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Nov 15 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-494
Washington, D.C. 20554

In the Matter of)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Rate Regulation)

MM Docket 92-266 ✓

ORDER

Adopted: November 10, 1993 **Released:** November 10, 1993

By the Commission: Chairman Quello and Commissioner Duggan
issuing separate statements; Commissioner Barrett dissenting and
issuing a separate statement.

I. Introduction

1. In this Order, on our own motion, we reconsider the
expiration date of the freeze of regulated cable service
revenues, and extend the expiration date of the freeze from
November 15, 1993 until February 15, 1994.¹

II. Background

2. In the Rate Order, we established a comprehensive
regulatory framework providing for rate regulation of the basic
service tier by local franchising authorities and of cable
programming services tiers by the Commission as required under
the Cable Act of 1992.² We established June 21, 1993 as the

¹ See Implementation of Sections of the Cable Television
Consumer Protection and Competition Act of 1992, Rate Regulation,
MM Docket 92-266, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993) ("Rate
Freeze Order"), clarified, 8 FCC Rcd 2917, 58 FR 21929 (April 26,
1993) ("Clarification Order"), extended, FCC 93-304, 58 FR 33560
(June 18, 1993) ("Deferral Order").

² Cable Television Consumer Protection and Competition Act of
1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act of
1992"); 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, MM Docket 92-266,
8 FCC Rcd 5631, 58 FR 29736 (May 21, 1993) ("Rate Order"), First
Order on Reconsideration, Second Report and Order, and Third Notice
of Proposed Rulemaking; FCC 93-428, 58 FR 46718 (September 2,

effective date of our rate regulations.³ At the same time, we were concerned that during the period between adoption of our rules and the earliest practical opportunity for local franchising authorities to establish regulation of the basic service tier, and for consumers to file complaints with the Commission concerning rates for cable programming services tiers, cable operators could raise rates, effectively undermining the statutory goal that rates for cable services remain reasonable.⁴ In particular, we were concerned that cable operators could raise rates to potentially unreasonable levels, as determined under the rate regulations ultimately adopted. We determined that a freeze of regulated cable service revenues until August 3, 1992 would provide a reasonable opportunity for local franchise authorities to become certified to regulate the basic service tier and for consumers to invoke by complaint the Commission's regulatory oversight over cable programming services tiers. Accordingly, we established a freeze until that date of revenues for cable services subject to regulation under the Cable Act of 1992.⁵

3. Subsequently, the Commission reexamined the feasibility of implementing rate regulation by June 21, 1993 in view of the significant additional responsibilities imposed on the Commission by the Cable Act of 1992 and a severe funding shortfall faced by the Commission at that time.⁶ We extended the effective date of cable rate regulation from June 21, 1993 until October 1, 1993, and the freeze until November 15, 1993 in order to provide local franchising authorities and consumers a continued opportunity to exercise their rights under the Cable Act of 1992 and our regulations in light of the new effective date of cable rate

1993) ("First Rates Reconsideration").

³ Rate Order, 8 FCC Rcd at 5635.

⁴ See Rate Freeze Order, 8 FCC Rcd at 2921; Deferral Order, at para. 5.

⁵ Rate Freeze Order, 8 FCC Rcd at 2921-22. See also Clarification Order, 8 FCC Rcd at 2918. Under the freeze, the average monthly subscriber bill for cable services and associated equipment subject to rate regulation under the Cable Act of 1992 may not increase above the level determined under rates in effect on April 5, 1993. The Commission provided for waivers of the rate freeze in particular cases where a cable operator can demonstrate that the freeze would impose severe economic hardship or threaten the viability of continued cable service. Rate Freeze Order, 8 FCC Rcd at 2921-22 n.6. See e.g., In the Matter of Fidelity Cablevision, Inc., Petition for Emergency Relief, Order, FCC 93-445 (released September 21, 1993).

⁶ Deferral Order, FCC 93-304, 58 FR 33560 (June 18, 1993).

regulation.⁷ We later determined that an earlier implementation of cable rate regulation was feasible because of a supplemental appropriation provided to the Commission and moved the effective date of rate regulation from October 1, 1993 to September 1, 1993.⁸ We did not alter the date for expiration of the freeze because we were concerned that local franchising authorities may have established implementation plans based on an effective date of October 1, 1993.⁹ Our regulations establishing rate regulation of cable service became effective September 1, 1993.

