

FCC MAIL SECTION

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

FCC 95-43

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

MM Docket No. 92-266

**NINTH ORDER ON RECONSIDERATION**

Adopted: February 3, 1995

Released: February 6, 1995

By the Commission:

**I. Introduction**

1. In this Ninth Order on Reconsideration, the Commission on its own motion reconsiders the provision in its *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking ("Second Reconsideration Order")*<sup>1</sup> which prohibits small systems and low-price systems that have been provided with transition relief to adjust their transition rates to reflect increases in inflation.

**II. Inflation Adjustments for Systems Eligible for Transition Relief**

**A. Background**

2. In the *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266 ("*Rate Order*"), we developed a benchmark formula for the purpose of establishing initial rates for regulated services.<sup>2</sup> Under the benchmark approach, regulated

<sup>1</sup> *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994).

<sup>2</sup> *Report and Order and Further Notice of Proposed Rulemaking ("Rate Order")*, MM Docket No. 92-266, 93-177, 8 FCC Rcd 5631 (1993) at para. 14 n.29, para. 387, n.946.

cable systems were required to use a formula established to calculate an applicable benchmark -- an estimate of the rate that a cable system with similar characteristics, but subject to effective competition, would charge.<sup>3</sup> Cable systems whose rates exceeded the applicable benchmark were required to reduce their rates either to the benchmark or by 10%, whichever reduction was less.<sup>4</sup> The 10% "competitive differential" represented the average difference that the Commission determined existed between the rates of competitive and noncompetitive systems.<sup>5</sup> For those cases in which the benchmark approach may not produce fully compensatory rates, operators were given the option of establishing rates based on costs pursuant to individual cost-of-service showings.<sup>6</sup>

3. In the *Second Order on Reconsideration*, we refined the econometric model, recalculated the competitive differential, and concluded that a competitive differential of 17% more accurately estimates the difference between effectively competitive and noncompetitive cable rates.<sup>7</sup> Accordingly, we required most systems with rates above the benchmark to either reduce their regulated rates to a level that represented their September 30, 1992 regulated revenues, reduced by 17% (mitigated by annual inflation increases, changes in external costs and changes in the number of programming channels) or to submit a cost-of-service showing supporting higher rates.<sup>4</sup> To compute this "full reduction rate," cable operators were required to take their September 30, 1992 regulated revenues per subscriber and subtract 17%.<sup>5</sup> After reducing their September 30, 1992 regulated revenues per subscriber by 17%, operators added adjustments for the following elements: (1) the inflation that occurred between October 1, 1992 and September 1, 1993; (2) changes in external costs; and (3) changes that resulted from the addition or deletion of program channels to regulated service tiers.<sup>6</sup>

4. We granted two classes of cable operators transition relief by not requiring them to implement the full 17% reduction rate, pending a review of such operators' prices and costs. The first category of systems that were provided with transition relief is systems

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<sup>3</sup> *Id.* at para.

<sup>4</sup> *Id.* at para.

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

<sup>6</sup> *Rate Order* at paras. 258-265.

<sup>7</sup> *Second Order on Reconsideration* at para. 2.

<sup>4</sup> *Id.* at para. 109.

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

<sup>6</sup> See 47 C.F.R. § 76.922(d)-(e).

owned by "small operators," defined as operators serving 15,000 or fewer subscribers and not affiliated with a larger operator.<sup>7</sup> Systems owned by small operators were not required to reduce rates by 17%.<sup>8</sup> Rather, these operators were allowed to use the permitted rate charged on March 31, 1994 to establish initial restructured rates, and adjust accordingly to reflect external costs until we completed our study of prices and costs experienced by small operators.<sup>9</sup>

5. The second category of systems that were provided with transition relief is systems that charge relatively low prices for regulated services. Low-price systems are defined as systems (1) whose March 31, 1994 rates were below the benchmark rate or (2) whose March 31, 1994 rates were above their March 31, 1994 benchmark rates but whose March 31, 1994 full reduction rates are below their March 31, 1994 benchmark rates as determined under FCC Form 1200.<sup>10</sup> During the transition period, systems whose March 31, 1994 rates were below the benchmark rate had their rates capped at March 31, 1994 levels.<sup>11</sup> Systems whose March 31, 1994 rates were above the benchmark, but whose full reduction rates were below the benchmark were only required to reduce their rates to, but not below, the benchmark.

6. We stated that we would not require small cable operators and low-price systems that were provided with transition relief to make full competitive rate reductions until we collected and analyzed data about such operators' prices and costs, and determined whether the competitive rate reduction was appropriate.<sup>12</sup> We stated that after the Commission staff

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<sup>7</sup> *Id.* at paras. 109-110, 117-122.

<sup>8</sup> *Id.* at para. 127.

<sup>9</sup> *Id.* at paras. 132-133.

<sup>10</sup> *Id.* at paras. 111, 123-126.

<sup>11</sup> *Id.* at para. 127.

