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

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

FOURTEENTH ORDER ON RECONSIDERATION

Adopted: September 24, 1997 **Released: October 1, 1997**

By the Commission:

I. INTRODUCTION

1. On May 5, 1995, the Commission adopted the *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266 and 93-215 ("*Small System Order*"),[1] thereby modifying the rules governing rates charged for regulated cable services by certain smaller cable systems. In this order, we address petitions for reconsideration of the *Small System Order*.

II. BACKGROUND

2. Section 623(i) of the Communications Act of 1934, as amended ("Communications Act"), requires that the Commission design rate regulations to reduce the administrative burdens and the cost of compliance for cable systems with 1,000 or fewer subscribers.[2] In the course of establishing the standard benchmark and cost of service ratemaking methodologies generally available to cable operators, the Commission adopted various measures aimed specifically at easing regulatory burdens for these smaller systems.[3] In the *Small System Order*, the Commission further extended small system rate relief

[1]FCC 95-196, 10 FCC Rcd 7393 (1995).

[2]47 U.S.C. § 543(i).

[3]*See, e.g., Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993) ("*Rate Order*"); *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking* in MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Reconsideration Order*"); *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket Nos. 93-215 & 93-266, 9 FCC Rcd 5327 (1994); *Eighth Order on Reconsideration* in MM Docket Nos. 92-266 & 93-215, FCC 95-42, 10 FCC Rcd 5179 (1995).

to certain systems that exceed the 1,000-subscriber standard.[4] These systems were deemed eligible for small system treatment because we determined that they faced higher costs and other burdens disproportionate to their size.[5]

3. The *Small System Order* defines a small system as any system that serves 15,000 or fewer subscribers.[6] The Commission recognized that systems with no more than 15,000 subscribers were qualitatively different from larger systems with respect to a number of characteristics, including: (1) average monthly regulated revenues per channel per subscriber; (2) average number of subscribers per mile; and (3) average annual premium revenues per subscriber.[7] The magnitude of the differences between the two classes of systems as to these characteristics indicated that the 15,000 subscriber threshold was an appropriate point of demarcation for purposes of providing for substantive and procedural regulatory relief.[8]

4. Most forms of rate relief provided under the *Small System Order* and the Commission's rules are available only to those small systems that are owned by a small cable company, which is defined as a cable operator that serves a total of 400,000 or fewer subscribers over all of its systems.[9] The Commission adopted this threshold because it roughly corresponds to $100 million in annual regulated revenues, a standard the Commission has used in other contexts to identify smaller entities deserving of relaxed regulatory treatment.[10] The Commission found that cable companies exceeding this threshold would find it easier than smaller companies to attract the financing and

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[4]*Small System Order*, 10 FCC Rcd at 7406.

[5]*Id.* at 7407. More recently, Congress amended Section 623 of the Communications Act to allow greater deregulation for "small cable operators," defined as operators that "directly or through an affiliate, [serve] in the aggregate fewer than 1 percent of all subscribers in the United States and [are] not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 301(c), 110 Stat. 56, approved February 8, 1996; Communications Act, § 623(m), 47 U.S.C. § 543(m). Pursuant to this amendment, the rate regulation requirements of Sections 623(a), (b) and (c) do not apply to a small cable operator with respect to "(A) cable programming services, or (B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994," in areas where the operator serves 50,000 or fewer subscribers. *Id.* A cable operator subject to deregulation under this statutory provision is, of course, exempt from our rules regulating small systems. *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85, 11 FCC 5937, 5947-50 (1996).

[6]*Small System Order*, 10 FCC Rcd at 7406.

[7]*Id.* at 7408.

[8]*Id.*

[9]*Id.* A small system is deemed owned by a larger cable company if the company "holds more than a 20 percent equity interest (active or passive) in the system or exercises *de jure* control (such as through a general partnership or majority voting shareholder interest)." *Id.* at 7412-13, n.88.

[10]*Id.* at 7409-11.

investment necessary to maintain and improve service.[11] In addition, the Commission determined that cable companies that exceeded the small cable company definition "are better able to absorb the costs and burdens of regulation due to their expanded administrative and technical resources."[12]

5. In addition to adopting the new categories of small systems and small cable companies, the *Small System Order* introduced a form of rate regulation known as the small system cost of service methodology.[13] This approach, which is available only to small systems owned by small cable companies, follows general principles of cost of service rate regulation. An eligible cable operator may establish a maximum permitted rate for regulated cable service equal to the amount necessary to cover its operating expenses plus a reasonable return on its prudent investment in the assets used to provide that service. The small system cost of service methodology differs both procedurally and substantively from the standard cost of service methodology available to cable operators generally. We sought to adopt an administratively less burdensome procedure for eligible small cable companies based on evidence that our standard procedures "place an inordinate hardship upon [smaller cable companies] in terms of labor and other resources that must be devoted to ensuring compliance."[14] In addition, we intended to relieve eligible small cable companies from some of the substantive burdens that otherwise apply in cost of service cases, having found that our standard rules "do not adequately take into account the higher costs of doing business, and particularly the higher costs of capital, faced by smaller cable companies."[15]

