: "No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."

[342]47 C.F.R. § 76.601-76.630.

[343]47 C.F.R. § 76.601(a), (d) and (Note).

[344]47 C.F.R. § 76.605 (Notes 1 and 2).

[345]47 C.F.R. § 76.607.

[346]*Id*.

[347]47 U.S.C. § 546(b)(2).

[348]47 U.S.C. § 546(c)(1)(B).

[349]47 U.S.C. § 541(a)(4)(C).

122. Commenters have generally focused on two interrelated aspects of amended Section 624(e) of the Communications Act. The first is whether that section precludes an LFA from enforcing the Commission's technical standards. The second is the effect of Section 624(e) on the ability of an LFA to establish franchise requirements for facilities and equipment, during initial franchising or renewal, and to enforce these requirements. Some commenters read Section 624(e) broadly (for example, that Section 624(e) prohibits all local regulation and enforcement in the areas of cable equipment, facilities, technical standards and transmission technologies), while others interpret the ban in Section 624(e) on local restrictions on "subscriber equipment" and "transmission technology" more narrowly (for example, the ban is meant to refer only to restrictions on converter boxes, remotes, and scrambling and trapping technologies).

123. Cable operators generally rely on the deletion of the permissive enforcement language, inserted by the 1992 Cable Act, as unequivocal proof that Congress intended to eliminate completely LFA enforcement of the Commission's technical standards. NCTA states the Commission must eliminate day-to-day LFA oversight and enforcement of technical standards. NCTA asserts that the elimination of enforcement language in Section 624(e) is confirmation of Congress' "unambiguous intent to preclude" local establishment and enforcement of technical standards, and that "no other Congressional action was required."[350] Similarly, TCI states that Congress' deletion of the enforcement language, and its addition of language forbidding an LFA from restricting the use of any subscriber equipment or transmission technology, "unequivocally prohibits" State and local authorities from enforcing technical standards.[351] Time Warner asserts that Congress would not have deleted the enforcement language from Section 624(e) if it had wanted LFA's to continue enforcement of the Commission's technical standards.[352]

124. As several LFA commenters have noted, prior to the 1992 Cable Act's addition of the permissive enforcement language in Section 624(e), LFAs were the primary enforcers of cable operator technical standards, and the language added in the 1992 Cable Act did nothing to change that status.[353] The Commission, according to these commenters, has long recognized the importance of, and relied upon, local enforcement in the area of technical standards.[354] These commenters point out that Section 624(e), as amended, does not expressly prohibit a state or LFA from enforcing the national technical standards established by the Commission, rather it is silent with respect to this issue.[355] According to these commenters, because of the history of local enforcement in this area, coupled with established Commission technical standards which call for primary enforcement by local authorities, Congress would have included a prohibition on local enforcement in the language of the statute if had intended to end local enforcement.[356]

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[350]NCTA Comments at 50-51. *Accord* Time Warner Comments at 49.

[351]TCI Reply Comments at 2.

[352]Time Warner Comments at 49.

[353]*See* Denver Comments at 7-8; Michigan, Illinois, and Texas Communities Reply Comments at 7; Los Angeles, League of Cities, and NATOA Reply Comments at 15-16.

[354]*Id.*

[355]*Id. See also* Kramer, Monroe & Wyatt, LLC ("Kramer") Comments at 6-8.

[356]*See e.g.*, Denver Comments at 14; New York City Comments at 20; New Jersey Board Comments at 7.

125. Denver states, "Simply, all Congress did in the 1996 Act is to keep certain technical standards *development* at the federal level."[357] New York City emphasizes that the Conference Report is concerned with states and franchising authorities regulating in the areas of technical standards, customer equipment and transmission technology.[358] According to the New Jersey Board, the changes to Section 624(e) do not preclude LFA oversight of "a minimum level of technical quality relating to considerations such as standards for visual carrier to noise ratios, signal leakage, visual and aural signal levels to subscriber equipment or safety considerations such as bonding or grounding."[359] Denver states, "If Congress wished to take a stance directly against LFA involvement in the enforcement of technical standards, it would have, for example, proactively inserted the word "not" after the word "may"" in the deleted sentence.[360]

126. According to the legislative history of the amendment to Section 624(e):

> Subsection (j) [now section 301(e)] amends section 624(e) of the Communications Act by prohibiting States or franchising authorities from regulating in the areas of technical standards, customer equipment, and transmission technologies. The Committee intends by this subsection to avoid the affects of disjointed local regulation. The Committee finds that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment.[361]

127. The legislative history clearly states that the amendment prohibits states or LFAs from regulating in the area of technical standards. We agree with those commenters asserting that Section 624(e) now precludes an LFA from enacting and enforcing technical standards that differ from those established by the Commission.[362] Prior to the passage of the 1992 Cable Act, we stated, "uniformity of technical standards . . . is essential to prevent the inefficiency and confusion that threatened the cable industry during the period when local authorities . . . could set stricter standards than those promulgated by the Commission."[363] The 1996 Act echoes these concerns.

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[357]Denver Comments at 14 (emphasis in original).

[358]New York City Comments at 20-21, citing Conference Report at 168, 170.

[359]New Jersey Board Comments at 7.

[360]Denver Comments at 7

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

[362]*See* 47 C.F.R. pt. 76 subpt. K--Technical Standards. *See e.g.*, Michigan, Illinois and Texas Communities Reply Comments at 2; Comcast Comments at 20-22; GMCC Comments at 2; US WEST Reply Comments at 11. We note that franchising authorities may petition the Commission for a waiver to impose "additional or different" requirements, pursuant to 47 C.F.R. § 76.7. *See also City of New York v. FCC*, 486 U.S. 57, 108 S.Ct. 1637 (1988). In that decision, the Court found that the Commission did not exceed its statutory authority by preempting state and local technical standards, but also noted that state and local authorities remained free to petition the Commission for individualized waivers pursuant to 47 C.F.R. § 76.7. *Id.* at n.5.

[363]*Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962, 5056 (1990).

128. The Commission has long relied on LFAs to enforce technical standards.[364] This was the case even before Congress added the permissive enforcement language to the Communications Act in 1992.[365] In 1992, we stated that "we have in the past referred complaints concerning service quality to local authorities for resolution, and this practice resulted in the disposition of the vast majority of such complaints."[366] In addition, we stated that LFAs are "the proper initial locus of any complaint about the quality of technical service provided by a cable operator," and that they are "most familiar with the local system operation and plant, as well as any local factors which could impact on the resolution of a problem."[367] As many municipal commenters have noted, residents rely on local authorities to resolve cable picture quality problems, and expect their LFA to intercede on their behalf.[368]

129. Commenters also have pointed to the difficulties that would be associated with Commission enforcement of its technical standards. Several commenters note that local enforcement of the Commission's technical standards is "the only practical method of handling complaints" regarding signal quality problems.[369] Denver states the Commission would simply lack the resources to enforce its technical standards on a system by system basis.[370] According to Denver, LFAs have been involved in literally thousands of technical standard enforcement actions, and the Commission could not undertake such enforcement without a significant increase in Commission personnel and funding.[371] Similarly, Kramer states that the Commission does not have the resources to be "the first and only point of contact in resolving the many thousands of technical quality complaints that are filed with LFAs annually."[372] The FCC Local State Government Advisory Committee recommends against any interpretation of Section 624(e) that would prevent local franchising authorities from enforcing the Commission's technical standards.[373]

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[364]*See Cable Television Technical and Operational Requirements, Review of the Technical and Operational Requirements of Part 76, Cable Television*, Report and Order ("*Technical Order*"), 7 FCC Rcd 2021, 2035 (1992). *See also Cable Television Technical and Operational Requirements, Review of the Technical and Operational Requirements of Part 76, Cable Television*, Notice of Proposed Rulemaking ("*Technical Notice*"), 6 FCC Rcd 3673, 3679 (1991).

[365]*See* Denver Comments at 7-8, citing *Technical Order* and *Technical Notice*.

[366] *See Technical Order* at 2035. *See also Technical Notice* at 3679 ("our previous practice upon receiving complaints concerning a cable system's deviation from our technical standards was to refer the complaint for local resolution . . .").

[367]*Technical Order* at 2035; *see Technical Notice* at 3679.

[368]Los Angeles, NLC, and NATOA Reply Comments at 17-18.

[369]*See* City of Austin Comments at 2; City of Lake Forest Comments at 2; City of Rolling Meadows Comments at 1; City of Lincolnwood Comments at 1. *See also* GMCC Comments at 8.

[370]Denver Comments at 13.

[371]*Id.*

[372]Kramer Comments at 9.

[373]LSGAC Recommendation 13(B).

130. Los Angeles, the League of Cities, and NATOA suggest that Congress' deletion of the language in Section 624(e), regarding LFA enforcement of the Commission's technical standards, can be seen as necessary to effectuate the added language prohibiting LFA restrictions on any "subscriber equipment" and "transmission technology."[374] The commenters believe that the terms "subscriber equipment" and "transmission technology" are meant to refer to the narrow category of converter boxes, remotes, and scrambling and trapping technologies. Thus, they argue that any restriction on local enforcement of technical standards from Congress' change to Section 624(e) should be narrowly construed.[375]

131. We agree as a practical matter that, unlike local authorities, the Commission is not in a position to attend to day-to-day local technical problems as they arise. Thus, were we to interpret Section 624(e) as mandating Commission enforcement of its technical standards, we would necessarily change the very nature of traditional technical standards enforcement. As the above comments illustrate, the impact of this change in enforcement entities would be significantly more far reaching than merely representing a switch in the proper forum for a subscriber complaint. Subscriber reliance on timely responses to their complaints regarding technical problems would be thrown into considerable doubt if local authorities were not permitted to engage in day-to-day enforcement of the Commission's technical standards.

132. We do not believe that Congress meant to set in motion such a fundamental change in technical standards enforcement without affirmatively stating its intent to do so either in the language of the 1996 Act or in the legislative history. Nowhere in the 1996 Act or its legislative history does Congress state an intent to end local enforcement of the Commissions technical standards. Rather, as noted above, the legislative history clearly states that the amendment to Section 624(e) of the Communications Act prevents states or LFAs from regulating in the areas of technical standards, customer equipment, and transmission technologies. Local enforcement of uniform national standards furthers Congress' intent. While Congress sought to preclude the development of a patchwork of technical standards varying between franchise areas, it did not make mention of any additional intended effects of its amendment to Section 624(e).