III. Discussion

4. Under the Cable Act of 1992 and our implementing regulatory framework, cable operators are generally free to raise rates for the basic service tier in the absence of local certification and for cable programming service tiers in the absence of subscriber complaints invoking the regulatory oversight of the Commission. As of November 3, 1993, the Commission has received 3425 applications for certification from local franchising authorities covering approximately 5050 communities served by cable, and no more than approximately 836 properly completed subscriber complaints. These figures represent only a small percentage of the nearly 33,000 communities that are potentially eligible to regulate the basic service tier, and an even smaller percentage of the country's 58 million cable subscribers.

5. In light of the relatively few applications for certification and subscriber complaints received to date, we are concerned that the expiration of the freeze on November 15, 1993 could undermine the statutory purpose that rates for regulated cable service be reasonable by permitting rates to rise before rate regulation has begun in earnest. We believe that the purposes of the statute will best be fulfilled if we establish an additional opportunity for local franchising authorities and subscribers to participate in assuring the reasonableness of cable service rates prior to expiration of the freeze.¹⁰ We believe that an extension of the freeze until February 15, 1994 will ensure that we have afforded local franchising authorities a

⁷ Id.

⁸ In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Order, MM Docket No. 92-266, FCC 93-372, 58 FR 41042 (August 2, 1993).

⁹ Id.

¹⁰ The Commission has received over 10,500 requests from consumers for the cable programming service rate complaint form.

sufficient period in which to seek Commission certification to regulate basic cable service rates, and in which cable subscribers may exercise their rights to invoke Commission oversight of cable programming services. Accordingly, we will reconsider, on our own motion,¹¹ the decision in the Deferral Order that the freeze should expire November 15, 1993, and extend the expiration date of the freeze until February 15, 1994.¹²

6. At the same time, we recognize that by this Order the freeze will have been in place for over ten months. We emphasize that we will entertain petitions for relief where the operator can show that the freeze is causing severe economic hardship or threatens the viability of continued provision of cable service.¹³

¹¹ As we have previously explained, in light of the various petitions for reconsideration and other pleadings pending before us in this docket, we retain jurisdiction on our motion over decisions we have made previously. See Order FCC 93-372, at n.1.

¹² When the basic tier becomes subject to regulation, a cable operator may generally raise rates only after approval by local franchising authorities. Where local governments already have initiated rate regulation of the basic service tier, we are not concerned that rates for the tier could rise to unreasonable levels after November 15, 1993. Accordingly, after the effective date of this Order, the freeze will not apply to a basic service tier that has become subject to regulation by a local franchising authority or the Commission. In the Rate Freeze Order, we determined that it was necessary to freeze rates for the cable programming service tier in order to prevent cable operators from evading the freeze of the basic tier by moving programming from the basic to the cable programming service tier. See Rate Freeze Order, 8 FCC Rcd at 2922 n.10. In situations where the basic tier is already subject to regulation, it is not necessary to continue the freeze in effect for the cable programming service tier in order to prevent an evasion of rate regulation of the basic tier. Accordingly, where the basic tier has become subject to regulation, the freeze will expire on that date for both tiers. In such situations, we note that subscribers and local franchising authorities may file complaints to make the cable programming service tier subject to regulation and establish refund liability for cable programming service rates as of the date of the complaint. Where only the cable programming service tier is subject to regulation, we do not believe that the cable operator's capacity to evade the freeze of the basic tier by shifting programming to the higher tier is significantly diminished. Accordingly, where only the cable programming service tier is subject to regulation, the freeze will continue in effect for both tiers.

¹³ See Rate Freeze Order, 8 FCC Rcd at 2921-22 n.6.

7. As indicated, our comprehensive regulatory framework governing cable service rates became effective September 1, 1993. Under that framework, operators are currently scheduled to respond on November 15, 1993 to initial notices of regulation of the basic service tier that occurred prior to October 15, 1993, and to complaints filed with the Commission prior to October 15, 1993 concerning rates for cable programming services tiers.¹⁴ This schedule will permit local authorities and the Commission to bring to consumers the benefits of rate regulation. In particular, local authorities and the Commission can begin reviewing promptly on November 15, 1993 FCC Forms 393 where operators have elected to use the benchmark approach for setting initial rates.¹⁵ Moreover, in the Rate Order, we established that cost-of-service showings would be reviewed on a case-by-case basis under established standards of cost-of-service regulation traditionally applied to public utilities.¹⁶ Thus, under the current schedule and regulatory framework, local authorities and the Commission can begin reviewing as early as November 15, 1993 cost-of-service showings and assess in individual cases the costs that may be recovered in rates for regulated cable services. These local and federal regulatory actions will enable operators and consumers to receive assurance in the near future that rates are in compliance with our requirements where rates are within

¹⁴ Order, FCC 93-372, at para. 10.

