ENDNOTES

1. Pub. L. No. 102-385, 106 Stat. 1460 (amending the Communications Act of 1934 (the "Communications Act") and codified at 47 U.S.C. § 151, *et. seq.*).

2. *See Report and Order and Further Notice of Proposed Rulemaking ("Rate Order")*, MM Docket No. 92-266, 8 FCC Rcd 5631, 58 FR 29736 (1993) at para. 2; 1992 Cable Act § 2(b)(4), 106 Stat. at 1463.

3. We have released the following documents in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation: *Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 510 (1992) (*Rate Notice*); *Order*, MM Docket No. 92-266, 8 FCC Rcd 226 (1992) (*Survey Order*); *Order*, MM Docket No. 92-266, , 8 FCC Rcd 2921 (1993) (*Rate Freeze Order*); *Order*, MM Docket No. 92-266, 58 Fed. Reg. 19626 (Apr. 15, 1993) (*Rate Freeze Clarification Order*); *Order Denying Stay*, MM Docket No. 92-266, 8 FCC Rcd 2917 (1993) (*Freeze Stay Order*); *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) (*Rate Order*); *Order Denying Stay*, MM Docket No. 92-266, 8 FCC Rcd 3652 (1993) (*Effective Date Order*); *Order*, MM Docket No. 92-266, 58 Fed. Reg. 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993) (*Freeze Extension Order*); *Order*, MM Docket No. 92-266, 58 Fed. Reg. 41042 (Aug. 2, 1993) (*Effective Date Extension Order*); *Notice of Proposed Rulemaking*, MM Docket No. 93-215, 58 Fed. Reg. 40762 (July 30, 1993) (*Cost Notice*); *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5585 (1993) (*Small System Further Notice*); *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*,MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*First Recon. Order*); *Third Report and Order*, MM Docket No. 92-266, 8 FCC Rcd 8444 (1993) (*Third Order*); *Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 58 Fed. Reg. 46737 (Sept. 2, 1993) (*Going Forward Further Notice*); *Order*, MM Docket No. 92-266, 58 Fed. Reg. 60141 (Nov. 15, 1993) (*Freeze Extension Order*); *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 4119 (1994) (*Second Recon. Order or Fourth Report and Order or Fifth Notice*); *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket Nos. 92-266, 93-215, 9 FCC Rcd 4527 (1994) (*Cost Order or Cost Further Notice*); *Third Order on Reconsideration*,MM Docket Nos. 92-266, 92-262, 9 FCC Rcd 4316 (1994) (*Third Recon. Order*); *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket Nos. 92-266, 93-215, FCC 94-234, 59 FR 51869 (adopted Sept. 12, 1994 and released Sept. 26, 1994) (*Fifth Recon. Order*); *Fourth Order on Reconsideration*, MM Docket No. 92-266, FCC 94-254, 59 FR 53113 (adopted Sept. 30, 1994 and released Oct. 5, 1994) (*Fourth Recon. Order*) .

4. See *Fifth Notice* at paras. 255-56.

5. *See* 1992 Cable Act §§ 2(a)(2), (5), 106 Stat. at 1460; *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report ("Competition Report")*, CS Docket No. 94-48, FCC 94-235 (adopted Sept. 19, 1994 and released Sept. 28, 1994).

6. 1992 Cable Act, § 2(b), 106 Stat. 1463.

7. 1992 Cable Act § 2(b), 106 Stat. at 1463.

8. Communications Act § 623(f), 47 U.S.C. 543(f).

9. *Cost Further Notice* at para. 309, *citing* 8 FCC Rcd 8071 (1993) (Telco Notice).

10. *See* 1992 Cable Act § 2(b), 106 Stat. at 1463.

11. *Id.*

12. Communications Act § 623(c)(1)(C), 47 U.S.C. 543(c)(1)(C).

13. Communications Act § 623(c)(2), 47 U.S.C. 543(c)(2).

14. *Id.*

15. *Rate Order* at para. 387.

16. *Id.*

17. *Id.* at para. 14 n.29, para. 387 n.946.

18. *Id.* at para. 387 n.946.

19. *See id.* at paras. 262-264.

20. *Id.* at para. 396.

21. *Id.*

22. *Id.* at para. 397; *See also Second Recon. Order* at paras. 109-110.

23. *Second Recon. Order at* paras. 109-110.

24. *See* 47 C.F.R. § 76.922(b)(4).

25. 1992 Cable Act § 2(b), 106 Stat. at 1463.

26. 47 C.F.R. § 76.922(d).

27. *Id.* at § 76.922(e).

28. *Id.* at § 76.922(d)(3)(xi).

29. *See, e.g.*, Letter from Turner Broadcasting System, Inc. to Reed E. Hundt, Chairman, FCC (October 5, 1994); Letter from Arts & Entertainment Network to James Quello, Commissioner, FCC (May 17, 1994); Letter from Cablevision to Reed Hundt, Chairman, FCC (February 10, 1994).

30. *Id.*

31. *See, e.g.*, Letter from Lifetime Television (September 28, 1994) in response to the Commission's Request for Information (September 19, 1994).

32. *See, e.g.*, Providence Journal Company, Sammons Communications Inc., Multivision Cable TV Corp., and Parcable, Inc. Comments to Fifth Notice at 8-9; Arts & Entertainment and ESPN Comments on Petition for Recon. at 20.

33. *See, e.g.,ex parte* letter from Turner Broadcasting System, Inc. to Reed Hundt, Chairman, FCC (October 5, 1994); *ex parte* letter from Cox Cable Communications to Reed Hundt, Chairman, FCC (October 20, 1994); *ex parte* letter from Newhouse Broadcasting Corporation to Kathleen Wallman, FCC (September 16, 1994).

