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

FCC MAIL SECTION

FCC 94-33

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

DISPATCHED BY
MM Docket 92-266

ORDER

Adopted: February 8, 1994

Released: February 8, 1994

By the Commission: Commissioner Barrett 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 February 15, 1994 until May 15, 1994.¹ Later this month, the Commission will consider pending petitions to reconsider various aspects of its rate regulations.² This short extension of the freeze is the minimum amount of time required to enable affected parties to familiarize themselves with any modifications to the cable rate regulations before the freeze is lifted.³

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 (released June 15, 1993), 58 FR 33560 (June 18, 1993) ("Deferral Order"), extended, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993) ("Nov. 10 Extension Order").

² In considering the petitions for reconsideration and other issues outstanding in the rate regulation proceedings, the Commission will address, among other issues, the benchmark/price cap methodology, relief for small systems and so-called "going forward issues." The Commission also plans to adopt cost of service rules.

³ See para. 5.

II. Background

2. In the Rate Order issued in May 1993, 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 1992.⁴ We established June 21, 1993 as the effective date of our new rate regulations.⁵ 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 mandate that rates for cable services remain reasonable.⁶ 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, 1993 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 1992.⁷

⁴ 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 (released Aug. 27, 1993), 58 FR 46718 (September 2, 1993) ("First Rate Reconsideration").

⁵ Rate Order, 8 FCC Rcd at 5635.

⁶ See Rate Freeze Order, 8 FCC Rcd at 2921; Deferral Order, at para. 5.

⁷ 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

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. We extended the freeze until November 15, 1993.⁸ Our regulations establishing rate regulation of cable service became effective September 1, 1993.⁹ However, those regulations were subject to reconsideration. Because the rate regulations were pending reconsideration, by early November, 1993, the Commission had received applications for certification from local franchising authorities representing less than 20 percent of communities that may regulate the basic service tier. Accordingly, on November 10, 1993, the Commission further extended the freeze on regulated revenues until February 15, 1994.¹⁰

III. Discussion

4. As of January 31, 1994, the Commission had received 4,896 applications for certification from local franchising

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).

⁸ Deferral Order, FCC 93-304, 58 FR 33560 (June 18, 1993).

⁹ Id. See also 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 (Aug. 2, 1993).

¹⁰ Nov. 10 Extension Order, at paras. 4-5. We stated that, where local governments already have initiated rate regulation of the basic tier, we were not concerned that rates for the tier could raise to unreasonable levels after November 15, 1993. We noted that in the initial freeze order, we determined that a freeze on rates for the cable programming services tier was necessary to prevent operators from evading the freeze by moving programming from the basic to the cable programming service tier. Rate Freeze Order, 8 FCC Rcd at 2933 n.10. We concluded in the Nov. 10 Extension Order that it was unnecessary to continue the freeze for cable programming service tiers where the basic tier has become subject to rate regulation. Accordingly, we amended the rule to make clear that the freeze would no longer apply to regulated cable services provided by cable operators whose basic cable service has become subject to rate regulation by a local franchising authority or the Commission. Nov. 10 Extension Order, at fn. 12. As a result, the number of cable systems subject to the freeze decreases as franchising authorities become certified.

authorities covering approximately 7,534 communities served by cable. Although these figures for certifications are significant increases from the last time we extended the freeze, they still represent only a small percentage of the nearly 30,000 communities that are potentially eligible to regulate the basic service tier. We continue to believe that it is important to provide franchising authorities and other affected parties sufficient time to become familiar with any modifications to our rate regulations before the freeze is lifted. We expect to act on reconsideration by the end of this month, and we believe that it is important that the statutory goal of ensuring reasonable rates not be undermined in the interim.

5. The Administrative Procedure Act requires that new substantive rules be published in the Federal Register at least 30 days prior to their effective date.¹¹ In the event that we adopt any substantive changes to our rules on reconsideration, we anticipate that such revised rules would be released approximately 30 days after adoption and that these regulations would be published in the Federal Register within 15 days thereafter.¹² Thus, under this schedule, any new regulations adopted would become effective approximately 75 days after adoption. Extension of the freeze for that period of time is the minimum amount of time required to enable the Commission to adopt modified rules, should it choose to do so, and for such rules to become effective before the freeze is lifted.

6. We believe that this brief extension of the freeze will ensure that local regulators have been afforded a sufficient opportunity to file for certification and prepare for rate regulation under any modified rules that may be adopted. This extension should provide sufficient time for local regulators to become familiar with their rights and obligations under any such new regulations before cable operators are free to raise rates absent regulation. We emphasize that we will continue to provide cable operators the opportunity to file petitions for relief which demonstrate, in individual cases, that the freeze is causing severe economic hardship or threatens the viability of continued provision of cable service.¹³ Throughout the duration of the rate freeze, we have received only five such petitions for

¹¹ See 5 U.S.C. § 553(d); See also 47 C.F.R. § 1.427.

