Table 5
Average License Fee Programming Cost Data
Double Weighting

Year	Nominal Rate (1)	GDP-PI (2)	Real ($1994) Rate Column1 x Column2 (3)	Real ($1994) Rate Adjusted for Competitive Differential Column3 x (1-.17) (4)	Programming Costs ($1994) (5)	Total Channels (6)	Change in Real ($1994) Rate Per Change in Total Channels Column4 / Column6 (7)	Change in Programming Costs ($1994) Per Change in Total Channels Column5 / Column6 (8)	Per Channel Adjustment Factor ($1994) Column7 - Column8 (9)
1986	$10.57	1.29463	$13.68	$11.36	$0.95	28.28			
1991	$17.49	1.06585	$18.64	$15.47	$2.75	40.67			
1986-1991 Change				$4.12	$1.80	12.39	0.332	0.145	0.187

Notes:

Column (1): Monthly rates weighted by subscribers across tiers and by subscribers across operators.
Column (2): Gross Domestic Product Price Index, rebased to 1994 equals 100.
Column (3): Monthly rates adjusted for inflation using GDP-PI.
Column (4): Real monthly rates adjusted for market power by multiplying by the FCC competitive differential (1 - .17).
Column (5): License fee expenses per subscriber per month.
Column (6): Number of total channels weighted by subscribers across tiers and by subscribers across operators.
Column (7): Increase in real, competitive rates per additional channel.
Column (8): Increase in programming costs per additional channel.
Column (9): Increase in rates per channel minus increase in programming costs per channel = Per Channel Adjustment Factor.

Sources:

Columns (1) and (6): FCC sample of 500 randomly selected cable firms with data from the Television and Cable Factbook, Warren Publishing, Inc., 1986-1991 editions.
Column (2): United States Department of Commerce, Bureau of Economic Analysis.
Column (5): Cable TV Programming, Paul Kagan Associates, Inc., March 27, 1992; April 30, 1992; Cablevision, Chilton Publications, January 1986, January 1987, January 1988.

Table 6
Average License Fee of New Channels
Lower Bound Estimate of Per Subscriber Programming Costs
1985-1991

Channel	Launch Date (1)	First Year License Fee (Nominal Dollars) (2)	Subscribers (3)	Inflation Adjustment Factor (4)	First Year License Fee ($1994) [Column2*Column4] (5)
CNBC	1989	0.07	13,000,000	1.15622	0.08
Comedy Channel	1990	0.07	4,500,000	1.10724	0.08
Court TV	1991	0.13	6,000,000	1.06585	0.14
Monitor	1991	0.00	5,000,000	1.06585	0.00
TNT	1988	0.00	23,000,000	1.20741	0.00
VH-1	1985	0.00	8,900,000	1.38476	0.00
VISN	1988	0.03	6,200,000	1.20741	0.04
			Weighted Average		0.037

Notes:

Column (1) Year in which channel was launched.
Column (2) License fee charged for channel in the year it was launched.
Column (3) Number of subscribers receiving channel in the year it was launched.
Column (4) GDP-PI inflation factors to convert yearly nominal dollars into constant 1994 dollars.
Column (5) The license fee in the first year of service converted into 1994 dollars.
At the bottom is the average of these numbers weighted by the number of subscribers.

Sources:

Column (1) Cable Television Developments, April 1994, National Cable Television Association.
Column (3) Cable TV Programming, March 27, 1992, No. 167, Paul Kagan Associates, Inc.; Cablevision, Chilton Publication, various issues, 1985-1991
Column (3) Cable TV Programming, March 27, 1992, No. 167, Paul Kagan Associates, Inc.; Cablevision, Chilton Publications, various issues, 1985-1991
Column (4) United States Department of Commerce, Bureau of Economic Analysis.

Statement of Commissioner James H. Quello

In re: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Sixth Order on Reconsideration and Fifth Report and Order

Going forward rules have at long last been adopted. Programmers and cable operators finally know the federal rules of the road. This will, hopefully, allow the programming marketplace to develop, particularly in the realm of New Product Tiers, with respect to which cable operators have been given substantial flexibility to be creative in packaging and marketing packages of exciting new channels.

