C. The Small Business Act

49. The Commission does not believe that SBA size standards, to which federal agencies may be required to adhere under Section 3 of the Small Business Act, are applicable to the Commission's definitions of small systems and small cable companies under the 1992 Cable Act. Section 3(a) of the Small Business Act provides that SBA size standards apply for the purposes of all legislation, unless the legislation specifically authorizes different size standards. The 1992 Cable Act in fact suggests one system size definition that the Commission may use as one with 1,000 or fewer subscribers.[102] The Commission has implemented the statutory provision regarding small system relief in a more flexible manner than is explicitly mandated by the Cable Act and is now extending relief to additional systems. But this does not alter the fact that the Commission is implementing a statute with an explicit small business size standard. Therefore, Section 3(a) of the Small Business Act is inapplicable. Section 3(a) is also inapplicable because the SBA defines a small-business concern as one "which is not dominant in its field of operation."[103] Cable systems subject to rate regulation are by definition dominant in their field of operation because they do not face effective competition.

50. Moreover, even if the SBA rules defining a small cable system as one with $11 million or less in gross annual revenues were applicable, the definitions we are adopting today are designed to provide relief to such companies. This *Order* extends relief to cable companies with 400,000 or fewer subscribers, a standard we equate with $100 million in annual regulated revenues as advocated by SBA's Office of Advocacy. Thus, we believe that our standards are more protective of small businesses than is the $11 million dollar standard promulgated by the SBA. In any event, we are directing the Commission's Secretary to provide a copy of this order to the SBA.

VI. ELEVENTH ORDER ON RECONSIDERATION

51. Having redefined the class of systems entitled to relief on the basis of system size, we here adopt expanded relief for such systems. Again, the system may establish its initial eligibility with respect to the system and company size limitations as of the effective date of this order or as of the date the system files the documentation necessary to seek the relief.

52. In adopting transition relief, we stated that when cost studies were completed, we might make permanent, eliminate, or modify such relief for qualifying systems and

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[102] *See* 47 U.S.C. § 543(i).

[103] 15 U.S.C. § 632(a)(1).

operators.[104] We also stated that when we develop average equipment cost schedules, we could terminate or modify our provisions for streamlined rate reductions.[105] Finally, we gave notice that in our final cost proceeding, we may modify our requirements for cost showings by small systems.[106]

53. The comments received in response to the *Further Notice of Proposed Rulemaking* suggest that many smaller cable operators and companies have an immediate need for further relief from certain aspects of rate regulation currently applicable to them. Moreover, we believe that the data we already have accumulated is sufficient to design additional relief for those systems most in need. In such circumstances, we see no reason to impose on smaller systems the burdens and delay that a formal cost study would entail. Therefore, based on the comments received in this proceeding, 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 smaller systems, and hereby make certain relief available to systems that have 15,000 or fewer subscribers and that are owned by a small cable company, as we have now defined that term.[107]

54. As explained more fully below, eligible systems will be able to establish their permitted rates on the basis of an extremely simple formula that requires the operator to supply only five items of data: total operating expenses, net rate base, rate of return, channel count and subscribers. These five items will be used in an easy formula that will generate a per-channel rate that will be presumed reasonable if it is no more than $1.24 per channel. To disapprove such a rate, the franchising authority will have the burden of showing that the cable operator did not reasonably interpret and allocate its cost and expense data in coming up with the operating expense, net rate base, and rate of return figures claimed by the operator in calculating its permitted rate. If the formula-generated rate exceeds $1.24, the burden will be on the operator to establish the reasonableness of its calculations, if the franchising authority elects to question the requested rate. This new optional mechanism will replace most other forms, used to compute rates, including FCC Form 1205. Equipment rates will be set to comply with 47 U.S.C. § 623(b)(3). This new mechanism can be used by any qualifying company, regardless of what rate regulation methodology has been used to

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[104] *Second Reconsideration Order*, 9 FCC Rcd at 4119, 4167-69, 4199-4200.

[105] *Second Reconsideration Order*, 9 FCC Rcd at 4223.

[106] *Id.*; *Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd at 4247.

[107] 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).

justify existing rates or an increase in rates.

55. We adopt these measures partly in response to comments received pursuant to the *Further Notice of Proposed Rulemaking* which we have summarized in the preceding *Sixth Report and Order*. We will not repeat that summary here, except to note again that the comments indicate that smaller cable companies are unduly burdened by the current scheme of rate regulation in two ways. First, the comments suggest that our rate rules do not adequately take into account the higher costs of doing business, and particularly the higher costs of capital, faced by smaller companies. Second, many operators claim that our rules place an inordinate hardship upon them in terms of the labor and other resources that must be devoted to ensuring compliance. Such comments suggest that some operators may be facing the dilemma of desiring to impose rates that our cost-of-service rules may well permit, but at the same time being averse to risking the resources that a cost-of-service showing entails since they cannot be guaranteed that the showing will be successful. In crafting the relief we adopt today, we have attempted to alleviate both the substantive and the procedural burdens of which smaller cable companies complain.

56. We are particularly sensitive to the notion that smaller systems face disproportionately higher costs. In adopting rate rules, the Commission is required to consider operator-specific cost data.[108] Thus, any scheme we adopt must take into account the cost data of the individual operator and give the operator the opportunity to recover its actual, reasonable costs. To some extent, however, the inclusion of operator-specific data in our scheme of rate regulation conflicts with the goal of simplifying the regulatory process. Establishing permitted rates on the basis of precise and detailed data entails more work for the operator that must compile that information from its own records and reproduce it in accordance with whatever forms and formulas we devise. For example, we have estimated that it takes 60 hours to complete the simplified cost-of-service form, FCC Form 1225, which requires operators to provide substantial data regarding the costs incurred in operating the system. Such regulation also imposes a burden on regulatory authorities that must review the data. We note that in many cases small local franchising authorities have scarce resources to review complicated cost-of-service filings. Yet to the extent we lessen the regulatory burden on operators and franchising authorities by reducing the amount of data that must be assembled and reviewed to calculate permitted rates, we are also concerned that we have confidence that the operator's rates are reasonable.

