Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	

COMMENTS

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Barbara S. Esbin
Scott C. Friedman
Elizabeth Cuttner
Cinnamon Mueller
1875 Eye Street, NW, Suite 700
Washington, DC 20006
(202) 872-6811

Attorneys for American Cable Association

Mary Lovejoy
Vice President of Regulatory Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 603-1735

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TABLE OF CONTENTS

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	)	
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	)	

COMMENTS

I. INTRODUCTION AND SUMMARY

The American Cable Association ("ACA") submits these comments in response to the Public Notice ("Notice") issued by the Commission in the above-captioned proceeding.[1] ACA appreciates the Commission's initiative to review its rules applicable to media entities, including cable operators, and welcomes this opportunity to assist the Commission in identifying rules that are outdated, unnecessary, or unduly burdensome, and therefore ripe for elimination or modification. ACA's comments discuss several regulations affecting multichannel video programming distributors ("MVPDs") providing services subject to the Commission's Part 76 rules.

[1] *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105 (rel. May 18, 2017) ("Public Notice").

First, the Commission should consider eliminating or modifying its performance testing obligations[2] and related recordkeeping requirements,[3] as well as its technical standards for analog cable systems,[4] and the requirement that operators establish a signal quality-specific complaint resolution process.[5] Second, the Commission should review several recordkeeping and public inspection file rules, including the requirement to maintain a hard copy of Part 76,[6] the Equal Employment Opportunity ("EEO") website posting requirement,[7] the requirement to maintain a current channel lineup at a local system office,[8] and the amount of information cable operators must denote on their lists of must-carry signals carried.[9] In addition, the Commission should investigate potential relief for cable operators from the burdens of demonstrating compliance with the children's advertising limits.[10] Third, the Commission should review the continued need for certain customer notice obligations, including the categories of content that cable operators must provide subscribers annually,[11] basic tier availability notices that must be provided at installation,[12] and notices of equipment compatibility.[13] The Commission should also eliminate its regulation requiring DTV transition notices.[14] Finally, the Commission should

[2] 47 C.F.R. § 76.601.

[3] 47 C.F.R. § 76.1704.

[4] 47 C.F.R. § 76.605.

[5] 47 C.F.R. § 76.1713.

[6] 47 C.F.R. § 76.1714.

[7] 47 C.F.R. § 76.1702.

[8] 47 C.F.R. § 76.1705.

[9] 47 C.F.R. § 76.1709.

[10] 47 C.F.R. § 76.1703

[11] 47 C.F.R. § 76.1602.

[12] 47 C.F.R. § 76.1618.

[13] 47 C.F.R. §§ 76.621; 76.1622.

[14] 47 C.F.R. § 76.1630.

eliminate Form 325 or, at the minimum, no longer sample a random number of cable systems with less than 20,000 subscribers.[15]

These regulations are no longer necessary or are unduly burdensome, particularly for smaller operators. ACA recommends that the Commission examine whether these rules can be eliminated or modified as required to accomplish the Commission's goals "to advance the public interest by reducing unnecessary regulations and undue burdens that can stand in the way of competition and innovation in media markets."[16]

II. THE COMMISSION SHOULD CONSIDER ELIMINATING OR MODIFYING CERTAIN RULES RELATED TO ITS CABLE TECHNICAL STANDARDS AND PROOF-OF-PERFORMANCE TESTING

The Commission's performance testing obligations and related recordkeeping requirements, as well as its mandatory technical standards for analog cable systems and signal quality-complaint resolution requirement, are outdated and unnecessary, and they create undue burdens with no commensurate public benefit. In other words, they are exactly the type of regulations that the Commission should address in its effort to modernize its media regulations.

In 1990, pursuant to Section 623(h) of the 1984 Cable Act,[17] the Commission issued a report to Congress regarding the state of competition in the cable marketplace, in which it found that there was a "pattern of technical problems with cable service."[18] Two years later, the Commission adopted a series of rules designed to alleviate that problem: a requirement that

[15] 47 C.F.R. § 76.403.

[16] Public Notice at 1.

[17] Section 623(h) of the 1984 Cable Act required that "[n]ot later than 6 years after the date of the enactment of this title, the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recommendations shall be based on a study of such regulation which the Commission shall conduct regarding the effect of competition in the marketplace." *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984).

[18] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962, ¶¶ 9, 39 (1990) ("Report to Congress").

cable operators conduct semi-annual technical proof-of-performance tests,[19] a requirement that cable operators retain records of those tests for at least five years,[20] a requirement that operators employ certain minimum technical standards,[21] and a requirement that operators establish a complaint resolution process specifically for complaints related to signal quality.[22]

Given the advancements in technology that have taken place since then and the fact that consumers now have at least two alternatives to their local operator in the market, not to mention a variety of online video programming options, signal quality is no longer an issue that requires regulatory intervention. The Commission therefore can advance the public interest in eliminating unnecessary regulations by proposing to eliminate or modify these rules in a rulemaking proceeding.

A. The Commission should examine elimination of its semi-annual technical proof-of-performance tests (§ 76.601) or provide further relief to small operators.

The Commission should investigate whether, in a marketplace characterized by intense video competition, its semi-annual cable proof-of-performance testing requirements remain necessary, or, at a minimum, whether they can be amended to provide further relief to small operators. With the amount of competition for video subscribers today, evidenced by the Commission's recent Order adopting a presumption that cable operators are subject to "effective competition,"[23] cable operators are highly motivated to ensure that their systems perform at a very high level of reliability and audio and visual quality. The proof-of-performance rule is not mandated by statute, and there is no longer any demonstrable need for the

[19] 47 C.F.R. § 76.601.

[20] 47 C.F.R. § 76.1704.

[21] 47 C.F.R. § 76.605.

[22] 47 C.F.R. § 76.1713.

[23] *Amendment to the Commission's Rules Concerning Effective Competition*; *Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015) (adopting rebuttable presumption that cable operators are subject to effective competition).

Commission to regulate cable performance testing practices, as the marketplace provides more than adequate incentives for cable operators to ensure that their signal quality meets the high expectations of consumers.