34. 1992 Cable Act, § 3(c)(l)(2).

35. Communications Act § 623(c)(1)(A), 47 U.S.C. 543(c)(1)(A).

36. Communications Act § 623(c)(2), 47 U.S.C. 543(c)(2).

37. Communications Act § 623(l)(2), 47 U.S.C. § 543(l)(2).

38. *Rate Order* at paras. 326-328.

39. *Id.* at para. 328 n.808.

40. *Id.*

41. *See Second Recon.Order* at para. 192; *see also Rate Order* at para. 329.

42. *Id.* at para. 193.

43. *Id.* at para. 194.

44. *See Second Recon. Order* at paras. 195-196.

45. *Id.* at para. 195 n.263

46. *Id.* at para. 200.

47. NCTA Comments on Fifth Notice at 12-14, Reply Comments at 4-5; Arts & Entertainment and ESPN Comments on Petitions for Recon. at 19-20; Court TV Comments on Fifth Notice at 16; Discovery Communications Comments on Fifth Notice at 10-11; E! Entertainment Television Comments on Fifth Notice at 4-5; Lifetime Television reply Comments at 8; Providence Journal *et al.* Comments on Fifth Notice at 8; Time Warner Reply Comments at 7; Tele-Communications, Inc. ("TCI") Comments on Fifth Notice at 14-15; Viacom Comments on Fifth Notice at 10-11; and Newhouse Broadcasting Corporation reply Comments at 3.

48. Ovation, Inc and PBS Horizons Network ("Programming Providers") Comments on Fifth Notice at 20-22.

49. NCTA Comments on Fifth Notice at 13.

50. *Id. at 14.*

51. Viacom Comments on Fifth Notice at 10-11.

52. *See* Discovery Communications Comments on Fifth Notice at 10-11.

53. *Henslee v. Union Planters Nat'l Bank & Trust Co. et al.*, 335 U.S. 595, 600 (1949) (dissenting opinion).

54. *Rate Order* at para. 329.

55. S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991).

56. *Id.* at 19-20.

57. H.R. Rep. No. 628, 102d Cong., 2d Sess. 79 (1992) *accord* at 90 (cable programming service excludes "programming offered on a stand-alone, per channel basis (such as HBO and Showtime and some regional sports channels)").

58. Adelphia Cable Partners, L.P. South Dade County, Florida, LOI-93-42, DA-94-1277 (adopted and released November 18, 1994).

59. *See id.*, Warner Cable Communications, L.P. Milwaukee, Wisconsin, LOI-93-14, DA-94-1276 (adopted and released November 18, 1994), Comcast Cablevision, City of Tallahassee, Florida, LOI-93-2, DA 94-1275 (adopted and released November 18, 1994).

60. 114 S. Ct. 2223 (1994).

61. 395 U.S. 258 (1969).

62. *Solorio v. United States*, 483 U.S. 435, 445 (1987).

63. 401 U.S. 355 (1971).

64. *Solorio*, 483 U.S. at 448.

65. *Id.* at 450.

66. Codified at 47 U.S.C. § 543.

67. *See Rate Order* at para. 187; *Cost Order*.

68. *See Rate Order* at paras. 227, 396; 47 C.F.R. §§ 76.922(c),(d),(e).

69. *See id.* at para. 239; 47 C.F.R. §76.922(d)(2).

70. *See Fourth Report* at paras. 246-249.

71. *Id.* at para. 246 n. 345.

72. *See Fifth Notice* at paras. 255-256.

73. *See, e.g.*, Viacom International, Inc. (Viacom) Petition for Recon. at 2-7; United Video Petition for Recon. at 8; Eternal World Television Network Petition for Recon. at 2-6; Public Interest Petitioners Petition for Recon. at 9-11, 15; and Office of the Commissioner of Baseball Petition for Recon. at 1-3.

74. Time Warner Comments on Fifth Notice at 3-4; Viacom Petition for Recon. at 5-7; *accord* National Cable Television Association ("NCTA") Comments on Fifth Notice at 6-7.

75. *See, e.g.*, Viacom Petition for Recon. at 6.

76. *See, e.g.*, Continental Cablevision Response to Petitions for Recon. at 8.

77. *See, e.g.*, USA Networks Comments on Fifth Notice at 8-9; United Video Petition for Recon. at 8.

78. USA Networks Comments on Fifth Notice at 11.

79. Letter from Bradley Stillman, Consumer Federation of America to Reed E. Hundt, Chairman, FCC (August 25, 1994).

80. *See, e.g.*, Providence Journal et al. Comments on Fifth Notice at 4-5; Cablevision Industries Comments on Fifth Notice at 10-14; Time Warner Comments on Fifth Notice at 4-6; TCI Comments on Fifth Notice at 21-23; Liberty Media Corporation Reply Comments on Fifth Notice at 6-8; Viacom Petition for Recon. at 2; Public Interest Petitioners Petition for Recon. at 11-13; United Video Petition for Recon. at 8; and Continental Cablevision Response

to Petitions for Recon. at 7.

81. *See, e.g.*, C-SPAN Comments on Fifth Notice at 1-6; NCTA Comments on Fifth Notice at 7-8; *see also* E! Entertainment Television Comments on Fifth Notice at 3; Programming Providers Comments on Fifth Notice at 8-9; The Inspirational Network Reply Comments on Fifth Notice at 3; Lifetime Television Reply Comments on Fifth Notice at 6-8; Eternal World Television Network Petition for Recon. at 2-3; and Arts & Entertainment and ESPN Comments in Support of Petitions for Recon. at 8.

