

FCC MAIL SECTION

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

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FCC 95-42

DISP	In the Matter of	)	
		)	
	Implementation of Sections of the	)	MM Docket No. 92-266
	Cable Television Consumer Protection	)	
	and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215
		)	

**EIGHTH ORDER ON RECONSIDERATION**

Adopted: February 3, 1995;

Released: February 6, 1995

By the Commission:

**I. INTRODUCTION**

1. In this *Eighth Order on Reconsideration* we amend our rules to permit certified local franchising authorities, independent small systems, and small systems owned by small multiple system operators ("MSOs") to enter into alternative rate regulation agreements that comply with the Communications Act of 1934, as amended.<sup>1</sup>

**II. BACKGROUND**

2. Pursuant to the 1992 Cable Act, the Commission has established a comprehensive regulatory framework governing rates for regulated cable services and equipment.<sup>2</sup> Subject to certain limited exceptions, all regulated cable systems generally must

<sup>1</sup> Communications Act of 1934, as amended, 47 U.S.C. § 521 et seq. (Communications Act"). The Cable Television Consumer Protection and Competition Act of 1992 amends Title 6 of the Communications Act. Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 534 (1992) ("the 1992 Cable Act" or "the Cable Act of 1992").

<sup>2</sup> See *Report and Order and Further Notice of Proposed Rulemaking*, ("Rate Order"), MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993); *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-389, 8 FCC Rcd 5585 (1993); *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 (1993); *Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking*, ("Second Reconsideration Order"), MM Docket No. 92-266, FCC 94-

set rates based on a 17% competitive rate reduction from September 30, 1992 levels unless the system justifies rates based on a cost-of-service showing.<sup>3</sup> The 1992 Cable Act requires the Commission to reduce regulatory burdens and the cost of compliance for small systems.<sup>4</sup> Small systems are defined in the statute as systems serving 1,000 or fewer subscribers.<sup>5</sup> Pursuant to that mandate, the Commission has created different regulatory approaches that are available to small systems.

3. For example, an operator that owns more than one small system may establish its unbundled charges for regulated equipment based on the average equipment costs of all its small systems, or only some of them, rather than on a system-by-system basis.<sup>6</sup> Under our interim cost-of-service rules, independent small systems and small systems owned by small MSOs<sup>7</sup> may use simplified forms for purposes of making cost-of-service showings.<sup>8</sup> Small operators, defined as operators serving 15,000 or fewer subscribers and not affiliated with a larger operator, are eligible for transition relief.<sup>9</sup> Instead of setting rates based on a 17% competitive reduction, small operators may maintain their March 31, 1994 rates, with certain

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38, 9 FCC Rcd 4119 (1994); *Third Order on Reconsideration*, ("Third Reconsideration Order"), MM Docket No. 92-266 and MM Docket No. 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994).

<sup>3</sup> 47 C.F.R. § 76.922(b)(1). Interim rules and policies governing a cost-of-service showing are set forth in the *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 93-215, FCC 94-39, 9 FCC Rcd 4527 (1994).

<sup>4</sup> Communications Act § 623(i), 47 U.S.C. §543(i).

<sup>5</sup> *Id.*

<sup>6</sup> 47 C.F.R. § 76.923(l). The Commission may alter this cost averaging approach as a result of our cost studies. See *Second Reconsideration Order* at para. 219, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd at 4227 (1994).

<sup>7</sup> A small MSO is an MSO serving 250,000 or fewer total subscribers that owns only systems with less than 10,000 subscribers each and has an average system size of 1,000 or fewer subscribers. See 47 C.F.R. § 76.922(b)(5)(A).

<sup>8</sup> See *Report and Order and Further Notice of Proposed Rulemaking* at para. 272-279, MM Docket No. 93-215, FCC 94-39, 9 FCC Rcd at 4668-4672 (1994).

<sup>9</sup> 47 C.F.R. § 76.922(b)(4)(A)(i). Low-price systems also are eligible for transition treatment. Low-price systems are those (1) whose March 31, 1994 rate is below their March 31, 1994 benchmark rate or (2) whose March 31, 1994 rate is above their March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below their March 31, 1994 benchmark rate, as determined under FCC Form 1200. 47 C.F.R. § 76.922(b)(4)(B).

adjustments as determined under FCC Form 1200,<sup>10</sup> pending completion of our cost studies.