At the time that the Commission amended Section 76.601 to require performance testing, the Commission concluded that "requiring semiannual tests [would] . . . contribute [] to ensuring that cable operators provide their subscribers with quality service[.]"[24] This rule was arguably necessary then, as competition among cable operators was limited, and some operators may have been tempted to ignore performance issues. Conversely, cable operators have strong incentives in today's highly competitive video market to deliver high quality services to consumers, as they must compete with DBS operators, IPTV providers, over-the-top video products such as Netflix, and other competitive entrants based upon the quality of their signals. If a cable operator provides a poor signal, consumers can easily obtain video programming elsewhere. As the Commission has found, "MVPDs further attempt to differentiate their products by claiming their products have superior quality."[25] This is especially true among smaller operators who often cannot compete against larger MVPDs on price, and must therefore rely on superior service to attract and retain customers. These marketplace incentives ensure that cable operators engage in ongoing measures to provide and maintain good quality signals, regardless of any regulatory mandate.

In addition to being unnecessary, Section 76.601 is extremely burdensome, as it requires cable operators to conduct complete performance tests of each system at least twice each calendar year, at intervals not to exceed seven months so that the Commission can

[24] *Cable Television Technical and Operational Requirements; Review of the Technical and Operational Requirements of Part 76, Cable Television*, Report and Order, 7 FCC Rcd 2021, ¶ 57 (1992) ("1992 Cable Technical Rules Order").

[25] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610, ¶¶ 27, 37, 40 (2012).

determine the extent of compliance with its technical standards.[26] In each test, the operator must measure and record a sampling of channels, along with the date and time of the measurement, once every six hours, to include the warmest and coldest times, during a 24-hour period in January or February and in July or August.[27] Testing is also required at a predetermined number of "widely separated points" within the system, depending on the size of the cable system,[28] that must be "balanced to represent all geographic areas served by the cable system."[29] As a result, smaller cable operators with systems serving large rural areas, who operate with limited administrative resources, are disproportionally burdened by these performance testing requirements.[30] Eliminating the proof-of-performance requirement would thus provide relief for small cable operators who are already resource constrained and overburdened by various statutory and regulatory requirements.

Given that the current proof-of-performance testing rule is both unnecessary and burdensome, the Commission should take steps to eliminate it. At the very least, the Commission should consider modifying the rule to minimize the burdens on smaller operators. While the existing rule does provide some relief by tying the number of points that must be

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[26] 47 C.F.R. § 76.601(b) ("The operator of each cable television system shall conduct complete performance tests of that system at least twice each calendar year (at intervals not to exceed seven months), unless otherwise noted below. The performance tests shall be directed at determining the extent to which the system complies with all the technical standards set forth in §76.605(a) . . . .").

[27] 47 C.F.R. § 76.601(b)(3) ("The operator of each cable television system shall conduct semi-annual proof-of-performance tests of that system, to determine the extent to which the system complies with the technical standards set forth in §76.605(a)(4) as follows. The visual signal level on each channel shall be measured and recorded, along with the date and time of the measurement, once every six hours (at intervals of not less than five hours or no more than seven hours after the previous measurement), to include the warmest and the coldest times, during a 24-hour period in January or February and in July or August.").

[28] For example, cable television systems with 1,000 or more subscribers but with 12,500 or fewer subscribers must conduct proof-of-performance tests at six widely separated points. *See* 47 C.F.R. § 76.1601(b)(1).

[29] 47 C.F.R. § 76.1601(a)(1).

[30] The Commission does provide some relief to small cable systems by exempting systems with fewer than 1,000 subscribers, but given that the requirement no longer serves any purpose, there is no reason to continue imposing the burdens on systems with 1,000 or more subscribers.

tested to subscriber numbers, its burdens still far outweigh any conceivable benefit to the public in today's market.

B. The Commission should investigate whether to eliminate its proof-of-performance recordkeeping requirements (§ 76.1704).

In conjunction with its investigation into eliminating its proof-of-performance testing requirements, the Commission should also consider eliminating or, at the minimum, providing further relief to small operators from the proof-of-performance recordkeeping requirements.

Section 76.1704 of the Commission's rules requires cable operators to maintain proof-of-performance data for five years at the operator's local business office on-site and make the data available to the Commission or local franchising authority ("LFA") upon request.[31] The Commission provided no specific rationale for requiring operators to retain a written record of their proof-of-performance tests, and the five-year retention period is based on a similar requirement for the retention of signal leakage reports.[32]

As with proof-of-performance testing requirements, these rules are outdated, unnecessary, and burdensome, and should be eliminated or modified even if the Commission continues to obligate cable operators to conduct performance tests. Not only is there no evidence that proof-of-performance records are of value to the public, but the five-year retention period far exceeds the length of time that operators must retain other records.[33] Small cable operators with limited administrative resources often struggle to keep up with excessive recordkeeping requirements, despite their good-faith intentions to comply with all statutory and

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[31] 47 C.F.R. § 76.1704(a) ("The proof of performance tests required by §76.601 shall be maintained on file at the operator's local business office for at least five years. The test data shall be made available for inspection by the Commission or the local franchiser, upon request.").

[32] *See Cable Television Technical and Operational Requirements; Review of the Technical and Operational Requirements of Part 76*, *Cable Television,* Notice of Proposed Rulemaking, 6 FCC Rcd 3673, ¶ 35 (1991).

[33] *See*, *e.g.,* 47 C.F.R. §§ 76.1701 (two-year retention requirement for political file); 76.1706 (two-year retention requirement for signal leakage logs).

regulatory requirements, and the length of this particular requirement makes it particularly difficult to track.

Commission rules also obligate operators to "show, on request by an authorized representative of the Commission or the [LFA], that the system does, in fact, comply with the technical standards rules in part 76, subpart K."[34] This obligation to demonstrate compliance with the technical standards upon request, along with marketplace incentives which deter allowing system performance to lapse, makes the proof-of-performance recordkeeping requirement unnecessary. As such, the Commission should consider eliminating it.