¹⁵ Under our comprehensive regulatory framework, a benchmark and price cap approach serves as the primary method of setting rates for regulated cable services. Rate Order, 8 FCC Rcd at 5755-56. We are currently reviewing on reconsideration whether further changes to the benchmark scheme are warranted. As we stated in our first reconsideration order, we will provide for appropriate transition mechanisms should any changes be adopted. See First Rates Reconsideration, FCC 93-428, at n.7.

¹⁶ Rate Order, 8 FCC Rcd at 5755. See also In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Notice of Proposed Rulemaking, FCC 93-353, 58 FR 40762, 40763 (July 30, 1993) ("Cost-of-Service Notice"). Although we are in the process of developing and adopting uniform cost-of-service standards, See Cost-of-Service Notice, FCC 93-353, such standards are not an essential part of our rate regulation scheme. Application of traditional cost-of-service principles on a case-by-case basis will give cable operators ample opportunity to justify their rates based on costs and ensure that their constitutional rights are not violated. In this regard, we note that the U.S. Court of Appeals for the D.C. Circuit rejected a request by several operators that our rate rules be stayed until we adopted final cost-of-service rules. Intermedia Partners v. FCC, No. 93-1491 (D.C. Cir. August 31, 1993).

permitted levels, and to enjoy the benefits of rate adjustments and refunds where rates exceed permitted levels. Our current regulatory framework and implementation schedule, therefore, will permit local authorities and the Commission to begin without further delay the regulatory processes that will assure that cable service rates are reasonable as required under the Cable Act of 1992. Moreover, implementation of the rate regulation provision of the 1992 Cable Act will inevitably be a learning process for the Commission, local authorities, and the industry that will require revision and refinement over time. Accordingly, we believe it imperative that the process be commenced so that we can gain experience with the process and so that the benefits of the Act will be received by subscribers.

8. We find good cause under the Administrative Procedure Act to make this freeze effective with less than 30 days advance publication in the Federal Register.¹⁷ As explained, an extension of the freeze from November 15, 1993 until February 15, 1994 is necessary in order to afford local franchising authorities a sufficient period in which to seek Commission certification to regulate basic cable service rates, and in which cable subscribers may exercise their rights to invoke Commission oversight of cable programming services. We will make this Order and implementing rule changes effective upon publication in the Federal Register in order to prevent an expiration of the freeze that would otherwise occur under 30 days advance publication in the Federal Register.

IV. Ordering Clauses

9. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 543, that the freeze of cable service rates established in Order, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), clarified, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993), extended, FCC 93-304, 58 FR 33560 (June 18, 1993), IS EXTENDED UNTIL February 15, 1994.

10. IT IS FURTHER ORDERED, that Section 76.1090 of the Commission's rules, 47 C.F.R. Section 76.1090, IS AMENDED as set forth below.

11. IT IS FURTHER ORDERED, that this Order IS EFFECTIVE (upon publication in the Federal Register).

¹⁷ The Administrative Procedure Act generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days advance publication in the Federal Register for good cause. See 5 U.S.C. § 553(d)(1); See also 47 C.F.R. § 1.427(b).

List of Subjects in 47 C.F.R. Part 76

Cable television.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
William F. Caton
Acting Secretary

APPENDIX

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

PART 76 - CABLE TELEVISION SERVICE

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

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552, as amended, 106 Stat. 1460.

2. Section 76.1090 is amended by revising paragraph (a), and adding new paragraph (c) to read as follows:

§ 76.1090 Temporary Freeze of Cable Rates.

(a) The average monthly subscriber bill for services provided by cable operators subject to regulation under Section 623 of the Communications Act shall not increase above the average monthly subscriber bill determined under rates in effect on April 5, 1993, until February 15, 1994.

* * * * *

(c) The freeze imposed by paragraph (a) of this section will not apply where a basic tier service has become subject to regulation by a local franchising authority or the Commission.