4. In addition, independent small systems and those owned by small MSOs may elect to make streamlined rate reductions under which they reduce each billed item of regulated cable service as of March 31, 1994 by 14% instead of setting rates based on 17% competitive rate reductions from September 30, 1992 levels.<sup>11</sup> This reduces administrative burdens by eliminating the need for these small systems to complete FCC Forms 1200 and 1205, and by eliminating the requirements to unbundle equipment and installation charges from programming service charges, and to set equipment and installation charges at actual cost.<sup>12</sup>

5. On a going-forward basis, the Commission has provided cable operators an incentive to add new programming. Under the revised rules, all operators may introduce New Product Tiers which they are permitted to price as they elect, subject to certain conditions.<sup>13</sup> They also may add new channels to regulated service tiers and recover a flat mark-up fee, again subject to certain restrictions.<sup>14</sup> Initially, we decided to give small systems an alternative with respect to the pricing of new channels added to regulated tiers. In lieu of recovering the flat mark-up fee for such new channels, our revised rules would have allowed small systems to pass through to subscribers the costs of new headend equipment for adding not more than seven new channels to regulated service tiers over the next three years.<sup>15</sup> The amount the qualifying small system could recover was to be limited to the actual cost of the headend equipment necessary to add a channel, not to exceed \$5,000 per channel, plus the channel's licensing fee, if any.<sup>16</sup> The cost of the headend equipment would be amortized over the useful life of the equipment and small systems will be allowed

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<sup>10</sup> 47 C.F.R. § 76.922(b)(4)(A)(iii).

<sup>11</sup> 47 C.F.R. § 76.922(b)(5)(B). Streamlined rate reductions will be available to small systems pending completion of the Commission's cost studies.

<sup>12</sup> See *Second Reconsideration Order* at paras. 209, 210, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd at 4221-4222 (1994). This administrative relief may be terminated upon completion of cost studies by the Commission and development of average equipment cost schedules.

<sup>13</sup> See *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket No. 92-266 and MM Docket No. 93-215, FCC 94-286, summarized at 59 Fed. Reg. 62614 (December 6, 1994).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

an 11.25% return on the undepreciated investment.<sup>17</sup> Upon reconsideration, we have chosen to permit some smaller systems to take both the flat fee mark-up and the headend adjustment when adding channels to regulated tiers.<sup>18</sup>

6. The Cable Telecommunications Association ("CATA" or "the Association"), the Small Cable Business Association ("SCBA"), and other groups generally believe that our efforts have not produced the intended result of reducing administrative burdens and costs for smaller systems. Preliminarily, industry associations and individual operators assert that small systems face higher costs than other cable operators. In our *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking* we sought comment on definitions of small businesses that could be used to define eligibility for any special rate or administrative treatment this Commission may adopt.<sup>19</sup> In response, a number of commenters point out that smaller systems do not qualify for the volume discounts offered by equipment and program suppliers to larger systems.<sup>20</sup> In addition, commenters observe that a smaller system serving a large rural area faces increased construction costs due to the increased amount of cable that must be installed to reach the entire area and increased operating costs given the greater amount of facilities that must be maintained.<sup>21</sup> Moreover, commenters note that the total costs for which a small system is responsible must be recovered from a small subscriber base. Thus, as Avenue TV Cable points out, although the cost of installing a headend and a mile of cable may not vary significantly from system to system, smaller systems will have fewer subscribers from whom to recover such costs.<sup>22</sup> As CATA succinctly states: "[B]asic mathematics . . . dictates that fixed costs spread out over fewer

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<sup>17</sup> *Id.*

<sup>18</sup> See *Seventh Order on Reconsideration*, MM Docket No. 92-266, FCC 95-8, released January 5, 1995.

<sup>19</sup> *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking ("Fifth Reconsideration Order")*, MM Docket No. 93-215 and MM Docket No. 92-266, FCC 94-234, 9 FCC Rcd 5327 (1994). In a subsequent proceeding we will summarize and address comments regarding whether to retain our existing definitions or adopt new definitions of small operators and small MSOs for purposes of reducing regulatory burdens.

<sup>20</sup> See, e.g., Joint Comments of Cable Operators ("Cole") at 6; Comments of Avenue TV Cable *et al.* ("Avenue") at 5, 9-10. These comments were submitted in response to the *Fifth Reconsideration Order*, MM Docket No. 92-266 and MM Docket No. 93-215, FCC 94-234, 9 FCC Rcd 5327 (1994). See n. 19, *supra*.

<sup>21</sup> See, e.g., Avenue Comments at 4-5.

<sup>22</sup> Avenue Comments at 5.

subscribers produces less revenue."<sup>23</sup> Although our current rules take into account the number of subscribers a system has, the commenters are unanimous that the rules do not do so adequately.