57. Having reviewed the criteria identified by Congress as being relevant to the

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[108] Communications Act, § 623(b)(2)(C)(ii),(iii),(v) and (vi), 47 U.S.C. § 543 (b)(2)(C)(ii),(iii),(v) and (vi) (basic service); Communications Act, § 623(c)(2)(E), 47 U.S.C. § 543(c)(2)(E) (cable programming services).

establishment of rate regulations,[109] we have created a formula for generating permitted rates that entails as small a burden as possible while still producing a rate that reflects with reasonable accuracy the operating costs and capital investments of the operator. The formula can be expressed as follows:

$$\text{Per channel per subscriber rate*} = \frac{\text{Annual operating expenses* + (Net rate base* x rate of return)}}{\text{Number of regulated channels x Number of subscribers}}$$

*For regulated services only

This formula is designed to establish the annual per-channel per-subscriber revenue requirements of the regulated system. The formula permits a regulated cable company to set a per-channel per-subscriber rate that will both cover operating expenses and provide a reasonable return on investments. Such a recovery is necessary to guarantee the operator the opportunity to attract new capital, promote innovation, and cover all essential costs of operating a cable system. The new method can be used to justify existing rates, or establish new rates, regardless of what rate regulation has been used in the past. Operators may rely on previously existing information, such as tax forms or company financial statements, rather than recreating financial calculations.

58. To ensure that the per-channel revenue requirement is reasonable, all operating costs must be covered. Therefore, wages, salaries, programming, advertising, electricity, maintenance, depreciation, amortization and all other relevant costs are included in the total operating expenses. This is not an exhaustive list, however, and operators may recover other reasonable and legitimate costs of providing service. As under our standard benchmark and cost-of-service regulations, when calculating operating expenses the operator must take into account only those expenses related to providing regulated channels. Congress specifically provided that regulation of rates for the basic service tier ("BST") should take into account general operating costs only to the extent those costs are allocable to basic service.[110] With respect to regulation of both BST and CPST rates, inclusion of costs related to unregulated services would distort the revenue requirement for the regulated channels and equipment, since there are no restrictions on the discretion of cable operators in establishing rates for unregulated services. More specifically, inclusion of costs related to the provision of unregulated services could result in those services being subsidized by revenues from regulated channels. Clearly, Congress did not intend such a result.[111] However, to further

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[109] Communications Act, § 623(b)(2)(C), 47 U.S.C. § 543 (b)(2)(C) (basic service); Communications Act, § 623(c)(2), 47 U.S.C. § 543(c)(2) (cable programming services).

[110] Communications Act, § 623(b)(2)(B)(ii) and (iii), 47 U.S.C. § 543(b)(2)(B)(ii) and (iii).

[111] *Id.*

our goal of minimizing regulatory burdens, we are granting small cable systems owned by small cable companies substantial flexibility to fairly allocate costs between BST, CPST, equipment and unregulated services. We further stress that, when the requested rate does not exceed $1.24 per channel, the burden will be on the franchising authority to show that the operator was unreasonable in making allocations such as these.

59. The net rate base is included in the formula to reflect net investment. The net rate base consists of the depreciated value of property. It provides the proper basis for calculating a fair rate of return on investment. For the reasons stated in the preceding paragraph, only assets associated with providing regulated services may be included in the calculation of the net rate base. However, the operator shall have substantial flexibility in calculating its net rate base. The presumptions and restrictions applicable to standard cost-of-service proceedings shall not apply. Thus, for example, we will not presume it unreasonable to include in the rate base start-up losses that exceed the first two years of operating expenses.[112] Having isolated a category of systems for whom our standard rules need to be relaxed due to the particular characteristics of those systems, we seek to ensure that those systems will be permitted to establish rates in accordance with such characteristics, rather than in accordance with characteristics of cable systems generally.

60. Likewise, we will not presumptively exclude intangibles such as acquisition costs from the net rate base. In the *Cost Order*, we presumptively excluded acquisition costs for reasons that, again, were more applicable to cable systems as a whole than to the subset of systems at issue in this proceeding. For example, whereas we found that acquisition costs were attributable in part to the growing number of programs and channels available only by subscribing to cable service,[113] the limited channel line-ups of smaller systems means that a greater portion of their offerings consist of broadcast channels that many consumers can view for free without subscribing to cable. Thus, the acquisition costs of a smaller system are less likely to include a supra-competitive valuation of services over which the system has exclusive control. Likewise, in the *Cost Order* we concluded that excess acquisition costs reflected, in part, the value of unregulated services, such as premium and pay-per-view programming, that should not be included in regulated rates.[114] Smaller systems with more limited channel line-ups are less likely to have such programming available. As we noted above, the average premium revenue per subscriber is more than $32.00 less for systems with fewer than 15,000 subscribers than for systems with more than 15,000 subscribers.[115] Thus, acquisition costs for small systems will reflect more accurately the value of the regulated services, a value which the operator should be able to recover.

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[112] *See Cost Order*, 9 FCC Rcd at 4563-64.

[113] *Id.*, 9 FCC Rcd at 4578-79.

[114] *Id.*, 9 FCC Rcd at 4579.

[115] *See supra* at ¶ 27.