Nevertheless, these rules, like any rules, represent our best attempt to correctly balance competing interests in the absence of competition. From this perspective, I must repeat what I have emphasized so often in the past: the best mechanism for ensuring that the programming marketplace flourishes is not government regulation, however carefully crafted. Rather, it is the arrival of genuine competition to cable in every franchise area in the country. Competition will ensure that new programming services have every opportunity to succeed based on their merits -- not on whether this Commission has adopted rules that provide sufficient incentives for operators to add new channels. Competition will ensure that subscribers are charged reasonable rates for cable service -- not because of rate regulation but because competitors in a thriving marketplace are providing the best of all possible checks on rates. Competition will ensure that subscribers are able to choose the programming they desire -- not because cable operators are responding to government oversight but because cable systems are competing with alternative providers to offer consumers what they want. Competition will ensure that the cable industry grows and prospers -- not because it is a government-regulated monopoly but because it is free to compete with video dialtone, wireless cable, and other multichannel providers, without the shackles of regulation. Competition will also free this Commission of the extremely difficult and resource-intensive job of rate regulation, enabling us to instead spend our time nurturing the many actual and potential competitors in the video marketplace.

The day that competition arrives is a day I anxiously await. In the meantime, the Cable Act of 1992 looms before us, and we will do our best to ensure that its provisions are fully and fairly implemented.

DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (MM Docket Nos. 92-266 and 93-215)

Today, the Commission has adopted its going forward rules as they pertain to launch incentives, packaged *a la carte* offerings, negative option billing and affiliate transactions. Unfortunately, I believe that the launch incentive formula allowing for a two (2) year price cap of $1.50, a channel adjustment of 20¢ per channel and a license fee reserve of 30¢ provides little incentive for the addition of programming to the cable programming service tier(s) (CPSTs). Moreover, the elimination of collective *a la carte* offerings (despite the Commission's ability to create a clearly defined safe harbor) as a viable alternative to the "new product tier" (NPT), amounts to a reversal of prior Commission decisions,[1] and raises grave concerns about the Commission's objectives with regard to cable rate regulation. In my estimation, the Commission has failed in its task to provide a level of certainty and flexibility that would allow the cable industry to confidently develop and the capital market to assess strategic business plans to compete in the rapidly evolving video marketplace, particularly with respect to rapidly emerging technologies. Therefore, while I support the Commission's decision with regard to affiliate transactions and for the most part, negative option billing, my dissatisfaction with the resulting regulatory scheme warrants my unequivocal dissent in this decision.

Since the adoption of the 1992 Cable Act, the Commission has been charged with the unenviable task of developing a regulatory framework for an industry that thrived in a deregulated environment for an extended period of time. The Commission focused its efforts on the reasonableness of cable operators' rates for basic and cable programming service tiers. As the Commission was compelled by the 1992 Cable Act to create a regulatory scheme on an accelerated time frame that ensured the provision of reasonably priced service for cable subscribers, I have been concerned that a level of flexibility and certainty through the benchmark methodology of rate regulation be created.

Indeed, since the adoption of the April 1993 *Order*, I have

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[1] See Rate Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-177, released May 3, 1993, 58 Fed. Reg. 29736 (Separate Statement of Commissioner Andrew C. Barrett); See also Order in MM Docket No. 92-266, FCC 94-28, 59 FR 1743 (Separate Statement of Andrew C. Barrett).

cautioned the Commission to implement rate regulations in an orderly and effective manner. Moreover, I have expressed concern that the failure to heed this warning would serve to: (i) frustrate the integrity of our regulatory process; (ii) increase the potential for unintended consequences and (iii) create false expectations among the consumer public.[2] To that end, I have also stated that the Commission's rate regulation framework must incorporate measures of flexibility that seek to balance industry, consumer and franchising authority concerns while minimizing the uncertainty that has resulted from the rate regulation proceeding, in general, to allow consumers and the industry to develop realistic expectations and business plans.[3]

In September 1993, it came as no surprise that the cable industry diligently adapted to the new regulatory environment. Actions were undertaken by some operators to design strategic service offerings that conformed to our rules. However, it is believed by some at the Commission, that several operators took advantage of the option to offer *a la carte* service offerings solely as a means to evade rate regulation. Yet, early in this proceeding, it was my contention, that as the cable industry lowered rates in accordance with the Commission's rate regulations, consumers might also experience a corresponding reduction in the quantity of packaged cable services that programming vendors and operators would be willing to provide.[4] Further, I have indicated that more program services might need to be offered on an *a la carte* basis or in a variety of bundled "premium channel packages" to recoup the necessary returns.[5] Thus, while I have been concerned about some of the collective *a la carte* offerings, I have not been willing to concede that all were in violation of our rules per se.