6. To implement the small system cost of service rules, we designed FCC Form 1230, a simplified one-page form, for use exclusively by operators eligible for these rules. This form is more streamlined than Form 1220 used for cost of service showings by larger operators. To use Form 1230, the operator must calculate five items of data pertaining to the system in question: annual operating expenses, net rate base, rate of return, channel count and subscriber count.[16] Once these variables are calculated, the form generates the maximum per channel rate the operator may charge for regulated service. Although subject to regulatory review, this rate is presumed reasonable if it is no more than $1.24 per channel.[17] As we stated in the *Small System Order*:

> We have adopted the rate of $1.24 per channel . . . 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. . . . 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.

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[11] *Id.* at 7411.

[12] *Id.* at 7409.

[13] *Id.* at 7418-28.

[14] *Id.* at 7420.

[15] *Id.*

[16] *Id.* at 7419.

[17] *Id.*

> 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 $1.24. 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.[18]

7. When applicable, the presumption of reasonableness effectively exempts eligible cable operators from many of the proof burdens that apply under our standard cost of service rules. For example, eligible small cable companies have greater discretion than larger operators in determining how to allocate costs between regulated and unregulated services and between various levels of regulated services.[19] Similarly, qualifying cable operators using Form 1230 are not subject to the presumption of unreasonableness that otherwise attaches when an operator seeks a rate of return higher than 11.25%.[20] As noted, an eligible operator enjoys the presumption of reasonableness with respect to these and other factors only if the maximum permitted rate claimed on Form 1230 does not exceed $1.24 per channel. If the rate exceeds $1.24 per channel, the cable operator still may use Form 1230, but is subject to the same presumptions that apply in a standard cost of service showing. As with other rate-setting procedures, a cost of service showing involving Form 1230 is subject to review by the cable operator's local franchising authority and/or by the Commission.[21]

8. With respect to the effective date of the small system rules, we stated as follows:

> . . . 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

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[18] *Id.* at 7425-26. As we explained in the *Small System Order*, standard deviation measures variance from the average in a sample. Applying one standard deviation to the sample of cable systems used to calculate the $.93 average rate should capture about two-thirds of the eligible small cable systems. *Id.* at 7426, n.127. That is, two-thirds of the systems will have rates within one standard deviation from the average, with some having rates below the average and some above the average. The remaining one-third of eligible systems will have rates that are either so low or so high as to fall outside one standard deviation from the average. In the *Small System Order*, we incorrectly asserted that all systems falling outside one standard deviation are above it. *Id.* In fact, of the one-third of eligible systems not charging rates within one standard deviation of $.93, approximately half will have rates above one standard deviation (i.e., above $1.24 per regulated channel) and half will have rates below one standard deviation (i.e., below $.62 per regulated channel). Therefore, contrary to what we stated in the *Small System Order*, approximately one-sixth (i.e., one-half of one-third) of eligible systems will have rates exceeding $1.24 per regulated channel and will have the burden of showing the reasonableness of the rate, if challenged.

[19] *Id.* at 7421-22.

[20] *Id.* at 7423.

[21] *Id.* at 7425-26.

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.[22]

9. The *Small System Order* was released on June 5, 1995. We directed franchising authorities to apply the small system cost of service approach to rate cases pending as of that date because the record demonstrated that the pre-existing rules were imposing a significant burden on small systems.[23]

III. PETITIONS FOR RECONSIDERATION

10. Two parties have sought reconsideration of the *Small System Order* and a number of other parties have filed comments opposing the petitions.[24] In one petition, the Georgia Municipal Association ("GMA") requests that we repeal the small system cost of service rules in their entirety.[25] In the alternative, GMA urges the Commission to lower the maximum amount of $1.24 per channel at which an operator may set rates and still be entitled to a presumption of reasonableness.[26] In support of its petition, GMA questions the accuracy of the underlying cost data that we used to set the $1.24 per channel rate.[27] In addition, GMA claims that the new rules will increase burdens on franchising authorities and lead to unreasonable rates for regulated cable services.[28] GMA also cites examples of what it claims are cable operators abusing the small system rules.[29]

11. The New Jersey Board of Public Utilities ("New Jersey Board") seeks reconsideration of the *Small System Order* to the extent it permits application of the small system rules to rate cases that were pending as of the release date of the order.[30] In support of its petition, the New Jersey Board describes the possible impact of the small system rules upon a rate case that was pending before it when the Commission released the *Small System Order* on June 5, 1995. According to the New Jersey Board, the cable operator in that case has given notice of its intent to attempt to justify its proposed rate increase by filing FCC Form 1230.[31] The New Jersey Board complains that the rules governing the

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[22] *Id.* at 7428.

[23] *Id.*

[24] *See* Appendix A, List of Commenters.

[25] Georgia Municipal Association Petition for Reconsideration ("GMA Petition") at 1.