61. At a minimum, the permitted rate of return shall equal the operator's actual cost of debt as set forth in any loan agreements with third parties. However, the operator may make reasonable adjustments to this rate to reflect other relevant factors such as, but not limited to, its cost of equity and its capital structure. The operator will have substantial discretion in determining the precise manner in which its rate of return is calculated. Thus, the operator will not be limited to the single methodology for establishing cost of equity that we identified in the *Cost Order*.[116] We selected that methodology because it included a large group of publicly traded companies that we found to be representative of the universe of nonregulated firms.[117] While such a sampling is an appropriate source of surrogates for regulated cable service generally, we believe that small systems owned by small cable companies should be able to pursue any methodology that is appropriate based on their individual characteristics. Likewise, operators will not be limited to the range of debt-to-equity ratios applicable in a standard cost-of-service showing,[118] but instead may establish a system-specific or assumed ratio.[119]

62. Finally, eligible systems shall not face the heavy burden imposed on operators seeking rates of return higher than 11.25% in standard cost-of-service proceedings.[120] On the basis of the comments in this proceeding, we now recognize that, of all cable companies, smaller systems and operators are the ones for whom this rate is most likely to be inadequate to compensate them for the risks they encounter in providing service. Therefore, for operators seeking to establish rates no higher than $1.24 per channel, the rate of return claimed by the operator will be subject to the same strong presumption of reasonableness that will apply to all other aspects of the operator's calculation of its permitted rate.

63. Because it takes into account all operating expenses and the net rate base, the formula will generate a rate that covers the cost of providing all regulated services and all equipment necessary to receive those services. Thus, eligible systems will not be required to make a separate showing with respect to equipment. Operators may establish equipment rates in the manner they choose, so long as this results in equipment rates that comply with the 1992 Cable Act.[121]

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[116] *Cost Order*, 9 FCC Rcd at 4626.

[117] *Id.*

[118] *Cost Order*, 9 FCC Rcd at 4632.

[119] Those systems that currently have a negative equity percentage could not achieve a reasonable rate of return using its actual debt/equity ratio. Therefore, these companies may use a reasonable assumed ratio.

[120] *Cost Order*, 9 FCC Rcd at 4616 & n. 327.

[121] Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).

64. To implement this scheme of rate regulation, we have created FCC Form 1230, a one-page form on which the system inserts its expense, rate base, rate of return, channel count and subscriber count figures and then calculates its permitted rate. The system can set rates at any level up to the rate generated by FCC Form 1230. Before increasing rates, the system must comply with the 30-day notice requirement applicable whenever a system takes a rate increase.[122] In giving notice to the certified local franchising authority of its first rate increase taken pursuant to this procedure, the operator shall include the completed FCC Form 1230 showing the maximum permitted rate, although the system need not raise rates to the maximum permitted level. As noted above, when filing the form the system shall not be required to file documentation or calculations underlying the expense and rate base figures included on the form. Upon filing of the form, however, our existing rules, permitting a certified local franchising authority to review the proposed rates, to request additional information, and to toll the effective date of the proposed rates, will then apply,[123] subject to certain conditions set forth below. Because Form 1230 is a modified cost-of-service showing, the franchising authority may toll the rate for up to 150 days.[124]

65. In view of our intent to minimize burdens upon operators, local franchising authorities, and the Commission, we urge franchising authorities to carefully limit their requests for information, should they deem it necessary to request further information upon the filing of Form 1230. We recognize that certified franchise authorities have a responsibility to protect consumers from the exercise of market power by cable operators and may have a legitimate need to request information to verify operators' rate requests. We believe that, particularly since operators have been given wide discretion in choosing methods of calculating operating costs, rate base, and rate of return, franchise authorities should have access to the information necessary for judging the validity of methods used for calculating these costs. With respect to requested rates not exceeding $1.24 per channel, a reasonable request for information, if deemed necessary at all, should seek only existing, relevant documents or other data compilations and should not require the operator to create documents, although the operator should replicate responsive documents that are missing or destroyed. Where the requested rate exceeds $1.24 per channel, a broader request for supporting documentation, and greater scrutiny of that documentation, will be permitted.

66. In order to guard against burdensome and unnecessary data requests from franchising authorities, cable operators will be permitted to seek relief from the Commission. If a request for information by the franchising authority exceeds a reasonable scope as

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[122] 47 C.F.R. § 76.932.

[123] 47 C.F.R. § 76.933.

[124] 47 C.F.R. § 76.933(b)(2).

described above, or if the franchising authority tolls a rate request,[125] the operator may file an interlocutory appeal requesting the Commission to quash the request. The appeal of a request for information or a rate suspension may be by an informal letter to the chief of the Cable Services Bureau rather than by way of a formal pleading. The appeal will be handled pursuant to the following expedited procedure. The franchising authority is required to respond to an interlocutory appeal in seven days; the cable operator's optional reply date is four days thereafter. The operator will not be required to respond to a franchising authority's request for information while an appeal is pending at the Commission. The Commission will resolve those appeals expeditiously.

67. The operator may appeal a request for information or a tolling order even if its requested rate exceeds $1.24 per channel. However, where the requested rate is no more than $1.24 per channel, our review of the appeal will be guided by the presumption of reasonableness that will attach to rates not exceeding that amount and by our conception of what constitutes a reasonable request for information, as described above. A decision by the Commission to sustain an operator's interlocutory appeal will be accompanied by an order directing the franchising authority to issue the appropriate order based upon the documentation previously supplied by the operator.[126]

68. We have adopted the rate of $1.24 per channel for the purposes set forth above based on the 35 FCC Form 1220 cost-of-service filings that have been submitted by systems with 15,000 or fewer subscribers owned by what we have defined here as small cable companies. We expect to adjust this figure in the future to account for changes in the relevant economic data, such as inflation. Using the rate-setting formula that we hereby adopt, staff found that the subscriber-weighted average cost per channel for eligible systems that had filed FCC Form 1220 amounted to $.93. Because this is an average figure, we know that, according to the data provided on the forms, a fair number of these Form 1220 filers would be entitled to rates exceeding $.93 per channel, presumably because of higher costs or recent capital improvements that justified a higher than average rate. Using the $.93 figure for purposes of establishing presumptions of reasonableness would have imposed an unfair burden on many systems for whom a higher rate is well justified. Therefore, one standard deviation was added to the $.93 per channel rate, producing a per channel rate of

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[125] As noted above, small systems owned by small cable companies may make their initial basic tier rates, established in accordance with the Commission's rate regulations, effective on 30 days' notice without prior approval from their local franchising authority, subject to refund liability if the rates are found later to be unreasonable. *See supra* ¶ 44. Therefore, with respect to small systems owned by small cable companies, the tolling provision of our rules applies when a system seeks to increase rates above a level previously established pursuant to one of our regulatory schemes, but does not apply when a system establishes rates after first becoming subject to regulation.