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[2]See Order in MM Docket No. 92-266, FCC 93-372 released July 27, 1993, 58 FR 41402 (Concurring in Part and Dissenting in Part Statement of 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 Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance (September 28, 1993).

[3]See Keynote Address by Andrew C. Barrett, Federal Communications Commission, Prentice Hall Law & Business Cable Conference, June 28, 1993. See also 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); Testimony of Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance (September 28, 1993); Order, MM Docket No. 92-266, released February 8, 1994 (Separate Statement of Commissioner Andrew C. Barrett).

[4]See Keynote Address by Andrew C. Barrett, Federal Communications Commission, Prentice Hall Law & Business Cable Conference, June 28, 1993.

[5]Id.

In February 1994, the Commission, among other things, cited fifteen (15) factors in an effort to provide guidance to cable operators with regard to "acceptable" versus "unacceptable" *a la carte* offerings. Moreover, the Commission promulgated a launch incentive plan for the addition of programming services to cable systems. At that time, I indicated that my support of the decision, and in particular, the establishment of the seventeen percent (17%) competitive differential, was based, in large part, on the understanding that it would represent the "[h]ighest point of what I would consider to an acceptable range" for the policy determination.[6] It was also my understanding that the incorporated launch incentive and *a la carte* decisions would be revisited, if necessary, to ensure flexibility, simplicity and certainty for cable operators commensurate with the higher competitive differential on a prospective basis.[7]

Immediately after the release of the March 1994 Order, industry reaction, as reflected by petitioners and commenters in this proceeding, made it clear that the Commission had not provided an allowance that would offer sufficient incentives for cable operators to add new services. Equally compelling were the parties that inquired as to the method for satisfying the *a la carte* factors with some measure of certainty in an effort to provide unregulated packaged offerings. Indeed, the loser was the cable subscriber who, as we have been advised, may not have benefited from increased choices of service offerings that may have been planned by the operators.

In light of the apparent flaws in the Commission's good faith attempt to create balanced incentives, the "industry" was encouraged to develop a compromise proposal with respect to launch incentives and *a la carte* offerings. The "industry" presented "packaged" concessions for these two (2) issues. The first, concession included launch incentives and the second component, included a "safe harbor" for collective *a la carte* offerings. Unfortunately, this contribution by an industry fraught with diverse concerns and viewpoints for operators and programmers has been summarily rejected, and I would argue, unfairly manipulated by this Commission.

My concerns regarding the decision at hand are founded in the inherent lack of flexibility, certainty and simplicity that emanate from the going forward rules. The Commission, under the auspices of its authority to assert jurisdiction over packages of services (including packages of *a la carte* offerings), has spun what can only be described as a "tangled regulatory web". The convoluted

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[6]See Order in MM Docket No. 92-266, FCC 94-28, 59 FR 1743 (Separate Statement of Commissioner Andrew C. Barrett).

[7]Id.

rationale for regulating every aspect of an operator's packaged service offerings remains unsubstantiated and, in my opinion, obfuscates the intention of the 1992 Cable Act. The intricate and complex formula for launching channels on the cable programming service tier was developed to ensure a singular objective--limiting increases in subscriber prices. Finally, instead of providing a level of certainty to allow cable operators and programmers to create more choices for subscribers, they must always remain mindful of the "threat" of rate regulation for virtually all services which they offer.

The "new product tier" was purportedly conceived to offer operators increased flexibility. Yet, for the addition of new services, it is the only choice (save per channel or per program offerings). Indeed, as long as they agree to certain conditions, operators are promised latitude to be creative and innovative in their services offerings on the NPT. They are encouraged to "assume" that the Commission will not assert jurisdiction over the NPT and to take advantage of market demand. Yet, it is the Commission's silence with regard to "acceptable" as opposed to "unacceptable" collective offerings that is deafening.

The freedom that operators are given under the NPT is frustrated by their inability to discern what will trigger rate regulation for the tier(s) of service in the future (*i.e.* a specific number of complaints, public outcry or general concerns by the Commission as the industry adapts to the new regulatory framework). However, it has become abundantly clear that migration from the basic and CPSTs is wholly unacceptable to this Commission. I suggest that this uncertainty that now exists could have been resolved by the introduction of a safe harbor for *a la carte* offerings. In that way, operators would have the flexibility to knowingly elect the regulatory "conundrum" that comes with the NPT or to conclude that collective offerings meeting the criteria of an established safe harbor would best suit their needs.