82. *See, e.g.*, C-SPAN Comments on Fifth Notice at 4-5.

83. *See, e.g.*, NCTA Comments on Fifth Notice at 7; Programming Providers Comments on Fifth Notice at 8-9, *accord*, Lifetime Television Reply Comments on Fifth Notice at 3-4; and Continental Cablevision Response to Petitions for Recon. at 7.

84. Public Interest Petitioners Petition for Recon. at 6; *accord* United Church of Christ Reply to Comments on Petitions for Recon. at 2; and Letter from Black Citizens for a Fair Media, to William Caton, Acting Secretary, FCC (May 20, 1994).

85. *See, e.g.*, Cablevision Industries Comments on Fifth Notice at 10-14; Time Warner Comments on Fifth Notice at 4-6; Court TV Comments on Fifth Notice at 8-9; Discovery Communications, Inc. Comments on Fifth Notice at 6; Programming Providers Comments on Fifth Notice at 4-6; USA Networks Comments on Fifth Notice at 2, 4; Viacom Petition for Recon. at 2-3; United Video Petition for Recon. at 8; Continental Cablevision Response to Petitions for Recon. at 8; A&E and ESPN Comments in Support of Petitions for Recon. at 14-15; and Letter from Reynaldo Ortiz, Jones Education Networks, to Reed E. Hundt, Chairman, FCC (June 29, 1994) (Jones Education Networks Letter) at 3-4.

86. *See, e.g.*, Cablevision Industries Comments on Fifth Notice at 7-8; NCTA Comments on Fifth Notice at 7; Discovery Communications, Inc. Comments on Fifth Notice at 6-7.

87. *See, e.g.*, Time Warner Comments on Fifth Notice at 4-7; Programming Providers Comments on Fifth Notice at 4-5.

88. *See, e.g.*, Court TV Comments on Fifth Notice at 8-9; *accord*, C-SPAN Comments at 9-10; USA Networks Comments on Fifth Notice at 2; and Public Interest Petitioners Petition for Recon. at 12.

89. *E.g.*, Letter from Black Entertainment Television to Reed Hundt, FCC Chairman (October 24, 1994); Letter from Discovery Communications Inc. to Reed Hundt, FCC Chairman (October 13, 1994); Letter from Arts & Entertainment Network to Reed Hundt, Chairman, FCC (October 12, 1994); Letter from Lifetime Television to Chief Cable Services Bureau (October 13, 1994).

90. Economists' Inc. Study (appended to NCTA Reply Comments on Fifth Notice and stating at page 6 that 30 cents would be a conservative measure of opportunity costs); Charles River Associates Study (appended to TCI Comments on Fifth Notice and suggesting a mark-up on the order of 25 cents at page 13). Several commenters agree with a flat per channel charge approach, generally advocating 25 cents except where indicated: E! Entertainment Television Comments on Fifth Notice at 3; Cablevision Industries Comments on Fifth Notice at 13-14 (35-40 cents); Court TV Comments on Fifth Notice at 15; Discovery Communications, Inc. Comments on Fifth Notice at 7 (however, no flat fee mark-up for home shopping networks or pay-per-view channels); Programming Providers Comments on Fifth Notice at 11-12; USA Networks Comments on Fifth Notice at 9-10; Lifetime Television Reply Comments on Fifth Notice at 5; The Inspirational Network Reply Comments on Fifth Notice at 4 (7 cents); Liberty Media Corporation Reply Comments on Fifth Notice at 7 (35-40 cents); Eternal World Television Network Petition for Recon. at 5; Arts & Entertainment and ESPN Comments in Support of Petitions for Recon. at 9 (30 cents); Letter dated June 16, 1994 from Fox Basic Cable, Inc. at 2; and Jones Education Networks Letter at 6 (30 cents).

91. *See, e.g.*, Time Warner Comments on Fifth Notice at 6-7; Discovery Communications, Inc. Comments on Fifth Notice at 9-10; and Arts & Entertainment Comments in Support of Petitions for Recon. at 9-12;

92. *See, e.g.*, TCI Comments on Fifth Notice at 25-26.

93. *See, e.g.*, Continental Cablevision Response to Petitions for Recon. at 10-12.

94. Cablevision Industries Comments on Fifth Notice at 13-14; *accord* Discovery Communications, Inc. Comments on Fifth Notice at 7-8.

95. Cablevision Industries Comments on Fifth Notice at 11.

96. *Id.* at 14.

97. *Id.*

98. CATA Comments on Fifth Notice at 4-5.

99. Viacom Comments on Fifth Notice at 9-10; *accord* Lifetime Television Reply Comments on Fifth Notice at 8.

100. TCI Reply Comments on Fifth Notice at 6 (annual cap causes delay in or abandonment of launch of new services).

101. *See, e.g.*, Liberty Media Corporation Reply Comments on Fifth Notice at 7-8; Affiliated Regional Communications Reply Comments on Fifth Notice at 14-18.

102. *See* paras. 88-90, infra.

103. *Ex parte* letter from Susan Littlefield, The National Association of Telecommunications Officers and Advisors ("NATOA") to Reed Hundt, Chairman, FCC (October 19, 1994).

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* Letter from the City of St. Louis, Missouri, to Reed Hundt, Chairman, FCC (October 21, 1994).

108. *See* Letter from the Consumer Federation of America, to Reed Hundt, Chairman, FCC (August 25, 1994).

109. *See* Letter from the City of St. Louis, Missouri, to Reed Hundt, Chairman, FCC (October 21, 1994).

110. *See Fourth Report* at paras. 239-249; 47 C.F.R. § 76.922(e).