133. Additional factors help clarify the intended scope of new Section 624(e). For example, the 1996 Act did not alter an LFA's ability to deny a franchise renewal based on deficient signal quality. If LFAs were unable to monitor cable operator compliance with the Commission's technical standards, they would likewise be unable to give an operator the notice and opportunity to cure signal quality defects required under Section 626 of the Communications Act as a prerequisite to denying a franchise renewal based on the documented violations. Thus, interpreting Section 624(e) as precluding LFA oversight and enforcement of the Commission's technical standards would render meaningless the statutory language in Section 626.

134. Time Warner attempts to resolve this ambiguity by stating that while Section 624(e) prohibits an LFA from monitoring the cable operator's signal, an LFA may still take into account compliance with the Commission's standards, as determined by the Commission, in a franchise grant or renewal.[376] Time Warner's

[374]Los Angeles, League of Cities, and NATOA Reply Comments at 15-18.

[375]*Accord* Michigan, Illinois, and Texas Communities Reply Comments at 5-6.

[376]Time Warner Comments at 49-51. Time Warner states that determinations of compliance with the Commission's technical standards must be conducted by the Commission. Time Warner Comments at 51. *See also* NCTA Comments at 51-52.

views as to elimination of LFA day-to-day review and enforcement of the Commissions standards, coupled with its belief that LFAs may consider Commission determined compliance with these standards in franchising and renewal proceedings, would leave franchising authorities in the position of being able to deny a franchise based on these failures, without being able to exercise less drastic measures to ensure compliance as commonly provided for in franchise agreements. We do not believe Congress intended such a result.

135. Given the long tradition of LFA enforcement of technical standards, the practical difficulties of Commission enforcement of technical standards at the local level, and the difficulties in reconciling a ban on LFA enforcement of technical standards with other parts of the Communications Act that were unaltered by the 1996 Act, we conclude that if Congress had intended to end local enforcement of the Commission's technical standards, it would have expressly stated such a prohibition in the actual language of the 1996 Act.

136. With respect to the prohibition against State or franchising authority regulation of a system's use of subscriber equipment or any transmission technology added to Section 624(e) by the 1996 Act, Cole Raywid and other cable commenters assert that this restriction is not necessarily inconsistent with the unaltered portions of the Communications Act regarding local involvement in facilities and equipment.[377] As several cable and municipal commenters state, an LFA may still require upgrades under Section 626 in conjunction with franchise renewal.[378]

137. Although agreeing that LFAs can require upgrades, TCI argues that Section 624(e) "fundamentally alters" the role of state and local authorities in an operator's technical decisions, even though the franchising authority can still require system upgrades.[379] TCI asserts that LFAs may not continue to require standards in conjunction with upgrades or rebuilds, such as channel capacity requirements at specific MHz levels, numbers of optical fibers deployed, homes served per fiber optic node, amplifiers per cascade, and the amount of standby power at the headend.[380] Los Angeles, the League of Cities and NATOA disagree, contending that the negotiation of specific terms of a system upgrade (such as system capacity, homes per node, and amplifiers per cascade) within the initial franchising or renewal process is necessary to implement determinations of local community needs and interests, and is also critical to the associated LFA authority to reject a franchise for failing to meet these needs and interests.[381]

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[377] *Id.* at 23-24; Fleischman Comments at 38-39 (LFAs may still consider compliance with the Commission's standards in the context of franchising and renewal).

[378] TCI Reply Comments at 8 (Section 624 (b) "allows the LFA, for example, to require that a cable operator provide certain services or facilities (such as minimum channel capacity) but does not empower an LFA to dictate the specific technical means by which the operator meets such generic requirements."); Los Angeles, NLC, and NATOA Reply Comments at 20-21 (the amendments to Section 624(e) do not interfere with LFA's authority to establish, during the franchising process, facilities and equipment requirements, including upgrade requirements). *See also* Comcast Comments at 21; NCTA Comments at 51; SCBA Comments at 37-39.

[379] TCI Comments at 28-32.

[380] *Id.* at 29.

[381] Los Angeles, League of Cities, and NATOA Reply Comments at 20 & n.43. *See* State of New York Comments at 23.

138. Los Angeles, NLC, and NATOA argue that Section 624(e) is intended to preclude LFAs from adopting and enforcing their own standards regarding subscriber equipment, such as converter boxes, and transmission technology, such as the scrambling or trapping methods used to secure an operator's signals.[382] They state that the amendment was a response to efforts by local authorities' to restrict the use of converter boxes introduced by Time Warner in several New England communities, and therefore that the terms "subscriber equipment" and "transmission technology" should be interpreted narrowly.[383] They contend that a reasonable interpretation of the amendment to Section 624(e) is that it clarifies that an LFA, when establishing equipment and facilities requirements under Sections 624(b)(1) and 624(b)(2), may not specify technologies relating to converter boxes or scrambling.[384]

139. The Commission's Local State Government Advisory Committee ("LSGAC") likewise argues for a narrow reading of the prohibition against nonfederal regulation of transmission technology.[385] It argues that the prohibition should be read in the context of signal protocols and, in this context, is consistent with Congress' grant of authority to the Commission in Section 624A of the Communications Act[386] to address equipment compatibility standards. It recommends that the prohibition should be limited to converter boxes, scrambler and unscrambler devices, and similar customer reception equipment, and that franchising authorities' ability to negotiate, include, and enforce provisions for specific cable system equipment and facilities under Section 624(b) of the Communications Act[387] should be unrestricted.

140. Section 624 of the Communications Act relates to the regulation of services, facilities, and equipment of cable operators. Paragraph (a) of Section 624 states:

> Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title.

Paragraph (b) of Section 624 generally provides that franchise authorities may enforce requirements contained within the franchise -

> for facilities and equipment

Paragraph (e) of Section 624, as added by the Telecommunications Act of 1996, states:

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[382]Los Angeles, League of Cities, and NATOA Reply Comments at 17-18. *See* Michigan, Illinois, and Texas Communities Reply Comments at 5-6.

[383]Los Angeles, League of Cities, and NATOA Reply Comments at 17-18, referring to *Committee on Science, Technology and Energy*, 11 FCC Rcd 10250. *See also* Kramer Comments at 4-6; State of New York Comments at 25-26.

[384]*Id.*

[385]LSGAC Recommendation 13(A): Resolution on Technical Standards Amendment.

[386]47 U.S.C. § 544a, Consumer Electronics Equipment Compatibility.

[387]47 U.S.C. § 544 (in requesting proposals for a franchise or franchise renewal, a franchising authority "may establish requirements for facilities and equipment . . ." and may enforce such requirements).

> No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

It is clear from the above, and agreed among the commenting parties, that "subscriber equipment" may no longer be "prohibited, conditioned, or restricted " by local authorities under Section 624. "Transmission technology" may also not be "prohibited, conditioned, or restricted ." The question remains, however, as to what is encompassed in the phrase "transmission technology" and how the newly added limitation can be reconciled with the grant of authority regarding "facilities and equipment."

141. "Transmission technology" is not a defined term in the Communications Act nor does the legislative history help to define its breadth.[388] Rather, Congress appears to have used the phrase in the everyday sense in which it has been used in discussions of communications policy issues. A review of the usage of the phrase indicates that it has been frequently used to include both the transmission medium, i.e. microwave, satellite, coaxial cable, twisted pair copper telephone lines, and fiber optic systems,[389] and the specific modulation or communications format, i.e. analog or digital communications.[390] Based on the foregoing, we believe, for example, that local authorities may not control whether a cable operator uses digital

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[388]The Conference Report, for example, simply explains that Section 624(e) amends the Act "by prohibiting States or franchising authorities from regulating in the areas of technical standards, customer equipment, and transmission technologies." H.R. Conf. Rep. No. 458, 104th Cong., 1st Sess. 168 (1996). Section 3(33) of the Communications Act does define the term "radio communications" and includes within it "transmission" by radio "including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." 47 U.S.C. § 153(33).

[389]Thus, for example, the State of Tennessee adopted a regulatory reform program involving the replacement of existing telephone plant with fiber optics that was judicially described as involving a change in "transmission technologies." See *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W. 2d 151, 156 (1992). A Commission report, *Trends in Telephone Service*, 1999 WL 83930 (February 1999), contains a discussion of "transmission technology" and lists "copper" and "fiber optic cables" as two transmission technologies. The Commission has discussed satellites and undersea cables as two "transmission technologies." *Communications Satellite Corp.*, 56 FCC 2d 1101, 1161 (1975). *See also Comsat Corp.*, 13 FCC Rcd. 14083, para. 32 (1998) (There is no evidence that parties "owning or controlling both satellite and cable connections . . . are favoring the use of one transmission technology.").

[390]The Commission has consistently described "analog" and "digital" communications as well as various modulation schemes as different "transmission technologies." *See e.g. Development of Wireline Services Offering Advanced Telecommunications Capability*, 1998 WL 458500, para. 35 ("xDSL and packet switching are simply transmission technologies"); Public Notice: Commission Staff Seek Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000, 13 FCC Rcd 16221, 16222 (commercial mobile radio service licensee has flexibility "to change their existing radio transmission technology."); *Application for Transfer of Control of MCI Communications to Worldcom*, 1998 WL 611053, para. 45 ("Qwest's network will include more fibers per cable than the current average national network, and will employ high capacity transmission technologies."); *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements through the Year 2010*, 1998 WL 667599, n.315 (1998) ("In the Second Notice, we entitled sections primarily addressing the question of analog versus digital modulation `Transmission Technology', a more general term that seemingly could encompass many other issues as well."); *Creation of A Low Power Radio Service*, MM Docket No. 99-25, 1999 WL 46878, para. 29 (1999) ("We are also concerned whether an LP1000 service would limit or impair the ability of full power stations to implement digital transmission technology such as in-band-on-channel (`IBOC') conversion.").

or analog transmissions nor determine whether its transmission plant is composed of coaxial cable, fiber optic cable, or microwave radio facilities. An LFA's authority under Section 624(b) to establish requirements for facilities and equipment is granted only "to the extent consistent with this title"[391] and must be read in the context of the limits imposed by the revisions to Section 624(e) in the 1996 Act.[392] As noted above, the legislative history of the amendment to Section 624(e) states that "the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment."