7. Separately, commenters suggest that the cost of complying with rate regulation is itself unduly burdensome for certain smaller systems. These comments indicate that smaller systems lack the in-house staff necessary to analyze and comply with existing rules and lack the resources to hire outside legal and accounting assistance to handle such matters.<sup>24</sup> Again, the comments reflect the fact that while the cost of understanding and completing rate regulation forms, like other fixed costs, may be comparable among systems of varying sizes, a smaller system must spread these costs among a limited subscriber base, thus raising the effective cost of compliance for these systems.<sup>25</sup> Accordingly, commenters assert that our rules impinge on their ability to earn a profit, and that time and money spent in following our regulations adversely affect their ability to provide and improve service to their subscribers.

8. Compounding these problems, according to some commenters, is the reduced opportunity for revenue that small systems face as the result of numerous factors. These factors include the reduced demand for local advertising on their systems and the lower per-subscriber revenues that smaller systems typically recover. These factors often are amplified when small systems operate in rural areas where incomes are lower.<sup>26</sup> The comments reflect a need for prompt relief from these burdens for certain small systems.<sup>27</sup>

9. CATA further asserts that complexities in our rules, and the cost of enforcing them, have discouraged local franchising authorities in smaller communities from seeking certification.<sup>28</sup> While CATA highlights the fact that, even in these circumstances, the mere potential of rate regulation hinders small systems in their attempts to obtain financing and capital, thus increasing their cost of doing business, we are equally concerned that there are local franchising authorities which desire to regulate basic rates but which lack the resources to do so in accordance with our existing rules.

10. Based on these factors, these groups have urged the Commission to adopt

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<sup>23</sup> CATA Comments at 7.

<sup>24</sup> Cole Comments at 6.

<sup>25</sup> Avenue Comments at 6-7.

<sup>26</sup> Avenue Comment at 10-14.

<sup>27</sup> SCBA Comments at 14-15.

<sup>28</sup> See Letter from CATA to Chairman Reed E. Hundt, dated September 23, 1994 ("CATA letter").

different and less stringent rules for small cable companies. For example, SCBA states that small cable companies need benchmark adjustments to offset higher costs of programming and lower amounts of unregulated revenue, and that under benchmark regulation, small systems must be able to recover headend costs and high per subscriber capital costs when adding channels.<sup>29</sup> In comments and in a letter to Chairman Reed E. Hundt, CATA proposes an alternative rate regulation scheme that differs significantly from the present method of rate regulation which CATA, like the other commenters, claims is too complicated and burdensome.<sup>30</sup>

### III. THE CATA PROPOSAL

11. CATA's proposal is as follows: The Commission should permit local franchising authorities and small systems to create their own alternative rate regulation plan. CATA states that alternative regulation should be available to all small systems of 1,000 or fewer subscribers regardless of whether they are currently subject to regulation and without regard to system ownership or affiliation with an MSO of any size. CATA envisions that the parties could agree to regulate rates for the basic service and cable programming service ("CPS") tiers, as well as going-forward, inflation, and external cost issues. Rate increases also could be agreed to in advance. If a small system and a local franchising authority entered into an alternative regulation plan affecting the CPS tier, subscribers could still file a rate complaint with the Commission.<sup>31</sup> In reviewing such a complaint, CATA asserts that the Commission should give "great weight" to local franchising authority determinations regarding rates for the CPS tier. If the Commission determines that a local franchising authority has made a reasonable attempt to apply the 1992 Cable Act's statutory criteria, the Commission would dismiss the complaint. To relieve burdens on small systems, CATA suggests that such alternative agreements need not be based on the Commission's benchmark/cost-of-service rules or forms but would be required to meet the regulatory criteria of the 1992 Cable Act. Thus, for an alternative rate regulation agreement to be effective, a local franchising authority would first be required to evaluate certain factors, discussed below, when agreeing to the rates charged by the eligible small system. A small system could appeal to the Commission a rate decision reached under an alternative regulatory plan. As part of alternative regulation, a local franchising authority would certify with the Commission simply by providing written notification that it plans to regulate rates using an alternative plan, and that it has procedures in place to provide interested parties access to the process. It would not submit an FCC Form 328.

12. Under CATA's proposal, both the small system and the local franchising

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<sup>29</sup> See Supplemental Comments of SCBA.

<sup>30</sup> See CATA letter.

<sup>31</sup> Section 623(c)(1)(B) of the Communications Act requires the Commission to resolve such subscriber complaints. 47 U.S.C. § 543(c)(1)(B).

authority would have to consent to the alternative regulatory framework. If the parties could not agree on an alternative approach, the local franchising authority would regulate rates, if at all, using Commission rules.

