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Before the
Federal Communications Commission
Washington, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1996 **Released: December 31, 1996**

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we adopt rule changes responsive to the decision of the court in *Time Warner Entertainment Co.* v. *FCC*, 56 F.3d 151 (D.C. Cir. 1995). In its decision, the court considered rules adopted by the Commission[1] to implement rate regulation and related provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[2] The rules were largely affirmed by the court. In five discrete areas, however, the court reversed the Commission's implementing decisions and rules. First, the court concluded that the Commission construed the term "effective competition" too narrowly in terms of the entities that could be counted as providing direct competition to existing cable operators. Second, the Commission erred in concluding that the requirement for a uniform rate structure applies to all systems, including those facing effective competition and not otherwise

[1] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 (1993); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd. 1164 (1993); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, 9 FCC Rcd. 4119 (1994); Rate Regulation, Third Order on Reconsideration, 9 FCC Rcd. 4316 (1994).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992). The 1992 Cable Act amended the Communications Act of 1934, which has been further amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). This order amends rules the Commission adopted in implementing the 1992 Cable Act, and does not implement the Telecommunications Act of 1996.

subject to rate regulation under the statute. Third, the Commission's conclusion that the statute's tier buy-through provision applies to systems subject to effective competition was found to conflict with the structure and the language of the statute. Fourth, the Commission was found to have exceeded its authority by establishing a presumption that franchising authorities seeking to cede the basic rate regulation function to the Commission could themselves fund rate regulation locally if they were collecting franchise fees. Fifth, the court vacated the Commission's rules relating to so-called gap period external costs. The following sections address each of these findings in relation to our previous decisions and rules.[3]

II. REDEFINITION OF EFFECTIVE COMPETITION

2. **Statutory Provisions**. Under the 1992 Cable Act, cable system rates are subject to regulation only in those situations where effective competition is absent.[4] The 1992 Cable Act contains a clear preference for competition rather than rate regulation. In the legislative findings accompanying the 1992 Cable Act, Congress stated that it wished (1) to "promote the availability to the public of a diversity of views and information . . . ," (2) to "rely on the marketplace, to the maximum extent feasible, to achieve that availability," and (3) "where cable television systems are not subject to effective competition, [to] ensure that consumer interests are protected in the receipt of cable service."[5] Congress thus looked first to the marketplace as the source of rate discipline, and only secondarily to government regulation. The "rate regulation" section of the statute, in addition to prohibiting the Commission, the states, and franchising authorities from regulating rates other than as provided in the statute, expressly exempts the rates of all systems facing "effective competition" from regulation by the Commission or franchising authorities. For systems not facing "effective competition," local franchising authorities (and in certain circumstances, the Commission) may regulate rates for the basic service tier under Section 543(b) and the Commission regulates cable programming services rates under Section 543(c).

3. The 1992 Cable Act defined three types of systems that are subject to "effective competition" and therefore exempt from rate regulation: low penetration systems, competing

[3]The statutory provision underlyling the rate regulations, section 3 of the 1992 Cable Act, was found constitutional by the United States District Court for the District of Columbia. *Daniels Cablevision* v. *United States*, 835 F.Supp. 1, 10 (D.D.C. 1993) On appeal, the United States Court of Appeals for the District of Columbia Circuit recently sustained the constitutionality of section 3, basing its decision on the court's reasoning in the *Time Warner* case we are implementing in this Order. *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957, 967 (1996).

[4] 47 U.S.C. § 543.

[5] 1992 Cable Act § 2(b)(1), (2) & (4).

provider systems, and municipal systems.[6] Effective competition resulting from a competing provider exists if the franchise area is--

> (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
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> (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area . . . .[7]

4. **Commission's Implementing Decision**. In *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking* ("*Rate Order*"), the Commission concluded that, in determining whether 15% of households in the franchise area subscribe to cable services for purposes of Section 543(l)(1)(B)(ii), "only those multichannel video programming distributors that offer programming to at least 50 percent of the households in the franchise area should be included . . . ."[8] In *Rate Regulation, Third Order on Reconsideration* ("*Third Reconsideration*"), the Commission reasoned that inclusion of other, less available multichannel video programming distributors in calculating the 15% subscribership would cause anomalous results, make the 15% actual subscribership test the sole determinative factor in almost all situations, and render Section 543(l)(1)(B)(i) (the 50% coverage provision) superfluous.[9]