<sup>12</sup> *Id.* at paras. 132-133. We adopted the transition approach for cable systems owned by small operators because there was evidence that smaller operators may face higher than average costs, although due to the absence of industry-wide cost data, we were unable to conclude that small operators face systematically higher costs. *Id.* at para. 118. We also expressed concern that some small operators may not have the financial resources to withstand the impact of a significant rate reduction. *Id.*

We adopted the transition approach for low-price systems because these systems were charging comparatively low prices when measured against other noncompetitive systems. *Id.* at para. 124. Although we did not find conclusive evidence that low-price systems are not exercising market power, we expressed concern that, because their prices are significantly

completes a cost study "in the near future" we would require systems eligible for transition relief to make the full reduction unless the analysis reveals that application of the 17% competitive differential to these systems is inappropriate.<sup>13</sup>

7. Systems entitled to transition relief have been permitted to increase their rates to reflect increases in external costs and a per channel adjustment when increasing the number of channels.<sup>14</sup> We decided not to allow such systems, however, to increase their transition rates to reflect increases in inflation until the transition rate equals their full reduction rate.<sup>15</sup> We determined that because the full reduction rate rises with inflation, as well as with changes in external costs and channel changes, a transition rate system's hypothetical full reduction rate may eventually exceed the transition rate.<sup>16</sup> We decided, therefore, that if a system's transition rate and the full reduction rate became equal, that system would be entitled to take advantage of inflation adjustments.<sup>17</sup>

8. We also stated that after we have determined whether we should require transition relief operators to reduce their rates in accordance with an appropriate competitive differential, those systems will be entitled to an aggregate inflation adjustment equal to the GNP-PI inflation adjustments for the period beginning October 1, 1992 through the most recent June 30.<sup>18</sup> For those systems that have already received some inflation adjustment because their hypothetical full reduction rate exceeded their transition rate, we said that the system will receive the net of the aggregate inflation adjustment minus any inflation adjustment already received.<sup>19</sup> We found that such systems will be eligible for additional inflation adjustments on an annual basis, but no earlier than September 30 of each year to reflect the final GNP-PI through June 30 of the applicable year.<sup>20</sup>

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lower than those charged by most noncompetitive systems, low-price systems may face unusual demand, costs or other influences that have not been captured in our analysis. *Id.* at para. 125.

<sup>13</sup> *Id.* at paras. 111, 132.

<sup>14</sup> *Id.* at para. 130.

<sup>15</sup> *Id.* at para. 131.

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

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

<sup>18</sup> *Id.* at para. 134.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

## B. Discussion

9. On our own motion, we find that low-price systems and small operators that have been provided with transition relief should no longer be prevented from adjusting their rates to reflect changes in inflation.<sup>21</sup> In the *Second Order on Reconsideration*, we decided to defer implementing the inflation adjustment for transition relief systems because we were not yet requiring them to reduce their rates by the competitive differential.<sup>22</sup> We decided that we would provide transition relief systems with the opportunity to make inflation adjustments after we developed a better picture of the price/cost profiles of these systems and determined the appropriate competitive differential for such systems.<sup>23</sup> In making this decision, we stated that we expected to complete the collection of cost/price data within nine months.<sup>24</sup>

10. Because we have not yet completed our collection of these data and nearly ten months have passed since we released the *Second Order on Reconsideration*, we find that it would be unfair to delay any further implementation of inflation adjustments for transition relief systems. We are concerned that a further delay in permitting transition relief systems to make inflation adjustments could be particularly burdensome on small operators because many small operators may not have the financial resources to withstand the impact of not being able to make inflation adjustments. A further delay in implementing the inflation adjustment for small operators may jeopardize the financial integrity of many of those systems because they may not be large enough to have access to sufficient bank loans, credit lines, or other sources of financing.

11. We also find that low-price systems should not be required to experience any further delays in implementing inflation adjustments. In the *Second Order on Reconsideration*, we found that because their prices are significantly lower than those charged by most noncompetitive systems, low price systems may face unusual demand, costs or other influences that were not captured in our analysis. A further delay in allowing low-price systems to make inflation adjustments may, therefore, impose a substantial burden upon those operators.

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<sup>21</sup> 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>22</sup> *Id.* at para. 131.

<sup>23</sup> *Id.* at para. 134.

<sup>24</sup> *Id.* at para. 111.

12. Accordingly, between April 1, 1995 and August 31, 1995, cable operators that have been afforded transition relief may adjust their rates to reflect the net of a 5.21% inflation adjustment, minus any inflation adjustments they have already received. This adjustment accounts for the 3% inflation factor that regulated cable operators were permitted to recover for the September 30, 1992 to September 30, 1993 period<sup>25</sup> and the 2.15% inflation factor that operators were permitted to recover between October 1, 1994 and August 31, 1995 for the October 1, 1993 to June 30, 1994 period.<sup>26</sup>

13. With one exception, however, transition relief systems will not receive the full 5.21% inflation adjustment because, under the old rules, they received an inflation adjustment from September 30, 1992 to the date they were subject to regulation for the purpose of establishing their initial rates prior to May 15, 1994. The exception is for most low price systems that had their March 31, 1994 rates above the benchmark, but their full reduction rate below the benchmark. When these systems set their rates for the period after May 15, 1994 they lost the inflation adjustment they received prior to May 15, 1994, because they were required to reduce their rates to the benchmark. Therefore, they will be permitted to adjust their rates to reflect the full 5.21% inflation factor. If, however, their actual post-May 15, 1994 rate reduction was less than their earlier inflation adjustment, they will be permitted to receive the 5.21% inflation adjustment minus the difference between their inflation adjustment and their actual post-May 15, 1994 rate reduction.