November 10, 1993

Separate Statement of Chairman James H. Quello

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

Today, the Commission issues a decision to extend the rate freeze until February 15, 1994, where local governments have not initiated rate regulation of the basic service tier. This decision is designed to give local franchising authorities and consumers additional time to participate in the process of rate regulation to assure that the rates charged by cable operators are reasonable. **Toward this end, I wish to emphasize that the regulation of basic rates is not triggered until local franchising authorities request and are granted authority to regulate; and the regulation of expanded basic rates is not triggered until subscribers file a properly completed complaint with the Commission.** Thus, it is vital that we give local franchising authorities and subscribers every opportunity, within reason, to file requests for certification and complaints. By extending the freeze, we can ensure that rates remain stable in the interim.

However, I am, as always, concerned about the effect of our rules on small cable systems. Therefore, I wish to emphasize that the Commission will entertain petitions for relief filed by operators who can show that the freeze is causing severe economic hardship or threatens the viability of continued provision of cable service.

Also today, we decided not to extend the November 15, 1993, date established for cable operators to respond to initial notices of regulation of the basic tier, and subscriber complaints, filed prior to October 15, 1993. By maintaining the November 15 response date, we can begin the process of rate regulation at the earliest possible time by providing local authorities and the FCC with the information they need to evaluate the reasonableness of rates. We can then order rate rollbacks and refunds for subscribers where rates are found to be unreasonable.

I wish to emphasize that I am sympathetic to the concerns of cable operators who urged the Commission to extend the response date along with the freeze, arguing that our benchmark formula is subject to change on reconsideration, and that current cost-of-service guidelines -- which state that responses will be reviewed pursuant to "generally accepted cost-of-service principles" -- are not sufficiently specific and will in any event be replaced by more detailed guidelines in the future. However, moving the

November 15 response date would not resolve these concerns. Cable operators have known since July 27, 1993, that responses to initial certification requests and subscriber complaints would be due on November 15, 1993, and they have known since May 3, 1993, the benchmark and cost of service rules and principles that will apply to responses filed on this date. While the Commission will be addressing in the near future petitions for reconsideration of the benchmark rules, as well as interim, and ultimately final, cost of service guidelines, those rules can only be applied prospectively, and not to the time period from September 1, 1993 until the effective date of any new rules. Thus, regardless of what action the Commission takes in the future with respect to the benchmark formula and cost of service guidelines, the showing cable operators are required to make for the current period of regulation will not change, and further guidance or specificity will not be provided, whether the cable operators' response is filed November 15, 1993, February 15, 1994, or any time in between.

I point out that the above scheme was specifically contemplated by the Commission -- in a Report and Order voted on by all three Commissioners -- at the time our initial benchmark formula and cost-of-service guidelines were adopted on April 1, 1993. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rule Making, MM Docket 92-266, 8 FCC Rcd 5631, paras. 271-272 (1993) (FCC declined to adopt specific cost-of-service standards, stating instead that pending adoption of more specific standards, cable operators could attempt to justify above-benchmark rates in their "initial rate filings"). To claim at this late date that this approach is somehow unfair or unintended is disingenuous.

The statutory deadlines with which the Commission was faced in implementing the 1992 Cable Act were such that reconsideration of the benchmark formula and more detailed cost of service rules simply were not possible prior to the effective date of the Act - - despite the herculean, around the clock, work of the Commission's staff. However, both the Commission and the Courts have determined that the rules and policies currently in place are sufficient to proceed with rate regulation. Rate Order, 8 FCC Rcd 5631, paras. 271-272; Intermedia Partners v. FCC, No. 93-1491 (D.C. Cir. August 31, 1993) (rejecting request by cable operators that our rate rules be stayed until adoption of final cost-of-service rules).

Thus, to delay the response date for complaints and certification requests filed by October 15 would merely put off the inevitable. The only conceivable benefit to cable operators is simply additional time to prepare a response. This, when weighed against the benefits to consumers of moving forward with the business of rate regulation as quickly as possible, is not

compelling. While I have carefully considered the arguments of cable operators, I must side on this issue with subscribers.

Finally, I wish to respond to Commissioner Barrett's dissenting statement on the freeze. As to the freeze extension, until late last night, it was my express understanding that Commissioner Barrett supported extension. As to the response date, Commissioner Barrett apparently for the first time has concerns about the "two-pronged" enforcement scheme, a scheme that was set forth in the Rate Order that he voted for on April 1, 1993, seven months ago.