#### IV. DISCUSSION

##### A. Requirements Under The Communications Act

13. Based on comments received in response to the *Fifth Reconsideration Order*, and in light of other pending petitions for reconsideration, we reconsider on our own motion the *Second Reconsideration Order* as it relates to rate regulation of small systems.<sup>32</sup> We believe that, subject to modifications discussed below, the alternative rate regulation framework proposed by CATA is consistent with the spirit and the letter of the Communications Act.<sup>33</sup>

14. We believe that alternative rate regulation agreements for small systems will further the congressional goal of reducing administrative burdens on small systems while ensuring reasonable rates. With respect to rates, our fundamental duty under the Communications Act and, more particularly, the 1992 Cable Act, is to adopt regulations that ensure the reasonableness of the rates charged to subscribers of systems that are not subject to effective competition<sup>34</sup> while minimizing the regulatory burdens imposed upon all parties,

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<sup>32</sup> *Second Reconsideration Order*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994). In light of pending petitions for reconsideration of the *Second Reconsideration Order*, the Commission retains jurisdiction to grant reconsideration on its own motion. See 47 U.S.C. § 405; 47 C.F.R. § 1.108; *Central Florida Enterprises v. FCC*, 598 F.2d 37, 48, n. 51 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979); *Rebecca Radio of Marco*, 5 FCC Rcd 2913, 2914, n. 8 (1990). See also *Order*, MM Docket No. 92-266, FCC 93-372, n. 1, summarized at 41 Fed. Reg. 41042 (August 2, 1993).

<sup>33</sup> SCBA supports the CATA plan; however, it also states that many small system issues will not be resolved by adoption of an alternative rate regulation scheme. SCBA urges the Commission to continue to review SCBA's proposals for addressing those issues, and to provide small systems with additional administrative and substantive relief from the benchmark/cost-of-service rules. See Supplemental Comments of SCBA. See also para. 10, *supra*. We agree that many issues concerning small systems remain pending, and we will continue to review the proposals of SCBA and others in order to create permanent regulations that alleviate small system burdens.

<sup>34</sup> Communications Act § 623(b)(1), 47 U.S.C. § 543(b)(1) (regulation of basic tier rates); Communications Act § 623(c)(1), 47 U.S.C. § 543(c)(1) (regulation of cable programming services).

including cable operators and local franchising authorities.<sup>35</sup> Thus, fulfillment of the statute requires us to balance these competing objectives. Accordingly, rather than dictating specific rules of general applicability, Congress granted the Commission the discretion to "adopt formulas or other mechanisms and procedures in complying" with its duties under the Communications Act.<sup>36</sup> In crafting these provisions, the overriding intent of Congress was to ensure that the Commission had the flexibility it needed to address the many considerations that Congress knew the Commission would face in adopting a regulatory scheme to govern rates charged by cable operators:

Rather than requiring the Commission to adopt a formula to set a maximum rate for basic cable service, the conferees agree to allow the Commission to adopt formulas or other mechanisms and procedures to carry out this purpose. The purposes of these changes is to give the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process.<sup>37</sup>

15. We believe that, in general, our rules strike the balance that Congress intended us to achieve in weighing the sometimes conflicting objectives of ensuring reasonable rates and reducing regulatory burdens. However, the record in these dockets indicate that our rules of general applicability may be inappropriate for the smallest of cable systems. From the perspective of these small systems, our general rules with respect to the regulation of rates can sometimes fail to fulfill the statutory mandate to reduce regulatory burdens. For some small systems, attempting to spread the cost of compliance over a limited subscriber base may, in individual cases, impede the growth and development of those systems and threaten to frustrate the intent of Congress in enacting the 1992 Cable Act "to ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems . . . ."<sup>38</sup>

16. Congress acknowledged the special circumstances faced by small systems by specifically directing the Commission to reduce the administrative burdens and cost of compliance for them.<sup>39</sup> We believe that Section 623(i) of the Communications Act authorizes us to devise an alternative scheme with respect to eligible small systems that meets the statutory directive to reduce regulatory burdens imposed upon them. We believe that this goal can best be achieved by permitting local franchising authorities and eligible systems

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<sup>35</sup> Communications Act § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A).

<sup>36</sup> Communications Act § 623(b)(2)(B), 47 U.S.C. § 543(b)(2)(B).

<sup>37</sup> H. Rep. 862, 102d Cong., 2d Sess. 62 (1992).

<sup>38</sup> 1992 Cable Act § 2(b)(3).

<sup>39</sup> Communications Act § 623(i), 47 U.S.C. 543(i).

discretion to opt, by mutual agreement, for an alternative form of rate regulation that will involve a traditional bargaining process guided by the specific criteria set forth in the Communications Act as being relevant to the establishment of rates for basic services<sup>40</sup> and cable programming services.<sup>41</sup> This framework will free both the cable operator and the local franchising authority from the burdens and costs of analyzing and applying our benchmark and cost-of-service rules.<sup>42</sup>

17. While minimizing regulatory burdens, the alternative rate regulation agreements also will further the goal of ensuring reasonable rates by requiring local franchising authorities to take into account specific factors, identified by Congress, when imposing rate regulations for both the basic service tier and cable programming service tiers. With respect to basic service, those criteria are:

[1] the rates for cable systems, if any, that are subject to effective competition;

[2] the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B) [Communications Act § 623 (b)(7)(B), 47 U.S.C. § 543(b)(7)(B)], and changes in such costs;

[3] only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

[4] the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

[5] the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

[6] any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under

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<sup>40</sup> Communications Act § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C).