14. We determined in the Second Order on Reconsideration that, because the full reduction rate rises with inflation, a transition rate system's hypothetical full reduction rate may eventually exceed the transition rate.<sup>27</sup> We decided that a transition rate system will be entitled to take an inflation adjustment once the hypothetical full reduction rate and transition rate became equal.<sup>28</sup> Therefore, those transition relief systems that have already received this inflation adjustment, because their hypothetical full reduction rate exceeded their transition rate, will only be permitted to receive the net of the aggregate inflation adjustment minus any inflation adjustment already received.<sup>29</sup>

15. With the inflation adjustment they received prior to May 15, 1994 and the inflation adjustment we are granting them now, transition relief systems will be able to adjust their rates to reflect the same inflation adjustment that we have granted all other operators.

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<sup>25</sup> See FCC Form 1200, Module G, Line G10.

<sup>26</sup> Bureau of Economic Analysis, U.S. Department of Commerce, Survey of Current Business, Vol. 74, No. 8 at 24, Table 7.3 (August, 1994).

<sup>27</sup> *Second Order on Reconsideration* at para. 131.

<sup>28</sup> *Id.*

<sup>29</sup> *See Id.*

Moreover, in the future, all transition relief systems may join other cable operators in making inflation adjustments on an annual basis, no earlier than October 1 of each year and no later than August 31 of the following year to reflect the final GNP-PI through June 30 of the applicable year.

### **III. Regulatory Flexibility Act Analysis**

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

17. 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.

18. 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 *Report and Order and Further Notice of Proposed Rulemaking*.<sup>30</sup>

19. 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 low-price systems by permitting them to adjust their transition rates with an inflation adjustment.

### **IV. Paperwork Reduction Act**

20. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and are found to impose a new information collection requirement on the public. Implementation of the new requirement will be subject to approval by the Office of Management and Budget.

### **V. Ordering Clauses**

21. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i).

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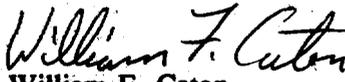
<sup>30</sup> 8 FCC Rcd 5631 (1993).

154(j), 303(r), 532, 542(c) and 543, the rules, requirements and policies discussed in this Ninth Order on Reconsideration, ARE ADOPTED and Part 76 of the Commission's rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix A.

22. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Order to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

23. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective on April 1, 1995.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

APPENDIX A

FCC MAIL SECTION

Title 47, Part 76 of the Code of Federal Regulations is amended as follows

FEB 7 12 31 PM '95

PART 76 -- CABLE TELEVISION SERVICE

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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 76.922 is amended to revise paragraph (d)(2) to read as follows:

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

\* \* \* \* \*

(d) Inflation Adjustments. The residual component of a system's permitted charge may be adjusted annually for inflation. The annual inflation adjustment shall be based on inflation occurring from June 30 of the previous year to June 30 of the year in which the inflation adjustment is made, except that the first annual inflation adjustment shall cover inflation from September 30, 1993 until June 30 of the year in which the inflation adjustment is made. The adjustment may be made after September 30, but no later than August 31, of the next calendar year. Adjustments shall be based on changes in the Gross National Product Price Index as published by the Bureau of Economic Analysis of the United States Department of Commerce. Cable systems that establish a transition rate pursuant to paragraph (b)(4) above may not begin adjusting rates on account of inflation before April 1, 1995. Between April 1, 1995 and August 31, 1995 cable systems that established a transition rate may adjust their rates to reflect the net of a 5.21% inflation adjustment minus any inflation adjustments they have already received. Low price systems that had their March 31, 1994 rates above the benchmark, but their full reduction rate below the benchmark will be permitted to adjust their rates to reflect the full 5.21% inflation factor unless the rate reduction was less than the inflation adjustment received on an FCC Form 393 for rates established prior to May 15, 1994. If the rate reduction established by a low price system that reduced its rate to the benchmark was less than the inflation adjustment received on an FCC Form 393, the system will be permitted to receive the 5.21% inflation adjustment minus the difference between the rate reduction and the inflation adjustment the system made on its FCC Form 393. Cable systems that established a transition rate may make future inflation adjustments on an annual basis with all other cable operators, no earlier than October 1 of each year and no later than August 31 of the following year to reflect the final GNP-PI through June 30 of the applicable year.

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