Ironically, one of the industry's packaged concessions has been seized and it has become an integral part of the Commission's "going forward" decision--no migration of services from either the basic and cable programming services tiers.[8] By disallowing the migration of these services, the Commission has raised several unsettling issues. First, I am concerned that the Commission may be encroaching on operators' freedom of speech as a result of its decision to disallow migration of services as a condition for offering the NPT. I believe that a less restrictive approach (in the form of limited migration) could have been developed to ensure that cable subscribers continue to receive a substantially similar

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[8]Under the revised going forward framework, operators that elect to offer the NPT are only permitted to migrate new or "incubated" services that are added to the tier after September 30, 1994.

level of service while reducing the potential for evasive tactics by operators.

Second, a significant benefit is bestowed upon those existing programming services that are now carried on the regulated tiers. The need to compete with new services in order to remain on the basic and cable programming service tiers has been effectively eliminated under this revised going forward scheme.[9] It appears that the operator's only option for a programming service carried on the basic tier or CPST that seeks to extract exorbitant price increases is to drop that service. I believe that an operator would be given greater flexibility through *a la carte* packages with a safe harbor for limited migration to address this situation. Clearly, the inability to migrate the service to another tier results in a less palatable choice for an operator whose subscribers may view the service as "popular" and is problematic for the subscriber who is forced to pay the higher price.

Third, systems with more than one hundred (100) channels will not be able to take advantage of the NPT. Consequently, we are affording those operators that have taken the initiative to upgrade their facilities and to provide subscribers with increased programming choices with less favorable treatment than those that have waited to implement upgrades. In the end, as more systems upgrade their infrastructure, I believe that this regulatory disparity will become more conspicuous.

Next, I am concerned that the Commission has on the one hand given the industry a sense of freedom to create the NPT, and on the other, cautioned that it will review the going forward rules to determine whether changes are necessary on a prospective basis. The projected sense of freedom by the Commission thus becomes a misnomer and requires operators to, in effect, "guess" about the amount of latitude that they can anticipate.

Further, I believe the launch incentive plan is based on flawed rationale. The Commission assumes that operators will only increase their basic and cable programming services by two (2) channels each year. The basis for this assumption lies with a Commission analysis of industry trends from 1986 to 1992 where operators were found to add an average of 1.92 channels per year. In light of the upgrades that are being proposed by operators seeking to maintain a competitive edge in the video marketplace, and given a variety of potential competitive strategies for particular cable operators, I fail to see the logic of relying on

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[9] I do not wish to imply that these services will not be encouraged to improve their programming, if necessary. I simply mean that they will no longer be subject to concerns about competition that may exist with the introduction of new entrants into the programming marketplace as they vie to be placed on the basic and cable programming service tiers.

past trends in system channel additions to justify constraints on future behavior. Moreover, while the Commission does not limit any operator to adding two (2) channels per year, the Commission's price cap necessarily encourages the addition of only a limited number of channels to both the basic and cable programming service tiers over a three (3) year period.

My misgivings extend to the implementation of these rules. First, the Commission equates the NPT with a CPST, but opts to regulate them differently. The disparate treatment raises questions about the proper methodology that the Commission may use for determining the reasonableness of the rates on the NPT in the event it is deemed appropriate. Second, cable operators that choose to offer the NPT must file rate cards and material. As a result, cable systems that are not now subject to regulation will become so by virtue of their election to offer the NPT. Finally, the Commission has not indicated how it will react to potential complaints from subscribers who are dissatisfied with prices for the NPT or in the event a single cable operator is believed to have acted in "bad faith" under these going forward rules.