5. **Court Decision**. On review, the court concluded that, although the Commission's definition of competing providers was theoretically sound, it conflicted with the plain language of the statute, and Congress did not limit the 15% threshold in Section 543(l)(1)(B)(ii) to those cable systems that satisfy the requirements of Section 543(l)(1)(B)(i). As stated by the court:

> By its plain terms, the 1992 Cable Act requires the Commission to include the customers of "multichannel video programming distributors other than the largest"

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[6] The definition of effective competition is found in 47 C.F.R. § 543(l)(1). The Telecommunications Act of 1996 amends Section 543(l)(1) by adding a subsection (D), which contains a fourth test for effective competition. *See* Telecommunications Act of 1996, Section 301(b)(3). The Commission has incorporated this new test into its rules. *See* 47 C.F.R. § 76.905(b)(4). *See also* Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking (*"Cable Act Reform"*), CS Docket No. 96-85, FCC 96-154 (released April 9, 1996), 11 FCC Rcd 5937 (1996); 47 C.F.R. § 76.1401. All references herein to Section 543(l)(1) do not include this amendment.

[7] 47 U.S.C. § 543(l)(1)(B).

[8] *Rate Order*, 8 FCC Rcd at 5664-65.

[9] *Third Reconsideration*, 9 FCC Rcd at 4321.

in making the 15% subscribership calculation. The statute does not refer to "multichannel video programming distributors mentioned in §543(l)(1)(B)(i) other than the largest," or "such multichannel programming distributors other than the largest;" it does not limit in any way the multichannel video programming distributors to be considered in aggregating subscribership.[10]

6. **Response to Court's Decision**. In response to the court's decision we are amending the rules relating to the definition of effective competition as reflected in Appendix A. With this change in place, a demonstration of "competing provider" effective competition requires only evidence that the franchise area is served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50% of the households in the franchise area and that the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15% of the households in the franchise area.

III. UNIFORM RATE STRUCTURE

7. **Statutory Provisions**. Section 543(d)[11] provides:

> A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.[12]

8. **Commission's Implementing Decision**. The Commission initially determined that the focus of this uniform rate structure provision was properly "on regulated systems in regulated markets," that is, systems that did not face effective competition as defined by the 1992 Cable Act.[13] On reconsideration, however, the Commission decided that the uniform rate structure provision applied not only to regulated systems, but also to systems subject to effective competition and otherwise exempt from rate regulation under the 1992 Cable Act.[14] The Commission reasoned that the harms targeted by the uniform rate provision -- "charging different subscribers different rates with no economic justification and unfairly undercutting

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[10] 56 F.3d at 189.

[11] Section 301(b)(2) of the Telecommunications Act of 1996 amends Section 543(d). *See infra* para. 11. All references herein to Section 543(d) do not include this amendment.

[12] 47 U.S.C. § 543(d).

[13] *Rate Order*, 8 FCC Rcd. at 5896.

[14] *Third Reconsideration*, 9 FCC Rcd. at 4327.

competitors' prices" -- exist equally in areas where "effective competition" exists.[15]

9. **Court Decision**. The court concluded the latter interpretation conflicts with the language and legislative purpose of the 1992 Cable Act. As stated in the court's decision:

> Application of the uniform rate provision to competitive systems violates 47 U.S.C. § 543(a)(2), which prohibits the Commission and franchising authorities from utilizing their rate regulation authority under the 1992 Cable Act to regulate the rates charged by cable systems facing "effective competition." The fact that § 543(a)(2) does not specifically mention the uniform rate structure provision does not change this conclusion. The subsection exempts competitive systems not only from the regulation of basic and cable programming rates under § 543(b) & (c), but from any rate regulation that the Commission or franchising authorities promulgate "under this section [543]" (footnote omitted).[16]