C. The Commission should update and make voluntary its cable technical performance standards to reflect changes in technology (§ 76.605).

The Commission should also launch a rulemaking to reexamine the need for regulations that require cable operators to employ minimum technical standards related to their systems' technical operation and signal quality.[35]

In the 1990 Report to Congress in which it found a pattern of technical issues, the Commission also concluded that "uniformity of technical standards in the 27,000 communities with cable franchises [was] essential to prevent the inefficiency and confusion that threatened the cable industry during the period when local authorities (far fewer at that time) could set stricter standards than those promulgated by the Commission."[36] The Commission further stated that "uniform standards would permit cable operators, program suppliers and equipment manufacturers to take advantage of any economies of scale that might otherwise be lost if differing technical standards force them to customize their services or equipment to meet the

[34] 47 C.F.R. § 76.1717.

[35] The Commission should also conclude that technical standards are unnecessary for all-digital cable systems and close its now five-year-old rulemaking. *Cable Television Technical and Operational Requirements*, Notice of Proposed Rulemaking, 27 FCC Rcd 9678 (2012).

[36] Report to Congress, ¶ 200.

requirements of a myriad of jurisdictions."[37] Two years later, Congress passed Section 624(e) of the Communications Act, directing the Commission to "prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality," and to "update such standards periodically to reflect improvements in technology," and prohibiting state and local franchising authorities from imposing their own technical standards or restrictions.[38] In 1992, the Commission implemented this requirement by adopting Section 76.605 which required cable operators to employ certain minimum technical standards for analog systems.

Most observers would agree that requiring cable operators to employ uniform standards served a valuable purpose at the time that it was enacted. As the Commission predicted, uniform standards allowed the cable industry to take advantage of economies of scale and prevented the confusion caused by individual LFAs imposing conflicting standards. Today, however, the requirement is no longer necessary, as most cable systems have transitioned away from analog technology. Those analog systems that remain already employ uniform technical standards and are not likely to discontinue their use unless the Commission establishes new standards that are more efficient and less burdensome.

To this end, the Commission should launch a proceeding to examine whether it is still appropriate to require operators of analog cable systems to meet certain minimum technical standards. Although Section 624(e) directs the Commission to establish minimum technical standards, the statute does not direct the Commission to mandate compliance with such minimum standards. There is no reason that the Commission could not retain *voluntary* minimum technical standards that provide guidance to analog cable system operators, but both

[37] *Id.*

[38] 47 U.S.C. § 544(e) ("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.").

technology and the marketplace have evolved to the point that requiring their use is no longer necessary.

D. The Commission should consider eliminating its customer signal-quality specific complaint resolution requirement (§ 76.1713).

The Commission should consider eliminating its signal quality-specific complaint resolution process rule because it is unnecessary. The Commission's rules require cable operators to inform subscribers of the procedures for resolution of complaints about the quality of the television signal delivered by the signal operator.[39] In addition, cable operators must (i) establish a process for resolving complaints from subscribers about the quality of the television signal delivered; (ii) make aggregate data based upon these complaints available for inspection by the Commission and franchise authorities, upon request; and (iii) maintain these records for at least one year.[40]

The Commission's complaint resolution process stems from the same finding, discussed above, in its 1990 Report to Congress that there was "a pattern of technical problems with cable service," and the Commission's conclusion that there were insufficient market incentives to ensure high quality of service without strict federal standards.[41] As part of its efforts to resolve this issue, in addition to mandating minimum technical standards related to cable systems' operations and signal quality, the Commission also imposed requirements related to the resolution of subscriber complaints related specifically to the quality of the television signal delivered."[42]

Today, these requirements are unnecessary given that cable operators and MVPDs generally have complaint procedures in place at the local level, as well as the general lack of

[39] 47 C.F.R. § 76.1602(c).

[40] 47 C.F.R. § 76.1713.

[41] Report to Congress, ¶¶ 39, 199.

[42] 47 C.F.R. § 76.1713.

any widespread, systemic signal quality issues. Additionally, small operators are active members of their communities, and understand and value the importance of customer service, and at the very least should be exempt from such requirements. Moreover, due to the level of competition in today's video market and improvements in technology, signal quality complaints are few and far between, making the Commission's recordkeeping and data obligations under its complaint process rule superfluous. ACA is unaware of any recent Commission actions in response to evidence of system signal quality complaints or referrals from LFAs, strongly suggesting that the signal-quality specific complaint requirement has outlived its usefulness. The Commission should review this rule to determine whether it should be eliminated.

III. THE COMMISSION SHOULD REVIEW ITS RECORDKEEPING AND PUBLIC INSPECTION FILE REQUIREMENTS FOR ELIMINATION OR MODIFICATION

The Commission has adopted several orders this decade moving public inspection file requirements for various industries, including the MVPD industry, online. In line with these attempts to modernize its rules and administrative burdens on cable providers,[43] the Commission should review several outdated and burdensome public inspection file and recordkeeping requirements as candidates for elimination.

A. The Commission should eliminate its requirement that cable operators maintain a hard copy of the Commission's rules and regulations (§ 76.1714).

The Commission should eliminate the requirement to keep hard copies of the Part 76 rules,[44] an obligation which dates back to 1972 when the Commission first adopted comprehensive rules to govern the cable industry.[45] Developing a comprehensive regulatory

[43] *See*, *e.g.*, *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report and Order, 31 FCC Rcd 526 (2016) ("2016 Online Public File Order"); *Revisions to Public Inspection File Requirements – Broadcaster Correspondence File and Cable Principal Headend Location*, Report and Order, 31 FCC Rcd 5796 (2017).

[44] 47 C.F.R. § 76.1714.