142. While the 1996 Act imposes some specific limits of the role LFAs play with respect to subscriber equipment and transmission technology, it does not diminish the LFAs' important responsibilities in determining local cable-related needs and interests and seeing that those needs are met through the franchising and renewal process.[393] Although local authorities are limited in dictating the use of transmission technologies, other facility and equipment requirements can still be enforced under Section 624(b).[394] In addition, Section 611 of the Communications Act affirms the ability of an LFA to establish and enforce franchise provisions concerning facilities and equipment related to PEG channels and for educational and governmental use of channel capacity on institutional networks. Section 621(a)(3) authorizes franchising authorities to ensure access to cable services throughout the franchise area, regardless of the income levels of potential residential subscribers. Section 621(a)(4) authorizes the LFA to require adequate assurance of the cable operator's financial, technical, and legal qualifications to provide cable service. Section 621(b)(3)(D) allows an LFA to require institutional networks. Section 626(b)(2) states that, subject to Section 624, a franchise renewal proposal "shall contain such material as the franchising authority may require, including proposals for the upgrade of the system." Section 632(a)(2) enables an LFA to establish and enforce "construction schedules and other construction-related performance requirements."[395] The Commission likewise has long acknowledged areas of local concern, such as studio capacities, electrical safety codes, construction requirements, and management of public rights-of-way.[396] Local governments perform a range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, and to manage facilities that crisscross the streets and public rights-of-way, which are unaffected by Section 624(e). The 1996 Act also does not preclude LFA review of the adequacy of the cable operator's plans for meeting the cable-related needs identified by the LFA.

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[391] Section 624(a), 47 U.S.C. § 544(a).

[392] *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. __ (1984), P&F Radio Reg. ¶ 1277, p. 10:779.

[393] *See* Section 626(a)(1), 47 U.S.C. § 546(a)(1).

[394] 47 U.S.C. § 544(b).

[395] 47 U.S.C. §§ 531, 541(a)(3), (4), (b)(3)(D), 546(b)(2), 552(a)(2).

[396] *See Review of the Technical and Operational Requirements of Part 76, Cable Television*, Report and Order, 102 FCC2d 1372, 1380 n.12 (1985); *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21441 (1997), *reconsideration denied*, 13 FCC Rcd 16400. In *TCI Cablevision*, the Commission also found that a city condition that cable construction permits would not be used for telecommunications purposes did not violate Section 624(e) because the condition concerned the nature of services the cable operator would be providing over its facilities pursuant to its cable franchise rather than either the transmission technology or subscriber equipment used for the services. 12 FCC Rcd at 21430-32.

143. Although this Order clarifies to some extent the meaning of "transmission technology" for purposes of Section 624(e), we recognize that over three years have passed since the 1996 Act was signed into law. We also recognize that, in the absence of a final federal rule, local franchise authorities and cable operators have entered into agreements based on their own understandings of the language of Section 624(e). In the absence of today's guidance, parties may have drafted certain franchise provisions in a way that they believed was permissible under Section 642(b), but that now would be found impermissible under our reading of Section 624(e). Had the parties had the benefit of today's *Order*, these provisions could have been drafted in a way that would have permitted local authorities to exercise their legitimate rights under Section 624(b) without running afoul of Section 624(e). We have received no formal complaints from any party claiming Section 624(e) has been violated. Given these settled contractual arrangements, nothing in this *Order* is intended automatically to preempt or affect the enforceability of existing franchise agreements.[397]

VIII. PRIOR YEAR LOSSES

A. Background

144. Section 301(k)(1) of the 1996 Act amended Section 623 of the Communications Act to preclude the disallowance of certain losses incurred by original franchisees prior to September 4, 1992. Specifically, the statute provides:

> (n) Treatment of Prior Year Losses. -- Notwithstanding any other provision of this section or of section 612, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.[398]

[397] *See, e.g., Pan American Life insurance Co. v. Blue Cross and Blue Shield*, 127 F.3d 1099 (4th Cir. 1997) (unpublished disposition, per curium) (finding that voluntary agreement was enforceable, even if agreement was based on parties' mistaken belief that ERISA did not preempt state statute); *E. Norman Peterson Marital Trust v. Commissioner of Internal Revenue*, 78 F.3d 795 (2d Cir. 1996):

> If the particular language used in a statute is highly susceptible to misunderstanding by a lay person, and if the clarification which the regulations are intended to provide is available only after ordinary people have made choices in reliance on the more common meaning of the statutory term, it might be a situation of such substantial unfairness would arise that it would be permissible to apply the late-coming regulations only prospectively.

78 F.3d at 800.

[398] 1996 Act, § 301(k)(1), 110 Stat. 118, 47 U.S.C. § 543(n).

This provision was effective upon enactment and applicable to rate filings made after September 4, 1993 that had not been acted upon by December 1, 1995.[399]

145. In the *Notice*, we identified apparent distinctions between this new statutory provision and the treatment of start up losses under our existing cost-of-service rules.[400] We noted that, unlike the statute, our rules do not preclude recovery of start up losses for all cable operators, while the recovery of prior year losses under Section 301(k)(1) is limited to original franchisees.[401] We also noted that our cost-of-service rules do not limit the years for recovery of such losses, while Section 301(k)(1) limits recovery to losses incurred prior to September 4, 1992.[402] Finally, we noted that Section 301(k)(1) does not limit losses to those incurred in the early years of a system's operation. Instead, it allows recovery of losses for all years up to the September 4, 1992 cut-off date.[403] In the *Notice*, we requested comment on these tentative conclusions and requested comment on whether Section 301(k)(1) should be interpreted to allow recovery of prior year losses even when such losses are attributable to unreasonable or imprudent expenditures.[404]

B. Discussion

146. We affirm the tentative conclusions set forth in the *Notice.* Under Section 301(k)(1), prior year losses incurred before September 4, 1992 cannot be disallowed in determining the lawfulness of cable rates under our rules when such losses are claimed by the original franchisee of the system.[405] This provision, however, is not applicable to losses incurred after September 4, 1992, and does not apply to an operator that is not the original franchisee of its system.

147. The Massachusetts Commission suggests that the scope of Section 301(k)(1) should not be limited to original franchisees. It argues that the statute does not explicitly prohibit other operators from recovering start up losses incurred prior to September 4, 1992.[406] We agree that the statute does not prohibit the recovery of start up losses based on other qualifying criteria. Indeed, as noted above, we have authorized

[399]1996 Act, § 301(k)(2), 110 Stat. 118.

[400]*Notice*, 11 FCC Rcd at 5974, citing *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service*, 11 FCC Rcd 2220 (1996); 47 C.F.R. § 76.922(i)(6).

[401]*Notice* at 5974. To the extent that acquiring operators are permitted recovery of acquisition premiums as part of the rate base, operators would not be permitted to recover start up losses for which they are compensated by acquisition premiums.

[402]*Id.*

[403]*Id.*

[404]*Id.*

[405]Applicability of Section 301(k)(1), however, remains subject to the conditions contained in Section 301(k)(2) of the 1996 Act.

[406]Massachusetts Cable Commission Comments at 11.

the recovery of certain start up losses without the time period limitation or the original franchisee requirement contained in Section 301(k)(1). Nevertheless, we find no basis for further changing the rules beyond what the statute directs. The existing rules, it should be emphasized, authorize the recovery of certain start up losses for operators who are not original franchisees, and these rules remain available to such operators to guide their recovery of start up losses.[407]

148. In the *Notice*, we requested comment on whether losses claimed pursuant to Section 301(k)(1) are subject to limitations involving the reasonableness or prudence of expenditures. No commenters addressed this issue specifically. Under the explicit terms of Section 301(k)(1), the Commission, in determining the lawfulness of cable rates, is prohibited from limiting the recovery of losses "in whole or in part" if such losses are associated with a cable system and incurred before September 4, 1992 by an original franchisee. Standards of prudence and reasonableness have long characterized the review of regulated rates.[408] We have incorporated these standard regulatory concepts in our review of cost based rates. Section 301(k)(1) itself specifies that losses, to be recoverable, must be "associated with a cable system." We believe this condition underscores that a reasonable relationship must exist between the amounts claimed as losses and the provision of regulated cable services. We further note that the statute, despite the Commission's historic practice of excluding unreasonable or imprudent costs from rate recovery, is silent regarding this established regulatory approach. Accordingly, we will continue to apply the prudent investment standard to the evaluation of cost-based rates, including rates submitted by operators that otherwise fall within the terms of Section 301(k)(1).

IX. ADVANCED TELECOMMUNICATIONS INCENTIVES

A. Background

149. Subsection 706(a) of the 1996 Act requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[409] In the *Notice*, we sought comment on how we could advance Congress' goal within the context of our cable services regulation. This has been addressed in the Commission's report into

[407] *See* note 400, *supra*.

[408] *See Implementation of Sections of the Cable Television Consumer Protection an Competition Act of 1992: Rate Regulation, and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service*, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4563 (1994).

[409] 1996 Act § 706(a), 110 Stat. 153.

the deployment of advanced telecommunications capability adopted pursuant to Section 706(b) of the 1996 Act.[410]

X. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMMING

A. Background

150. The 1996 Act amended Sections 611(e) and 612(c)(2) of the Communications Act to provide that a cable operator may refuse to transmit any leased access or public access programming containing "obscenity, indecency, or nudity."[411] In the *Order*, the Commission amended Sections 76.701 and 76.702 of the Commission's rules concerning leased access and PEG access, respectively, to incorporate these amendments.[412] Because the rules had originally been adopted pursuant to Section 10 of the 1992 Cable Act and been stayed on appeal,[413] the *Order* stayed the rules as amended pending Supreme Court review of the constitutionality of Section 10.[414] The *Notice* solicited comment on the Commission's tentative conclusion that the term "nudity" in each rule should be interpreted to mean nudity that is obscene or indecent.[415]

151. The Supreme Court later issued its opinion on Section 10 of the 1992 Cable Act.[416] In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* ("*Denver Consortium*"),[417] the Court held that language in Section 10(a), which permits cable operators to adopt prospective rules prohibiting the transmission of indecent materials over leased access channels, is consistent with the First Amendment. The Court held that language in Section 10(c), which permits cable operators to refuse to transmit indecent programming over PEG access channels, is not valid.[418]

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[410] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry (CC Docket 98-146), 13 FCC Rcd 15280 (1998), Report, FCC 99-5 (released Jan. 28, 1999).