November 10, 1993

**SEPARATE STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN**

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

The Commission today takes two more steps in its final transition to cable rate regulation. I support the first of those steps: extending until February 15 the freeze on cable rates. I have serious misgivings, however, about the second step: maintaining November 15 as the date upon which cable operators must respond to complaints filed since September 1st. I therefore write separately to state why I support the Commission's decision overall.

Extending the rate freeze for an additional 90 days will give local franchising authorities and cable consumers a final opportunity to trigger the regulatory process before cable rates change again. This decision simply underscores the odd dichotomy of the Cable Act's rate regulation section: It directs the Commission to construct the rate-setting process, yet leaves local franchising authorities and consumers with most of the power to set that process in motion. To be sure, the number of local franchising bodies seeking certification to regulate basic cable rates is approaching 2,000 (in a universe of nearly 11,000). Consumer complaints slightly exceed that figure. These statistics nevertheless fall below the Commission's expectations and those of the Congressional Budget Office.

I want to underscore here some advice I gave to local regulators in September, in remarks to the National Association of Telecommunications Officers and Advisors: Congress has given local authorities substantial responsibility for cable rate regulation. If franchising bodies do not accept that responsibility, they should not expect the Commission to do the job for them. This agency has many other heavy responsibilities under the Cable Act, including exclusive jurisdiction over upper-tier rates. We cannot also shoulder the burden of local regulation and do both jobs effectively.

As Chairman Quello has announced, the Commission is launching a six-city series of seminars to educate consumers about rate provisions of the Cable Act and to explain the complaint process. If consumers do not yet fully understand their rights under the Act to initiate rate proceedings against their local cable companies, these seminars should help inform

them. But, suppose February 15 arrives and the situation has not changed; suppose that still only a minority of the nation's local franchising authorities are seeking certification to regulate, and that only a small fraction of the nation's 60 million cable subscribers have taken advantage of their opportunity to lodge complaints. In that situation, policy-makers in Washington may well conclude, with Horace, that the mountain of indignation about cable rates has "laboured in childbirth, yet brought forth only a mouse."

Our second action today--- maintaining the November 15 deadline for cable companies' responses to rate complaints now on file--- is troubling to me, although I have agreed to support it. This decision falls heavily on cable operators who are required by the Commission to defend their rates through cost-of-service showings with only the briefest sketch of the FCC's requirements for such showings. The Commission has said merely that, until we adopt at least interim guidelines for evaluating cost-based appeals, we intend to review such responses under "generally accepted cost-of-service principles." Cable operators who hope to support their rates with cost-based arguments may justifiably wonder how much guidance such a broadly stated principle will give them on November 15th.

Our transition to the first days of rate regulation would have been smoother, in my judgment--- and my strong sense of inequity eased--- if the Commission had completed its work on cost rules earlier and put a complete framework in place by now. I am not pleased, therefore, that we find ourselves in this position today: ordering cable operators, in effect, to abide by rules that we have only partially defined.

I vote to go forward only because several critical points have been urged upon me by the Commission's senior staff. They point out, first, that even a brief additional delay of the filing date could well place refunds for consumers at legal risk. I simply will not take any action raising the specter that consumers might lose the full benefit of rate refunds when these rate cases are finally adjudicated.

Second, I am assured by the staff that even in the absence of full guidance from the Commission, cable companies have every right and opportunity to put forward their strongest possible cost-of-service cases, and that they will receive every benefit of due process. I also will recommend that cable operators be allowed to amend their cost-of-service showings when the interim cost-of-service rules are adopted.

This brings me to a third important point. I support today's order on the strength of another assurance: that the Commission will be punctilious about both the appearance and the reality of impartiality during this time of transition. Those who are concerned about our process during this transition period deserve some assurance that their cost-of-service cases will be handled on a case-by-case basis, and judged on their individual merits. They also need to be assured that our ultimate cost-of-service rules will be drawn in a separate process based on the record.

Finally, I will insist that the Commission make every effort to minimize uncertainty between November 15 and the adoption of more definitive rules and guidelines to steer the rate-setting process. To this end, I note with satisfaction that we pledge to issue interim cost-of-service guidelines and complete the Benchmark Reconsideration proceeding no later than mid-December. At that point, I hope that we can declare an end to this bumpy period of transition and move ahead on other aspects of cable regulation and enforcement.