10. Consequently, because it found that Section 543(d) regulates rates within the meaning of Section 543(a)(2), the court concluded that the Commission's uniform rate structure regulation was contrary to the statute insofar as it applied to cable operators subject to "effective competition." The court stated that, by requiring competitive systems to charge uniform rates, the Commission undermined a hallmark purpose of the 1992 Cable Act, which is to allow market forces to determine the rates charged by cable systems that are subject to "effective competition" as defined by Congress.[17]

11. **Telecommunications Act of 1996.** The Telecommunications Act of 1996 amended Section 543(d) by adding, inter alia, the following language to the end of that section:

> This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, ...[18]

The Commission has amended its rules to reflect this statutory amendment, and in so doing has complied with the court's decision with respect to the uniform rates requirement.[19]

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[15] *Id.*

[16] 56 F.3d at 190-191.

[17] 56 F.3d at 191.

[18] Telecommunications Act of 1996, Section 301(b)(2).

[19] See 47 C.F.R. § 76.984(c). *See also* Cable Act Reform at paras. 33-36.

IV. TIER BUY-THROUGH

12. **Statutory Provisions**. Section 543(b)(8)(A) prohibits cable operators from requiring a "buy-through" or purchase of any tier other than the basic tier as a prerequisite for purchase of per program or per channel video programming:

> A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.[20]

13. **Commission's Implementing Decision**. In its *Third Reconsideration*, the Commission concluded that the tier buy-through provision applies not only to regulated systems, but also to systems subject to "effective competition" and thus not subject to rate regulation under the 1992 Cable Act.[21]

14. **Court Decision**. The court found that the Commission's interpretation of the tier buy-through provision was not permissible under the 1992 Cable Act. First, the court found that the provision appears within Section 543(b), a subsection that generally focuses on regulating basic tier rates of systems not facing effective competition.[22] More importantly, the court found the tier buy-through provision is inextricably intertwined with the immediately preceding provision, entitled "Components of the basic tier subject to rate regulation," which clearly applies only to systems not subject to effective competition.[23] The text of the tier buy-through provision, the court concluded, expressly references Section 543(b)(7) and provides that only the basic service tier required by that section can be required as a condition of access to per channel programming.[24] That Section 543(b)(7) applies only to regulated systems is made clear by Section 543(b)(7)(B), which provides that any additional, optional signals placed upon the basic service tier "shall be provided to subscribers at rates determined under the regulations prescribed

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[20] 47 U.S.C. § 543(b)(8)(A).

[21] 9 FCC Rcd at 4328; 47 C.F.R. § 76.921.

[22] *See* 47 U.S.C. § 543(a)(2) ("If . . . a cable system is not subject to effective competition . . . the rates for the provision of basic cable service shall be subject to regulation . . . under [47 U.S.C. § 543(b)]."); 47 U.S.C. § 543(b)(1) ("[R]egulations [to ensure reasonable basic rates] shall be designed to . . . protect[ ] subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged . . . if such cable system were subject to effective competition.").

[23] 56 F.3d at 192 (quoting 47 U.S.C. § 543(b)(7)).

[24] 56 F.3d at 192.

by the Commission under this subsection."[25] Because this provision applies to any basic tier established pursuant to Section 543(b)(7) and clearly states an intention directly to regulate rates, it cannot, the court concluded, apply to systems that face effective competition.[26]

15. **Response to Court's Decision**. In response to the court's decision, we are amending our rules as reflected in Appendix A to provide that the tier buy-through requirement applies only to systems not subject to effective competition.

V. REQUIREMENT THAT FRANCHISING AUTHORITIES PAY FOR REGULATION WITH FRANCHISE FEES

16. **Statutory Provisions**. Section 542(i) prohibits the Commission from "regulat[ing] the amount of the franchise fees paid by a cable operator, or regulat[ing] use of funds derived from those fees."