[411] 1996 Act § 506(a), (b), 110 Stat. 136-37, *codified* 47 U.S.C. §§ 531(e), 532(c)(2).

[412] *Order*, 11 FCC Rcd at 5960.

[413] *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995).

[414] *Id.* at 5961.

[415] *Notice*, 11 FCC Rcd at 5975.

[416] *See* 1992 Cable Act § 10, 106 Stat. 1486, *codified* 47 U.S.C. § 532(h).

[417] 116 S.Ct. 2374 (1996).

[418] The Court also invalidated Section 10(b) of the 1992 Cable Act, which required cable operators to place indecent programming on a "blocked" leased access channel if they did not voluntarily prohibit indecent programming. The Commission eliminated rules implementing Section 10(b). *See Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992*, 12 FCC Rcd 6390, 6393 (1997) ("*Implementation of Section 10*").

152. In response to *Denver Consortium*, the Commission amended the PEG access rule in Section 76.702.[419] The rule now states that a cable operator may refuse to transmit any public access programming that the operator believes contains obscenity.

153. The Commission amended the leased access rule in Section 76.701 to respond to the Court's decision in *Denver Consortium*, and clarified in Section 76.701(b) that "[a] cable operator may refuse to transmit any leased access program or portion of a leased access program that the operator reasonably believes contains obscenity, indecency, or nudity.[420] The Commission left the interpretation of the word "nudity" to the instant docket.[421]

B. Discussion

154. We adopt the tentative conclusion in the *Notice* that "nudity" in the leased access rule should be interpreted to mean nudity that is obscene or indecent. As many commenters advise, this interpretation avoids the overbreadth problem addressed in *Erznoznik v. City of Jacksonville*, in which the Supreme Court invalidated a city ordinance that prohibited showing films containing nudity at drive-in theaters visible from public places.[422] This interpretation is also consistent with the concern the Court acknowledged in *Denver Consortium*; namely, protecting children from patently offensive depictions of sex on leased access channels.[423] Obscene programming is unprotected under the Constitution. "Indecent" programming for purposes of Section 76.701(b) is the kind of programming a cable operator may prohibit under Section 76.701(a); namely, programming which describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards. Commenters have generally supported this interpretation of "nudity."

XI. SUBSCRIBER NOTICE

A. Background

155. As amended by Section 301(g) of the 1996 Act, Section 632 of the Communications Act includes the following new subsection:

> (c) Subscriber Notice. A cable operator may provide notice of service and rate changes using any reasonable written means at its sole discretion. Notwithstanding Section 623(b)(6) or any other provision of this Act, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee,

[419] *Id.* at 6393-94, 6398; *see* 47 C.F.R. § 76.702.

[420] *Implementation of Section 10* at 6393-94, 6398; *see* 47 C.F.R. § 76.701.

[421] *Id.* at 6393 n.10.

[422] 422 US 205 (1975). *See, e.g.*, Alliance for Community Media Comments at 4.

[423] *Denver Consortium*, 116 S.Ct. at 2385-86.

tax assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.[424]

156. We amended Sections 76.309(c)(3)(i)(B) and 76.964 of our rules to correspond with this statutory revision.[425] In making these amendments, we noted that the Commission had previously distinguished written notice sent to subscribers from written announcements on the cable system or in the newspaper.[426] We had made these distinctions as necessary to ensure that notice was adequate depending on the circumstances.[427] However, the legislative history of the House amendment concerning notice to subscribers of rate increases stated that "[n]otice need not be inserted in the subscriber's bill."[428] Accordingly, in the *Interim Order,* we determined that notices of rate changes provided to subscribers through written announcements on the cable system or in the newspaper will be presumed sufficient.[429] We stated that we would address any disputes that might arise in this area on a case-by-case basis.[430]

B. Discussion

157. The State of New York asserts that the 1996 Act does not preempt franchising authorities from adopting more stringent subscriber notice standards than are required by Section 632(c).[431] The State of New York further asserts that Section 632(d) specifically preserves the authority of LFAs to impose customer service standards that exceed the standards adopted by the Commission under other provisions of Section 632.[432]

158. Los Angeles, the League of Cities, and NATOA argue that "reasonable written notice" should include notice directly to the subscribers.[433] They also argue that notice by way of publication in a newspaper is usually prescribed when the parties' whereabouts are unknown. Because an operator knows the whereabouts of its subscribers, they maintain that "reasonable written notice" would entail giving direct notice to subscribers

[424]110 Stat. 117, *codified* 47 U.S.C. § 552(c).

[425]*Interim Order* at 11 FCC Rcd 5952; *see* 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.964(b).

[426]*Interim Order,* 11 FCC Rcd at 5952 (citing 47 C.F.R. 76.964(c)). *See also Rate Order,* 8 FCC Rcd at 5713-14.

[427]*Interim Order,* 11 FCC Rcd at 5952.

[428]*Id.* citing Conference Report at 169.

[429]*Interim Order,* 11 FCC Rcd at 5952.

[430]*Id.*

[431]State of New York Comments at 11-15.

[432]*Id.* at 11-12. *Accord* LSGAC Recommendation 13(D), which recommends that local jurisdictions be able to define "reasonable written means" within their communities.

[433]Los Angeles, League of Cities, and NATOA Reply Comments at 14.

via a bill enclosure.[434] They agree with the State of New York that the new statutory language does not preempt more stringent state or local notice requirements.[435]

159. Fleischman urges the Commission to clarify that the new statutory language preempts state and local consumer protection and customer service requirements specifying the means by which cable operators must notify subscribers of rate and service changes.[436] Absent such a clarification, Fleischman asserts that disputes regarding subscriber notice requirements will almost inevitably arise between cable operators and LFAs.[437] Fleischman argues that its position is supported not only by the plain language of Section 632(c), but also by the 1996 Act's legislative history, which establishes a federal policy of promoting "increased flexibility" in the provision of subscriber notice and which declares that "[t]here is no need for intrusive regulations to dictate how cable operators communicate" advance notice of rate and service changes to their subscribers.[438]

160. NCTA agrees with Fleischman that Section 632(c) is preemptive and prohibits states and LFAs from prescribing specific mechanisms for subscriber notice.[439] According to NCTA, Congress would not have used the phrase "sole discretion" in describing a cable operator's latitude regarding subscriber notice if it intended state and local governments to dictate the nature of such notice.[440]

161. Furthermore, NCTA disputes the assertions that Section 632(d) permits LFAs to impose stricter requirements than those required by Section 632(c).[441] NCTA argues that Section 632(d) allows state law or municipal ordinances to establish customer service requirements that exceed the standards the Commission is authorized to establish.[442] In the case of customer notice standards, NCTA argues that Congress has prohibited the Commission from interfering with a cable operator's decision to provide notice by any reasonable written means.[443] The Commission has no authority to establish subscriber notice standards, according to NCTA, and therefore LFA's lack such authority as well.[444]

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[434]*Id.* at 14-15.

[435]*Id.* at 15. *Accord* LSGAC Recommendation 13(D).

[436]Fleischman Comments at 41.

[437]*Id.*

[438]*Id.* at 42 citing Conference Report at 111-112.

[439]NCTA Reply Comments at 18-19.

[440]*Id.* citing Section 632(c).

[441]*Id.*

[442]*Id.*

[443]*Id.*

[444]*Id.*

162. Congress's use of the phrase "sole discretion" indicates that Congress intended to limit the Commission's discretion in this area. Congress, however, did not completely eliminate the role of regulatory authorities. In Section 632(d)(1), Congress specifically preserved LFA authority to enact and enforce consumer protection laws to the extent not specifically preempted by Title VI of the Communications Act.[445] Nor did Congress grant cable operators unbridled discretion regarding the means used to notify subscribers of changes in rates and service. Congress allowed cable operators to exercise their "sole discretion" within the constraints of "reasonable written" means. LFAs and the Commission retain the authority to determine that a particular mechanism is not reasonable. Congress also generally permits LFAs to enforce customer service standards that exceed federal requirements. We note, however, the suggestion in the legislative history that cable operators need not give subscribers individual written notice of rate and service changes in their bills.[446]

163. Los Angeles, the League of Cities, and NATOA argue that reasonableness of a notice of a rate change appearing in a newspaper depends upon several variables such as its location in the newspaper, the size of the notice, and the font of the print used in the notice.[447] We agree. We do not believe that Congress intended to set uniform national standards, however, since the reasonableness of a particular manner of giving notice will vary from community to community. We urge cable operators and LFAs to negotiate notice procedures that are reasonable in light of local circumstances.

164. In the absence of an agreement, the LFA should prescribe notice requirements consistent with this *Order*. Local requirements should leave cable operators with considerable discretion and should be designed primarily to identify unreasonable means of giving notice, rather than specifying a particular means that the cable operator must follow. An aggrieved cable operator may file a petition with the Commission seeking a declaration that the notice requirements are unreasonable. A cable operator should abide by local notice requirements unless granted relief from them by the Commission.

165. We adopt the State of New York's recommendation to amend Section 76.964(a) to require cable operators to inform subscribers of their right to file complaints with the LFA within 90 days of the effective date of the increase, as well as to provide the name, address and telephone number of the LFA.[448] We also agree with the State of New York's suggested amendment to add the word "written" to Section 76.964(b) in describing the reasonable means by which a cable operator may provide notice of service or rate changes. These changes are designed to more accurately conform our rules with the new statutory language.[449]

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[445]Communications Act § 632(d)(1), 47 U.S.C. § 632(d)(1).