I have consistently raised concerns about issues of flexibility, certainty and balance with regard to the regulation of an industry, and in particular, the cable industry, that seeks to realistically compete in today's telecommunications marketplace. Most recently in the video dialtone proceeding, I stated that: (i) the Commission's cost-of-service rules for cable systems will need to be compatible with the identification of direct costs and standards for allowing common costs in the video dialtone context, and (ii) the Commission must establish standards for cable operators to allocate common costs as they upgrade their distribution networks to provide voice services.[10]

I also indicated that our decision to loosen the regulatory constraints on the telephone companies' provision of video services required us to demonstrate greater flexibility in our approach toward the "going forward" and *a la carte* aspects of cable regulation. Unfortunately, I believe this decision does not incorporate the necessary flexibility for cable operators. I am particularly concerned that the Commission has failed to balance its prior decision on the further rate rollback with an allowance for regulatory parity relative to potential multi-channel video competitors. Instead, the going forward rules will present yet another challenge for the cable industry as we nurture the efforts

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[10]See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, released November 7, 1994 (Separate Statement of Commissioner Andrew C. Barrett).

of their competitors.

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Going Forward Rules (MM Docket Nos. 92-266 and 93-215)

Today's decision represents an important piece of a larger puzzle. The cable industry, like the telephone industry, is preparing to undergo a radical transformation, a transition to a competitive market that promises both opportunity and risk.

Our efforts to formulate "going forward" rules must recognize the circumstances, needs, and aspirations of the cable industry. Equally important, we must faithfully carry out our consumer protection responsibilities, as set forth in the 1992 Cable Television Consumer Protection and Competition Act. The rules we adopt today are carefully crafted to encourage the cable industry to do more of what it already does so well, yet also protect consumers against unbridled rate increases. I believe we have struck an appropriate balance.

In my prior life as a media lender, I financed a wide variety of cable and programming companies, large and small. From that experience, I believe that the New Product Tier introduced today embodies the entrepreneurial spirit characteristic of the cable industry. This tier gives cable operators the freedom to design innovative programming packages at market prices that will best attract subscribers and reward operators.

Competition from alternative video delivery media will, in time, allow us to end regulation of cable rates. But "effective competition," as required by the 1992 Cable Act, has not yet arrived. While we manage the transition to competition, we must not stifle the production of quality new program networks nor curtail the operators' flexibility to offer programming in ways that best meet subscribers' demands.

The New Product Tier (NPT) is a win-win-win opportunity. It enables an operator that has the additional capacity to create new packages of programming, knowing that the rules are simple to follow and that the packages will not be price regulated. Programmers benefit from the flexibility offered by the NPT, to offer programming in unique and innovative ways. And consumers benefit from the additional choices NPTs provide at reasonable, market-driven prices.

The structure of the New Product Tier is simple. To offer a New Product Tier, an operator must meet four conditions:

- Preserve the fundamental nature of its regulated tiers.
- Agree not to migrate channels from existing regulated tiers to NPTs.
- Continue to actively market its regulated tiers.
- Affirmatively market its NPTs.

The New Product Tier not only provides operators with price freedom but also reduces administrative burdens. No forms need be filed, nor rate calculations continually revised, in order to offer an NPT.

The New Product Tier is flexible. The range of options available to the operator for structuring its programming packages is broad. A cable operator may offer, as a New Product Tier, existing popular channels "cloned" (not migrated) from the regulated tier along with brand new programming services and price the offering as the operator chooses. For example, "news junkies" may have the option of buying a package of CNN, political talk shows and news programs. A New Product Tier may also be structured as a tier of a la carte offerings, permitting consumers to choose some or all of the services on the tier, again priced at the operator's discretion.

The New Product Tier is innovative. It gives the operator freedom from price regulation and gives the consumer maximum choice. Because New Product Tiers will be offered side by side with price regulated tiers, and therefore compete with them for the consumer's dollar, market pressure, not government regulation, will influence the pricing of NPT offerings. Consumers will be able to choose among packages competing with each other, both in content and price.

But many cable systems lack addressability or have only limited additional capacity. The New Product Tier may be of limited value to them in the near-term. For that reason, the "going forward" order provides incentives to add new services to invigorate existing regulated tiers. We also recognize that many programmers seek the wide audience that regulated tiers provide.

The rules we adopt today provide ample incentive for operators to add new programming to regulated tiers. The data show that cable operators historically have added between two and three new channels per year. The new formula gives an operator the flexibility to add channels at a rate consistent with historical practices.

Most importantly, we want to ensure that, when new programming is added to

regulated tiers, subscribers are not subjected to unreasonable rate increases. Where NPTs are not available, subscribers to regulated tiers have no choice but to pay the higher price attributable to new programming which they may or may not want or drop cable service -- take it or leave it. Today's order reflects the Commission's effort to balance subscriber protections against the needs of operators and programmers.