<sup>41</sup> Communications Act § 623(c)(2), 47 U.S.C. § 543(c)(2).

<sup>42</sup> See Communications Act § 623(i), 47 U.S.C. 543(i) (mandating reduced burdens for small systems); Communications Act § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A) (mandating reduced burdens for franchising authorities).

the franchise; and

[7] a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1) [Communications Act § 623 (b)(1), 47 U.S.C. § 543(b)(1)].<sup>43</sup>

18. Among other factors, the criteria to be used in establishing the rates to be charged for cable programming services are:

[1] the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

[2] the rates for cable systems, if any, that are subject to effective competition;

[3] the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

[4] the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;

[5] capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

[6] the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.<sup>44</sup>

19. We believe the rules we adopt here properly take into account these statutory factors. As a preliminary matter, we note that alternative rate regulation agreements will present an option for local franchising authorities and small systems. Both parties remain free to insist on analysis under our existing rules, which we have already determined take into account the statutory factors. In addition, we believe that small systems and local franchising authorities in markets where small systems provide service are likely to be familiar with the facts and circumstances underlying the factors for their particular markets. Moreover, the statutory factors must be taken into account in negotiating alternative rate regulation agreements.

20. Given its knowledge of local conditions and its experience with the cable operator, the local franchising authority often will be in the best position to assess the relative

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<sup>43</sup> Communications Act § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C) .

<sup>44</sup> Communications Act § 623(c)(2), 47 U.S.C. § 543(C)(2).

importance of these criteria and to gather the relevant facts accordingly. Moreover, since a small system is likely to be located in an area with a relatively small population, we expect that the local franchising authority will be particularly responsive to the needs and desires of cable subscribers. This circumstance should give the local franchising authority substantial encouragement and leverage to guard against any attempt by the cable operator to view the alternative framework as an avenue to achieve unreasonable rates. Indeed, unless and until an alternative rate agreement is reached, the local franchising authority will always be able to rely upon the general benchmark/cost-of-service rules, further ensuring the reasonableness of the rates permitted under an alternative rate regulation agreement. Thus, we conclude that rates subject to alternative rate regulation agreements by small systems will be reasonable.

21. For these reasons, we conclude that in addition to furthering the Communications Act's mandates to reduce regulatory burdens, alternative rate regulation agreements also are consistent with the 1992 Cable Act's intent to ensure that cable operators' rates are reasonable. Further, we believe that alternative rate regulation agreements will assist the Commission in ensuring that rates for cable programming services are not unreasonable.<sup>45</sup> As part of the alternative process, certified local franchising authorities are required to take into account relevant statutory factors to ensure that rates for CPS tiers are not unreasonable before entering into the negotiated agreement.<sup>46</sup> The Commission, however, shall retain jurisdiction over cable programming service rates.<sup>47</sup> Accordingly, we will establish an alternative form of rate regulation for independent small systems and small systems owned by small MSOs based upon CATA's suggestions.<sup>48</sup> We limit availability of this alternative process to independent small systems and small systems owned by small MSOs because we believe that larger systems have the financial and administrative resources necessary to comply with our benchmark and cost-of-service rate regulations. However, we may modify our eligibility standards in response to action we take in our proceeding on system size definitions.<sup>49</sup>

22. Although the alternative regulatory framework we adopt today contemplates a consensual, negotiated agreement between a qualifying cable operator not subject to effective competition and a local franchising authority, this plan borrows heavily from our existing

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<sup>45</sup> See Communications Act § 623(c)(1), 47 U.S.C. § 543(c)(1).

<sup>46</sup> See *infra*, para. 26.

<sup>47</sup> See Communications Act § 623(c)(2), 47 U.S.C. § 543(c)(2).

<sup>48</sup> A number of commenters have argued that our rules should not distinguish between small systems on the basis of affiliation with larger systems or MSOs. We will resolve that issue as part of our comprehensive treatment of system size definitions. See n. 19, *supra*.