[26] *Id.*

[27] *Id.* at 2.

[28] *Id.*

[29] *Id.* at 3.

[30] New Jersey Board of Public Utilities Petition for Reconsideration ("New Jersey Board Petition") at 1.

[31] *Id.* at 5.

information that a franchising authority may seek in conjunction with its review of a Form 1230 are overly restrictive.[32] The New Jersey Board also objects to having to bear the burden of showing the unreasonableness of the rate sought by the operator if that rate does not exceed $1.24 per regulated channel.[33] As a result of the above, the New Jersey Board contends it will be "precluded from establishing whether the cable operator's subscribers are being charged a reasonable rate," assuming the operator meets the small system and small cable company definitions.[34] The New Jersey Board also asserts the alleged unfairness of applying the small system cost of service rules to the pending case in light of the resources that the Board already has expended in the case.[35] Along with its petition for reconsideration, the New Jersey Board also filed a motion for stay of the *Small System Order* to the extent it mandates application of the new rules to pending cases.[36]

IV. DISCUSSION

12. Neither petition challenges our determination that some measure of regulatory relief is appropriate for small systems owned by small cable companies. The petitioners do not dispute our conclusion that such systems face proportionately higher operating and capital costs than larger cable entities. Likewise, the petitioners do not contest that our standard cost of service rules may place "an inordinate hardship" on smaller systems "in terms of the labor and other resources that must be devoted to ensuring compliance."[37] As the National Cable Television Association states in its opposition: "The [p]etitions do not dispute the core underpinnings of the new rules."[38] Therefore, the petitions give us no reason to reconsider our decision to establish for eligible small systems a form of rate regulation that lessens some of the substantive and procedural burdens that otherwise would apply. Because the petitions raise separate issues, we will resolve the merits of each petition individually.

A. The GMA Petition

13. GMA challenges the presumption of reasonableness that arises when an eligible small system uses Form 1230 to justify a regulated rate that does not exceed $1.24 per channel. As noted above, we established $1.24 per channel as the appropriate cut-off based on cost data previously submitted to the Commission by small cable companies seeking to establish regulated rates for their small systems

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 7.

[35] *Id.* at 6-7.

[36] With the exception of some additional language alleging irreparable harm if a stay is not granted, the New Jersey Board's motion is identical to the New Jersey Board Petition. *See generally* New Jersey Board of Public Utilities Motion for Stay ("New Jersey Board Motion for Stay"). Because the New Jersey Board Motion for Stay repeats the New Jersey Board Petition almost verbatim, we need not summarize it separately.

[37] *Small System Order*, 10 FCC Rcd at 7420.

[38] National Cable Television Association Opposition at 4.

by using Form 1220 in accordance with our standard cost of service rules. GMA asserts that a careful review of the Form 1220s that we relied on to set the $1.24 per channel rate "would probably . . . [show] that corrections should be made to the operators' calculations in a large percentage of cases."[39] In support of this prediction, GMA states that "several" Georgia cable operators using FCC Form 1220 have overstated the value of the intangible assets in their ratebases.[40] In addition, GMA states that the Commission found calculation or allocation errors in each of the nine cost of service cases that we had addressed as of the date GMA filed its petition.[41] GMA cites three specific cost of service cases in which the Cable Services Bureau ("Bureau") made adjustments to correct such errors.[42] On this basis, GMA argues that "there is a strong possibility that there are errors" in the Form 1220s from which we gleaned the cost data to establish the presumptively reasonable rate of $1.24 per channel.

14. We believe that the rate-setting mechanism we adopted in the *Small System Order* reflects a reasoned judgment as to the method for establishing the rates that an eligible small system may charge for regulated services. Neither GMA nor any other party challenges this mechanism. GMA objects only to the input data that produced the standard of $1.24 per regulated channel against which the rates of eligible small systems are measured. We considered whether a more comprehensive review of small system cost data was necessary to ensure that our small system rules were properly tailored to the conditions faced by such systems. In weighing the advantages and disadvantages of conducting such a survey, we observed that

> many smaller cable operators and cable 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.[43]

15. GMA does not challenge our finding that small systems owned by small cable companies were in need of immediate relief. GMA suggests that the Form 1220 filings on which we relied were so facially inaccurate that we should have conducted a further analysis of small system cost data. We disagree. This approach would have delayed implementation of measures for which there was an immediate need and would have imposed additional administrative responsibilities (i.e., having to respond to Commission inquiries concerning small system costs) on the very entities that we found were the most burdened by regulation.

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[39]GMA Petition at 2.

[40]*Id.*

[41]*Id.*

[42]*Id.* at 2, n.2, citing *In the Matter of Cable TV of Georgia, L.P., Memorandum Opinion and Order*, 9 FCC Rcd 7151 (Cable Services Bur. rel. Nov. 9, 1994) ("*Cable TV of Georgia*"); *In the Matter of Mid-Atlantic CATV Limited Partnership, Memorandum Opinion and Order*, 9 FCC Rcd 7204 (Cable Services Bur. rel. Nov. 9, 1994) ("*Mid-Atlantic*"); *In the Matter of United Video Cablevision, Inc., Memorandum Opinion and Order*, 9 FCC Rcd 7163 (Cable Services Bur. rel. Nov. 9, 1994) ("*United Video*").