[45] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, et al.*, Cable Television Report and Order, 36 FCC.2d 143, Appendix A (1972) ("1972 Cable Order").

regime for cable service involved both implementing new rules and reorganizing existing rules into Part 76. Given these profound changes, it was logical to require cable operators "to be familiar with the rules governing cable television systems," and to maintain a paper copy at each system as a reference, since that was the only option available. Today, however, copies of Part 76 are automatically uploaded into each cable system's online public file, and the rules are available in the online Electronic Code of Federal Regulations maintained by the Government Publishing Office.[46] Moreover, cable systems today have wireline telephone service, and employees in cable systems have wireless telephone service. In the rare case that an employee must refer to the Commission's rules and regulations and cannot access the material themselves, they can contact a colleague in their principal place of business or elsewhere who can access the rules online. Retaining a paper copy is technologically outdated, burdensome, and ecologically suspect, given the sheer volume of Part 76.

B. The Commission should eliminate the duplicative EEO public inspection file website posting requirement (§ 76.1702(b)).

The Commission should take steps to eliminate the duplicative requirements of Section 76.1702(a) and 76.1702(b) of its rules, which are both related to the public availability of a cable operator's EEO materials.[47] Although substantive EEO rules have been in place in some form or another since 1972, the Commission did not require cable operators to place annual reports on their EEO programs in their public inspection file and on their website until 2000, when it reasoned that making these materials publicly available would help facilitate public participation in the EEO process.[48] Although the Commission in 2016 required cable systems serving 1,000

[46] Government Publishing Office, Electronic Code of Federal Regulations, *available at* https://www.ecfr.gov/cgi-bin/ECFR?page=browse (last visited July 5, 2017).

[47] 47 C.F.R. § 76.1702(a) requires cable operators to place certain EEO materials in the Commission's online public inspection file. 47 C.F.R. § 76.1702(b) requires operators to post that same material on their website, either via a link to a page within their website, or a link to the EEO materials on their online public file page on the Commission's website. 2016 Online Public File Order, ¶ 37.

[48] *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, 15 FCC Rcd 2329, ¶ 191

or more subscribers to place public inspection files online and to make the public files accessible through a link on the operator's website, it declined to remove the requirement for a separate website link to EEO reports, again citing the need to facilitate meaningful public input.[49] While ACA and its members support the Commission's efforts to engage the public in the EEO process, and will continue to adhere to public inspection file rules to ensure compliance with EEO obligations, requiring substantially similar information to be available through two distinct links on an operator's homepage is unnecessary.

Having separate requirements for making EEO materials available both in the public inspection file and on an operator's website made sense when the public inspection file was a physical file located at a cable operator's main system office, as very few members of the public were likely to seek out such information in person. Having those materials available on an operator's website allowed the public to access them without having to visit the operator's brick and mortar location. Now that the public inspection file, including EEO materials, must be posted online, there is no justification for retaining both requirements, especially since cable operators are also required to post a link to their public inspection file on their website. Simply put, providing on an operator's website both a link to the operator's public inspection file (which includes the EEO materials) and a separate link to the operator's very same EEO materials is redundant. In the interest of eliminating outdated and unnecessary regulations, the Commission

(2000); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Polices*, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, ¶ 141 (2002). In this Second Report and Order, the Commission adopted a new broadcast EEO rule in response to the D.C. Circuit's decision in *MD/DC/DE Broadcasters Ass'n v. FCC*, 23 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002), and amended its EEO rules and policies applicable to cable operators and other MVPDs to conform them, as much as possible, to the broadcast EEO rule. *See id.*, ¶ 1.

[49] 2016 Online Public File Order, ¶ 37. The Commission clarified that cable operators may, in addition to the link to the first page of its online public file, provide a direct link to the EEO materials on their online public file page to satisfy the EEO website posting requirement. *Id*.

should eliminate the requirement that cable operators post a direct link to their EEO materials on their website.[50]

C. The Commission should eliminate the requirement to maintain a current channel lineup at a local system office (§ 76.1705).

The Commission should eliminate the requirement that a cable operator maintain a current listing of the cable television channels each system delivers at its local office.[51] The obligation to keep a list of "channels delivered" was originally part of the Commission's technical standard performance rules. At that time, the Commission was concerned with service quality in the burgeoning cable industry, which, as the Commission explained, was "rapidly evolving from its original role as a small, five-channel, reception service" toward "12-channel or larger systems" with "entry into large metropolitan centers."[52] The technical standards the Commission adopted were therefore designed to "provide much needed uniformity on a national basis" in how cable systems operated.[53] This included resolving the Commission's concern that the "channels delivered to subscribers conform[ed] to the capability of [a subscriber's] television broadcast receiver."[54] Although the Commission did not explain in its order specifically why it believed that maintaining a list of channels delivered at a cable operator's local system office was necessary to achieve that purpose, the rule seems designed to ensure that subscribers had

[50] Cable systems with less than 1,000 subscribers are exempt from the requirement to maintain EEO files for public inspection in their public files. *See* 47 C.F.R. § 76.1700(d). To ensure that such operators' EEO materials remain available to the public, the Commission could modify the rule to require that operators provide a link to their EEO materials on their website if they do not include such materials in the Commission's online public inspection database.

[51] 47 C.F.R. § 76.1705.

[52] *Amendment of Subpart K of Part 74 of the Commission's Rules and Regulations with Respect to Technical Standards for Community Antenna Television Systems*, Notice of Proposed Rulemaking, 25 FCC.2d 38, ¶ 5 (1970).

[53] 1972 Cable Order, ¶ 149.

[54] *Id*., ¶ 155. The obligation to keep a list of channels delivered was previously codified at 47 C.F.R. § 76.601(b) before its move to Section 76.1705 in 1999. *1998 Biennial Regulatory Review – Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, Report and Order, 14 FCC Rcd 4653, Appendix D (1999).

the opportunity to compare the channels they were supposed to receive with those channels that they actually did receive.

This requirement is now redundant and unnecessary. Cable service has evolved well beyond delivery of a small number of off-air channels. Today, cable operators compete against other MVPDs to provide hundreds of digital and high-definition channels. Competition requires cable operators to ensure that potential subscribers are aware of, and can access the channels they offer. This includes making channel lineup information available in a multitude of locations, such as an operator's website, its electronic program guide, in the annual subscriber notice, and in its public inspection file.[55] Further, despite the fact that few, if any, subscribers ever stop by a local office in person for the purpose of viewing the operators' channel lineup, cable operators have such information on hand in the regular course of business, regardless of whether it is required by the Commission's rules. In the interest of clearing the regulatory underbrush, the Commission should remove this redundant and unnecessary regulation from the books.