<sup>49</sup> See *Fifth Reconsideration Order*, MM Docket No. 92-266 and MM Docket No. 93-215, FCC 94-234, 9 FCC Rcd 5327 (1994).

rules.<sup>50</sup> As discussed below, the local franchising authority must be certified in accordance with our standard procedures. Before entering into an alternative rate regulation agreement, the local franchising authority must take into account the relevant criteria specified by Congress and must provide for public notice and comment. Finally, all alternative rate regulation agreements will be subject to Commission review, as mandated by the Communications Act.<sup>51</sup> For data collection purposes, and to assist the Commission in evaluating complaints, eligible cable operators must file with the Commission a copy of the operative alternative rate regulation agreement within 30 days after its effective date.

23. We have previously interpreted Section 623(j) of the Communications Act to preclude grandfathering rate agreements entered into after July 1, 1990, in part because we concluded that grandfathering such agreements would conflict with the 1992 Cable Act's intent to abrogate rate agreements entered into after July 1, 1990.<sup>52</sup> The rules we adopt today, permitting certified local franchising authorities to enter into agreements with qualifying cable operators with respect to rates, will be applied in the context of our existing cable rate regulation rules. These rules will provide a framework consistent with the statute, under which any such agreements will be negotiated. In addition, our rules will require local franchising authorities to take into account specific factors identified by Congress when determining rates for both basic and CPS tiers. In light of this requirement, we find such alternative rate agreements, developed in accordance with the statutory factors Congress identified for establishing rules to ensure that basic rates were reasonable and that CPS rates were not unreasonable, consistent with the Communications Act. As such, these agreements do not pose the kinds of conflicts with the 1992 Cable Act that we previously identified when we interpreted Section 623(j) as obviating rate agreements entered into after July 1, 1990.

#### **B. Alternative Rate Agreements**

24. As with any local franchising authority seeking to enforce rate regulations, a local franchising authority that elects to regulate pursuant to an alternative rate agreement must file the certification required by Section 623(a)(3) of the Communications Act and our rules.<sup>53</sup> The certification process shall be governed by our existing rules applicable to local

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<sup>50</sup> See Communications Act § 623(a)(1), 47 U.S.C. § 543(a)(1).

<sup>51</sup> See Communications Act § 623(c)(1)(B), 47 U.S.C. § 543(c)(1)(B).

<sup>52</sup> Communications Act § 623(j), 47 U.S.C. § 543(j). See *Rate Order*, 8 FCC Rcd at 5926 (1993).

<sup>53</sup> 47 C.F.R. § 76.910. Local franchising authorities electing to enter into alternative rate regulation agreements shall properly complete and file FCC Form 328 with the Commission. CATA suggests that a local franchising authority could certify by providing written notification to the Commission that it had agreed with a qualifying system to opt for alternative rate regulation, and that it will provide a reasonable opportunity for interested

franchising authorities who wish to regulate cable operators according to the benchmark and cost-of-service rules.<sup>54</sup> No alternative rate regulation agreement will be effective until the effective date of the certification.<sup>55</sup> However, this does not preclude a local franchising authority that has yet to be certified from entering into an alternative rate agreement that is conditioned upon the effectiveness of the local franchising authority's certification. Alternatively, the parties may wait until after the franchising authority is certified to begin their negotiations. A local franchising authority that already is certified by the Commission may enter into an alternative rate agreement with the cable operator at any time. We note that the cable operator will be subject to the standard benchmark/cost-of-service rules upon the expiration of an alternative rate agreement. Thus, the local franchising authority shall accept as reasonable the basic service rate in effect at the time the agreement expires and may apply benchmark/cost-of-service rules on a going-forward basis to determine the reasonableness of proposed changes to basic service rates stemming from external costs, inflation, and the addition, deletion, or substitution of channels.<sup>56</sup>

25. The alternative approach may be pursued only by agreement of both the cable operator and the local franchising authority. To ensure maximum freedom from regulatory constraints, we will not establish any requirements to control the negotiation process. We note, however, that the scope of alternative agreements is limited exclusively to the regulation of rates charged for basic service and CPS tiers and the equipment used to receive these tiers.<sup>57</sup> Moreover, the intention of the alternative framework is not only to ease the cost of

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parties to make their views known. See CATA Letter. This suggested approach differs little from our current rules (which require completion and filing of one-page form), except that the Commission would be informed at the time a local franchising authority certifies that it is electing alternative rate regulation. We do not believe that local franchising authorities will necessarily have made that decision at the time they seek certification. We do not wish to cut short the period of time in which local franchising authorities have to consider the best approach to rate regulation. As our current rules place no greater burden on local franchising authorities than would CATA's approach, we decline to adopt CATA's suggestion.

<sup>54</sup> 47 C.F.R. § 76.910.

<sup>55</sup> Communications Act § 623(b)(4), 47 U.S.C. § 543(b)(4).

<sup>56</sup> See 47 C.F.R. §§ 76.922(d)(3)(x), 76.922(d)(3)(xi), 76.922(e), 76.923.