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November 10, 1993

DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation (Cable Rate Freeze)

In this Order, the Commission, on its own motion, reconsiders the expiration of the freeze of regulated cable service revenues, and extends the expiration of the freeze from November 15, 1993 until February 15, 1994.¹ The Commission and its staff have made a strong effort to implement rate regulation under very confusing procedural circumstances, involving many conflicting messages. At this point, the vast majority of rate regulation implementation problems faced by the Commission have been thrust upon it by a premature effective date for rate regulation. This Order continues the litany of regulatory confusion surrounding the implementation of our rate rules under the 1992 Cable Act. I dissent to this Order because it fails to take procedural steps that could have mitigated the tremendous confusion that already surrounds the implementation of our current cable rate regulations. In addition, I believe the effect of this decision will impose tremendous additional expense and administrative processing "nightmares" on franchise authorities and the FCC.

The Order today will harm franchise authorities and cable operators by immediately imposing the first prong of what could be a two-prong rate regulation and cost-of-service enforcement scheme. To the extent current rate rules are subject to change on reconsideration, the Order today immediately imposes a flawed regulatory regime on franchise authorities and cable operators. As the adjudication of the initial rate mechanisms proceeds, cable operators will file responses to complaints based on these rules. Franchise authorities and the FCC also will receive cost-of-service filings based on a vague, amorphous framework called "general cost-of-service principles." All of this action will commence while the Commission is still in the process of reconsidering its current rate regulation scheme, and attempting to develop interim cost-of-service guidelines. Thus, as case-by-case adjudications begin under the current framework, at some date in the near future the Commission may impose new rate rules and cost-of-service guidelines that could significantly change the manner in which such cases are reviewed. Clearly,

¹ See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), clarified, 8 FCC Rcd 2917, 58 FR 33560 (June 18, 1993).

such a dual-mode regulatory framework presents an unbelievable administrative burden, even on an expert agency like the FCC. Beyond the FCC, local franchise authorities, many of whom do not have the resources of a state Public Utility Commission, could be inundated with a confusing array of dual-mode rate regulation and cost-of-service rules. Further, by requiring rate adjudications to commence as of November 15, rate and cost-of-service cases will be adjudicated prior to the final revision of rate rules or the implementation of any cost-of-service guidelines. As a result, I am concerned that the Commission ultimately may place itself in the awkward position of creating "ex post facto" cost-of-service rules based on prior case-by-case adjudications.²

Upon adopting the Rate Order that established the initial regulatory framework for cable rates, the Commission established a June 21, 1993 effective date and imposed a freeze on regulated cable service revenues until August 3, 1993. The freeze was imposed in order to provide a reasonable opportunity for local franchise authorities to become certified to regulate the basic service tier, and for consumers to file complaints to invoke the Commission's regulation of cable programming service tiers. The Commission later reexamined the feasibility of implementing rate regulation by June 21, 1993 due to the significant responsibilities imposed on it by the 1992 Cable Act, while also facing a severe funding shortfall. Therefore, the Commission extended (1) the effective date of rate regulation from June 21, 1993 to October 1, 1993, and (2) the freeze until November 15, 1993. After receiving supplemental funding for cable matters, the Commission moved the effective date for rate regulation, including consumer refunds, from October 1, 1993 to September 1, 1993.

In addition to dissenting from the decision to adopt the earlier effective date for cable rate regulation of September 1, 1993, I have consistently stated that the Commission must implement rate regulations in an orderly and effective manner in order to maintain the integrity of our regulatory process, to avoid creating potential unintended consequences, and to minimize false expectations among the consumer public.³ In the context of the decision regarding the September 1 effective date, I also stated my concern that even the former October 1 deadline was an ambitious goal, and that additional time would contribute to a more orderly process that would

² In addition, I believe that we should have allowed more time for operators to analyze any interim FCC clarifications pertaining to rate regulation forms and rules. To the extent additional time is not allowed for these pending actions, greater confusion will reign in the rate enforcement process. I am concerned that by resolving initial cost-of-service questions on a case-by-case basis according to vague cost-of-service principles, and before any cost-of-service rules are adopted, the Commission could face challenge as a result of the retroactive application of subsequent cost-of-service rules that adversely affect any prior cost-of-service adjudications.