D. The Commission should reduce the amount of information cable operators must include in their public inspection files related to must-carry signals (§ 76.1709).

The Commission should also consider, as a candidate for elimination, the requirement that cable operators maintain in their public inspection files certain information about stations that they retransmit pursuant to their must-carry obligations.[56] Under Sections 614(b) and 615(k) of the 1992 Cable Act, cable operators must, upon request, identify the commercial or non-commercial signals, respectively, carried on the operator's system in fulfillment of must-

[55] *See* 47 C.F.R. § 76.1602(b)(5). The Federal Trade Commission also enforces truth-in-advertising laws. Federal Trade Commission, Advertising and Marketing, *available at* https://www.ftc.gov/tips-advice/business-center/advertising-and-marketing (last visited July 5, 2017) ("Under the law, claims in advertisements must be truthful, cannot be deceptive or unfair, and must be evidence-based."). State consumer protection laws also ensure that customers receive accurate information about their video services. *See*, *e.g.*, N.Y. CLS Gen. Bus. § 349 (deceptive acts and practices unlawful); Cal. Bus. & Prof. Code § 17500 et seq. (false advertising unlawful).

[56] 47 C.F.R. § 76.1709.

carry requirements.[57] The requirement to include information regarding the call sign, community of license, broadcast channel number, cable channel number, and, if the station is a noncommercial educational broadcast station, whether that station was carried by the system on March 29, 1990, was adopted as part of the Commission's implementation of the must-carry and retransmission consent provisions of the 1992 Cable Act.[58] The Commission, however, gave no explanation for why it was necessary for operators to include such detailed information in their public inspection files.[59]

Whatever purpose the rule was intended to serve, it is now unnecessary and at times redundant, as much of this information is available to the public elsewhere.[60] In particular, cable subscribers have no need to know, and are unlikely to care, whether a noncommercial educational broadcast station was carried over 27 years ago,[61] and it is unduly burdensome to require operators to include this information in their list of must-carry signals maintained in their public inspection file.

E. The Commission should investigate potential relief for cable operators from the burdens of demonstrating compliance with the children's advertising limits (§ 76.1703).

Requiring cable operators to obtain quarterly certifications demonstrating compliance with the advertising restrictions in children's programming from the various programmers that they carry and post them to their online public inspection files on a system-by-system basis is

[57] 47 U.S.C. §§ 534(b)(8); 535(k).

[58] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues; Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market*, Report and Order, 8 FCC Rcd 2965, ¶¶ 10, n.29, 24-25, 36 (1993).

[59] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*; *Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, ¶¶ 14, 16 (1992).

[60] *See, e.g.,* 47 C.F.R. §§ 76.1605, 76.1602 (channel lineup notice and availability).

[61] To the extent that the public or the Commission need to know this information, it is better sought from the broadcasters themselves.

unnecessary and extremely burdensome, especially for smaller cable operators with limited resources and no leverage to force programmers to comply with their requests for such certifications.[62]

The commercial limits record retention requirement stems from the Children's Television Act of 1990.[63] The Act defines "commercial television broadcast licensee" to include cable operators, leading the Commission to find that cable operators are responsible for compliance with the commercial limits on cable network programs that they carry.[64] In order to demonstrate compliance and police the satellite cable programmers on the Commission's behalf, cable operators must obtain quarterly certifications from dozens – if not hundreds – of programmers within 10 days of the end of each quarter.[65] Cable operators must do this on a system-by-system basis even though programming networks are generally carried uniformly across a cable operator's footprint, an extremely high (and painstaking) administrative burden.[66]

It simply makes no sense to require cable operators to collect and make publicly available certifications from every programmer they carry. The administrative burden of this requirement is substantial, and has in fact been made worse by the transition of the public file to the Commission's online database. Operators must now not only obtain quarterly paper

[62] 47 C.F.R. § 76.1703.

[63] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000 (1990), *codified at* 47 U.S.C. §§ 303a, 303b, 394.

[64] *Policies and Rules Concerning Children's Television Programming; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 6 FCC Rcd 2111, ¶¶ 10-11 (1991) ("If Congress intended for commercial limits to apply to cable, as it clearly did, it could not have intended for the bulk of that programming to be exempt from the proscriptions of the Act.").

[65] *Id.*, ¶ 12 (explaining how the Commission would rely on certifications in the public file and "the probably efficacy of public monitoring" to ensure compliance with the commercial limits requirements).

[66] Cable systems serving less than 1,000 subscribers are exempt. *See* 47 C.F.R. § 76.1700(d).

certifications, but they must scan them into readable text files and upload them to their online public inspection files on a system-by-system basis. [67]

The Commission should explore alternative standards for cable operators to demonstrate compliance with the statutory requirement that advertising be limited during children's television programming.[68] For example, the Commission could permit operators to provide relevant documentation from programmers regarding compliance with the children's programming commercial limits only in the event of a complaint, which Commission regulations already permit in other circumstances.[69] At the very least, the Commission should adopt the less burdensome approach of demonstrating compliance only in response to a complaint for smaller cable operators.

IV. THE COMMISSION SHOULD INITIATE A RULEMAKING TO UPDATE OUTDATED CUSTOMER NOTIFICATION REQUIREMENTS

The Commission should launch a rulemaking to review the continued need for the requirements imposed by the following rules:

- Annual Cable Customer Notifications (§ 76.1602);
- Basic Tier Availability Notifications (§ 76.1618); and
- Equipment Compatibility Notifications (§ 76.1622).

[67] While ACA appreciated the relief that the Commission provided in its 2016 Online Public File Order, when it clarified that entities could negotiate with third-party vendors for assistance in uploading documents to their online public inspection files, the burden of this requirement remains excessive. *See* 2016 Online Public File Order, ¶ 62.