[43]*Small System Order*, 10 FCC Rcd at 7419.

16. GMA fails to persuade us that the benefits of further analysis of small system cost data would have outweighed the administrative costs and delay that such analysis would have entailed. While GMA does not dispute that such costs and delay would have been both inevitable and extremely burdensome, it fails to factor these considerations into its discussion. GMA bases its request for reconsideration on the fact that the Bureau found allocation or calculation errors in the cost of service cases it cites. In *Cable TV of Georgia*, for example, the Bureau adjusted the claimed operating losses by excluding start-up losses incurred after the system's first two years of operation and by correcting the manner in which the operator had allocated costs between regulated tiers of cable service.[44] Similarly, the Bureau made adjustments in the *United Video* matter to correct improper allocations between tiers and to reduce the rate of return claimed by the cable operator.[45] The major adjustments made in *Mid-Atlantic* resulted from improper tier allocations and excessive start-up losses claimed by the operator.[46]

17. The impact of the adjustments cited are overstated by GMA and do not undermine the formulation of the $1.24 standard. The Bureau decisions cited by GMA were based on general cost of service principles and not under the interim rules the Commission adopted in February 1994.[47] As of the time of those filings, we had directed cost of service operators to justify their rates in accordance with traditional cost of service principles generally applicable in the field of utility rate regulation.[48] After seeking and reviewing further public comment, we subsequently adopted more refined cost of service rules better tailored for use in the cable service context.[49] At the same time, we designed Form 1220 for use in accordance with the new rules. The cost data used in the *Small System Order* were gleaned from Form 1220s filed by small systems pursuant to cost of service rules adapted specifically for use by cable operators. The specificity of the new rules, combined with the uniformity of presentation required by

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[44]9 FCC Rcd at 7153-54.

[45]*Id.* at 7164-65.

[46]9 FCC Rcd at 7205-07.

[47]Our general cable cost of service rules have been the subject of three major Commission orders. When we adopted the *Rate Order*, our first order implementing the rate regulation provisions of the 1992 Cable Act, we found that the record did not contain sufficient information to enable us to develop detailed cost of service rules properly tailored for the cable industry. 8 FCC Rcd at 5799. Pending the adoption of specific rules pursuant to a further rulemaking, we said that in lieu of the benchmark approach, operators could make individual cost showings that would be subject to case-by-case review. After further notice and comment, we adopted a specific cost of service alternative to the benchmark approach. *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 93-215 and CS Docket No. 94-28, FCC 94-39, 9 FCC Rcd 4527 (1994) ("*Interim Cost Order*" or "*Further Notice*"). The *Interim Cost Order* refined general cost of service principles to better suit the unique characteristics of the cable industry. As its name suggests, the *Interim Cost Order* did not resolve all of the outstanding issues, thus necessitating the *Further Notice*. Pursuant to comments received in response to that item, we subsequently adopted the *Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking* in MM Docket No. 93-215 and CS Docket No. 94-28, FCC 95-402, 11 FCC Rcd 2220 (1996) ("*Final Cost Order*"). Between adoption of the *Interim Cost Order* and the *Final Cost Order*, we adopted the small system cost of service rules in the *Small System Order*.

[48]*See supra* note 46.

[49]*See, generally, Interim Cost Order.*

Form 1220, makes the latter submissions inherently more reliable than the earlier submissions cited by GMA.[50] Thus, the errors in the filings relied on by GMA do not suggest the likelihood of material inaccuracies in the subsequent Form 1220 filings. This is particularly true given the nature of the errors in the cases cited by GMA. In each case, the errors were so minor that the Bureau found that the rates actually being charged by the cable operator were nevertheless justified and denied the complaint.

18. We further note that in the *Small System Order*, we decided that standards applicable to cable systems generally were inappropriate for small systems owned by small cable companies. In particular, we decided that eligible small systems should be given more regulatory leeway than larger cable entities, because small systems face disproportionately higher operating costs, capital costs, and regulatory compliance costs: "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."[51]

19. With respect to eligible small systems, we relaxed the very standards that had caused the Bureau to make the adjustments described in the cost of service cases cited by GMA. For example, we decided that small systems owned by small cable companies were entitled to "substantial flexibility to fairly allocate costs between . . . [regulated service tiers], equipment and unregulated services."[52] Likewise, we concluded that an eligible small cable company should "have substantial flexibility in calculating its net rate base."[53] We stated, among other things, that for qualifying systems "we will not presume it unreasonable to include in the rate base start-up losses that exceed the first two years of operating expenses," even though larger operators are subject to such a presumption.[54] Noting the greater risks of providing service and the higher costs of capital faced by many small systems, we found it reasonable for small systems owned by small cable companies to seek a higher rate of return than larger companies.[55] Further, with respect to the valuation of intangible assets, we stated that in the case of eligible small systems, "we will not presumptively exclude intangibles such as acquisition costs from the net rate base," even though in the case of larger cable companies, including those cited by GMA, we have been more restrictive with respect to the inclusion of the value of intangible assets in the ratebase.[56]

20. GMA does not dispute that we should be less restrictive in applying cost of service principles to small systems owned by small cable companies. Yet it invites us to question cost information submitted by such systems by applying the stricter standards that we have found inappropriate

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[50]James Cable Partners and Rifkin and Associates, Inc. Opposition ("James Cable Opposition") at 6.