³ See Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 FR 41042 (Concurring in Part and Dissenting in Part Statement of Commissioner Andrew C. Barrett). See also First Order on Reconsideration in MM Docket No. 92-266, FCC 93-248, released August 27, 1993, 58 FR 46718 (Separate Statement of Commissioner Andrew C. Barrett); Testimony of Commissioner Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance, (September 28, 1993).

benefit consumers and the industry in the long term. I remain concerned about the potential inequities for the industry, consumers, and franchising authorities that may result from this Order, because I believe it will exacerbate the confusion facing the public.

First, I am concerned that the date on which operators are required to file responses to rate complaints should coincide more closely with the date when final rules are in place for cost-of-service proceedings and the reconsideration of the benchmark mechanism. Until operators are presented with a more complete basis upon which to make their decisions to justify rates for regulated services, I believe that the Commission is creating a fundamentally inequitable situation for cable operators by forcing critical business decisions based on benchmark standards that are subject to revision, or general cost-of-service principles that may not fully reflect the rules that the Commission ultimately will adopt. Moreover, franchise authorities will be faced with the potential burden of enforcing two sets of rate schemes, and two sets of cost-of-service schemes. To the extent the Commission could have delayed the date of adjudicating rate and cost-of-service cases until subsequent rules are adopted, both franchise authorities and the FCC would have had more time to prepare for this dual-mode regulatory structure. Furthermore, to the extent that the November 15 filing date arguably is necessary to maintain refund liability and protect the rights of consumers, I believe that shifting the response filing date to coincide with the rate freeze period, or at a minimum the completion of rate reconsideration and interim cost-of-service rules, would allow the FCC and franchise authorities to administer bifurcated regimes that govern cable rates in a more orderly fashion. All parties would be on notice as to the administrative costs and rate regulation requirements imposed by such a dual-mode framework.

Next, given the February 15, 1994 freeze date and the November 15, 1993 response date, operators are now responsible for responding to complaints, or making cost-of-service showings, that may subject them to increased costs due to the heightened administrative uncertainty. Because certain programming costs also will increase over the extended period for the freeze, I believe that an earlier date for the expiration of the freeze may be appropriate in order to allow operators to take actions in response to these greater costs. I am especially concerned that various aspects of the Commission's decision ultimately will increase the burdens on small cable operators, who may experience increased costs and additional confusion with fewer resources available for response.⁴ At a time when steps of caution might mitigate the administrative confusion, I believe that the Commission must now undertake a more accelerated effort to complete the cost-of-service rulemaking and the reconsideration of the rate regulation mechanisms. Furthermore, the Commission has been burdened with a great number of responsibilities related to the rate regulation provisions of the 1992 Cable Act, including

⁴ On August 10, 1993, the Commission temporarily stayed the effective date of the cable rate regulation rules for cable television systems with 1,000 or fewer subscribers. This limited stay will remain in effect until the effective date of the Commission's order on reconsideration addressing issues concerning the "administrative burdens and cost of compliance" for small cable systems. See *Memorandum Opinion and Order*, MM Docket No. 92-266, FCC 93-389, 8 FCC Rcd 5585 (1993), 58 FR 43816 (August, 18, 1993). To the extent that today's decision regarding the extension of the freeze may exacerbate the confusion in implementing cable rate regulations, I am concerned that it will also increase the administrative burden for small cable operators as well as for the franchising authorities that govern them.

completing the relevant rulemakings and reconsideration, processing complaints, and analyzing results from a survey of cable service rate changes between April 1, 1993 and September 1, 1993. Because the process for appealing rate matters will move forward without final guidelines in place, or without final results of the survey, I believe the FCC and local franchising authorities will face increased administrative costs and confusion. Such confusion ultimately could delay the proper implementation of rate rules over the long term.

Now that operators must respond to rate complaints and file cost-of-service showings as of November 15, I believe they should be allowed to make some adjustment to rates -- to at least account for inflation as measured by GNP-PI -- in order to offset the additional administrative costs imposed by these filings. If cable operators are liable for excessive rate actions, at present as well as in the future, I believe that the Commission's decision disallowing at least partial recovery of these increasing costs is unfair. Again, although an allowance for inflation may not fully address cost increases over the relevant period, I believe that some relief, particularly for smaller cable operators, would offset the administrative burdens created as a result of this Order.