17. Under the regulatory system established by Congress, franchising authorities maintain primary authority for regulating basic rates.[27] The 1992 Cable Act provides that the Commission may exercise jurisdiction over basic rates if it "disapproves a franchising authority's certification . . . or revokes such authority's jurisdiction" because (1) the franchising authority's rate regulations conflict with the Commission's rate standards promulgated under the Act; (2) the franchising authority lacks the legal power to regulate or the personnel to administer its regulations; or (3) the authority's procedural rules do not provide for a full hearing.[28]

18. **Commission's Implementing Decision**. The Commission, reasoning that some franchising authorities might wish to have basic rates regulated but lack the legal power or resources to do so at the local level, concluded that its general mandate to "ensure that the rates for the basic service tier are reasonable" empowered it to regulate basic rates upon the request of such franchising authorities.[29] Rather than requiring these franchising authorities to file a certification application that was intended to be denied in order to establish their lack of power or resources, the Commission decided to allow the authorities affirmatively to request federal regulation of basic rates. However, the Commission decided to require a showing that the franchising authority could not afford to regulate when a franchising

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[25] *Id.* (quoting 47 U.S.C. § 543(b)(7)(B)).

[26] 56 F.3d at 192.

[27] 47 U.S.C. § 543(a)(2)(A).

[28] 47 U.S.C. § 543(a)(4), (6).

[29] *Rate Order*, 8 FCC Rcd. at 5675-76.

authority that collects franchise fees claims financial incapacity.[30] The Commission established a presumption that franchising authorities receiving franchise fees have the resources to regulate and required any franchising authority seeking to have the Commission exercise jurisdiction over basic rates to rebut this presumption with evidence showing why the proceeds of the franchise fees could not be used to cover the cost of rate regulation.[31] This process, the Commission believed, was "not a regulation of 'the use of funds derived from such fees' within the meaning of [47 U.S.C. § 542(i)], but it is merely a test for determining which regulatory efforts should receive the benefit of the Commission's limited resources, based on the importance placed on that regulation by the respective franchising authority."[32]

19. **Court Decision**. The court concluded, however, that the Commission erred in establishing this presumption because the presumption implies that the franchising authority must use any available franchise fees for purposes of rate regulation. The court stated:

> If this provision [§543(b)] is interpreted (as it reasonably can be) to authorize the Commission to regulate rates in franchise areas where the government cannot afford regulation, then under its mandatory terms the Commission must regulate in all such areas. Although the Commission could also have reasonably concluded that this provision does not in any way authorize it to step in when franchising authorities cannot afford to regulate, the provision cannot possibly support the Commission's present view that it allows the Commission to step in at its discretion. In addition, even if the Commission could consider relevant criteria in determining whether a franchising authority can afford to regulate, it could not use those criteria to accomplish indirectly what §542(i) directly proscribes.
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> A test that ties the assumption of the Commission's responsibilities to a particular use of franchise fees is inconsistent with the statute. For both of these reasons, the Commission's interpretation of 47 U.S.C. §543(b), allowing it to assume regulation of the basic tier only upon a showing by the franchising authority that its franchise fees are insufficient to cover the costs of regulation, is impermissible.[33]

20. **Response to Court's Decision**. In response to the court's decision, we will

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[30] *Id.* at 5677.

[31] *Id.* at 5676.

[32] *Third Reconsideration*, 9 FCC Rcd at 4333.

[33] 56 F.3d at 201.

no longer establish a relationship between the franchising authority's ability to regulate and its franchise fee collection. The Commission will continue, however, to exercise authority over the basic tier in response to a franchising authority's request only when justified by a franchising authority's financial or legal inability to proceed on its own. We are amending our rules as reflected in Appendix A to incorporate the court's decision regarding franchising authorities requests for Commission assumption of jurisdiction.

VI. EXTERNAL COSTS TREATMENT

21. **Statutory Provisions.** Section 543 contains the rate regulation provisions of the 1992 Cable Act. It generally instructs the Commission to "ensure that the rates for the basic service tier are reasonable" through the adoption of rules to be followed by franchising authorities that have been certified to regulate basic rates.[34] That section also requires the Commission to ensure that rates for cable programming services are not unreasonable. Rates for cable programming service tiers are to be regulated by the Commission on a complaint basis.[35]