[126] When appropriate, we will make informal attempts at mediation of such disputes.

$1.24.[127] We therefore believe that a strong presumption of reasonableness should attach to a rate at or below this level when established by an eligible operator. As noted above, to disapprove a rate that does not exceed $1.24 per channel, the burden will be upon the franchising authority to show that the cable operator did not reasonably interpret and allocate its cost and expense data in coming up with the operating expense, net rate base, and rate of return figures claimed by the operator in calculating its permitted rate.

69. Once the operator has established rates at a level permitted by Form 1230, it may increase rates thereafter at its discretion until it reaches the maximum level permitted by the form, subject only to the 30 days' notice requirement. Even though the operator is charging less than the maximum rate permitted by Form 1230, the operator may adjust that maximum rate. For example, an operator may adjust its maximum permitted rate to take account of inflation and increases in external costs.[128] Likewise, when adding channels an operator may use the going-forward methodology[129] to adjust its maximum permitted rate. While making these adjustments to the maximum permitted rate, the operator simultaneously may, but need not, increase the actual rate charged. Thus, adjustments to the actual rate charged may be made independent of adjustments to the maximum rate permitted. As long as the actual rate does not exceed the maximum permitted rate, the operator may adjust its actual rate as and when it desires, subject to the notice requirement. In addition, at any time an operator may adjust its maximum permitted rate simply by filing a new Form 1230.

70. Once the operator has established rates at the maximum level permitted by Form 1230, the operator will be able to increase its actual rate by adjusting its maximum permitted rate in accordance with our normal rules to reflect increases in inflation and external costs. When adding channels, an operator may establish its new rate by filing a new Form 1230 or by complying with the going forward rules.[130] In determining the number of

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[127] Standard deviation is a commonly used measure of variability. It measures the amount of variance from the average in a sample. The amount of variance is usually expressed in terms of one or more standard deviations from the average. One standard deviation, when applied to the average, generally will capture about two-thirds of the sample, e.g., in this case, two-thirds of eligible cable systems. Two standard deviations generally will capture about 95% of the sample. In this case we selected one standard deviation as the appropriate measure. Thus, about one-third of eligible systems who file for this form of relief should have rates above the $1.24 threshold and will have the burden of justifying their rates.

[128] 47 C.F.R. § 76.922(d)(3).

[129] 47 C.F.R. § 76.922(e).

[130] The operator must elect between the two forms of relief. Therefore, upon adding a channel, an operator may file a new Form 1230 reflecting that channel addition, *or* elect going-forward treatment with respect to the new channel, but it cannot do both.

channels for which a small system owned by a small cable company may claim the alternative going-forward treatment that we adopted in the *Sixth Reconsideration Order*, only those channels added after the system files its first Form 1230 shall be counted. Therefore, if an operator added channels under the alternative going-forward rules before filing its initial Form 1230, the previously added channels will not be counted against the maximum of seven channels that an operator may add for purposes of those rules. However, the filing of a second or subsequent Form 1230 shall not increase the number of channel additions qualifying for the alternative going-forward treatment.

71. The cable system and any other participant in the rate making proceeding at the franchising authority level may appeal to the Commission for review of the final decision of the franchising authority under our normal appellate procedure.[131] If the rate decision is appealed by the operator, we first will review any challenged request for information that was not the subject of an interlocutory appeal by the operator. If, under the standards outlined above, we find no proper grounds for the request for information, we will have the ability to permit the operator to charge the requested rate without proceeding further. Thus, where the requested rate does not exceed $1.24, if a franchising authority denies the request on the basis of information that goes beyond the reasonable scope described above, we will reverse the rate decision. If the scope of information requested by the franchising authority is not at issue up on appeal of the final rate decision, the franchising authority will have the burden of proving the reasonableness of its decision to deny any requested rate that does not exceed $1.24, and the operator will have the burden of establishing the reasonableness of the requested rate if it exceeds that amount. Thus, we will look more closely at rates exceeding $1.24 per channel and, as noted above, will be less restrictive with respect to the permissible scope of information which the franchising authority may request and rely upon in determining the reasonableness of the rate. If we uphold a franchising authority decision to request further information, we will permit an operator to present its arguments as to why its rate is reasonable.

72. Complaints regarding CPST rates will be resolved by the Commission, as required by the 1992 Cable Act.[132] In reviewing CPST rates pursuant to a complaint, we will apply the same standard that is to be applied by a certified franchising authority when an operator files its Form 1230.

73. A system's initial and continued eligibility for this new form of relief shall be determined in the same manner as any other relief now available to them.[133] Thus, if a system qualifies for relief under this approach as of the effective date of this order or as of the date it files Form 1230, it shall remain eligible for so long as it serves 15,000 or fewer

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[131] 47 C.F.R. § 76.944.

[132] Communications Act, § 623(c)(1)(B), 47 U.S.C. § 543(c)(1)(B).