[446]*See* H.R. Rep. No. 204(1), 104th Cong., 1st Sess. 111-112 (1995). We note that the Commission has proposed that telephone companies provide their customers with clear and conspicuous notification of changes in rates and services in their telephone bills. *See Truth in Billing and Billing Format*, Notice of Proposed Rulemaking in CC Docket No. 98-170, FCC 98-232 (released September 17, 1998). This proposal was made pursuant to the Commission's authority under Title II of the Communications Act, e.g., 47 U.S.C. § 201(b).

[447]Los Angeles, League of Cities, and NATOA Reply Comments at 14.

[448]State of New York Comments at 14.

[449]*Id.* at 13.

166. Time Warner suggests that operators subject to effective competition not be required to provide advance notice of changes in service and rates.[450] According to Time Warner, such operators will be severely disadvantaged by having to divulge to their competitors new rate and services initiatives thirty days in advance.[451] Competitors will have sufficient time not only to devise a marketing strategy to respond to a cable operator's initiative, Time Warner asserts, but also to put into effect their own counter strategy and pricing plans before the cable operator's changes even become effective.[452]

167. Section 632 is not in the rate regulation portion of the Communications Act, and as a result applies even where there is effective competition. Therefore, we will not adopt a blanket rule automatically exempting a cable operator from the subscriber notice requirement once effective competition is shown. However, advance notice will not be required in the case of a rate decrease. In that case, the benefits of giving advance notice to consumers are minimal.

XII. MARKET ENTRY ANALYSIS

168. Section 257 of the Act requires the Commission to complete a proceeding to identify and eliminate market entry barriers for entrepreneurs and other small businesses in the telecommunications industry.[453] The Commission is directed to promote a diversity of media voices and vigorous economic competition, among other things.[454] We believe that this *Order* is consistent with the objectives of Section 257 in that it implements the Cable Act Reform provisions of the 1996 Act which were designed, in part, to eliminate provisions of the Act which disadvantaged new competitors, and to hasten the development video competition in order to provide consumers with increased program choice.[455]

XIII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

169. As required by the Regulatory Flexibility Act (RFA),[456] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85 ("*Notice*").[457] The Commission sought written public comment on the proposals in the Cable Act Reform item,

[450]Time Warner Comments at 29-30

[451]*Id.*

[452]*Id.*

[453]Communications Act § 257(a), 47 U.S.C. § 257(a).

[454]Communications Act § 257(b), 47 U.S.C. § 257(b).

[455]Conference Report at 173.

[456]*See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq*., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[457]11 FCC Rcd 5937, 5976-77 (1996).

including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[458]

170. *Need for, and Objectives of, Cable Act Reform* . The rulemaking implements portions of Sections 301 and 302 of the Telecommunications Act of 1996 (the "1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. The purposes of this action are to establish final rules regulating cable television service and cable system operators pursuant to the 1996 Act, which amended or deleted numerous portions of Title VI of the Communications Act of 1934 (the Communications Act"), 47 U.S.C. §§ 151-614, and added new provisions affecting cable television.

171. *Summary of Significant Issues Raised by Public Commenters in Response to the IRFA.* Municipal parties filed a comment in response to the initial regulatory flexibility analysis. The parties state that the Commission failed to consider, in the IFRA to the *Notice*, the effect of the proposed rules on small governmental entities. Specifically, the municipal parties state the Commission's proposal to require a local franchising authorities ("LFA") to send complaints to the cable operator, wait for a response, and then forward the response to the Commission, would impose additional burdens on small government entities. Additionally, municipal commenters state that burdens for small governmental entities will increase if operators are not required to give direct notice to subscribers of rate increases (because LFAs will receive additional complaints from subscribers that were not aware that rate increases were taking place), and that LFAs, if unable to negotiate facilities and equipment requirements, will need to devise indirect means of assuring community needs and interests are met under renewal portions of the Communications Act. The municipal commenters state that, in the alternative, the Commission should reinstate its original process for rate complaint filings, should simply redesign the rate complaint form to allow an LFA to certify that it has received subscriber complaints, and should allow a franchising authority to file the complaint with the Commission and the operator, with the operator filing its rate justification directly with the Commission. We discuss these alternatives in the body of the *Order*, and in the below analysis. In addition, other commenters raised issues in response to the *Notice* that could involve small entities. These comments are addressed in the *Order* and below.

172. *Description and Estimate of the Number of Small Entities to Which Rules Will Apply*. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and the same meaning as the term "small business concern" under Section 3 of the Small Business Act."[459] A small concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[460]

173. The Communications Act at 47 U.S.C. 543 (m) (2) 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." Under the Communications Act, at 47 U.S.C. 543 (m) (1), a small cable operator is not subject to the rate regulation requirements of Sections 543 (a), (b) and (c) on cable programming service

[458]*See* 5 U.S.C. § 604.

[459]RFA, 5 U.S.C. § 601(3) (1980).

[460]Small Business Act, 15 U.S.C. § 632 (1996).

tiers ("CPSTs") in any franchise area in which it serves 50,000 or fewer subscribers. The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, in the *Interim Order*, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[461] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[462] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act. We are likewise unable to estimate the number of these small cable operators that serve 50,000 or fewer subscribers in a franchise area. We can, however, assume that the number of cable operators serving 617,000 subscribers or less that 1) are not affiliated with entities whose gross annual revenues exceed $250,000,000 or 2) serve 50,000 or fewer subscribers in a franchise area, is less than 1450.

174. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[463] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[464] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators. Under the Commission's rules, a small cable system is a cable system with 15,000 or fewer subscribers owned by a cable company serving 400,000 or fewer subscribers over all of its cable systems. We stated in the Notice that we were unable to estimate the number of small cable systems nationwide, and we sought comment on the number of small cable systems. No comments were received with respect to this number.

175. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.

176. The term "small governmental jurisdiction" is defined as "governments . . . districts, with a population of less than fifty thousand." There are 85,006 governmental entities in the United States. This number includes such entities as states, counties, cities, utility districts and school districts. We note that any official actions with respect to cable systems will typically be undertaken by LFAs, which primarily consist

[461]47 C.F.R. § 76.1403(b).

[462]Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[463]47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

[464]Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

of counties, cities and towns. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states, which typically are not LFAs. Of the 38,978 counties, cities and towns, 37,566, or 96% have populations of fewer than 50,000. Thus, approximately 37,500 "small governmental jurisdictions" may be affected by the rules adopted in this Order.

177. *Reporting, Recordkeeping and Other Compliance Requirements.* The following addresses the requirements of regulations adopted, amended, modified or clarified in the Order.

178. *Effective Competition*. The 1996 Act adds a fourth test for effective competition to Section 623 of the Communications Act. The rules adopted in this Order will affect municipalities and cable operators, including those that are small entities. The rules adopted in this Order require that a finding of effective competition must be based on a record that demonstrates that effective competition exists, and not on a mere claim by a cable operator that it is subject to effective competition. Our rules state that all claims of effective competition should be filed as petitions for determinations of effective competition under Section 76.7 of our rules. We do not believe that the rules adopted here today will require any specialized skills beyond those already used by LFAs and operators beyond those already required by our rules.

179. *CPST Rate Complaints*. The 1996 Act amended the CPST rate complaint procedures in Section 623(c)(3) of the Communications Act. Under our rules adopted here today, we clarify that 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. The rules adopted here today clarify that the LFA should not file a complaint with the Commission that is based on subscriber complaints concerning the BAST 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. In our rules, we determine that for purposes of triggering the LFA's 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 files a complaint with the Commission. We 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. However, we 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. LFAs should continue to use Form 329 to file CPST rate complaints with the Commission. LFAs should use Form 329 to serve notice on the operator of its intent to file a complaint with the Commission. When providing the operator with 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 via certified mail, return receipt requested. A copy of the return receipt showing delivery of the complaint to the cable operator should be included when the complaint is filed with the Commission. We do not believe that determining whether subscriber complaints concern the BAST or premium services will require any specialized skills beyond those already used by LFAs and operators beyond those already required by our rules. Furthermore, we do not believe that the determination that the LFA has received more than one com;plaint per community unit served by the operator before filing a complaint against the operator's rates in that community unit and certifying to the date of the first valid complaint will require any specialized skills.

180. *Small Cable Operators*. The 1996 Act exempts small cable operators in some circumstances from the rate regulation requirements of Section 623 of the Communications Act. The Communications Act

at 47 U.S.C. 543(m)(2) defines a small cable operator as "a cable operator that, directly or through an affiliate, serves in the aggregate fewer that 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." Under the Communications Act, at 47 U.S.C. 543(m)(1), a small cable operator is not subject to the rate regulation requirements of Sections 543(a), (b), and (c) on cable programming service tiers (CPSTs") in any franchise area in which it serves 50,000 or fewer subscribers. The interim rules set forth a procedure that enables operators to assert eligibility for small operator treatment. The rules adopted here today allow LFAs a 90 day response period to determine eligibility for small operator treatment. Our rules also allow operators to appeal to the Commission when information requests from LFAs are deemed to burdensome and the LFA refuses to drop or modify the information request in response to the operator's challenge. An LFA may request an operator seeking certification to 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. Small operators with only one tier of service subject to regulation as of December 31, 1994 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 if it meets the relevant numerical thresholds and limits of the statute. Operators claiming eligibility for deregulatory treatment based on this aspect of the small operator provision may assert such eligibility consistent with the procedures established in the Order. We do not believe that the rules adopted here today will require any specialized skills beyond those already used by LFAs and operators beyond those already required by our rules.

181. *Transition from Small Operator Treatment.* 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. The 1996 Act 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. In the *Order*, we allow small operators that lose eligibility for small operator treatment to maintain the rates that prevailed prior to the loss of eligibility. We do not believe that the rule adopted here today will require any specialized skills beyond those already used by LFAs and operators beyond those already required by our rules.

182. *Technical Standards*. In the *Notice*, we sought comment on whether Section 624(e) of the Communications Act, as amended by Section 301(e) of the 1996 Act precludes an LFA from enforcing the Commission's technical standards. In the *Order*, we preclude LFAs from specifying the technical means by which a cable operator delivers its signal to subscribers.