22. **Commission's Implementing Decision.** Generally speaking, the Commission's rate rules, as revised in the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order ("Second Reconsideration Order")*, implement a benchmark system which protects subscribers by ensuring that an operator's regulated rates do not exceed what the operator would charge if it faced effective competition. The benchmark system was based on a survey that demonstrated the difference between rates in competitive and noncompetitive situations on September 30, 1992. Under the benchmark system, most regulated cable operators were required to reduce their regulated rates to a level that represented their September 30, 1992 regulated revenues reduced by a 17% "competitive differential" (adjusted for annual inflation increases, changes in external costs and changes in the number of programming channels).[36] The 17% "competitive differential" represented the average difference that the Commission determined existed between the rates of competitive and noncompetitive systems.[37]

23. To account for changes taking place between the September 30, 1992 survey date and the actual date on which the reasonableness of the rates were being judged, the reduced rates were to be adjusted upward to account for inflation. Future rate adjustments

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[34] 47 U.S.C. §§ 543(a)(2)(A), 543(b)(1).

[35] 47 U.S.C. § 543(c)(1)(B).

[36] *See Second Reconsideration Order*, 9 FCC Rcd at 4124.

[37] *Id.*

would be based both on actual changes in certain external costs (principally changes in programming costs and costs imposed by governments),[38] and inflation for changes in non-external costs.[39] Thus, current justifiable rate levels using the benchmark process account for inflation and external cost increases after the start of regulation but do not account for increases in external costs that took place between September 30, 1992 and the date actual rate regulation commenced. During this period between the benchmark survey date and the commencement of regulation, however, system operators were permitted to continue to charge unreduced noncompetitive rates.

24. **Court Decision.** In the judicial proceeding, petitioners argued that:

> The court should order amendment of the regulations governing the completion of Form 1210 (47 C.F.R. § 76.922(d)) to permit inclusion in the benchmark rate of accrued external cost increases incurred during the gap period. That is the necessary remedy: mere deletion of the offending regulations would provide no relief, since the gap period has now ended.[40]

The court agreed and found that the Commission's rationale for not permitting rate justifications based on external cost increases during the period from September 30, 1992 to regulation -- the so-called "gap period" -- was unconvincing. It concluded that the Commission's concern with administrative burdens on operators was misplaced since the Commission could have let an operator decide whether it believed the administrative burden of claiming the costs outweighed the amount of external cost recovery. The court further found the Commission's concern with its own administrative burdens unconvincing because the Commission would be reviewing the same type of filings in its review of rate adjustments after the initial rate was determined. Accordingly, the court held that the Commission's decision to preclude a rate adjustment designed to recover changes in external costs resulting from gap period increases was arbitrary and capricious.[41]

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[38] External costs include the following categories of costs: state and local taxes applicable to the provision of cable television service; franchise fees; costs of complying with franchise requirements; retransmission consent fees and copyright fees; other programming costs; and Commission cable television system regulatory fees. 47 C.F.R. § 76.922(f)(1).

[39] 47 C.F.R. § 76.922(d)(2).

[40] Petitioners' Joint Brief at 95. The scope of the relief requested is reflected in Time Warner's Emergency Motion for Expedited Review (May 3, 1994 at 17-18), urging judicial expedition because even if petitioners "eventually succeed in persuading this Court to rule in their favor, those losses cannot be recouped. Their unrecoverable economic loss thus constitutes irreparable injury."

[41] 56 F.3d at 173-174.

25. **Response to Court's Decision.** In response to the court's decision, we are amending our rules to permit operators to adjust their current permissible rates to reflect the rates the operators would currently be charging if they had been permitted to include increases in external costs occurring between September 30, 1992 and their initial date of regulation reduced by inflation increases already received with respect to those costs.

26. An increase in rates due to external cost changes that occurred during the gap period shall be reflected in the cable operator's next rate adjustment filing in accordance with our current rules.[42] Where an operator is required to file to justify its rates, the operator may reflect this adjustment the next time it makes such a filing, i.e., in its next FCC Form 1210 or FCC Form 1240.[43] The rate adjustment will be reviewed in accordance with existing Commission rules regarding review of rate increases, and where an operator has put into effect its adjustment but that adjustment is later found to have been calculated incorrectly, the operator will be subject to refund liability and prospective rate reductions.[44]

27. The operator will calculate an adjustment which will be incorporated into a Form 1210 or Form 1240, and which will be added to the operator's rate. To calculate the adjustment, the operator will use information from a previously filed Form 1200. A more detailed explanation of how to make the adjustment is provided in Appendix B. The general methodology is as follows: the operator should calculate and subtract (a) the "average monthly external cost per subscriber per tier as of September 30, 1992, as adjusted for inflation through the initial date of regulation" from (b) the "average monthly external cost per subscriber per tier as of the initial date of regulation." To determine (a), the operator would increase the average monthly external cost per subscriber per tier as of September 30, 1992 by the same inflation factor as was applied in the calculation of initial maximum permitted rates. The difference between (a) and (b) is the allowed adjustment.