111. *See* Communications Act § 623(c), 47 U.S.C. § 543(c).

112. *See* para. 83, *infra.*

113. *Id.*

114. *See Rate Order* at para. 387.

115. *See Rate Order* at paras. 196-197.

116. *See* Letter from NATOA to Reed Hundt, Chairman, FCC (October 19, 1994).

117. *Rate Order* at para. 253 n.602.

118. *See* para. 85, *infra.*

119. *See* 47 C.F.R. §§ 76.932, 76.933, 76.958, 76.964.

120. *See generally*, Letter from the Consumer Federation of America to Reed Hundt, Chairman, FCC (October 28, 1994); Letter from the National Association of Telecommunications Officers and Advisors ("NATOA") to Reed Hundt, Chairman, FCC (October 19, 1994); Letter from the City of St. Louis, Missouri, to Reed Hundt, Chairman, FCC (October 11, 1994).

121. *See* para. 73, *infra.*

122. Facsimile from Steven Brill, Courtroom Television Network to Blair Levin, Chief of Staff, FCC (October 7, 1994).

123. *See* 47 C.F.R. §§ 76.922(d)(3)(i), (ii).

124. *See Second Recon. Order* at paras. 117-122, 201-221; *Fifth Recon. Order* at paras. 6-8.

125. *See* CATA Comments on Fifth Notice at 7.

126. *See id.* at 6.

127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* Summit Communications, Inc. Comments on Fifth Notice at 1.

132. *See id.* at 2.

133. *Fifth Notice* at para. 255.

134. *Id.* at para. 256.

135. *See* CATA Comments on Fifth Notice at 5.

136. *See* Time Warner Comments on Fifth Notice at 25-26.

137. *See* Providence Journal Comments on Fifth Notice at 9.

138. *See* TCI Comments on Fifth Notice at 30-32.

139. *See* GTE Comments on Fifth Notice at 6-7.

140. Communications Act § 623(f), 47 U.S.C. § 543(f).

141. *Id.*

142. *Rate Order* at para. 440.

143. *Id.*

144. *Id.*

145. *Id.* at para. 441.

146. *Id.* at para. 442.

147. *Id.* at paras. 236-57.

148. *Third Order on Reconsideration ("Third Recon. Order")*, MM Docket No. 92-262, 9 FCC Rcd 4316 (1994) at para. 128.

149. Communications Act § 632(c)(1), 47 U.S.C. § 552(c)(1). *See also id.* at para. 128.

150. *Id.*

151. *Id.* at para. 129.

152. *Id.* at para. 131..

153. Time Warner Comments on Fifth Notice at 16, 22; NCTA Comments on Fifth Notice at 10-11.

154. *Rate Order* at paras. 440-442.

155. NCTA Letter at 5.

156. *Id.*

157. *Id.*

158. *Id.*

159. H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 65 (1992).

160. *Rate Order* at para. 440.

161. *Rate Order* at paras. 236-57.

162. *Id.* at para. 440.

163. *Id.*

164. *Id.* at para. 440 n.1100.

165. *Id.* at para. 440; *see also* 47 C.F.R. §§ 76.309(c)(3)(i)(B)(regarding advance notification to customers of any changes in rates, programming services or channel positions; 76.964(b) (requiring 30 days notice before any changes in rates for cable programming service or associated equipment).

166. *Third Recon. Order* at para. 128.

167. *Third Recon. Order* at para. 131.

168. *Id.*

169. *See, e.g., Free v. Bland*, 369 U.S. 663 (1962); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

170. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (the enforcement provisions of the Employee Retirement Income Security Act of 1974 (ERISA) preempt the field).

171. *See* 1992 Cable Act §§ 3(b)(1), 3(c)(1)(A).

172. 47 C.F.R. § 76.922(d)(3)(i).

173. 47 C.F.R. § 76.981.

174. *Third Recon. Order* at para. 131.

175. *Id.*

176. MM Docket No. 93-215 and CS Docket No. 94-28, 9 FCC Rcd 4527 (1994).

177. *Cost Order* at para. 249.

178. *Id.*

179. 47 C.F.R. §§ 76.924(i)(1)-(2).

180. *Id.* at § 76.924(i)(1).

181. *Id.*

182. *Id.* at §§ 76.924(1)(3)-(4).

183. *Cost Further Notice* at para. 310.

184. *Id.*

185. *Id.* at paras. 310-311.

186. TCI Comments on Cost Further Notice at 49. Time Warner Comments on Cost Further Notice at 27-28.

187. BellSouth Comments on Cost Further Notice at 4-7.

188. Turner Broadcasting System Comments on Cost Further Notice at 1-3; *See also* Discovery Comments on Cost Further Notice at 2-4; Jones Comments on Cost Further Notice at 3-7; Liberty Comments on Cost Further Notice at 18-22; Comcast Reply Comments on Cost Further Notice at 18.

189. *See, e.g.,* Turner Broadcasting System Comments on Cost Further Notice at 8-11; Rainbow Comments on Cost Further Notice at 4-5; Discovery Comments on Cost Further Notice at 5-7; Jones Comments on Cost Further Notice at 7-9.

190. *See, e.g.*, Fred Williamson and Associates Comments on Cost Further Notice at 3.

191. Bell Atlantic Comments on Cost Further Notice at 9-11. In its Reply Comments on Cost Further Notice, Bell Atlantic argues that regulatory parity dictates that similar rules in cable and telephony. *Id.* at 14-16.

192. USTA Reply Comments on Cost Further Notice at 3-5.

193. NCTA Reply Comments on Cost Further Notice at 61-63.

194. *See, e.g.,* Turner Broadcasting System Comments on Cost Further Notice at 11.