[51]*Small System Order*, 10 FCC Rcd at 7422.

[52]*Id.*

[53]*Id.*

[54]*Id.*

[55]*Id.* at 7423.

[56]*Id.* at 7422.

for those systems. Because GMA's argument relies on overly restrictive standards, we find that it has not raised a material issue with respect to the reliability of those filings.

21. In addition to its specific challenge to the per channel rate of $1.24, GMA recites several "experiences" of Georgia franchising authorities that purport to show that the small system rules "are unfair to those franchising authorities who have invested a substantial amount of time and money in the rate regulation process."[57] GMA further complains that these examples prove that "the rules are unfair to subscribers, because some cable operators will increase rates well beyond the level which subscribers would pay if competition existed."[58] These conclusory allegations do not refute the specific findings or analyses set forth in the *Small System Order* and do not state a basis for us to reconsider that order. Furthermore, franchising authorities had no reasonable reliance interest in our rules remaining unchanged. As for practices of the individual operators identified in the GMA petition, we do not believe it is appropriate for us to make specific findings in this context regarding the propriety of those practices. To the extent cable operators fail to abide by our rules, local franchising authorities may take appropriate action.

22. For the reasons stated above, we hereby deny GMA's petition for reconsideration.

B. The New Jersey Board Petition

23. The New Jersey Board objects to the *Small System Order* to the extent it requires local franchising authorities to permit eligible systems to use the small system cost of service methodology in cases pending as of the date the *Small System Order* was released. As we stated in the *Small System Order*: "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."[59]

24. In support of its petition, the New Jersey Board describes the potential impact of the *Small System Order* upon a rate case pending before it. That case involves the rates charged by Service Electric Cable TV of Hunterdon ("Service Electric"). Service Electric filed a standard cost of service showing with the New Jersey Board on July 14, 1994.[60] Pursuant to that showing, Service Electric sought to increase its monthly rates from $21.00 to $26.31 for its 60-channel basic service tier.[61] That

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[57]GMA Petition at 4. GMA attaches a letter from one cable operator informing the local franchising authority of its intention to increase its rates in accordance with the formula for small systems. In addition, GMA states that the cable operator for the City of Chatsworth threatened to use a rate increase under the *Small System Order* to offset any refund obligation. Finally, GMA describes a situation where the rate order issued by the City of Aldora was rendered meaningless because it was issued on June 6, 1995, and operators with rate cases pending as of June 5, 1995 were deemed eligible for small system treatment.

[58]*Id.*

[59]*Small System Order*, 10 FCC Rcd at 7428.

[60]New Jersey Board Petition at 4.

[61]*Id.*

case was pending when the Commission released the *Small System Order* on June 5, 1995, although the staff of the New Jersey Board had negotiated a tentative settlement with Service Electric that was subject to the approval of the New Jersey Board.[62] Before such approval occurred, Service Electric gave notice of its intent to attempt to justify its proposed rate increase by filing FCC Form 1230.[63]

25. The New Jersey Board contends that under the small system cost of service rules, Service Electric might be able to justify the rate increase it sought in its initial showing to the Board or, potentially, an even greater increase.[64] According to the New Jersey Board, the rules governing the information that a franchising authority may seek in conjunction with its review of Form 1230 are so restrictive that it will be "difficult if not impossible to challenge" the rate the operator seeks to justify.[65] The New Jersey Board also notes that under the small system cost of service rules, the burden is on the franchising authority to show the unreasonableness of the rate sought by an eligible small system if that rate does not exceed $1.24 per regulated channel.[66] The New Jersey Board asserts that this "unprecedented" shift in the burden of proof will "necessitate the use of Board and State resources not usually required" in order to establish the unreasonableness of the rate sought by the cable operator.[67]

26. Based on the above, the New Jersey Board argues that it will be "precluded from establishing whether Service Electric's subscribers are being charged a reasonable rate," assuming the operator meets the small system and small cable company definitions.[68] The New Jersey Board also asserts the alleged unfairness of applying the small system cost of service rules to the pending case in light of the resources that it already has expended in the case.[69]

27. As an initial matter, we note that the petition seeks reconsideration of a Commission rule of general applicability based solely on the potential effect of that rule on a single rate case affecting approximately 3,000 cable subscribers.[70] The Commission is charged with structuring a national framework of rate regulation. A broader and more representative showing of the rule's impact is necessary for us to review the merits of a particular rule or regulatory approach.