28. When using Form 1210 or Form 1240 to reflect these adjustments, the

[42] An operator should allocate its external cost increases so that they are reflected in the particular tier for which they are incurred. *See* 47 C.F.R. § 76.924(f).

[43] 47 C.F.R. § 76.922(d)(3)(iii); § 76.922(e)(2)(ii)(C). Section 76.922(d)(3)(i) provides that, under the quarterly system, a system must adjust its rates annually to reflect any changes in external costs, inflation and the number of channels on regulated tiers that occurred during the year if the system wishes to have such changes reflected in its regulated rates. A system that does not adjust its permitted rates annually to account for these changes will not be permitted to increase its rates subsequently to reflect the changes. 47 C.F.R. § 76.922(d)(3)(i). Therefore, if an operator has not reflected the external cost adjustment in the rates it is charging within one year after the effective date of the rule adopted herein regarding external costs, an operator filing Form 1210 thereafter will not be permitted to reflect the external cost adjustment. *See* 47 C.F.R. § 76.922(d)(3)(i). *See also* 47 C.F.R. § 76.922(e)(2)(ii). For operators on the annual system, the effective date of the rule will serve as the date the operator began incurring the cost. 47 C.F.R. § 76.922(e)(3)(i).

[44] *See* 47 C.F.R. §§ 76.933, 76.942, 76.944, 76.957, 76.960, 76.961.

operator shall disclose that the adjustment has been included in rates and shall provide its calculations.

VII. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

29. The requirements adopted in this *Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") 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 ("OMB") as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in this *Order* as required by the 1995 Act.[45] OMB comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

30. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after publication of the *Order* in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after publication of the *Order* in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236, NEOB, 725 -17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov. For additional information concerning the information collections contained herein contact Dorothy Conway at 202-418-0217, or via the Internet at dconway@fcc.gov.

VIII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

31. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in MM Docket 92-266 and in several further notices of proposed rulemaking. The Commission therein sought written public comments on the proposals, including comments on the IRFAs, and addressed these comments in previous orders. *See,*

[45]Pub. L. No. 104-13.

e.g., 8 FCC Rcd 5631, 5978 (1993); 9 FCC Rcd 1164, 1253 (1993); 9 FCC Rcd 4119, 4249 (1994). This FRFA thus addresses the impact of regulations on small entitities only as adopted or modified in the action and not as adopted or modified in earlier stages of this rulemaking proceeding. The Commission's Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847.[46]

32. *Need and Purpose for Action:* This action is taken to conform the Commission's rules to the court's decision in *Time Warner Entertainment Co.* v. *FCC*, 56 F.3d 151 (D.C. Cir. 1995).

33. *Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:* This order is adopted in direct response to a judicial remand and has been adopted without a further notice and comment cycle.

34. *Description and Estimate of the Number of Small Entities Impacted:*

Cable Systems: SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[47]

The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[48] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[49] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that

[46]Subtitle II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. § 610 *et seq.* (1996).

[47]1992 Census, *supra*, at Firm Size 1-123.

[48]47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995).

[49]Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Memorandum Opinion and Order.*

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[50] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[51] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[52] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Municipalities: The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand."[53] There are 85,006 governmental entities in the United States.[54] This number includes such entities as states, counties, cities, utility districts and school districts. We note that any official actions with respect to cable systems will typically be undertaken by LFAs, which primarily consist of counties, cities and towns. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states, which typically are not LFAs. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000. Thus, approximately 37,500 "small governmental jurisdictions" may be affected by the rules adopted in this *Memorandum Opinion and Order.*

35. *Reporting, Recordkeeping, and Other Compliance Requirements:* The rules do not establish any filing requirements. However, an operator choosing to adjust its rates to account for changes in its external costs as permitted by the rule adopted here will have to make additional calculations in conjunction with the filing of its form. The franshising authority will review these calculations in conjunction with its review of the form. The rule will not require any additional special skills beyond any which are already needed in the

[50]47 U.S.C. § 543(m)(2).