195. *Cost Further Notice* at para. 313.

196. *Id.*

197. *See* para. 83 *infra*.

APPENDIX A

Petitions for Reconsideration in MM Docket 92-266
Bell Atlantic
Commissioner of Baseball
Eternal Word Television
National Association of Telecommunications Officers and Advisors Et. Al. ("NATOA")
Public Interest Petitioners
United Video
Viacom International (also errata)

Comments/Oppositions to Petitions For Reconsideration in MM Docket 92-266
Arts & Entertainment and ESPN (also errata)
Bell Atlantic
City of Detroit
Continental Cablevision
Discovery Communications, Inc.
Fox Basic
GTE Service Corporation
Liberty Media
National Association of Telecommunications Officers and Advisors and the City of New York
National Cable Television Association
Time Warner Entertainment Co., L.P.
Viacom International

Replies to Comments/Oppositions to Petitions for Reconsideration in MM Docket 92-266
Bell Atlantic
City of Detroit
GTE Service Corporation
United Church
Public Interest Petitioners

Comments to Fifth Notice of Proposed Rulemaking in MM Docket 92-266
Affiliated Regional Communications, Inc.
Cable Telecommunications Association
Cablevision Industries Corporation
Cablevision Systems Corporation
Continental Cablevision, Inc.
Court TV
Discovery Communications, Inc.
E! Entertainment Co.
GTE Service Corporation
Jones Education Networks
Liberty Media Corporation

National Cable Satellite Network d/b/a C-SPAN
Lifetime Television
National Cable Television Association
National Hockey League
Pagosa Vision, Inc.
Programming Providers - Ovation, Inc. and PBS Horizons Cable Network
Providence Journal Company Et. Al.
Rainbow Programming Holdings, Inc.
Small Cable Business Association (also errata)
Tele-Communications, Inc.
The Times Mirror Company
Time Warner Cable
Turner Broadcasting System, Inc.
USA Networks
Viacom International, Inc.

Reply Comments to Fifth Notice of Proposed Rulemaking in MM Docket 92-266
Affiliated Regional Communications, Inc.
Commissioner of Baseball
The Inspirational Network
Liberty Cable Company, Inc.
Liberty Media Corporation
Lifetime Television
National Cable Television Association
National Hockey League
New England Sports
Newhouse Broadcasting Corporation
Sammons Communications Inc. and TCA Cable TV Inc.
Small Cable Business Association
Summit Communications, Inc.
Tele-Communications, Inc.
Time Warner Cable
USA Networks
Viacom International, Inc.

Comments to Further Cost Notice in MM Docket No. 93-215
Bell Atlantic
BellSouth Corporation and BellSouth Telecommunications, Inc.
Discovery
Jones Education Networks, Inc.
National Cable Television Association
Rainbow Programming Holdings, Inc.
Tele-Communications, Inc.
Time Warner Entertainment Company, L.P.
Turner Broadcasting Systems, Inc.
Fred Williamson & Associates, Inc.

Reply Comments to Further Cost Notice in MM Docket No. 93-215
Bell Atlantic
Comcast Cable Communication, Inc.
Liberty Media Corporation
United States Telephone Association

APPENDIX B

Title 47, Part 76 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, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.901 is amended to add paragraphs (d) and to read as follows:

Section 76.901 Definitions

* * * * *

(d) New Product Tier. A new product tier ("NPT") is a cable programming service tier meeting the conditions set forth in Section 76.987 of this Subpart.

3. Section 76.922 is amended to revise paragraphs (d)(3)(x), (d)(3)(xi) and (e) to read as follows:

Section 76.922 Rates for the basic service tier and cable programming service tiers.

* * * * *

(d)(3)(x) Adjustments to permitted charges on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer. Such adjustments shall apply on a channel-by-channel basis.

(d)(3)(xi) In calculating programming expense, operators may add a mark-up of 7.5% for increases in programming costs occurring after March 31, 1994, except that operators may not file for or take the 7.5% mark-up on programming costs for new channels added on or after May 15, 1994 for which the operator has used the methodology set forth in paragraph (e)(3) for adjusting rates for channels added to cable programming service tiers. Operators shall reduce rates by decreases in programming expense plus an additional 7.5% for decreases occurring after May 15, 1994 except with respect to programming cost decreases on channels added after May 15, 1994 for which the rate adjustment methodology in paragraph

(e)(3) was used.

(e) Changes in the number of channels on regulated tiers.

(1) Generally. A system may adjust the residual component of its permitted rate for a tier to reflect changes in the number of channels offered on the tier on a quarterly basis. Cable systems shall use FCC Form 1210 (or FCC Form 1211, where applicable) to justify rate changes made on account on changes in the number of channels on a basic service tier ("BST") or a cable programming service tier ("CPST"). Such rate adjustments shall be based on any changes in the number of regulated channels that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). However, when a system deletes channels in a calendar quarter, the system must adjust the residual component of the tier charge in the next calendar quarter to reflect that deletion. Operators must elect between the channel addition rules in paragraphs (2) and (3) the first time they adjust rates after December 31, 1994, to reflect a channel addition to a CPST that occurred on or after May 15, 1994, and must use the elected methodology for all rate adjustments through December 31, 1997. A system that adjusted rates after May 15, 1994, but before January 1, 1995 on account of a change in the number of channels on a CPST that occurred after May 15, 1994, may elect to revise its rates to charge the rates permitted by paragraph (3) on or after January 1, 1995, but is not required to do so as a condition for using the methodology in paragraph (e)(3) for rate adjustments after January 1, 1995. Rates for the BST will be governed exclusively by paragraph (2), except that where a system offered only one tier on May 14, 1994, the cable operator will be allowed to elect between paragraphs (2) and (3) as if the tier was a CPST.