[133] *See supra* ¶ 38.

subscribers, regardless of whether it, or the cable operator that owns the system, is subsequently acquired by a company that exceeds the 400,000 subscriber limit, or if its current operator subsequently exceeds 400,000 subscribers due to the normal growth of its systems.[134] When a system that has established rates in accordance with Form 1230 exceeds 15,000 subscribers, the system may maintain its then existing rates. However, any further adjustments shall not reflect increases in external costs, inflation or channel additions until the system has re-established initial permitted rates in accordance with our benchmark or cost-of-service rules.[135]

74. Finally, we must address the applicability of this new form of relief to pending matters. We have little reason to question those commenters who contend that our existing rules have significantly burdened small systems. Accordingly, we will direct franchising authorities to permit systems to use the small system cost-of-service approach to justify rates in any proceeding that is pending as of the date this item is released, using data that was accurate as of the time the rates were charged. To apply the small cable system cost-of-service relief to a pending case, the system must show that it met the new definitions of a small system owned by a small cable company as of the date this item is released and as of the period during which the disputed rates were in effect. Our adoption of this new form of relief shall not affect the validity of a final rate decision made by a franchising authority before the release date of this item. If such a decision is appealed to the Commission, we will review the decision in accordance with the rules that were in effect at the time the rates were charged and the decision was made. We believe that the interests of administrative finality warrant this treatment of cases already decided by a final decision of the franchising authority.

75. In any proceeding before the Commission involving a CPST complaint in which a final decision had not been issued as of the release date of this item, a small system owned by a small cable company may elect the form of rate regulation set forth in this section to justify rates charged prior to the adoption of this rule and to establish new rates. This approach will apply regardless of the current phase of the proceedings. Thus, a small system owned by a small cable company may file its Form 1230 to oppose a CPST rate complaint, to support a timely petition for reconsideration of a previous Bureau or Commission decision regarding a CPST complaint, or to support a petition for Commission review of a Bureau decision regarding a CPST complaint. As with cases pending before franchising authorities, to apply the small cable system cost-of-service relief to a case currently pending before the Commission, the system must show that it met the new definitions of a small system owned by a small cable company as of the date this item is released and as of the period during which the disputed rates were in effect.

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[134] *Id.*

[135] Such a system may file a petition for special relief seeking continued treatment as a small system. *See supra* ¶ 36.

VII. REGULATORY FLEXIBILITY ANALYSIS

76. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-12, the Commission's final analysis with respect to the *Sixth Report and Order and Eleventh Order on Reconsideration* is as follows:

77. Need and purpose of this action: The Commission, in compliance with section 3(i) of the Cable Television Consumer Protection and Competition Act of 1992 pertaining to rate regulation, adopts rules and procedures intended to ensure cable subscribers of reasonable rates for cable services with minimum regulatory and administrative burden on cable entities.

78. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis: There were no comments submitted in response to the Initial Regulatory Flexibility Analysis contained in the *Further Notice of Proposed Rulemaking*. The Chief Counsel for Advocacy of the United States Small Business Administration filed comments in the original rulemaking order. The Commission addressed these comments in the *Rate Order*.[136] The Chief Counsel for Advocacy of the United States Small Business Administration also filed comments in response to the *Further Notice of Proposed Rulemaking*. Those comments are addressed herein.

79. Significant alternatives considered and rejected. Petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. The Commission responded to these comments in this order which will significantly reduce the burdens on small cable systems and small cable companies.

VIII. Paperwork Reduction Act

80. 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 Act.

IX. Ordering Clauses

81. 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 *Sixth Report and Order and Eleventh Order on Reconsideration* ARE ADOPTED and Section 76.934 of the

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[136] *See Rate Order*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993).

Commission's rules, 47 C.F.R. Section 76.934, IS AMENDED as set forth in Appendix B.

82. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Order to the Chief Counsel for Advocacy of the United States Small Business Administration.

83. IT IS FURTHER ORDERED that, the requirements and regulations established in this decision shall become effective upon approval by the Office of Management and Budget of the new information collection requirements adopted herein, but no sooner than thirty (30) days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

LIST OF COMMENTERS

Comments

Antietam Cable, et al.
Community Antenna Television Association
National Cable Television Association
Small Cable Business Association
U.S. Small Business Administration

Reply Comments

Antietam Cable, et al.
Avenue TV Cable, et al.
Community Antenna Television Association
National Cable Television Association
National Telephone Cooperative Association

APPENDIX B

RULE CHANGES

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 76 Cable Television Service

1. Section 76.901 is amended by revising paragraph (c) and paragraph (e) to read as follows:

§ 76.901 Definitions.

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(c) Small System. A small system is a cable television system that serves 15,000 or fewer subscribers. The service area of a small system shall be determined by the number of subscribers that are served by the system's principal headend, including any other headends or microwave receive sites that are technically integrated to the principal headend.

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(e) Small cable company. A small cable company is a cable television operator that serves a total of 400,000 or fewer subscribers over one or more cable systems.

2. Section 76.922 is amended by revising paragraphs (b)(4)(A), (b)(4)(B), (b)(5)(A), (b)(5)(B), (b)(5)(C) and (e)(7) to read as follows.

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

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(b) ***

(4) ***

(A) Termination of transition relief for systems other than low price systems. Systems other than low-price systems that already have established a transition rate as of the effective date of this rule may maintain their current rates, as adjusted under the price cap requirements of Section 76.922(d), until two years from the effective date of this rule. These systems must begin charging reasonable rates in accordance with applicable rules, other than transition relief, no later than that date.

(B) Low-price systems. Low price systems shall be eligible to establish a transition rate

for a tier, pending a further order of the Commission.

(1) A low-price system is a system

(a) Whose March 31, 1994 rate is below its March 31, 1994 benchmark rate, or

(b) whose March 31, 1994 rate is above its March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below its March 31, 1994 benchmark rate, as defined in Section 76.922(b)(2), above.