183. *Subscriber Notice.* Section 301(g) of the 1996 Act added a new subsection to Section 632 of the Communications Act. We amended Sections 76.30 and 76.964 of our rules to correspond with this statutory revision.[465] The legislative history of the House amendment concerning notice to subscribers of rate increases stated that "[n]otice need not be inserted in the subscriber's bill."[466] Accordingly, in the *Interim Order*, we determined that notices of rate changes provided to subscribers through written announcements on the cable system or in the newspaper will be presumed sufficient. We stated that we would address any

[465]*Interim Order* at 11 FCC Rcd 5952. *See* 47 C.F.R. § 76.964(b).

[466]*Id.* citing Conference Report at 169.

disputes that might arise in this area on a case-by-case basis. In the *Order*, we allow cable operators and LFAs to negotiate notice procedures that are reasonable in light of local circumstances. In the absence of an agreement, the LFA should prescribe notice requirements consistent with this *Order*. We do not believe that the rule adopted here today will require any specialized skills beyond those already used by LFAs and operators beyond those already required by our rules.

184. Steps Taken to Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Rejected.

185. *Effective Competition.* The 1996 Act adds a fourth test for effective competition to Section 623 of the Communications Act.[467] The rules adopted in this *Order* will affect municipalities and cable operators, including those that are small entities. The rules adopted in this *Order* require that a finding of effective competition must be based on a record that demonstrates that effective competition exists, and not on a mere claim by a cable operator that it is subject to effective competition. Our rules state that all claims of effective competition should be filed as petitions for determinations of effective competition under Section 76.7 of our rules. Adopting this procedure as the sole means of establishing effective competition eliminates confusion and comports with the statutory requirement that such determinations be made by the Commission.

186. *CPST Rate Complaints.* A number of cable operators contend that the LFA should notify the operator each time a subscriber complaint is received, and these operators suggest proposals for implementation of this contention. In many instances, these proposals would place unnecessary burdens on both LFAs and cable operators. We see no purpose in requiring 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. There is no indication in the 1996 Act or its legislative history that Congress sought to impose additional burdens on LFAs in this regard. Moreover, we presume that subscriber complaints are matters of public record that are accessible under state or local laws. An 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 increases the role of LFAs with respect to substantive review of CPST rates. 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 that 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.

187. *Small Cable Operators*. The 1996 Act exempts small cable operators in some circumstances from the rate regulation requirements of under Section 623 of the Communications Act. The Communications Act at 47 U.S.C. 543 (m) (2) 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

[467] 1996 Act § 301(b)(3); *see* 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4).

with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." Under the Communications Act, at 47 U.S.C. 543 (m) (1), a small cable operator is not subject to the rate regulation requirements of Sections 543 (a), (b) and (c) on cable programming service tiers ("CPSTs") in any franchise area in which it serves 50,000 or fewer subscribers. The interim rules set forth a procedure that enables operators to assert eligibility for small operator treatment. We 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.[468] Cable operators support simplified procedures for asserting eligibility for small operator treatment. 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. SCBA requests rules that would allow operators to appeal to the Commission when information requests made by LFAs are considered unduly burdensome. 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 adopted here today allows LFAs sufficient time to determine eligibility for small operator treatment. Our rules also, however, 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. An LFA may request an operator seeking certification to 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.

188. *Transition From Small Operator Treatment*. 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. The 1996 Act 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 subjects the small operator to rate regulation. At the same time, we are concerned that the prospect of rate rollbacks either immediately at the local level or at the time of rate adjustments at the federal level will create an incentive for operators to restrict their own growth, which would disserve both consumers and operators. Accordingly, in the *Order*, we allow small operators that lose eligibility for small operator treatment to maintain the rates that prevailed prior to the loss of eligibility. This will ensure that operators are not subjected to sudden and disruptive rate rollbacks that create a perverse incentive for small operators to restrict their own growth. Our objectives are to minimize disruption to newly regulated operators and to assure operators that successful subscriber growth will not adversely affect their economic position.

189. *Technical Standards*. In the *Notice*, we sought comment on whether Section 624(e) of the Communications Act, as amended by Section 301(e) of the 1996 Act precludes an LFA from enforcing the Commission's technical standards. In the *Order*, we agree with commenting LFAs that local enforcement is not precluded. In the *Notice*, we also sought comment on the language in Section 624(e) that provides that no state or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology. Municipal interests argue that burdens for small governmental entities will increase if LFAs are unable to negotiate facilities and equipment requirements, because the LFAs will need to devise indirect means of assuring community needs and interests are met under renewal portions

[468] *Notice*, 11 FCC Rcd at 5969.

of the Communications Act. In the *Order*, we note the lack of controversy regarding interpretation of "subscriber equipment." With respect to "transmission technology," we note that the term is commonly used to include both the transmission medium and the specific modulation or communications format, and find that it is reasonably clear that local authorities may not control whether a cable operator uses digital or analog transmission nor determine whether its transmission plant is composed of coaxial cable, fiber optic cable, or microwave radio facilities. We further note that an LFA's authority to establish requirements for facilities and equipment must be read in the context of the limits imposed by the revisions to Section 624(e). As stated in the *Order*, the legislative history of the amendment to Section 624(e) states that the patchwork of regulations that would result from a locality-by-locality approach (in the areas of technical standards, transmission technology, and subscriber equipment) is particularly inappropriate in light of today's intensely dynamic technological environment. Allowing LFAs to specify transmission technology would be inconsistent with the clearly stated intent of Congress.

190. *Subscriber Notice*. Section 301(g) of the 1996 Act added a new subsection to Section 632 of the Communications Act. We amended Sections 76.30 and 76.964 of our rules to correspond with this statutory revision.[469] The legislative history of the House amendment concerning notice to subscribers of rate increases stated that "[n]otice need not be inserted in the subscriber's bill."[470] Accordingly, in the *Interim Order*, we determined that notices of rate changes provided to subscribers through written announcements on the cable system or in the newspaper will be presumed sufficient. We stated that we would address any disputes that might arise in this area on a case-by-case basis. In the *Report and Order*, we conclude that Congress intended to limit the Commission's discretion in this area but that Congress did not intend to eliminate completely the role of regulatory authorities. Congress specifically preserved LFA authority to enact and enforce consumer protection laws to the extent not specifically preempted by Title VI of the Communications Act. We also concluded that Congress did not give cable operators unbridled discretion regarding the means for notifying subscribers of changes in rates and service. Congress allowed cable operators to exercise their sole discretion within the constraints of "reasonable written" means of giving notice. LFAs and the Commission retain the authority to determine that a particular mechanism is not reasonable. We noted, however, the suggestion in the legislative history that cable operators need not give subscribers individual written notice of rate and service changes in their bills.

191. Municipal parties argue that burdens for small governmental entities will increase if operators are not required to give direct notice to subscribers of rate increases, because LFAs will receive additional complaints from subscribers that were not aware that rate increases were taking place. Municipal parties state that reasonableness of a notice of a rate change appearing in a newspaper depends upon several variables such as its location in the newspaper, the size of the notice, and the font of the print used in the notice. In the *Order*, we allow cable operators and LFAs to negotiate notice procedures that are reasonable in light of local circumstances. In the absence of an agreement, we allow the LFA to prescribe notice requirements consistent with this *Order*.

192. *Report to Congress*: The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and*

[469] *Interim Order* at 11 FCC Rcd 5952. *See* 47 C.F.R. § 76.964(b).

[470] *Id.* citing Conference Report at 169.

Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

XIV. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

193. The requirements adopted in this *Report and Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collection requirements contained in this *Report and Order*, as required by the 1995 Act. Public comments are due 30 days from date of publication of this *Order* in the Federal Register. OMB comments are due on or before 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

194. Written comments by the public on the modified information collection requirements are due 30 days from date of publication of this *Report and Order* in the Federal Register. Written comments must be submitted by OMB on the modified information collection requirements on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

XV. ORDERING CLAUSES

195. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and the Telecommunications Act of 1996, Sections 301 and 302, the requirements and policies discussed in this *Report and Order*, ARE AMENDED as set forth below.

196. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than 60 days after publication in the Federal Register.

197. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

COMMENTERS

Alliance for Community Media, Consumer Project on Technology, and Alliance for Communications Democracy
Allied Associated Partners, LP and GELD Information Systems
Bell Atlantic
BellSouth Corporation ("BellSouth")
Cable Telecommunications Association ("CATA")
Cablevision Systems Corporation ("Cablevision")
California Cable Television Association ("CCTA")
City and County of Denver, CO ("Denver")
City of Fairfield, CA ("Fairfield")
City of Indianapolis, IN ("Indianapolis")
Cole, Raywid, & Braverman (on behalf of Bresnan Communications Company, L.P., Charter Communications, Inc., Daniels Communications, Inc., Halcyon Communications Partners, James Cable Partners, L.P., Jones Intercable, Inc., Rifkin & Associates, Inc., TCA Cable TV, Inc. ("Cole, Raywid"))
Comcast Cable Communications, Inc. ("Comcast")
Cook Jr., William A. ("William Cook")
Cox Communications, Inc. ("Cox")
C-Tec Cable Systems, Inc. and Mercom, Inc. ("C-TEC and Mercom")
Falcon Holding Group, L.P. ("Falcon")
Fleischman and Walsh, L.L.P (on behalf of Adelphia Communications Corporation, Arizona Cable Telecommunications Association, Century Communications Corporation, Charter Communications, Inc., Insight Communications Co., State Cable TV Corp., and Suburban Cable TV Co. Inc. ("Fleischman"))
FrontierVision Operating Partners, L.P. ("FrontierVision")
Greater Metro Cable Consortium, Metro Denver, CO ("GMCC")
GTE Service Corporation ("GTE")
Independent Cable & Telecommunications Association ("ICTA")
Kramer, Monroe & Wyatt ("Kramer")
Massachusetts Cable Television Commission ("Massachusetts Cable Commission")
National Cable Television Association, Inc. ("NCTA")
National League of Cities and National Association of Telecommunications Officers and Advisors ("League of Cities and NATOA")
National Telephone Cooperative Association ("NTCA")
New England Cable Television Association, Inc. ("NECTA")
New Jersey State Board of Public Utilites ("New Jersey Board")
New Jersey State Division of the Ratepayer Advocate ("New Jersey Ratepayer Advocate")
New York City Department of Information Technology and Telecommunications ("New York City")
New York State Department of Public Service ("State of New York")
Optel, Inc. ("OpTel")