(2) Adjusting Rates for increases in the number of channels offered between May 15, 1994, and December 31, 1997, on a basic service tier and at the election of the operator on a cable programming service tier. The following table shall be used to adjust permitted rates for increases in the number of channels offered between May 15, 1994, and December 31, 1997, on a basic service tier and subject to the conditions in paragraph (1) at the election of the operator on a CPST. The entries in the table provide the cents per channel per subscriber per month by which cable operators will adjust the residual component using FCC Form 1210 (or FCC Form 1211, where applicable).

Average Number of Regulated Channels	Per-Channel Adjustment Factor	Average Number of Regulated Channels	Per-Channel Adjustment Factor
7	$0.52	14	0.14
7.5	0.45	14.5	0.13
8	0.40	15-15.5	0.12

8.5	0.36	16	0.11
9	0.33	16.5-17	0.10
9.5	0.29	17.5-18	0.09
10	0.27	18.5-19	0.08
10.5	0.24	19.5-21.5	0.07
11	0.22	22-23.5	0.06
11.5	0.20	24-26	0.05
12	0.19	26.5-29.5	0.04
12.5	0.17	30-35.5	0.03
13	0.16	36-46	0.02
13.5	0.15	46.5 -99.5	0.01

In order to adjust the residual component of the tier charge when there is an increase in the number of channels on a tier, the operator shall perform the following calculations: (1) take the sum of the old total number of channels on tiers subject to regulation (i.e., tiers that are, or could be, regulated but excluding New Product Tiers) and the new total number of channels and divide the resulting number by two; (2) consult the above table to find the applicable per channel adjustment factor for the number of channels produced by the calculations in step (1). For each tier for which there has been an increase in the number of channels, multiply the per-channel adjustment factor times the change in the number of channels on that tier. The result is the total adjustment for that tier.

(3) Alternative methodology for adjusting rates for changes in the number of channels offered on a cable programming service tier or a single tier system between May 15, 1994, and December 31, 1997. This paragraph at the Operator's discretion as set forth in paragraph (1) shall be used to adjust permitted rates for a CPST after December 31, 1994, for changes in the number of channels offered on a CPST between May 15, 1994, and December 31, 1997. For purposes of this paragraph (3), a single tier system may be treated as if it were a CPST.

(i) Operators Cap Attributable to New Channels on All CPSTs Through December 31, 1997. Operators electing to use the methodology set forth in this paragraph may increase their rates between January 1, 1995, and December 31, 1997, by up to 20 cents per channel, exclusive of programming costs, for new channels added to CPSTs on or after May 15, 1994, except that they may not make rate adjustments totalling more than $1.20 per month, per subscriber through December 31, 1996, and by more than $1.40 per month, per

subscriber through December 31, 1997 (the "Operator's Cap"). Except to the extent that the programming costs of such channels are covered by the License Fee Reserve provided for in subsection (iii) of this paragraph (3), programming costs associated with channels for which a rate adjustment is made pursuant to this paragraph (3) must fall within the Operator's Cap if the programming costs (including any increases therein) are reflected in rates before January 1, 1997. Inflation adjustments pursuant to Section 76.922(d)(2) of this Subpart are not counted against the Operator's Cap.

(ii) Per Channel Adjustment. Operators may increase rates by a per channel adjustment of up to 20 cents per subscriber per month, exclusive of programming costs, for each channel added to a CPST between May 15, 1994, and December 31, 1997, except that an operator may take the per channel adjustment only for channel additions that result in an increase in the highest number of channels offered on all CPSTs as compared to May 14, 1994, and each date thereafter. Any revenues received from a programmer, or shared by a programmer and an operator in connection with the addition of a channel to a CPST shall first be deducted from programming costs for that channel pursuant to paragraph (d)(3)(x) of this Section and then, to the extent revenues received from the programmer are greater than the programming costs, shall be deducted from the per channel adjustment. This deduction will apply on a channel by channel basis.

(iii) License Fee Reserve. In addition to the rate adjustments permitted in subsections (i) and (ii) of this paragraph, operators that make channel additions on or after May 15, 1994 may increase their rates by a total of 30 cents per month, per subscriber between January 1, 1995, and December 31, 1996, for license fees associated with such channels (the "License Fee Reserve"). The License Fee Reserve may be applied against the initial license fee and any increase in the license fee for such channels during this period. An operator may pass-through to subscribers more than the 30 cents between January 1, 1995, and December 31, 1996, for license fees associated with channels added after May 15, 1994, provided that the total amount recovered from subscribers for such channels, including the License Fee Reserve, does not exceed $1.50 per subscriber, per month. After December 31, 1996, license fees may be passed through to subscribers pursuant to paragraph (d) of this Section, except that license fees associated with channels added pursuant to this paragraph (3) will not be eligible for the 7.5% mark-up on increases in programming costs.

(iv) Timing. For purposes of determining whether a rate increase counts against the maximum rate increases specified in paragraphs (i) - (iii), the relevant date shall be when rates are increased as a result of channel additions, not when the addition occurs.

(4) Deletion of Channels. When dropping a channel from a BST or CPST, operators shall reflect the net reduction in external costs in their rates pursuant to paragraphs (d)(3)(i) and (ii) of this Section. With respect to channels to which the 7.5% mark-up on programming costs applied pursuant to paragraph (d(3)(xi), the operator shall treat the mark-up as part of its programming costs and subtract the mark-up from its external costs. Operators shall also reduce the price of that tier by the "residual" associated with that channel.