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[62] *Id.* at 5.

[63] *Id.*

[64] *Id.* at 6.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 7.

[69] *Id.* at 6-7.

[70] Service Electric Opposition at 3.

28. Further, the New Jersey Board fails to refute the underlying analysis supporting our decision to apply the new rules to pending cases. We adopted this approach based upon our balancing of various factors. With respect to rate regulation, Congress specifically directed us to reduce the administrative burdens and ease the costs of compliance for smaller systems.[71] In the *Small System Order*, we concluded that our then existing rules "have significantly burdened small systems."[72] We designed the small system cost of service rules to remedy this problem. Having determined small systems' need for immediate relief, we deemed it in the public interest to provide such relief accordingly.[73] We believe that it is appropriate to apply a new rule to pending cases where the new rule serves to alleviate an existing restriction on regulated parties, as the small system cost of service rules did by creating an additional method for eligible systems to justify their rates. In addition, were pending cases not made subject to the new rules, subscribers in some areas might have received refunds when the pending cases were decided, followed immediately by rate hikes when the systems put new rates into effect prospectively in accordance with the small system cost of service methodology. Applying the new small system rules to pending cases avoids this confusing "roller-coaster" result.[74]

29. We decided that the small system cost of service rules would not affect final decisions of local franchising authorities made before the release of the *Small System Order*.[75] In these cases, the public interest, and in particular the interests of administrative finality, dictated that the final decision of a local franchising authority should not be subject to reconsideration or appeal under the small system rules.[76]

30. By seeking reconsideration, the New Jersey Board suggests, implicitly, that we erred in finding a need for immediate relief. Yet it offers no arguments or evidence to refute this finding and thus presents no basis to reconsider it. The New Jersey Board's statement of a policy preference cannot overcome the evidence concerning the plight of smaller systems that was before us when we

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[71]Communications Act, § 623(i), 47 U.S.C. § 543(i).

[72]*Small System Order*, 10 FCC Rcd at 7428.

[73]*Id.* at 7419.

[74]We do not suggest that the small system cost of service rules automatically will generate higher rates for eligible systems. Results will vary depending upon various factors, including the extent to which the operator has depreciated its assets and the actual cost of capital that the operator confronts. However, we did recognize the overall higher costs of providing service that small systems tend to face. *Small System Order*, 10 FCC Rcd at 7420. Because our intent in adopting the small system rules was to ensure that eligible systems would be permitted to establish regulated rates in accordance with their peculiar cost environment, we concluded that such systems should not be subject to many of the presumptions that apply in a standard cost of service proceeding since those presumptions were based on characteristics of cable systems generally, not small systems in particular. *Id.* at 7420-23. Like any other cost of service operator, an operator making a showing pursuant to the rules adopted in the *Small System* Order still must justify its rates in accordance with its actual cost experience. That *Order* simply removes inappropriate presumptions that would make it difficult for a small system to demonstrate the rate that accurately reflects its costs of providing regulated service.

[75]*Small System Order*, 10 FCC Rcd at 7419.

[76]*Id.*

adopted the *Small System Order*. As James Cable Partners and Rifkin and Associates, Inc. ("James Cable") argues, it makes no sense "to complete pending cases under pre-existing criteria that do not embody the policy and statutory concerns that led to the adoption of the *Small System Order* in the first place."[77] Likewise, the New Jersey Board does not dispute the "roller-coaster" effect on rates that would result if the new rules were not applied to pending cases.[78]

31. The New Jersey Board contends that application of the small system rules to the pending Service Electric case will result in a waste of the resources it already has expended in that case. It objects to our decision to place on the franchising authority the burden of proving the unreasonableness of a proposed rate that does not exceed $1.24 per regulated channel. The New Jersey Board suggests that the presumption of reasonableness that will attach to such a rate, coupled with the limitations on the information it can demand from the operator, effectively will preclude it from determining whether a particular rate is reasonable.[79] We disagree.

32. We understand the frustration of the New Jersey Board with respect to its prior expenditure of resources in accordance with the standard cost of service rules. We note, however, that those expenditures were made with notice of the possibility that we would modify the rules governing small systems.[80] Unfortunately, rule changes and rule modifications sometimes lead to inefficiencies and disruptions for both the regulator and the regulated. We are forced to balance these factors against the impact of delaying implementation of the new rule. Since the Service Electric case is the only matter in which a franchising authority has articulated this concern, we cannot conclude that the problem is so significant to require us to reconsider our prior decision. We do not believe that the *Small System Order* will result in squandered resources even in the Service Electric case. The efforts already expended by the New Jersey Board in amassing data and making factual determinations will not have been wasted since they are relevant when the New Jersey Board decides the rate case in accordance with the small system rules.