[51]47 C.F.R. § 76.1403(b).

[52]Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[53]5 U.S.C. § 601(5).

[54]United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments.*

cable rate regulatory context.

36. *Steps Taken to Minimize the Economic Impact on Small Entities and Significant Alternatives Rejected:* The rule changes adopted in this Order are required by the court's decision, and, if anything, they result in decreasing the regulatory burdens on cable oeprators. If the revised interpretation of the statutory definition of effective competition results in a system being subject to effective competition, then the system will not be subject to rate regulation. The amendment to the tier buy-through rule provides more flexibility for cable systems subject to effective competition. The requirement that the Commission not establish a relationship between the franchising authority's ability to regulate and its franchise fee collection may simplify the franchising authority's request that the Commission assume jurisdiction. The cable operator may choose whether or not to adjust its rate to account for changes in external costs as permitted by the rule. If a system is regulated and it chooses to adjust its rate, it can do so the next time it is scheduled to file a form.

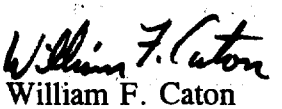
37. *Report to Congress:* The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Memorandum Opinion and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

IX. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Section 4(i) and (j) and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Part 76 of the Commission Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix A.

39. IT IS FURTHER ORDERED that the rule provisions set forth in Appendix A shall be effective 30 days after publication in the Federal Register, except that the amendments to 47 C.F.R. § 76.922 will not go into effect until approval by the Office of Management and Budget of the information collection requirements.

FEDERAL COMMUNICATIONS
COMMISSION



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: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.905 is amended to revise paragraph (f) to read as follows:

Section 76.905 Standards for identification of cable systems subject to effective competition.

* * * * *

(f) For purposes of determining the number of households subscribing to the services of a multichannel video programming distributor other than the largest multichannel video programming distributor, under paragraph (b)(2)(ii) of this section, the number of subscribers of all multichannel video programming distributors that offer service in the franchise area will be aggregated.

* * * * *

3. Section 76.913 is amended to revise paragraph (b)(1) to read as follows:

Section 76.913 Assumption of jurisdiction by the Commission.

* * * * *

(1) The franchising authority lacks the resources to administer rate regulation.

4. Section 76.921 is amended to revise paragraph (a) to read as follows:

Section 76.921 Buy-through of other tiers prohibited.

(a) No cable system operator, other than an operator subject to effective competition, may require the subscription to any tier other than the basic service tier as a condition of subscription to video programming offered on a per channel or per program charge basis. A cable operator may, however, require the subscription to one or more tiers of cable

programming services as a condition of access to one or more tiers of cable programming services.
(b) A cable operator not subject to effective competition may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per-channel or per-program charge basis.
(c) With respect to cable systems not subject to effective competition, prior to October 5, 2002, the provisions of paragraph (a) of this section shall not apply to any cable system that lacks the capacity to offer basic service and all programming distributed on a per channel or per program basis without also providing other intermediate tiers of service:
(1) By controlling subscriber access to nonbasic channels of service through addressable equipment electronically controlled from a central control point; or
(2) Through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided.
(d) With respect to cable systems not subject to effective competition, any retiering of channels or services that is not undertaken in order to accomplish legitimate regulatory, technical, or customer service objectives and that is intended to frustrate or has the effect of frustrating compliance with paragraphs (a) through (c) of this section is prohibited.