People for the American Way and Media Access Project
Residential Communications Network, Inc.
SBC Communications, Inc. and Southwestern Bell Video Systems, Inc. ("SBC")
Small Cable Business Association ("SCBA")
State of California Agency ("SMATV")
Tele-Communications, Inc. ("TCI")
Time Warner Cable (Time Warner)
United States Small Business Administration ("SBA")
United States Telephone Association ("USTA")
United States Wireless Cable, Inc. and Wedgewood Communications, Inc. ("U.S. Wireless and Wedgewood")
US WEST, Inc. ("U.S. WEST")
Wireless Cable Association International, Inc. ("WCA")

REPLY COMMENTERS

Alliance for Community Media
Ameritech New Media, Inc. ("Ameritech")
Bell Atlantic
City of Atlanta, GA
City of Los Angeles, CA; National League of Cities; and National Association of Telecommunications Officers & Advisors ("Los Angeles, League of Cities, and NATOA")
City of Austin, TX ("Austin")
City of Lake Forest, IL ("Lake Forest")
City of Naperville, IL ("Naperville")
City of Rolling Meadows, IL ("Rolling Meadows")
Cole, Raywid, & Braverman (on behalf of Bresnan Communications Company, L.P., Charter Communications, Inc., Daniels Communications, Inc., Halcyon Communications Partners, James Cable Partners, L.P., Jones Intercable, Inc., Rifkin & Associates, Inc., TCA Cable TV, Inc. ("Cole, Raywid"))
Comcast Cable Communications, Inc. ("Comcast")
Fleischman and Walsh, L.L.P (on behalf of Adelphia Communications Corporation, Arizona Cable Telecommunications Association, Century Communications Corporation, Charter Communications, Inc., Insight Communications Co., State Cable TV Corp., and Suburban Cable TV Co. Inc. ("Fleischman"))
General Electric Capital Corporation ("GE Capital")
Independent Cable & Telecommunications Association ("ICTA")
J.P. Morgan & Company, Brown Brothers Harriman & Co., Olympus Partners, and First Union Capital Partners, Inc.
Massachusetts Cable Television Commission ("Massachsetts Cable Commisssion")
Metropolitan Area Communications Commission representing Oregon communities ("MACC")
Michigan, Illinois and Texas Communities
National Cable Television Association, Inc. ("NCTA")
New York City Department of Information Technology and Telecommunications ("New York City")

Optel, Inc. ("OpTel")
Small Cable Business Association ("SCBA")
Tele-Communications, Inc. ("TCI")
Time Warner Cable ("Time Warner")
United States Telephone Association ("USTA")
United States Wireless Cable, Inc. and Wedgewood Communications, Inc. ("U.S. Wireless and Wedgewood")
US WEST, Inc. ("U.S. WEST")
Viacom, Inc. ("Viacom")
Village of Lincolnwood, IL ("Lincolnwood")
Wireless Cable Association International, Inc. ("WCA")

APPENDIX B

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.701 is amended by adding a new note to paragraph 701(b) as follows:

§ 76.701 Leased access channels.

* * * * *

NOTE: "Nudity" in paragraph (b) is interpreted to mean nudity that is obscene or indecent.

3. Section 76.901 is amended by adding a new paragraph (f) to read as follows:

Sec. 76.901 Definitions.

* * * * *

(f) Small Cable Operator. A small cable operator is an 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. For purposes of this definition, an operator shall be deemed affiliated with another entity if that entity holds a 20 percent or greater equity interest (not including truly passive investment) in the operator or exercises de jure or de facto control over the operator.

NOTE 1: Using the most reliable sources publicly available, the Commission periodically will determine and give public notice of the subscriber count that will serve as the 1 percent threshold until a new number is calculated.

NOTE 2: For a discussion of passive interests with respect to small cable operators, see Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order in CS Docket No. 96-85, FCC 99-57 (released March --, 1999).

NOTE 3: If two or more entities unaffiliated with each other each hold an equity interest in the small cable operator, the equity interests of the unaffiliated entities will not be aggregated with each other for the purpose of determining whether an entity meets or passes the 20 percent affiliation threshold.

3. Section 76.905 is amended by revising paragraph 76.905(g) to read as follows:

§ 76.905 Standards for identification of cable systems subject to effective competition.

* * * * *

(g) In order to offer comparable programming as that term is used in this section, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.

4. A new Section 76.907 is added to read as follows:

76.907. Petition for a determination of effective competition.

(a) A cable operator (or other interested party) may file a petition for a determination of effective competition with the Commission pursuant to the Commission's procedural rules in § 76.7.

(b) The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined in § 76.905, exists in the franchise area.

NOTE: The criteria for determining effective competition pursuant to § 76.905(b)(4) are described in Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order in CS Docket No. 96-85, FCC 99-57 (released March --, 1999).

(c) If the evidence establishing effective competition is not otherwise available, cable operators may request from a competitor information regarding the competitor's reach and number of subscribers. A competitor must respond to such request within 15 days. Such responses may be limited to numerical totals. In addition, with respect to petitions filed seeking to demonstrate the presence of effective competition pursuant to § 76.905(b)(4), the Commission may issue an order directing one or more persons to produce information relevant to the petition's disposition.

5. Section 76.911 is amended by revising paragraphs (a) and (a)(1) to read as follows; by deleting paragraph (b); and by renumbering paragraphs (c), (d), and (e) to read (b), (c), and (d), respectively.

§ 76.911 Petition for reconsideration of certification.

(a) A cable operator (or other interested party) may challenge a franchising authority's certification by filing a petition for reconsideration pursuant to § 1.106. The petition may allege either of the following:

(1) The cable operator is not subject to rate regulation because effective competition exists as defined in § 76.905. Section 76.907(b) and (c) apply to petitions filed under this section.

* * * * *

6. Section 76.915 is deleted.

7. Section 76.934 is amended by adding a note at the end of the rule to read as follows:

§ 76.934 Small systems and small cable companies

* * * * *

NOTE: For rules governing small cable operators, see § 76.990 of this Subpart.

8. Section 76.950 is amended by revising paragraph (b) as follows.

§ 76.950 Complaints regarding cable programming service rates.

* * * * *

(b) This section shall not apply to cable programming services provided after March 31, 1999.

9. Section 76.952 is amended by revising paragraph (a) as follows:

§ 76.952 Information to be provided by cable operator on monthly subscriber bills.

* * * * *

(a) The name, mailing address and phone number of the franchising authority, unless the franchising authority in writing requests the cable operator to omit such information.

10. Section 76.956 is amended by revising paragraph (a) to read as follows:

§ 76.956 Cable operator response.

(a) Unless otherwise directed by the local franchising authority, a cable operator must file with the local franchise authority a response to the complaint. The response shall indicate when the cable operator received notice of the complaint. Service by mail is complete upon mailing. See § 1.47(f) of this chapter. The response shall include the information required by the appropriate FCC form, including rate cards, channel line-ups, and an explanation of any discrepancy in the figures provided in these documents and the rate filing. The cable operator must file its response with the local franchise authority via first class mail.

11. Section 76.961 is amended by revising paragraph (b) to read as follows:

§ 76.961 Refunds.

* * * * *

(b) The cumulative refund due subscribers shall be calculated from the date of the first complaint filed with the franchising authority until the date a cable operator implements a prospective rate reduction as ordered by the Commission pursuant to § 76.960. The Commission shall calculate refund liability according to the rules in effect for determining the reasonableness of the rates for the period of time covered by the complaint.

12. Section 76.964 is amended by revising paragraph (b) to add the word "written" between the words "reasonable" and "means" as follows:

§ 76.964 Written notification of changes in rates and services.

* * * * *

(b) To the extent the operator is required to provide notice of service and rate changes to subscribers, the operator may provide such notice using any reasonable written means at its sole discretion.

13. Section 76.984 is amended by deleting the last sentence of paragraph (b); by moving the last 2 sentences of paragraph (c)(2) to new paragraph (c)(3); and by adding notes 1 and 2 as follows:

§ 76.984 Geographically uniform rate structure.

* * * * *

(c)(2) Any video programming offered on a per channel or per program basis.

(c)(3) Bulk discounts to multiple dwelling units shall not be subject to this section, 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.

NOTE 1: *Discovery procedures for predatory pricing complaints.* Requests for discovery will be addressed pursuant to the procedures specified in § 76.7(f).

NOTE 2: *Confidential information.* Parties submitting material believed to be exempt from disclosure pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552(b), and the Commission's rules, § 0.457, should follow the procedures in § 0.459 and § 76.9.

14. A new Section 76.990 is added to read as follows:

§ 76.990 Small cable operators.

(a) Effective February 8, 1996, a small cable operator is exempt from rate regulation on its cable programming services tier, or on its basic service tier if that tier was the only service tier subject to rate regulation as of December 31, 1994, in any franchise area in which that operator services 50,000 or fewer subscribers.

(b) *Procedures*. (1) A small cable operator, may certify in writing to its franchise authority at any time that it meets all criteria necessary to qualify as a small operator. Upon request of the local franchising authority, the operator shall identify in writing all of its affiliates that provide cable service, the total subscriber base of itself and each affiliate, and the aggregate gross revenues of its cable and non-cable affiliates. Within 90 days of receiving the original certification, the local franchising authority shall determine whether the operator qualifies for deregulation and shall notify the operator in writing of its decision, although this 90-day period shall be tolled for so long as it takes the operator to respond to a proper request for information by the local franchising authority. An operator may appeal to the Commission a local franchise authority's information request if the operator seeks to challenge the information request as unduly or unreasonably burdensome. If the local franchising authority finds that the operator does not qualify for deregulation, its notice shall state the grounds for that decision. The operator may appeal the local franchising authority's decision to the Commission within 30 days.

(2) Once the operator has certified its eligibility for deregulation on the basic service tier, the local franchising authority shall not prohibit the operator from taking a rate increase and shall not order the operator to make any refunds unless and until the local franchising authority has rejected the certification in a final order that is no longer subject to appeal or that the Commission has affirmed. The operator shall be liable for refunds for revenues gained (beyond revenues that could be gained under regulation) as a result of any rate increase taken during the period in which it claimed to be deregulated, plus interest, in the event the operator is later found not to be deregulated. The one-year limitation on refund liability will not be applicable during that period to ensure that the filing of an invalid small operator certification does not reduce any refund liability that the operator would otherwise incur.