For channels that were on a BST or CPST on May 14, 1994, or channels added after that date pursuant to paragraph (2), the per channel residual is the charge for the tier, minus the external costs for the tier, and any per channel adjustments made after that date, divided by the total number of channels on the tier minus the number of channels on the tier that received the per channel adjustment specified in paragraph (3). For channels added to a CPST after May 14, 1994, pursuant to paragraph (3), the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier.

(5) Movement of Channels Between Tiers. When a channel is moved from a CPST or a BST to another CPST or BST, the price of the tier from which the channel is dropped shall be reduced to reflect the decrease in programming costs and residual as described in paragraph (4) above. The residual associated with the shifted channel shall then be converted from per subscriber to aggregate numbers to ensure aggregate revenues from the channel remain the same when the channel is moved. The aggregate residual associated with the shifted channel may be shifted to the tier to which the channel is being moved. The residual shall then be converted to per subscriber figures on the new tier, plus any subsequent inflation adjustment. The price of the tier to which the channel is shifted may then be increased to reflect this amount. The price of that tier may also be increased to reflect any increase in programming cost. An operator may not shift a channel for which it received a per channel adjustment pursuant to paragraph (3) from a CPST to a BST.

(6) Substitution of Channels on a BST or CPST. If an operator substitutes a new channel for an existing channel on a CPST or a BST, no per channel adjustment may be made. Operators substituting channels on a CPST or a BST shall be required to reflect any reduction in programming costs in their rates and may reflect any increase in programming costs pursuant to paragraph (d)(3)(i), (ii). If the programming cost for the new channel is greater than the programming cost for the replaced channel, and the operator chooses to pass that increase through to subscribers, the excess shall count against the License Fee Reserve or the Operator Cap when the increased cost is passed through to subscribers. Where an operator substitutes a new channel for a channel on which a 7.5% mark-up on programming costs was taken pursuant to paragraph (d)(3)(xi), the operator may retain the 7.5% mark-up on the license fee of the dropped channel to the extent that it is no greater than 7.5% of programming cost of the new service.

(7) Headend Upgrades for Small Systems. When adding channels to CPSTs, independent small systems, as defined in Section 76.901(c) of this Subpart, and small systems owned by small multiple system operators, as defined in Section 76.922(b)(5), may choose among the methodologies set forth in this paragraph and in paragraphs (2) and (3). Operators choosing the methodology of this paragraph may increase rates to recover the actual cost of the headend equipment required to add up to seven channels to CPSTs, not to exceed $5,000 per additional channel, plus any applicable programming costs. Rate increases pursuant to this paragraph may occur between January 1, 1995, and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. Headend costs shall be depreciated over the useful life of the headend equipment. The rate of return on this

investment shall not exceed 11.25 percent. In order to recover costs for headend equipment pursuant to this paragraph, small systems must certify to the Commission their eligibility to use this paragraph, the level of costs they have actually incurred for adding the headend equipment and the depreciation schedule for the equipment.

(8) Sunset Provision. Paragraph (e) shall cease to be effective on January 1, 1998 unless renewed by the Commission.

* * * * *

3. Section 76.964 is amended to redesignate this Section to read as follows:

Sec. 76.964 Written notification of changes in rates and services

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4. Section 76.981 is amended to replace the existing section and to read as follows:

Sec. 76.981 Negative option billing.

(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

(b) The requirements of paragraph (a) of this Section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to Section 76.922 of this Subpart, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraphs (a) or (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C § 543.

5. Section 76.986 is amended to replace the existing section and to read as follows:

Section 76.986 "A la carte" offerings

(a) Collective offerings of unregulated per-channel or per-program ("a la carte") video programming shall be regulated as CPSTs pursuant to Section 76.922 of this Subpart. For

purposes of this Section, "multiplexed" channels shall be treated as one channel.

(b) A discounted package price offered by a cable system is not unreasonable with respect to any collective offering of channels if the component channels' collective offering also have been continuously available on the system on a per channel basis since April 1, 1993.

(c) A collective offering of per channel offerings may be treated as a New Product Tier if

(i) the collective offering meets the conditions set forth in Section 76.987, or

(ii) the collective offering was created between April 1, 1993 and September 30, 1994, involved only a small number of channels on BSTs or CPSTs, and the operator had reasonable grounds to believe the collective offering complied with the Commission's requirements as of the date it was first offered.

(d) In reviewing a basic service rate filing, local franchising authorities may make an initial decision addressing whether a collective offering of "a la carte" channels will be treated as a cable programming service tier that is an NPT under Section 76.987 of this Subpart or a CPST that is regulated under Section 76.922 of this Subpart. The franchising authority must make this initial decision within the 30 day period established for review of basic cable rates and equipment costs in Section 76.933(a) of this Subpart, or within the first 60 days of an extended 120 day period (if the franchise authority has requested an additional 90 days) pursuant to Section 76.933(b). The franchising authority shall provide notice of its decision to the cable system and shall provide public notice of its initial decision within seven days pursuant to local procedural rules for public notice. Operators or consumers may make an interlocutory appeal of the initial decision to the Commission within 14 days of the initial decision. Operators shall provide notice to franchise authorities of their decision whether or not to appeal to the Commission within this period. Consumers shall provide notice to franchise authorities of their decision to appeal to the Commission within this period.

(e) A limited initial decision under paragraph (b) shall toll the time periods under Section 76.933 within which local authorities must decide local rate cases. The time period shall resume running seven days after the Commission decides the interlocutory appeal, or seven days following the expiration of the period in which an interlocutory appeal pursuant to paragraph (b) may be filed.