<sup>57</sup> As part of alternative rate regulation, certified local franchising authorities may not enforce state/local negative option billing laws that conflict with federal negative option billing rules. See 47 C.F.R. § 76.981. See also *Memorandum Opinion & Order*, LOI-93-14, DA 95-60 (Cab. Serv. Bur. Jan. 20, 1995); *Memorandum Opinion & Order*, LOI-93-2, DA 95-61 (Cab. Serv. Bur. Jan. 20, 1995); *Consolidated Memorandum Opinion and Order*, LOI-93-1, *et al.*, DA 95-106 (Cab. Serv. Bur. Jan. 25, 1995). There are numerous provisions of federal law which may not be waived, even by agreement of the local

compliance with our rules but to ensure that eligible small systems are not required to reduce rates more than required by those rules. Therefore, an alternative rate agreement shall be unenforceable if it requires the cable operator to charge rates lower than would be permitted under the benchmark or cost-of-service rules.

26. In establishing rates, the local franchising authority must take into account the statutory criteria set forth in Sections 623(b)(2)(C) and (b)(3) of the Communications Act with respect to rates for basic services and equipment, and the criteria identified in Section 623(c)(2) of the Communications Act with respect to the rates for cable programming services and equipment. Based upon our own consideration of those criteria, we agree with CATA that, with respect to eligible small systems, the local franchising authority is in the best position to assess the weight to be given each element as it pertains to a particular cable operator in a specific franchise area.

27. Section 623(a)(3)(C) of the Communications Act requires a local franchising authority to "provide a reasonable opportunity for consideration of the views of interested parties" in the course of rate regulation proceedings.<sup>58</sup> Although this provision is applicable to rate proceedings regardless of whether the alternative procedure is followed, we expect this provision to be particularly significant in the context of alternative rate regulation agreements. Active involvement by interested parties at an early stage of the proceedings, i.e., prior to final adoption of an agreement, should reduce the occurrence of complaints after the alternative agreement is implemented. Thus, the local franchising authority shall provide a reasonable opportunity for comment by interested parties, including subscribers, and, based upon its consideration of such comments, modify the agreement to the extent it deems appropriate before submitting the proposal to the cable operator. The local franchising authority need solicit public comment only once and thus is not precluded from entering into an alternative agreement that differs from a proposal that is presented for public comment.

### C. Dispute Resolution

28. Once a cable operator is subject to rate regulation, the Communications Act and our rules provide various mechanisms for resolving disputes regarding rates and the enforcement of regulations by local franchising authorities. Subscribers and other interested parties may appeal to the Commission a rate decision made by a certified local franchising

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franchising authority and the small system, unless waivers are provided for in the Commission's rules. These provisions include, but are not limited to, geographically uniform rates structures, tier buy-through prohibitions, technical standards, must-carry obligations, and retransmission consent. See 47 C.F.R. §§ 76.984, 76.921, 76.605, 76.56, 76.64.

<sup>58</sup> The franchising authority must certify to the Commission that its procedural law and regulations provide for such an opportunity. See Communications Act § 623(b)(3)(C), 47 U.S.C. § 543(b)(3)(C); 47 C.F.R. § 76.910.

authority concerning the basic service tier.<sup>59</sup> Our rules also provide for Commission resolution of complaints regarding rates for CPS tiers.<sup>60</sup> The Commission also may review disputes between cable operators and certified local franchising authorities relating to the administration of regulations governing basic service tier rates.<sup>61</sup>

29. An appeal of a local franchising authority decision approving an alternative rate regulation agreement as it applies to basic service tier rates may be filed with the Commission under our regular procedures.<sup>62</sup> Since we have determined that the agreed upon rate is by definition a reasonable rate, the issue before the Commission will be whether the small system is charging the agreed upon rate and whether the agreement was entered into consistent with our requirements.<sup>63</sup>

30. We also believe it would be useful for potential complainants regarding CPS rates to attempt to resolve their complaints with the local franchising authority when CPS rates are subject to an alternative rate regulation agreement. Given the local franchising authority's role as a party to the agreement, we believe that many CPS rate disputes can be resolved at that level. Thus, we will require as a prerequisite to a CPS complaint to the Commission involving an alternative rate regulation agreement that the complainant provide evidence that he or she was denied the requested relief from the local franchising authority. As with basic service rates, in an FCC complaint the Commission will determine whether the rates are consistent with the agreement and our requirements.<sup>64</sup>

31. The Commission will resolve all CPS rate complaints pending at the time an alternative rate regulation agreement becomes effective under rules in effect at the time the rates were charged. Parties to an alternative rate regulation agreement must abide by the Commission's decision regarding appropriate remedies for unreasonable rates charged prior to the effective date of an alternative rate regulation agreement. However, the parties remain at liberty to determine reasonable CPS rates to be charged upon the effective date of an alternative rate regulation agreement. We do not believe this will hinder the negotiation process or implementation of an alternative rate regulation agreement because both local

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<sup>59</sup> 47 C.F.R. § 76.944.