I am mindful that there will be upward pressure on cable rates every year, from inflation and from increased programming cost pass-throughs from existing program networks, in addition to the increases we permit for new channels. Consumers will not care about the source of the rate increase; they will care deeply about how it affects their pocketbooks. In light of this, I think our rules provide as much flexibility to operators as we can reasonably allow.

The going forward proposal is not complete. While the introduction of New Product Tiers will allow opportunities for future expansion, until we address the proper regulatory treatment of upgrades of cable systems, we have not provided the industry proper incentives for the long term. Additional capacity will be critical for cable to compete with telephone companies in the provision of video programming as well as telephony.

The cable industry promises to be a key player in the development of the National Information Infrastructure. We must move expeditiously to provide operators with the regulatory certainty they need to invest in their infrastructure. Our recent decision on video dialtone makes this all the more imperative. I intend to work diligently toward that end.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

DISSENTING IN PART

Re: In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (MM Docket Nos. 92-266, 93-215)

My overriding goals in this cable "going forward" proceeding have been (1) to provide incentives to cable operators to add new programming services to their systems, consistent with our obligation under the 1992 Cable Act to ensure that cable rates are reasonable, (2) to provide the cable industry with maximum flexibility to respond to consumers, and (3) to provide the industry and the Commission with certainty by adopting clear, understandable rules. I support most of this item because I believe it is consistent with these goals. However, I do not think the going forward price cap structure for regulated tiers (or "channel adjustment formula"), is consistent with these goals, or my most basic regulatory tenet -- simple pragmatic regulation. Therefore, I respectfully dissent to this portion of the item.

The channel adjustment formula we adopt today allows a cable operator a 20 cent per channel adjustment for each new channel added to a regulated tier, subject to a cap. I support the 20 cent mark-up, and believe it will provide needed incentive to an operator to add channels to its regulated tiers.

I have serious concerns about other aspects of the formula, however. Although my colleagues and I have sought to achieve consensus, it has not been possible due to basic philosophical differences. First, I believe the formula is exceedingly complex. Already, members of the cable industry, particularly small operators, have registered complaints with me about the difficulties they have understanding and complying with the current cable rules. I would have preferred a simpler mechanism that is more readily understandable and lends itself to more predictability in its application and effect on rates.

Second, I would have preferred a formula that gives a cable operator the maximum flexibility to respond to consumer demand in its local service area. For example, the level of the "operator's cap" established in this decision is based on an understanding of past practices of the cable industry. While I certainly agree that we should factor past practices into our decision, I do not believe this should be our primary basis on which we make decisions for the future. We should also consider the programming market, as well as new competition entering the video distribution market.

This decision also limits a cable operator's flexibility by imposing a 30 cent "license fee reserve." I am not convinced that this reserve will have the desired effect given the level of the maximum rate increase allowed under the new rules over a three year period. I prefer that this agency avoid that level of regulation.

I have approved the rest of this item. A few other areas deserve comment. This item discusses the treatment of packages of programs offered on a per channel or per program basis. The decision we make here today represents a change from earlier Commission decisions, in that we exert jurisdiction over such packages.

With my lawyer hat on, I have carefully studied the relevant portions of the 1992 Cable Act and the legislative history on this point. Based on my analysis of the Act and congressional intent, I have come to support this portion of the decision because I believe this is the correct reading of the statute. I come to this decision reluctantly. I recognize that some will perceive this as needlessly imposing further government regulation on the cable industry. Nonetheless, I am obliged to effectuate the plain meaning of the statutory text.

My concern about this aspect of the decision is alleviated to some extent by the creation of "new product tiers." Under this scheme, new programming services are packaged and cable operators are allowed to set rates for such packages based on what they believe the market will bear. If an operator offers new product tiers, it must continue to offer its basic and expanded basic tiers of programming, the latter of which are rate regulated to ensure reasonableness under the 1992 Cable Act. I believe the competition between new product tiers and the regulated tiers will result in a reasonable rate being set for the new product tiers. This new scheme is more consistent with my regulatory philosophy because it relies on market forces to set rates.

Finally, I support the provision in this item that seeks to accommodate the particular problems faced by small cable systems. We adopt a special streamlined cost-of-service procedure for small systems that upgrade their headend equipment. It is my hope that this procedure will allow small systems to add new channels so they, too, can offer new programming services to their subscribers.