(f) A local franchising authority alternatively may decide whether a collective offering of "a la carte" channels will be treated as an NPT as a part of its final decision setting rates for the basic service tier. That decision may then be appealed to the Commission as provided for under Section 76.945 of this Subpart.

6. Section 76.987 is added to read as follows:

Section 76.987: New Product Tiers

(a) Operators may establish a category of CPSTs, referred to as "new product tiers" ("NPTs"), and offer these tiers to subscribers at prices they elect.

(b) In order to be eligible to offer NPTs, cable operators must meet the following conditions:

(1) Operators offering NPTs are prohibited from making fundamental changes to what they offer on their BSTs and CPSTs offerings on September 30, 1994. Operators may drop channels or move channels between BSTs and/or CPSTs or to an a la carte offering so long as the aggregation of such changes do not constitute a fundamental change in their BST or CPSTs.

(2) Operators may not drop channels that were offered on their BSTs or CPSTs on September 30, 1994 and move them to NPTs unless they wait at least two years from the date the channels were dropped from the BSTs or CPSTs. Time shifted versions, slightly altered versions or renamed versions of channels offered on BSTs and CPSTs on September 30, 1994 shall not be exempt from this restriction.

(3) Operators must market their BSTs and CPSTs so that customers should be reasonably aware that (1) those tiers are being offered to the public; (2) the names of the channels available on those tiers; and (3) the price of the tiers. A subscriber may not be charged for an NPT unless the cable operator has obtained the subscriber's affirmative consent. Changes to the fundamental nature of an NPT must be approved by subscribers in accordance with § 76.981.

(4) Operators may not require the subscription to any tier, other than a BST, as a condition for subscribing to an NPT and operators may not require subscription to an NPT as a condition for subscribing to a CPST. These restrictions will not apply to cable operators prior to October 5, 2002, if such operators lack the capacity to offer BSTs and NPTs without also providing other intermediate tiers of service as provided in Section 76.900(c) of this Subpart.

(c) Operators may offer the same service on NPTs as are on one or more BSTs or CPSTs. A channel that occupied a CPST or BST part-time on September 30, 1994 also may be offered full-time on an NPT as long as it continues to be offered at least part-time on the CPST or BST, under substantially the same conditions as before it was offered on the NPT. If a channel occupies a BST or CPST (regulated pursuant to Section 76.922 of this Subpart) full-time on September 30, 1994, and is subsequently reduced to part-time on the BST or CPST, that channel may not be offered on an NPT full-time. Operators that offer a channel both on an NPT and a BST or CPST will have a continuing obligation to ensure that subscribers are aware that the channels are available on the CPST or BST.

(d) Operators may temporarily place new channels on CPSTs for marketing purposes and then move them to NPTs. In order for an operator to move a channel from a CPST to an NPT pursuant to this paragraph, the channel must not have been offered on a BST or CPST prior to October 1, 1994.

(e) After initially electing to offer an NPT, a cable operator may cease to provide the NPT, upon proper notice to subscribers pursuant to Section 76.964 of this Subpart. If an operator drops an NPT and subsequently determines to reestablish that tier, at the time of the reestablishment it must comply with the conditions for offering NPTs set forth in paragraph (b).

(f) If the Commission receives a complaint about an NPT, the operator need not file the rate justification provided in Section 76.956 of this Subpart, but shall within the time period provided by that rule file documentation that the NPT meets all the conditions set forth in this Section.

(g) Within 30 days of the offering of an NPT, operators shall file with the Commission, a copy of the new rate card that contains the following information on their BSTs, CPSTs and NPTs: (i) the names of the programming services contained on each tier, and (ii) the price of each tier. Operators also must file with the Commission, copies of notifications that were sent to subscribers regarding the initial offering of NPTs. After this initial filing, cable operators must file updated rate cards and copies of customer notifications with the Commission within 30 days of rate or service changes affecting the NPT.

APPENDIX C

TECHNICAL APPENDIX

INTRODUCTION

In this Technical Appendix we describe the analysis and statistical methodology we used to inform our choice of the specific numerical values of the going forward price cap structure.

Under our new, alternative going forward rules, an operator[1] may raise rates for CPSTs[2] when it increases the number of channels offered on those tiers. These rate increases are designed to cover the cost of providing this additional programming to consumers. Specifically, these costs include the cost of an operator's capacity used to provide programming, the fees paid for programming, and marketing costs. In order to protect consumers from the exercise of market power by a cable operator that elects to use the new going forward rules, rate adjustments to CPSTs will be governed by a price cap which limits the amount of the permitted rate increase according to the following rules:

1. For each channel added to CPSTs between January 1, 1995 and December 31, 1997, an operator may not increase the monthly per subscriber charges, for non-programming costs, more than $0.20.[3] The $0.20 per channel limit is the *per channel adjustment factor.*[4]

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[1] Consistent with the *Code of Federal Regulations,* in this Appendix we use the following definitions. The term "cable system" refers to the physical system that delivers cable services to its subscribers in a particular area. The term "cable system operator" or "operator" refers to the entity that owns and/or operates one or more cable systems. These definitions are explained in more detail at 47 C.F.R. § 76.5(a),(cc).

[2] In this Appendix, unless indicated otherwise, we use "CPSTs" to mean existing cable programming service tiers that are rate regulated under Section 76.922 of our rules. Although new product tiers are CPSTs within the meaning of the 1992 Cable Act, in this Appendix they are separately referred to as new product tiers or "NPTs".

[3] This order provides specific rules on how systems may adjust their rates when removing channels from, or switching existing channels between the BST or the CPSTs. These specific regulations are contained at paras. 84-86 in the text of this order.

[4] The revised regulations may be used to adjust rates for channel additions occurring after May 14, 1994.