33. More generally, we disagree with the New Jersey Board's characterization of the permissible scope of information requests that a franchising authority may make when reviewing Form 1230. The *Small System Order* expressly recognizes the right of franchising authorities to obtain "the information necessary for judging the validity" of the filing.[81] No information has been submitted to indicate that anything more than what this rule permits is necessary.

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[77]James Cable Opposition at 4.

[78]*See supra* para. 29.

[79]While we do not agree with these conclusions, we also note that there is little nexus between the concerns the New Jersey Board articulates and the relief it seeks. The New Jersey Board objects to the permissible scope of discovery and the burden of proof, but requests that we eliminate these procedural restrictions in pending cases only. Apparently, the New Jersey Board does not object to the imposition of these restrictions in future cases. We are unable to discern the basis on which the New Jersey Board distinguishes pending cases from future cases for purposes of these restrictions.

[80]*See Second Reconsideration Order*, 9 FCC Rcd at 4119, 4167-69, 4199-4200, 4223, 4247.

[81]*Small System Order*, 10 FCC Rcd at 7424.

34. We further find that the New Jersey Board has failed to raise a valid argument against imposing the burden of proof on the franchising authority when the rate in question does not exceed $1.24 per channel. What it terms an "unprecedented shift in the burden of proof" is the logical extension of our determination that rates at or below $1.24 per regulated channel appear reasonable. The New Jersey Board does not challenge the analysis by which we arrived at the rate of $1.24 per channel. While not disputing that rates at or below $1.24 per channel can be presumed reasonable, the New Jersey Board would ignore this finding in individual rate proceedings and continue to place upon the cable operator the burden of establishing the reasonableness of its requested rate, regardless of the amount. We believe that having made the determination that rates at or below $1.24 per channel may by presumed reasonable, we should shift the burden of proof to the franchising authority when the operator seeks to justify rates that do not exceed that amount. The New Jersey Board does not contest this analysis and therefore we have no basis to reconsider our decision.

35. For these reasons, we hereby deny the New Jersey Board's Petition.[82]

C. Other Matters

36. On our own motion, we clarify one aspect of our rule that allocates the burden of establishing whether the rate claimed by a cable operator under the small system cost of service methodology is reasonable.[83] As discussed above, the current rule states: "If the maximum rate established on Form 1230 does not exceed $1.24 per channel, the rate shall be rebuttably presumed reasonable."[84] Thus, the current wording of the rule suggests that the burden depends on the maximum rate permitted by Form 1230, not on the rate that the operator intends to charge. Such an interpretation would create an anomaly where an operator determines that its maximum permitted rate is above $1.24 per regulated channel, but does not actually intend to charge more than $1.24. We did not intend for the operator to have the burden of overcoming all of the presumptions we generally found to be inappropriate for eligible small systems, if the actual rate the operator seeks to charge is within the zone of what we presume to be reasonable. To eliminate this potential confusion, we hereby clarify that the presumption of reasonableness shall apply as long as the actual rate to be charged does not exceed $1.24 per regulated channel, regardless of whether the maximum permitted rate, as calculated on Form 1230, exceeds that amount. The burden shall shift back to the operator once it seeks to actually raise rates above the $1.24 per channel threshold.

37. We also take this opportunity to correct three editing errors that appeared in the rules appendix to the *Small System Order*. These corrections do not amend the substance of the rules in any way.

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[82]As mentioned above, the New Jersey Board presents the same arguments in its Motion for Stay as it does in its Petition. *See* note 36, *supra*. Therefore, for the same reasons that we deny its Petition, we also deny the New Jersey Board's Motion for Stay.

[83]In light of pending petitions for reconsideration in this proceeding, the Commission retains jurisdiction to reconsider its own rules on its own motion. *See* Communications Act §405, 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).

[84]47 C.F.R. § 76.934(h)(5)(i).

38. In the *Small System Order*, we provided for the treatment of a small system that properly sets its rates in accordance with the small system cost of service methodology, but later experiences a change in its status, either because the system exceeds the 15,000-subscriber cap for a small system or because the operator exceeds the 400,000-subscriber threshold for a small cable company. While the text of the order explained the regulatory effect of such a transition, the accompanying rules did not.[85] Here we amend the rules consistent with the text of the *Small System Order*.[86]

39. As discussed above, the *Small System Order* provided for the application of the small system cost of service rules to cases pending as of the release date of the order if the cable operator in question met the subscriber threshold criteria as of the release date and as of the date the system became subject to rate regulation.[87] The rules appendix inadvertently referred to the effective date, instead of the release date, of the *Small System Order* for purposes of this rule. We hereby revise the text of Section 76.934(h)(9) of our rules[88] to conform it with our intent as set forth in the *Small System Order*.

40. Due to an editing error, the rules appendix to the *Small System Order* did not accurately indicate that we were revising the eligibility criteria for streamlined rate reduction to incorporate the new small system and small cable company definitions established in the *Small System Order*. We hereby amend Section 76.922(b)(5) of our rules[89] to conform it with our intent as set forth in the *Small System Order*.