(2) The transition rate on May 15, 1994 for a system whose March 31, 1994 rate is below its March 31, 1994 benchmark rate is the system's March 31, 1994 rate. The March 31, 1994 rate is in both cases adjusted:

(a) To establish permitted rates for equipment as required by Section 76.923 if such rates have not already been established; and

(b) For changes in external costs incurred between the earlier of initial date of regulation of any tier or February 28, 1994, and March 31, 1994, to the extent changes in such costs are not already reflected in the system's March 31, 1994 rate. The transition rate on May 15, 1994 for a system whose March 31, 1994 adjusted rate is above its March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below its March 31, 1994 benchmark rate, is the March 31, 1994 benchmark rate, adjusted to establish permitted rates for equipment as required by Section 76.923 if such rates have not already been established.

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(5) ***

(A) Small systems that are owned by small cable companies and that have not already restructured their rates to comply with the Commission's rules may establish rates for regulated program services and equipment by making a streamlined rate reduction. Small systems owned by small cable companies shall not be eligible for streamlined rate reductions if they are owned or controlled by, or are under common control or affiliated with, a cable operator that exceeds these subscriber limits. For purposes of this rule, a small system will be considered "affiliated with" such an operator if the operator has a 20 percent or greater equity interest in the small system.

(B) The streamlined rate for a tier on May 15, 1994 shall be the system's March 31, 1994 rate for the tier, reduced by 14 percent. A small system that elects to establish its rate for a tier by implementing this streamlined rate reduction must also reduce, at the same time, each billed item of regulated cable service, including equipment, by 14 percent. Regulated rates established using the streamlined rate reduction process shall remain in effect until:

(1) Adoption of a further order by the Commission establishing a schedule of average equipment costs;

(2) The system increases its rates using the calculations and time periods set forth in FCC Form 1211; or

(3) The system elects to establish permitted rates under another available option set forth in paragraph (b)(1) of this Section.

(C) Implementation and notification. An eligible small system that elects to use the streamlined rate reduction process must implement the required rate reductions and provide written notice of such reductions to subscribers, the local franchising authority and the

Commission according to the following schedule:

(1) Within 60 days from the date it receives the initial notice of regulation from the franchising authority or the Commission, the small system must provide written notice to subscribers and the franchising authority, or to the Commission if the Commission is regulating the basic tier, that it is electing to set its regulated rates by the streamlined rate reduction process. The system must then implement the streamlined rate reductions within 30 days after the written notification has been provided to subscribers and the local franchise authority or Commission.

(2) If a cable programming services complaint is filed against the system, the system must provide the required written notice, described in (C)(1) above, to subscribers, the local franchising authority or the Commission within 60 days after the complaint is filed. The system must then implement the streamlined rate reductions within 30 days after the written notification has been provided.

(3) A small system is required to give written notice of, and to implement, the rates that are produced by the streamlined rate reduction process only once. If a system has already provided notice of, and implemented, the streamlined rate reductions when a given tier becomes subject to regulation, it must report to the relevant regulator (either the franchising authority or the Commission) in writing within 30 days of becoming subject to regulation that it has already provided the required notice and implemented the required rate reductions.

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(e) ***

(7) Headend upgrades. When adding channels to CPSTs and single-tier systems, cable systems that are owned by a small cable company and incur additional monthly per subscriber headend costs of one full cent or more for an additional channel may choose among the methodologies set forth in paragraphs (e)(2) and (e)(3) of this Section. In addition, such systems may increase rates to recover the actual cost of the headend equipment required to add up to seven such channels to CPSTs and single-tier systems, not to exceed $5,000 per additional channel. Rate increases pursuant to this paragraph may occur between January 1, 1995, and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. Headend costs shall be depreciated over the useful life of the equipment. The rate of return on this investment shall not exceed 11.25 percent. In order to recover costs for headend equipment pursuant to this paragraph, systems must certify to the Commission their eligibility to use this paragraph, and the level of costs they have actually incurred for adding the headend equipment and the depreciation schedule for the equipment.

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3. Section 76.924 is amended by revising paragraph (d) to read as follows:

§ 76.924 Cost accounting and cost allocation requirements.

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(d) **Summary accounts.**

(1) Cable operators filing for cost-of-service regulation, other than small systems owned by small cable companies, shall report all investments, expenses, and revenue and income adjustments accounted for at the franchise, system, regional and/or company level(s) to the summary accounts listed below.

RATEBASE

Net Working Capital
Headend
Trunk and Distribution Facilities
Drops
Customer Premises Equipment
Construction/Maintenance Facilities and Equipment
Programming Production Facilities and Equipment
Business Offices Facilities and Equipment
Other Tangible Assets
Accumulated Depreciation
Plant Under Construction
Organizational and Franchise Costs
Subscriber Lists
Capitalized Start-up Losses
Goodwill
Other Intangibles
Accumulated Amortization
Deferred Taxes

OPERATING EXPENSES

Cable Plant Employee Payroll
Cable Plant Power Expense
Pole Rental, Duct, Other Rental for Cable Plant
Cable Plant Depreciation Expense
Cable Plant Expenses - Other
Plant Support Employee Payroll Expense
Plant Support Depreciation Expense
Plant Support Expense - Other
Programming Activities Employee Payroll
Programming Acquisition Expense
Programming Activities Depreciation Expense
Programming Expense - Other
Customer Services Expense

Advertising Activities Expense
Management Fees
General and Administrative Expenses
Selling General and Administrative Depreciation Expenses
Selling General and Administrative Expenses - Other
Amortization Expense - Franchise and Organizational Costs
Amortization Expense - Customer Lists
Amortization Expense - Capitalized Start-up Loss
Amortization Expense - Goodwill
Amortization Expense - Other Intangibles
Operating Taxes
Other Expenses (Excluding Franchise Fees)
Franchise Fees
Interest on Funded Debt
Interest on Capital Leases
Other Interest Expenses

REVENUE AND INCOME ADJUSTMENTS

Advertising Revenues
Other Cable Revenue Offsets
Gains and Losses on Sale of Assets
Extraordinary Items
Other Adjustments

(2) Except as provided in Section 76.934(h), small systems owned by small cable companies that file for cost-of-service regulation shall report all investments, expenses, and revenue and income adjustments accounted for at the franchise, system, regional and/or company level(s) to the following summary accounts:

RATEBASE

Net Working Capital
Headend, Trunk and Distribution System and Support Facilities and Equipment
Drops
Customer Premises Equipment
Production and Office Facilities, Furniture and Equipment
Other Tangible Assets
Accumulated Depreciation
Plant Under Construction
Goodwill
Other Intangibles
Accumulated Amortization
Deferred Taxes

OPERATING EXPENSES

Cable Plant Maintenance, Support and Operations Expense
Programming Production and Acquisition Expense
Customer Services Expense
Advertising Activities Expense
Management Fees
Selling, General and Administrative Expenses
Depreciation Expense
Amortization Expense - Goodwill
Amortization Expense - Other Intangibles
Other Operating Expense (Excluding Franchise Fees)
Franchise Fees
Interest Expense

REVENUE AND INCOME ADJUSTMENTS

Advertising Revenues
Other Cable Revenue Offsets
Gains and Losses on Sale of Assets
Extraordinary Items
Other Adjustments

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4. Section 76.934 is revised to read as follows:

§ 76.934 Small systems and small cable companies.

(a) For purposes of rules governing the reasonableness of rates charged by small systems, the size of a system or company shall be determined by reference to its size as of the date the system files with its franchising authority or the Commission the documentation necessary to qualify for the relief sought or, at the option of the company, by reference to system or company size as of the effective date of this paragraph. Where relief is dependent upon the size of both the system and the company, the operator must measure the size of both the system and the company as of the same date. A small system shall be considered affiliated with a cable company if the company holds a 20 percent or greater equity interest in the system or exercises de jure control over the system.

(b) A franchising authority that has been certified, pursuant to § 76.910, to regulate rates for basic service and associated equipment may permit a small system as defined in § 76.901 to certify that the small system's rates for basic service and associated equipment comply with § 76.922, the Commission's substantive rate regulations.

(c) Initial regulation of small systems

(1) If certified by the Commission, a local franchising authority may provide an initial

notice of regulation to a small system, as defined by Section 76.901(c), on May 15, 1994. Any initial notice of regulation issued by a certified local franchising authority prior to May 15, 1994 shall be considered as having been issued on May 15, 1994.

(2) The Commission will accept complaints concerning the rates for cable programming service tiers provided by small systems on or after May 15, 1994. Any complaints filed with the Commission about the rates for a cable programming service tier provided by a small system prior to May 15, 1994 shall be considered as having been filed on May 15, 1994.

(3) A small system that receives an initial notice of regulation from its local franchising authority, or a complaint filed with the Commission for its cable programming service tier, must respond within the time periods prescribed in Sections 76.930 and 76.956.

(d) Statutory period for filing initial complaint. A complaint concerning a rate for cable programming service or associated equipment provided by a small system that was in effect on May 15, 1994 must be filed within 180 days from May 15, 1994.

(e) Petitions for extension of time. Small systems may obtain an extension of time to establish compliance with rate regulations provided they can demonstrate that timely compliance would result in severe economic hardship. Requests for extension of time should be addressed to the local franchising authority concerning basic service and equipment rates and to the Commission concerning rates for a cable programming service tier and associated equipment. The filing of a request for an extension of time to comply with the rate regulations will not toll the effective date of rate regulation for small systems or alter refund liability for rates that exceed permitted levels after May 15, 1994.

(f) Small Systems owned by Small Cable Companies. Small systems owned by small cable companies shall have 90 days from their initial date of regulation on a tier to bring their rates for that tier into compliance with the requirements of Sections 76.922 and 76.923. Such systems shall have sixty days from the initial date of regulation to file FCC Forms 1200, 1205, 1210, 1211, 1215, 1220, 1225, and 1230 and any similar forms as appropriate. Rates established during the 90-day period shall not be subject to prior approval by franchising authorities or the Commission, but shall be subject to refund pursuant to sections 76.942 and 76.961 of these rules.

(g) Alternative rate regulation agreements.

(1) Local franchising authorities, certified pursuant to § 76.910, and small systems owned by small cable companies 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.

(h) Small system cost-of-service showings.
(1) At any time, a small system owned by a small cable company may establish new rates, or justify existing rates, for regulated program services in accordance with the small cable company cost-of-service methodology described below.
(2) The maximum annual per subscriber rate permitted initially by the small cable company cost-of-service methodology shall be calculated by adding
(i) The system's annual operating expenses to
(ii) The product of its net rate base and its rate of return, and then dividing that sum by (iii) the product of
(A) The total number of channels carried on the system's basic and cable programming service tiers and
(B) The number of subscribers. The annual rate so calculated must then be divided by 12 to arrive at a monthly rate.
(3) The system shall calculate its maximum permitted rate as described in paragraph (b) of this section by completing Form 1230. The system shall file Form 1230 as follows:
(i) Where the franchising authority has been certified by the Commission to regulate the system's basic service tier rates, the system shall file Form 1230 with the franchising authority.
(ii) Where the Commission is regulating the system's basic service tier rates, the system shall file Form 1230 with the Commission.
(iii) Where a complaint about the system's cable programming service rates is filed with the Commission, the system shall file Form 1230 with the Commission.
(4) In completing Form 1230:
(i) The annual operating expenses reported by the system shall equal the system's operating expenses allocable to its basic and cable programming service tiers for the most recent 12 month period for which the system has the relevant data readily available, adjusted for known and measurable changes occurring between the end of the 12 month period and the effective date of the rate. Expenses shall include all regular expenses normally incurred by a cable operator in the provision of regulated cable service, but shall not include any lobbying expense, charitable contributions, penalties and fines paid on account of statutes or rules, or membership fees in social service, recreational or athletic clubs or associations.
(ii) The net rate base of a system is the value of all of the system's assets, less depreciation.
(iii) The rate of return claimed by the system shall reflect the operator's actual cost of debt, its cost of equity, or an assumed cost of equity, and its capital structure, or an assumed capital structure.
(iv) The number of subscribers reported by the system shall be calculated according to the most recent reliable data maintained by the system.
(v) The number of channels reported by the system shall be the number of channels it has on its basic and cable programming service tiers on the day it files Form 1230.
(vi) In establishing its operating expenses, net rate base, and reasonable rate of return, a system may rely on previously existing information such as tax forms or company financial statements, rather than create or recreate financial calculations. To the extent existing information is incomplete or otherwise insufficient to make exact calculations, the system

may establish its operating expenses, net rate base, and reasonable rate of return on the basis of reasonable, good faith estimates.