5. Section 76.922 is amended to revise paragraph (d)(3)(vii) to read as follows:

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

* * * * *

(vii) The starting date for adjustments on account of external costs for a tier of regulated programming service shall be the earlier of the initial date of regulation for any basic or cable service tier or February 28, 1994. Except, for regulated FCC Form 1200 rates set on the the basis of rates at September 30, 1992 (using either March 31, 1994 rates initially determined from FCC Form 393 Worksheet 2 or using Form 1200 Full Reduction Rates from Line J6), the starting date shall be September 30, 1992. Operators in this latter group may make adjustment for changes in external costs for the period between September 30, 1992, and the initial date of regulation or February 28, 1994, whichever is applicable, based either on changes in the GNP-PI over that period or on the actual change in the external costs over that period. Thereafter, adjustment for external costs may be made on the basis of actual changes in external costs only.

* * * * *

APPENDIX B

This adjustment may be made only to rates set under the benchmark methodology on the basis of rates in effect at September 30, 1992 (using either March 31, 1994 rates initially determined from FCC Form 393 Worksheet 2 or using Form 1200 Full Reduction Rates from Line J6). This a one-time adjustment to rates and may be made on a FCC Form 1210 or FCC Form 1240. To adjust such rates to include fully the change in external costs occurring between September 30, 1992 and the initial date of regulation or February 28, 1994, whichever is earlier, the operator will make the adjustments pursuant to the procedure outlined below.

Step 1. Identify the average external cost per subscriber per tier as of the initial date of regulation or February 28, 1994, as applicable.

This information is found on Line B7 of Form 1200.

Step 2. Identify the average monthly external cost per subscriber per tier as of September 30, 1992.

This should be calculated using the same methodology used to determine the external cost per subscriber per tier on the initial date of regulation, and the operator shall therefore follow the instructions for Lines B2 through B7 on FCC Form 1200. In such case "Beginning Date" shall be considered to be September 30, 1992 for purposes of following these instructions.

Step 3. Determine the inflation factor applied in the calculation of initial maximum permitted rates to adjust for inflation for the period from September 30, 1992 to the initial date of regulation or February 28, 1994, as applicable.

If the rates being adjusted were determined on FCC Form 1200 based on rates in effect on September 30, 1992 under the FCC Form 1200 Full Reduction Methodology (*i.e.*, the rates on both Line I18 and Line J6 of FCC Form 1200), the inflation factor applied is 3%. In determining Full Reduction Rates on FCC Form 1200, the September 30, 1992 rates were adjusted to September 30, 1993 (on Line G10) using 3%.

If the rates being adjusted were determined on FCC Form 1200 based on rates current at March 31, 1994 but initially determined on FCC Form 393 from September 30, 1992 rates (under the Worksheet 2 methodology), the inflation factor applied from September 30, 1992 to the initial date of regulation is the factor found on Line 401 of FCC Form 393. This is the factor used by the operator initially to set rates using FCC Form 393, unless a corrected factor was ordered by a regulatory authority. If the factor was corrected, the

regulator-ordered factor for Line 401 shall be used.

Step 4. Adjust the amount from Step 2 by the factor identified in Step 3.

Step 5. Subtract the amount calculated in Step 4 from the amount determined in Step 1, *i.e.*, from the average monthly external cost per subscriber per tier as of the initial date of regulation. The resultant amount is the permanent adjustment -- a one-time average monthly per subscriber per tier adjustment to the operator's maximum permitted rate.

Step 6. Complete FCC Form 1210 or FCC Form 1240 in accordance with Commission rules and procedures for the applicable form, but include the adjustment calculated in Step 5.

> If a FCC Form 1210 is used, the resultant adjustment amount from Step 5 should be added to the amount on Line J8 (Aggregate Full Reduction Rate) or, if transition rates are being adjusted, the adjustment should be added to the amounts on Lines I8 (Updated Transition Rate per Tier) and J8.
>
> If a FCC Form 1240 is used, the resultant adjustment amount from Step 5 should be added to Line H9 (Maximum Permitted Rate for Projected Period).

Along with the FCC Form 1210 or FCC Form 1240 adjusted, the operator shall disclose that the adjustment has been included in rates and shall provide its calculations of the adjustment amount.

> The operator shall provide the level of external cost adjustment disclosure shown in Module B, Line B2 through B14 of FCC Form 1200, except that it shall also disclose the adjustment for inflation applied to the average monthly external cost per subscriber per tier as of September 30, 1992.