[68] *See, e.g., id.*, ¶ 62 (NCTA's proposal to revise the public file rules to permit operators to provide documentation of certification only in the event of a complaint).

[69] *See*, *e.g.*, 47 C.F.R. § 79.1(g)(6) (permitting video programming distributors, which include MVPDs, to provide the Commission with sufficient records and documentation to demonstrate compliance with the Commission's closed captioning rules only in response to a complaint).

Modifying these rules can relieve cable operators from undue notification burdens, as well as reduce customer "notice fatigue," which the Commission has recognized as a legitimate concern for subscribers.[70]

A. The Commission should launch a rulemaking to modify its annual cable customer notification requirements (§ 76.1602).

The Commission should launch a rulemaking to consider streamlining its list of required disclosures and to consider whether each of the categories of content that cable providers must provide to subscribers annually remains necessary today given the amount of information about cable service available online.

In the 1992 Cable Act, citing "inconsistent and unsatisfactory levels of customer service" provided by some cable operators,[71] Congress amended Section 632 of the Communications Act to require the Commission to adopt customer service standards for cable operators governing, among other things, communications between the cable operator and the subscriber (including standards governing bills and refunds).[72] In implementing that statute, the Commission adopted, with no explanation or analysis, a requirement that cable operators provide to subscribers, both at the time of installation and at least annually, written information on: (i) products and services offered; (ii) prices and options for programming services and conditions of subscription to programming and other services; (iii) installation and service maintenance policies; (iv) instructions on how to use the cable service; (v) channel positions of programming carried on the system; and (vi) billing and complaint procedures, including the

[70] *See*, *e.g.*, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, 31 FCC Rcd 2500, ¶ 23 (2016) (recognizing the harms inherent in over-notification).

[71] *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992*; *Consumer Protection and Customer Service*, Report and Order, 8 FCC Rcd 2892, ¶ 4 (1993) ("1993 Consumer Protection and Customer Service Order"), *citing* Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong., 2d Sess. at 20 (1992); House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 34-35, 105 (1992).

[72] 47 U.S.C. § 552(b).

address and telephone number of the LFA's cable office.[73] These requirements appear to be loosely based on a set of voluntary industry standards developed by the National Cable Television Association ("NCTA"),[74] but the Commission's order adopting these standards provides no explanation for its decision to go beyond NCTA's recommendations. The last two provisions of Section 76.1602(b), requiring cable operators to provide information about fees for navigation device and CableCARD rental, were added in 2010 pursuant to Section 629 of the Communications Act, which directs the Commission to "adopt regulations to assure the commercial availability" of retail navigation devices.[75] The Commission intended these notices to serve the dual purpose of informing customers about retail navigation device options enabling them to compare the price of a retail device to the price for leasing a set-top box from their cable operator, and ensuring that the price that subscribers pay for CableCARDs in retail devices is the same as the price that subscribers pay for CableCARDs that are affixed to leased devices.[76]

While the information contained in cable operators' required annual notices is, for the most part, important information for consumers to have, it is far from clear whether, in the current day and age, consumers still benefit from cable operators undertaking the burdensome task of delivering this information year after year.[77] Today's video market is highly competitive.

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[73] 47 C.F.R. §§ 76.1602(b)(1-6); Consumer Protection and Service Order, ¶ 64. *See Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992; Consumer Protection and Customer Service,* Notice of Proposed Rulemaking, 7 FCC Rcd 8641, ¶ 15 (1992).

[74] NCTA's standards suggested that cable companies provide, at the time of installation and at any future time upon request, information about: products and services offered, prices and service options, installation and service policies, and how to use the cable service.

[75] 47 U.S.C. § 549.

[76] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 25 FCC Rcd 14657, ¶ 15 (2010).

[77] ACA appreciates the Commission's recent Declaratory Ruling clarifying that cable operators may satisfy their obligation to provide "written" annual notices via e-mail to a verified email address. *See National Cable & Telecommunications Association and American Cable Association*, *Petition for Declaratory Ruling*, Declaratory Ruling, MB Docket No. 16-126 (rel. June 21, 2017). However, that much-needed relief involved only the method of distributing the notices, not their content or the frequency with which they must be delivered.

As discussed above in Section II.A, cable operators must compete with DBS operators, IPTV providers, over-the-top video products such as Netflix, and other competitive entrants. As such, much, if not all, of the information required to be disclosed under Section 76.1602(b) is readily available on a providers' website[78] or on customers' monthly bills,[79] and operators have more than adequate incentive to provide most of the required information as part of their business relationship with the customer.[80] Given the level of competition and the prevalence of information concerning cable service online, the Commission should launch a rulemaking seeking comment on whether it remains necessary for cable operators to annually notify subscribers about each of the categories of information covered by its rules and whether to update them.

B. The Commission should launch a rulemaking to modify its basic tier availability notice requirement (§ 76.1618).

The Commission should launch a rulemaking to revisit and reform its notice requirements so that cable operators have more flexibility in how they can provide notice of the basic tier. Although it is statutorily mandated to enact procedures for basic tier availability notice to consumers, the Commission should modernize its rules to reduce notification burdens for operators and relieve consumers from notice fatigue by giving operators the flexibility to choose their own notification methods.

Section 623 of the 1992 Cable Act requires cable operators to offer subscribers a separately available basic service tier, comprised of broadcast stations and any public,

[78] Operator websites almost uniformly contain both pricing and service options, and channel lineups.

[79] Section 76.1602(b)(6)'s requirement that the annual notice include the address and telephone number of the local franchise authority's cable office is duplicative of the requirement in Section 76.952 that the name, mailing address and phone number of the franchising authority be included on monthly bills. *See* 47 C.F.R. § 76.952(a).