¹² In addition, we will be adopting rules addressing issues raised in the Third Notice of Proposed Rulemaking. See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428 (released Aug. 27, 1993), 58 FR 46737 (Sep. 2, 1993).

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

relief. Thus, we conclude that only a small percentage of cable operators believe that the freeze has imposed hardship sufficient to compel them to seek relief from the freeze.

7. We also note that the Commission has acted expeditiously in addressing petitions for reconsideration of its rate regulation rules. In adopting rate regulations for the cable television industry, the Commission recognized that the rules would require further refinement based on survey data of the cable television industry to be gathered and analyzed by the Commission.¹⁴ Shortly after the new rules became effective, the Commission conducted a survey to collect the data necessary to help it assess the rate regulations.¹⁵ The Commission has analyzed this survey data and is now in a position to resolve the pending petitions for reconsideration by the end of this month.¹⁶

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 February 15, 1994 until May 15, 1994 is necessary to afford local franchising authorities a sufficient period in which to familiarize themselves with any revised regulations governing regulated cable service rates that the Commission may adopt on reconsideration later this month. We will make this Order and implementing rule changes effective upon publication in the Federal Register to prevent an expiration of the freeze that would otherwise occur with 30 days advance publication in the Federal Register. Such a result would seriously undermine the statutory goals of cable rate regulation

¹⁴ See, e.g., Rate Order, 8 FCC Rcd at 5773; Second Report and Order, FCC 93-428 (released Aug. 27, 1993) at para. 130.

¹⁵ Order, FCC 93-446 (released Sept. 17, 1993).

¹⁶ In addition to analyzing the survey data during the period since adoption of the rate rules, the Commission has accommodated the requests of numerous cable operators, franchise authorities, programmers and many other interested parties, to meet with the Commission's new Chairman, who assumed office on November 29, 1993, for the purpose of expressing their views on the issues which the Commission will address on reconsideration of the rate rules. See News Release, Nov. 29, 1993, "Reed E. Hundt Sworn in as FCC Chairman."

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).

and would be contrary to the public interest.

IV. Ordering Clauses

9. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 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 (released June 15, 1993), 58 FR 33560 (June 18, 1993), extended, FCC 93-494 (released November 10, 1993), 58 FR 60141, IS EXTENDED UNTIL May 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 in the Appendix.

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

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) 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 May 15, 1994.

* * * * *

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

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

In this Order, the Commission, on its own motion, reconsiders the expiration date of the freeze of regulated cable service revenues, and extends the expiration of the freeze from February 15, 1994 until May 15, 1994.¹ In doing so, the Commission's action will allow the minimum amount of time required for all affected parties to familiarize themselves with potential modifications to the cable rate regulations after the Commission completes its pending reconsideration of those rules.

Although I am supporting this action, I write separately because I believe it is necessary to reiterate a number of my concerns regarding the process of implementing the cable rate regulations, and the extent to which this action may address some of these issues. During this proceeding, 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.² I also have recognized that the Commission and its staff have made a concerted effort to implement rate regulation under very awkward procedural circumstances. In this regard, I have stated that the vast majority of implementation problems faced by the Commission regarding rate regulation were and continue to be a result of a premature effective

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), extended, FCC 93-304, 58 FR 33560 (June 18, 1993), extended, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993).

² 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).

date for those rules.³ I remain concerned about the potential inequities for the industry, consumers, and franchising authorities that may result from the cable rate regulation proceeding, especially to the extent that the public's confusion may continue to increase. Indeed, I dissented from the prior Order that extended the freeze on cable revenues because of several issues related to the general level of administrative confusion, including my concerns that the decision: (1) would impose tremendous additional expense and administrative processing "nightmares" on franchise authorities and the FCC; (2) failed to address the disparity between the date on which operators were required to file responses to rate complaints and the date when a full complement of rate regulation rules would be in place; and (3) required cable operators and franchising authorities to commence critical rate regulation decisions while the existing rate rules were subject to change on reconsideration and without the benefit of cost-of-service rules.⁴

I remain concerned that the Commission already has created a fundamentally inequitable situation for cable operators by forcing critical business decisions based on benchmark standards that are subject to revision, and without either the cost-of-service principles or rules that the Commission ultimately will adopt. I believe, however, that today's decision to extend the freeze on cable revenues to May 15 reflects a substantially different set of considerations as compared to the November 10, 1993 Order. In particular, this action does not affect the filing date for responses by cable operators, and the burdens created by the November 10, 1993 Order have already occurred. This extension of the freeze also is intended to coincide with the effective date for the reconsideration of the rate regulation mechanism, including cost-of-service rules. Therefore, I will support the Commission's decision because I believe that this action, on its own, will not exacerbate the administrative confusion regarding cable rate regulation.

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).

⁴ See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, Order ("November 10, 1993 Order"), released November 10, 1993, FCC 93-494, 58 FR 60141 (November 15, 1993) (Dissenting Statement of Commissioner Andrew C. Barrett).