(5) After the system files Form 1230, review by the franchising authority, or the Commission when appropriate, shall be governed by Section 76.933, subject to the following conditions.

(i) If the maximum rate established on Form 1230 does not exceed $1.24 per channel, the rate shall be rebuttably presumed reasonable. To disallow such a rate, the franchising authority shall bear the burden of showing that the operator did not reasonably interpret and allocate its cost and expense data in deriving its annual operating expenses, its net rate base, and a reasonable rate of return.

(ii) In the course of reviewing Form 1230, a franchising authority shall be permitted to obtain from the cable operator the information necessary for judging the validity of methods used for calculating its operating costs, rate base, and rate of return. If the maximum rate established on Form 1230 does not exceed $1.24 per channel, any request for information by the franchising authority shall be limited to existing relevant documents or other data compilations and should not require the operator to create documents, although the operator should replicate responsive documents that are missing or destroyed.

(iii) A system may file with the Cable Services Bureau an interlocutory appeal from any decision by the franchising authority requesting information from the system or tolling the effective date of a system's proposed rates. The appeal may be made by an informal letter to the Chief of the Cable Services Bureau, served on the franchising authority. The franchising authority must respond within seven days of its receipt of the appeal and shall serve the operator with its response. The operator shall have four days from its receipt of the response in which to file a reply, if desired. If the maximum rate established on Form 1230 does not exceed $1.24 per channel, the burden shall be on the franchising authority to show the reasonableness of its order. If the maximum rate established on Form 1230 exceeds $1.24 per channel, the burden shall be on the operator to show the unreasonableness of the order.

(iv) In reviewing Form 1230 and issuing a decision, the franchising authority shall determine the reasonableness of the maximum rate permitted by the form, not simply the rate which the operator intends to establish.

(v) A final decision of the franchising authority with respect to the requested rate shall be subject to appeal pursuant to section 76.944. The filing of an appeal shall stay the effectiveness of the final decision pending the disposition of the appeal by the Commission. An operator may bifurcate its appeal of a final rate decision by initially limiting the scope of the appeal to the reasonableness of any request for information made by the franchising authority. The operator may defer addressing the substantive rate-setting decision of the franchising authority until after the Commission has ruled on the reasonableness of the request for information. At its option, the operator may forego the bifurcated appeal and address both the request for documentation and the substantive rate-setting decision in a single appeal. When filing an appeal from a final rate-setting decision by the franchising authority, the operator may raise as an issue the scope of the request for information only if that request was not approved by the Commission on a previous interlocutory appeal by the operator.

(6) Complaints concerning the rates charged for a cable programming services tier by a

system that has elected the small cable company cost-of-service methodology may be filed pursuant to Section 76.957. Upon receipt of a complaint, the Commission shall review the system's rates in accordance with the standards set forth above with respect to basic tier rates.

(7) Unless otherwise ordered by the franchising authority or the Commission, the system may establish its per channel rate at any level that does not exceed the maximum rate permitted by Form 1230, provided that the system has given the required written notice to subscribers. If the system establishes its per channel rate at a level that is less than the maximum amount permitted by the form, it may increase rates at any time thereafter to the maximum amount upon providing the required written notice to subscribers.

(8) After determining the maximum rate permitted by Form 1230, the system may adjust that rate in accordance with this paragraph. Electing to adjust rates pursuant to one of the options set forth below shall not prohibit the system from electing a different option when adjusting rates thereafter. The system may adjust its maximum permitted rate without adjusting the actual rate it charges subscribers.

(i) The system may adjust its maximum permitted rate in accordance with the price cap requirements set forth in Section 76.922(d).

(ii) The system may adjust its maximum permitted rate in accordance with the requirements set forth in Section 76.922(e) for changes in the number of channels on regulated tiers. For any system that files Form 1230, no rate adjustments made prior to the effective date of this rule shall be charged against the system's Operator's Cap and License Reserve Fee described in Section 76.922(e)(3).

(iii) The system may adjust its maximum permitted rate by filing a new Form 1230 that permits a higher rate.

(iv) The system may adjust its maximum permitted rate by complying with any of the options set forth in Section 76.922(b)(1) for which it qualifies or under an alternative rate agreement as provided in paragraph (g) of this section.

(9) In any rate proceeding before a franchising authority in which a final decision had not been issued as of June 5, 1995, a small system owned by a small cable company may elect the form of rate regulation set forth in this section to justify the rates that are the subject of the proceeding, if the system and affiliated company were a small system and small company respectively as of the effective date of this rule and as of the period during which the disputed rates were in effect. This rule shall not affect the validity of a final rate decision made by a franchising authority before June 5, 1995.

(10) In any proceeding before the Commission involving a cable programming services tier complaint in which a final decision had not been issued as of June 5, 1995, a small system owned by a small cable company may elect the form of rate regulation set forth in this section to justify rates charged prior to the adoption of this rule and to establish new rates. For purposes of this paragraph, a decision shall not be deemed final until the operator has exhausted or is time-barred from pursuing any avenue of appeal, review, or reconsideration.

5. Section 76.953 is amended by removing paragraph (a) and redesignating paragraph (b) and paragraph (c) as paragraph (a) and paragraph (b) respectively.