[80] For example, cable operators have every incentive to provide information related to installation and service maintenance policies, instructions on how to use the service, and billing procedures as part of their ongoing relationship with the customer.

educational, and governmental access programming as required by franchise, to which customers must subscribe in order to purchase any other tier of service.[81] Section 623 also directs the Commission to prescribe standards and procedures to ensure subscribers received notice of the availability of the basic tier.[82] The Commission implemented this mandate by requiring operators to provide written notification about the availability of the basic tier to new subscribers at the time of installation.[83] Although the Commission first proposed notification to subscribers in any sales information distributed both prior to installation and again at the time of installation,[84] the Commission adopted a modified rule in 1993, requiring operators to notify new subscribers only at the time of installation.[85]

In order to "protect[] subscribers of any cable system that is not subject to effective competition," the 1992 Cable Act generally directs the Commission to adopt regulations that would ensure that subscription rates for the basic tier remained reasonable.[86] So that rate regulation of the basic tier would be effective, subscribers had to know that the basic tier was available, and that they were not required to purchase a more expensive video package in order to receive their local broadcast stations and PEG channels. In adopting the requirement that operators provide that information at the time of installation, the Commission explained that "this

[81] 47 U.S.C. § 543(b)(7).

[82] 47 U.S.C. § 543(b)(5)(D).

[83] 47 C.F.R. § 76.1618. The Commission should also review the syntax of the rule, as providing new subscribers with notice at the time of installation seems redundant, due to the fact that a customer would have already ordered services by the time of installation.

[84] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Notice of Proposed Rulemaking, 8 FCC Rcd 510, ¶ 89 (1992).

[85] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) ("1993 Rate Regulation Order"). Operators were also required to notify existing subscribers of the availability of the basic tier within 90 days or three billing cycles from the effective date of the rules. *Id*., ¶ 39.

[86] 1993 Rate Regulation Order, ¶ 7. *See also id*., ¶ 2 ("[W]here competition is absent, cable rates are to be regulated to protect the interests of subscribers.").

approach offers the best balance between the public's right to know about the availability of a basic service option, and the need to minimize the administrative burden on cable entities."[87]

Because this rule is so closely tied to the need for rate regulation, it is no longer necessary in its current form, and the Commission should allow cable operators greater flexibility to determine when and how they make information about the basic tier available to subscribers.[88] Cable operators today are presumed to be subject to effective competition, and as such they are not subject to rate regulation.[89] More importantly, the market today is truly competitive, ensuring that consumers have access to attractive video programming packages at reasonable prices. Given today's competitive video market, the fact that operators make this information available online, and the degree of communications that occurs electronically between operators and subscribers, the Commission should consider modifying its rules to allow cable operators to decide how best to convey statutorily mandated information about the basic tier to customers to customers.[90]

C. The Commission should launch a rulemaking to modify its equipment compatibility notification requirements (§ 76.1622).

As part of its investigation into relieving the burdens of extensive customer notification requirements, the Commission should consider whether it can, within the bounds of an outdated statutory mandate, update its rules related to the notice of equipment compatibility to subscribers so as to provide greater flexibility for cable operators to determine when and how to

[87] *Id.*, ¶ 152.

[88] A number of cable operators already market their basic tier services as an attractive, low-cost package that subscribers can use to supplement their subscriptions to over-the-top services such as Netflix and Hulu. *See, e.g.,* WAVE BROADBAND, The Basics, *available at* http://residential.wavebroadband.com/tv/ (last visited Jul. 5, 2017) ("Just want to watch all your local channels and keep it simple? Get local TV and consider adding a streaming partner for movies and more.").

[89] Cable operators are now presumed to be subject to effective competition. *See supra* note 23.

[90] For example, in lieu of providing information about the basic tier at the time of installation, cable operators could provide it in their promotional materials, on their websites, at the time of sale, or in their subscribers' monthly bills.

provide such notices. Section 624a of the Communications Act requires the Commission to issue regulations requiring cable operators to notify subscribers that they may be unable to benefit from special functions of TV receivers and VCRs, including functions that permit subscribers to: (i) watch a program on one channel and record on another; (ii) use a VCR to tape two shows at once; and (iii) use advanced picture generation and display features.[91] This statutory provision is a prime example of the law's inability to keep up with technology, as video recording and advanced TV compatibility have advanced so far beyond what was contemplated at the time that VCRs are now considered obsolete relic of a time gone-by, and consumers can now purchase or lease digital video recorders ("DVRs") or other devices that record multiple streams concurrently.[92] Indeed, references to outdated technology could confuse subscribers who are unfamiliar with those devices, causing undue concern about the compatibility of their more modern devices. Unfortunately, the specificity of Section 624a's text limits the Commission's ability to fully update its regulations, but the Commission can and should[93] examine whether there are any modest changes that it can make to its implementing rules to provide cable operators with greater flexibility in providing the required notices.[94]

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[91] 47 U.S.C. § 544a(c)(2)(B)(i). Section 624a also requires operators that offer the option of renting a remote control to notify subscribers that they may purchase remote controls at retail, and must specify what types of remotes are compatible with their equipment. 47 U.S.C. § 544a(c)(2)(E). The Commission adopted the required regulations in 1994. *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 Compatibility Between Cable Systems and Consumer Electronics Equipment*, First Report and Order, 9 FCC Rcd 1981 (1994) ("1994 Order").

[92] *See*, *e.g.*, Todd Bishop, *Xfinity X1: How Comcast roped me back in to cable*, GEEKWIRE, Aug. 22, 2013, *available at* https://www.geekwire.com/2013/xfinity-x1/.

[93] In fact, one could argue that the Commission has a statutory duty to review its equipment compatibility notice rules, given Section 624(a)'s directive that the Commission to "periodically review and, if necessary, modify the regulations issued pursuant to this section in light of any actions taken in response to such regulations and to reflect improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology." 47 U.S.C. § 544a(d).

[94] For example, when the Commission implemented these statutory requirements in Section 76.1622, it went well beyond the statute in its regulations by requiring cable operators to provide this information to subscribers both at the time they subscribe and then annually.