<sup>60</sup> 47 C.F.R. § 76.950.

<sup>61</sup> 47 C.F.R. § 76.944.

<sup>62</sup> *Id.*

<sup>63</sup> Our procedural requirements are particularly important here where the reasonableness of the rates is based not on an objective standard but on a negotiation process. In addition, we would not countenance alternative rate regulation agreements that were illegally obtained.

<sup>64</sup> See n. 63, *supra*.

franchising authorities and cable operators are served with copies of FCC Form 329 complaints filed with the Commission by a subscriber and will know the status of any complaints at the time negotiations commence. In addition, since entering into an alternative agreement is voluntary, the terms of the agreement shall be binding as between the cable operator and the local franchising authority such that neither party shall be permitted to seek from the Commission relief that is inconsistent with the agreement. Thus, a local franchising authority may not challenge a rate permitted under the terms of the agreement and a cable operator may not seek to increase its rates above what the agreement permits.

## V. Regulatory Flexibility Act Analysis

32. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's final analysis with respect to the *Eighth Order on Reconsideration* is as follows:

33. Need and purpose of this action. The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992), pertaining to rate regulation, adopts revised rules and procedures intended to ensure that cable services are offered at reasonable rates with minimum regulatory and administrative burdens on cable entities.

34. Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the *Rate Order*.<sup>65</sup>

35. Significant alternatives considered and rejected. In the course of this proceeding, petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. The Commission has attempted to accommodate the concerns expressed by these parties. In this *Order*, the Commission is providing relief to small systems and certified local franchising authorities by permitting them to enter into alternative rate regulation agreements that do not require completion of any forms.

## VI. Paperwork Reduction Act

36. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the

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<sup>65</sup> See *Rate Order*, 8 FCC Rcd 5631 (1993).

Act.

FCC MAIL SECTION

**VII. Ordering Clauses**

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37. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303 (r), 612, and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, and 543 the rules, requirements and policies discussed in this *Eighth Order on Reconsideration*, ARE ADOPTED and Sections 76.934 and 76.950 of the Commission's rules, 47 C.F.R. Section 76.934 and 47 C.F.R. Section 76.950 ARE AMENDED as set forth in Appendix A.

38. IT IS FURTHER ORDERED that, the requirements and regulations established in this decision shall become effective thirty days after publication in the Federal Register, with the exception of new reporting requirements which will become effective on that date or as soon thereafter as they may be approved by the Office of Management and Budget.

FEDERAL COMMUNICATIONS COMMISSION

*William F. Caton*  
William F. Caton  
Acting Secretary

## APPENDIX A

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 76.934 is amended to add section (f):

#### § 76.934 Small Systems and Small Operators

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##### (f) Alternative rate regulation agreements.

(1) Local franchising authorities, certified pursuant to § 76.910 of this subpart, independent small systems, and small systems owned by small multiple system operators as defined by §§ 76.901 and 76.922(b)(5)(A) of this subpart may enter into alternative rate regulation agreements affecting the basic service tier and the cable programming service tier. (i) Small systems must file with the Commission a copy of the operative alternative rate regulation agreement within 30 days after its effective date.

(2) Alternative rate regulation agreements affecting the basic service tier shall take into account the following: (i) the rates for cable systems that are subject to effective competition; (ii) the direct costs of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to §§ 76.56 and 76.64 of this subpart, and changes in such costs; (iii) only such portion of the joint and common costs of obtaining, transmitting, and otherwise providing such signals as is determined to be reasonably and properly allocable to the basic service tier, and changes in such costs; (iv) the revenues received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier; (v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers; (vi) any amount required to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and (vii) a reasonable profit.

The rate agreed to in such an alternative rate regulation agreement shall be deemed to be a reasonable rate.

(3) Alternative rate regulation agreements affecting the cable programming service tier shall take into account, among other factors, the following: (i) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors; (ii) the rates for cable systems, if any, that are subject to effective competition; (iii) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices; (iv) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis; (v) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and (vi) the revenues received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned. The rate agreed to in such an alternative rate regulation agreement shall be deemed to be a reasonable rate.

(4) Certified local franchising authorities shall provide a reasonable opportunity for consideration of the views of interested parties prior to finally entering into an alternative rate regulation agreement.

(5) A basic service rate decision by a certified local franchising authority made pursuant to an alternative rate regulation agreement may be appealed by an interested party to the Commission pursuant to §76.944 as if the decision were made according to §§ 76.922 and 76.923.