V. FINAL REGULATORY FLEXIBILITY CERTIFICATION

41. As permitted by Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b), ("RFA"), we certify that a regulatory flexibility analysis is not necessary because the amendments to the rules adopted in this order will not impose a significant economic impact on a substantial number of small entities as defined by statute, by our rules, or by the Small Business Administration ("SBA").[90] 5 U.S.C. § 605(b). Three of the amendments merely correct the rules and have no substantive effect. In addition, we clarified that the operator's presumption of reasonableness is preserved when the operator's

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[85]Consistent with the *Small System Order*, the rules provide that a small system may continue to establish rates in accordance with the small system methodology for so long as it serves no more than 15,000 subscribers, even if the operator of the system later exceeds 400,000 subscribers or if the system is acquired by an operator that exceeds that threshold. Thus, once a small system is eligible to establish rates in accordance with the small system cost of service methodology, its continued eligibility no longer depends on the size of the operator. When the system exceeds the small system cap of 15,000 subscribers, it may continue to charge the rate in effect when the system passed the 15,000 subscriber threshold. However, after exceeding 15,000 subscribers, the system may not adjust its rates further until it re-establishes initial permitted rates in accordance with the standard benchmark or cost-of-service rules applicable to cable systems generally. *Small System Order*, 10 FCC Rcd at 7427-28.

[86]*See* Appendix B (adding paragraph (h)(11) to 47 C.F.R. § 76.934).

[87]*Id.* at 7428.

[88]47 C.F.R. § 76.934(h)(9).

[89]47 C.F.R. § 76.922(b)(5).

[90]*See* 47 U.S.C. § 543(m)(2); 47 C.F.R. § 76.901(e); 13 C.F.R. § 121.201 (SIC 4841).

actual rate charged does not exceed $1.24 per regulated channel, regardless of the maximum permitted rate calculated on Form 1230. Because this clarification will benefit small systems owned by small cable companies, we believe a regulatory flexibility analysis is unnecessary. This certification conforms to the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").[91]

42. The Commission will send a copy of this certification, along with this 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), and to the Chief Counsel for Advocacy of the Small Business Association, 5 U.S.C. § 605(b). A copy of this certification will also be published in the Federal Register.

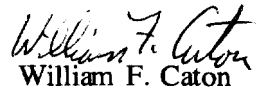
VI. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 4(j), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 543, the petitions for reconsideration filed by the Georgia Municipal Association and the New Jersey Board of Public Utilities, and the Motion for Stay filed by the New Jersey Board of Public Utilities, ARE DENIED.

44. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 4(j), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 543, Sections 76.922 and 76.934 of the Commission's rules, 47 C.F.R. Sections 76.922 and 76.934, ARE AMENDED as set forth in Appendix B.

45. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Fourteenth Order on Reconsideration*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary

[91]SBREFA is Title II of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 857 (1996), codified at 5 U.S.C. § 601 *et seq.*

APPENDIX A

LIST OF COMMENTERS

Petitions for Reconsideration

Georgia Municipal Association
New Jersey Board of Public Utilities

Oppositions to Petitions for Reconsideration

Cable Telecommunications Association
Chief Counsel for Advocacy, United States Small Business Association
James Cable Partners and Rifkin and Associates, Inc.
National Cable Television Association
Service Electric Cable TV of Hunterdon, Inc.
Small Cable Business Association
Summit Communications, Inc.

Motion for Stay

New Jersey Board of Public Utilities

Oppositions to Motion for Stay

Service Electric Cable TV of Hunterdon, Inc.
Small Cable Business Association

APPENDIX B

RULE CHANGES

Part 76 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 76.922 is amended by revising paragraph (b)(5)(i) to read as follows.

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

* * * * *

(5) *Streamlined rate reductions.* (i) Upon becoming subject to rate regulation, a small system owned by a small cable company may make a streamlined rate reduction, subject to the following conditions, in lieu of establishing initial rates pursuant to the other methods of rate regulation set forth in this subpart.

* * * * *

2. Section 76.934 is amended by revising paragraphs (h)(5)(i) and (h)(9) and by adding paragraph (h)(11) to read as follows:

§ 76.934 Small systems and small cable companies.

* * * * *

(h) * * *

(5) * * *

(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. If the maximum rate established on Form 1230 exceeds $1.24 per channel, the franchising authority shall bear such burden only if the rate that the cable operator actually seeks to charge does not exceed $1.24 per channel.

* * * * *

(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 June 5, 1995 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.

* * * * *

(11) A system that is eligible to establish its rates in accordance with the small system cost-of-service approach shall remain eligible for so long as the system serves no more than 15,000 subscribers. When a system that has established rates in accordance with the small system cost-of-service approach exceeds 15,000 subscribers, the system may maintain its then existing rates. After exceeding the 15,000 subscriber limit, any further rate adjustments shall not reflect increases in external costs, inflation or channel additions until the system has re-established initial permitted rates in accordance with some other method of rate regulation prescribed in this subpart.