(3) Within 30 days of being served with a local franchising authority's notice that the local franchising authority intends to file a cable programming services tier rate complaint, an operator may certify to the local franchising authority that it meets the criteria for qualification as a small cable operator.

This certification shall be filed in accordance with the cable programming services rate complaint procedure set forth in § 76.1402. Absent a cable programming services rate complaint, the operator may request a declaration of CPST rate deregulation from the Commission pursuant to § 76.7.

(c) *Transition from small cable operator status*. If a small cable operator subsequently becomes ineligible for small operator status, the operator will become subject to regulation but may maintain the rates it charged prior to losing small cable operator status if such rates (with an allowance for minor variations) were in effect for the three months preceding the loss of small cable operator status. Subsequent rate increases following the loss of small cable operator status will be subject to generally applicable regulations governing rate increases.

NOTE: For rules governing small cable systems and small cable companies, see § 76.934 of this Subpart.

15. Section 76.1401 is amended by deleting paragraphs (a), (c), and (d) and by renumbering paragraph (b) as paragraph (a).

16. Section 76.1403 is deleted.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Implementation of Cable Act Reform Provisions of the Telecommunications Act, CS Docket No. 96-85

In implementing the "effective competition" provision of the 1996 Telecommunications Act, Part II of this Report and Order requires that a local exchange carrier's service area "substantially overlap" that of the incumbent cable operator in a franchise area. Because the plain language of the statute reveals no substantiality test, and because other statutory definitions of effective competition expressly include such tests, I respectfully dissent from Part II.

I start with the text of the statute. Section 623(l)(1)(D) states that "effective competition" exists when:

> a local exchange carrier or its affiliate (or any multichannel video programming distributor ["MVPD"] 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.

47 U.S.C. section 543(l)(1)(D)(emphases added).

I now turn to the context of the provision. Section 623(l)(1)(D) was not the first time that Congress defined the meaning of "effective competition" for deregulatory purposes. The subsections immediately preceding the LEC effective competition provision, which were enacted in 1992, also define that term. Significantly, each of these definitions includes some kind of a pass or penetration rate that a new entrant must meet before a finding of effective competition is made and deregulation follows. In particular, these definitions provide that effective competition exists when:

> fewer than *30 percent of the households in the franchise area subscribe* to the service of a cable system;
>
> the franchise area is served by at least two unaffiliated MVPDs each of which *offers comparable video programming to at least 50 percent* of the households in the franchise area . . . [and] the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds *15 percent* of the households in the franchise area; [or]
>
> a MVPD operated by the franchising authority for that franchise area *offers video programming to at least 50 percent* of the households in that franchise area*;*

Id. sections 623(l)(1)(A)-(C) (emphases added).

Two things about the above-quoted statutory language are salient. First, nothing in subsection (D) states that the LEC must provide video programming to substantially the same number of households, or in substantially the same geographic area, as does the incumbent cable operator. There is simply no textual basis for a "substantial overlap" test. In terms of geography, all the statute requires is that the LEC offer service "in the franchise area," not "in a substantial part of the franchise area" or "in most of the franchise area." Notably, the definition *is* conditional -- for instance, the delivery cannot be via direct satellite, and the services must be comparable -- but a geographic coverage requirement within the franchise area is not one of the conditions set out by the statute. It is an extra condition that is entirely of the Commission's making and wholly extra-statutory.[1]

Second, the absence of language in subsection (D) regarding a coverage test is particularly conspicuous when considered in the context of the surrounding provisions. The other subsections defining effective competition include -- often immediately after the word "offer" -- some kind of threshold test for the substantiality of the offering in question. But after the word "offer" in subsection (D), there is no such test. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Congress clearly knew how to tack a numerical threshold onto the offering requirement, and it did not do so here. We cannot conveniently ignore the fact of this exclusion.[2]

The Notice in this matter suggested that LEC competition cannot be "effective" when it is not offered to a significant number of households within the franchise area. Congress has not asked the Commission to define the term "effective competition" based on our understanding of what is and is not effective in terms of a market disciplining presence. Rather, *Congress has already defined the term.* And, under that definition, if a LEC offers programming comparable to that of the local cable company "directly to subscribers . . . in the franchise area," by any means except direct-to-home satellite, each and every element of the definition is met. Cable rate deregulation then must follow as a matter of law.

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[1]If there were any doubt about the clarity of the statute, the legislative history supports the view that subsection (D) contains no coverage, pass, or penetration test. "Offer" in subsection (D) was intended to mean the same thing as in 47 CFR section 76.905(e). *See* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 170 (1996). That regulation includes no coverage, pass, or penetration rate. To be sure, the regulation establishes some requirements for an "offering" -- *e.g.*, a reasonable awareness on the part of potential subscribers of the availability of the services -- but it sets no threshold limit for the breadth or scope of the offering.

[2]If there is any basis for a numerical test under section 623(l)(1)(D), it must be derived from the statute -- specifically, the object of the phrase "offer to," "subscribers." The plural indicates that Congress meant two or more; the statute states nothing more, and nothing less, than this. And that result is not an absurd one, given the broad deregulatory nature of the Telecommunications Act of 1996. Unfortunately, the majority's reading of section 623(l)(1)(D) does not so much comport with Congressional intent as with their own policy judgments, as Commissioner Powell ably notes.

* * * * * * *

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL POWELL

Re: Implementation of Cable Act Reform Provisions of the Telecommunications Act, CS Docket No. 96-85

During my confirmation, I was asked by a Senator whether I would implement communications law as written by Congress even if I personally disagreed with the outcome. I promised that I would, for that was the duty of a regulator. Consistent with that promise, I respectfully dissent from Part II of this Report and Order which requires that a local exchange carrier's (LEC) service area must "substantially overlap" that of the incumbent cable operator in a franchise area before the LEC can be said to provide effective competition under Section 623(l)(1)(D) of the Communications Act. As Commissioner Furchtgott-Roth persuasively argues in his dissenting statement, this result cannot be squared with the plain language of the statute.

Having said this, I will note that I can appreciate the desire of the majority to read this provision more broadly. One can reasonably argue that it is not desirable to deregulate a monopoly cable provider when it faces only minimal competition in its franchise area. I would also concede that if the other three "effective competition" provisions of Section 623(l) did not specifically include pass or penetration tests, the Commission might have the latitude to assume that Congress intended some type of substantial overlap test. Given the context of the section 623(l)(1)(D), however, I see no such latitude. It is clear from the text of section 623(l) that where Congress intended the Commission to apply a pass or penetration test, it included the test in the statute. Congress, apparently, chose not to include a pass or penetration standard in the LEC effective competition test for whatever reason, and it is improper for the Commission to assume that Congress could not have intended what it wrote. Although we might think that some possible ramifications of interpreting the statute as written are extreme, this agency cannot substitute its judgement for that of Congress.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

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

I write separately to clarify my views on the technical standards section.

First, I believe that the Order fails to adequately acknowledge the ambiguity of the term "transmission technology." As the comments reflect, that term can be interpreted in several different ways, each plausible on its face. Neither the Communications Act, the legislative history, nor Commission precedent (until today) provide any clear guidance for choosing one definition over another. Thus, while I do not disagree with the interpretation of "transmission technology" ultimately adopted in today's Order, it is not the only plausible interpretation of the term.

Second, I would have made it clearer that parties should be protected from piecemeal abrogation of existing franchise agreements. As the Order notes, Section 624(e) was signed into law over three years ago. Since that time, the Commission failed to provide any guidance as to the meaning of Section 624(e), thereby forcing parties to enter into agreements based upon their own interpretation of the statute. Given Section 624(e)'s ambiguity, parties may have mistakenly drafted provisions that they believed were permissible regulation of facilities and equipment under Section 624(b), but which under today's Order would constitute an impermissible regulation of transmission technology. These mistakes were mutual: as the item notes, we have not received *a single* formal complaint from any party claiming that its Section 624(e) rights have been violated. Moreover, these mistakes were avoidable. Had the Commission spoken earlier, parties could have phrased their agreements in a way that would have complied with today's Order. Thus, given the Commission's delay and the parties' mutually mistaken reading of an ambiguous statute, I believe it would be patently unfair for these provisions to simply be struck from existing franchise agreements while the remainder of the agreement is enforced. I express no opinion on whether such agreements should be found enforceable or rescinded in their entirety, or reformed pursuant to renegotiation between the parties.

Indeed, I believe that simply striking contractual provisions that may now violate Section 624(e), without the opportunity for renegotiation, would violate the framework that Congress established in Section 624. Congress granted local authorities the right to regulate facilities and equipment in Section 624(b), so long as they did not step over the vague line into "transmission technology." For three years, the Commission provided no guidance regarding where that line was located. Now it appears that some local authorities and cable operators may have made incorrect -- albeit reasonable -- judgments about where Section 624(b) ended and Section 624(e) began. Had they had the benefit of today's Order, these mistakes could have been corrected in the drafting stage. Simply striking specific franchise provisions would deprive local communities of their legitimate rights to regulate facilities and equipment under Section 624(b). It would find that because they inadvertantly stepped over the line that divides Section 624(b) and Section 624(e), that they have lost *all* of

their rights under Section 624(b) for the length of the franchise term. Local communities should not pay such a high price for the Commission's indefensible delay.

Finally, I would be opposed to extending the definition of "transmission technology" beyond the specific examples cited in the Order.[1] For instance, I would be opposed to extending the definition to prohibit agreements that provide for a certain MHz level or a certain number of homes per fiber node. I believe we have done our statutory duty to fairly interpret the meaning of "transmission technology." Any expansion of that definition, I believe, would tread on the legitimate rights of local authorities.

[1]Specifically, the Order states that the term "transmission technology" has been used to include both the transmission medium (i.e., microwave, satellite, coaxial cable, twisted pair copper telephone line, and fiber optic systems) and the specific modulation or communications format (i.e., analog or digital).