For example, when the Commission implemented Section 624a's statutory requirements, it went above and beyond the provision's mandate by requiring cable operators to provide this information to subscribers both at the time they subscribe and then annually,[95] reasoning that "a requirement for cable operators to provide their subscribers a consumer education program at regular intervals is necessary and desirable to inform subscribers of compatibility issues and solutions."[96] Such redundancy is no longer necessary, especially now that technology has moved far beyond what was considered cutting edge at the time the statute was enacted, and the equipment compatibility problems the requirement was designed to solve are no longer pervasive. As part of the same "consumer education program," the Commission also requires cable operators to provide detailed information about the potential incompatibility of certain TV receivers and VCRs,[97] which is also unnecessary for the same reasons.[98] Concerns about TV receiver and VCR compatibility are, quite simply, no longer relevant to today's consumer.

Given the sea change in technology over the past twenty years, the Commission should review this rule to determine whether it can scale back the obligations placed on cable operators, including by eliminating those parts of the rules that are not mandated by statute. This type of relief would give providers greater flexibility in determining when and how to notify subscribers about equipment compatibility issues, and could resolve any confusion that such notices creates among customers who may not be familiar with older technology.[99]

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[95] 47 C.F.R. § 76.1622(a).

[96] 1994 Order, ¶ 64.

[97] 47 C.F.R. § 76.1622(b).

[98] *Id.*

[99] The Commission's requirement, under 47 C.F.R. § 76.1621, to inform subscribers of the availability of special equipment is similarly outdated and should be reviewed for elimination.

D. The Commission should eliminate its rule requiring DTV transition notices (§ 76.1630).

In addition to investigating the notice requirements outlined above, the Commission should eliminate its rule requiring notification of the digital television transition.[100] This rule, which required MVPDs to provide subscribers with notices about the transition for over-the-air full power broadcasting from analog to digital service in the monthly bills or bill notices received by subscribers beginning April 1, 2009 and concluding on June 30, 2009, is moot.[101] Removing it would have no practical impact on the public and would further the Commission's objectives in this proceeding to clear regulatory underbrush.

V. THE COMMISSION SHOULD ELIMINATE FORM 325 OR, AT THE MINIMUM, NO LONGER RANDOMLY SAMPLE CABLE SYSTEMS SERVING LESS THAN 20,000 SUBSCRIBERS (§ 76.403)

Form 325 serves as the Commission's basic annual reporting requirement for the cable industry.[102] It was first developed for use in 1966 and subsequently adopted as an annual filing requirement in 1971.[103] The form was intended to provide the Commission with information that would be of value in the development of policies and rules applicable to the cable industry.[104] The Commission required every cable operator to submit Form 325 up until 1999, when it amended its rules to require only that cable systems with 20,000 or more subscribers file Form

[100] 47 C.F.R. § 76.1630.

[101] *See* 47 C.F.R. § 76.1630(a) ("Multichannel video programming distributors (MVPDs) shall provide subscribers with notices about the transition for over-the-air full power broadcasting from analog to digital service (the "DTV Transition") in the monthly bills or bill notices received by subscribers beginning April 1, 2009 and concluding on June 30, 2009.").

[102] 47 C.F.R. § 76.403.

[103] *See Amendment of Subpart L, Part 91 et al.*, Second Report and Order, 2 FCC.2d 725, ¶ 99 (1966); *Amendment of Part 74*, Third Report and Order, 32 FCC.2d 13 (1971) ("1971 Form 325 Order").

[104] 1971 Form 325 Order, ¶ 2.

325 annually.[105] At the same time, the Commission retained the authority to send Form 325 to a random sampling of cable systems with less than 20,000 subscribers.[106]

ACA believes that Form 325 is no longer necessary and should be eliminated. The form requires cable operators, on a system-by-system basis, to provide the Commission with basic information that is otherwise publicly available (e.g., channel lineup information) or otherwise provided to the Commission via other required filings (e.g., signal distribution and frequency information).[107] Additional information provided to the Commission via Form 325, such as set-top box and cable plant details, has little utility today, especially considering that the Commission does not request similar data from the DBS providers or any competitive video entrant that is not registered in the Commission's COALS database. Moreover, subscriber information reported to the Commission via Form 325 is publicly available through cable operator's semi-annual Statements of Accounts on file at the Copyright Office and through media outlets such as SNL Kagan.

Nonetheless, should the Commission conclude that Form 325 remains necessary, it should no longer send Form 325 to a random sampling of cable systems with less than 20,000 subscribers. The Commission has long been concerned that Form 325 "not be burdensome to the cable industry."[108] Randomly sampling smaller cable systems increases the burden on those smaller providers selected, as the operators often have no experience filing the form and must often engage outside resources for assistance completing it.

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[105] *1998 Biennial Regulatory Review – "Annual Report of Cable Television Systems," Form 325, filed pursuant to Section 76.403 of the Commission's Rules*, Report and Order, 14 FCC Rcd 4720 (1999) ("1999 Biennial Review Order").

[106] *Id.*, ¶ 12.

[107] *See*, *e.g.*, *47* C.F.R. §§ 76.1803 (signal leakage monitoring); 76.1804 (aeronautical frequencies: leakage monitoring).

[108] 1999 Biennial Review Order, ¶ 4 ("In the *Notice*, we explained that the processing and compilation of Form 325 data has been a labor intensive process for the Commission. In addition, we were concerned that the filing of the form not be burdensome to the cable industry. Consequently, we questioned the form's overall utility given the resources necessary to maintain its collection.").

VI. CONCLUSION

ACA applauds the Commission's initiative to seek industry comment on clearing the regulatory underbrush that has accumulated over decades of Commission regulation of cable operators. Review, elimination or modification of the regulations ACA has identified will provide meaningful relief and allow smaller cable operators to focus their limited resources on service improvements and network expansions, rather than regulatory red-tape, without any diminution in service quality or customer care.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: 

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
7 Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220-3704
(412) 922-8300

Mary Lovejoy
Vice President of Regulatory Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 603-1735

Barbara S. Esbin
Scott C. Friedman
Elizabeth Cuttner
Cinnamon Mueller
1875 Eye Street, NW, Suite 700
Washington, DC 20006
(202) 872-6811

Attorneys for American Cable Association

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