

I. INTRODUCTION

Booth American Company ("Booth American"), a small cable company under the *Small System Order*,¹ files this combined Reply to the two Oppositions² filed against Booth American's Petition for Special Relief ("Petition"). The Petition seeks a waiver of the 15,000 subscriber limit for two systems in Southeast Michigan, Booth American's Birmingham system and Bloomfield system. These two systems would automatically qualify for small system rate regulation but for franchise mandated headend collocation and linkage.

The Oppositions' principal arguments involve disagreements with the Commission, not Booth American. Contrary to the *Small System Order*, the Oppositions advocate *increasing* the costs and burdens of cable rate regulation on a small cable company. The Oppositions repeatedly disagree with conclusions reached by the Commission and the Cable Services Bureau in the *Small System Order* and in *Insight Communications*.³ The Commission has heard these arguments before; they have nothing to do with an analysis of Booth American's case.

The Oppositions also raise several arguments concerning the Petition's analysis of the higher costs faced by Booth American. Each argument fails to confront specific standards concerning small system petitions announced in the *Small System Order* and further developed

¹*Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, FCC 95-196 (released June 1, 1995) ("*Small System Order*").

²Booth American received two Oppositions in response to the Petition. The Birmingham Area Cablecasting Board, the regulatory consortium representing the city of Birmingham and the Villages of Beverly Hills, Bingham Farms, and Franklin, filed one Opposition ("Birmingham Opposition"). The other consortium, the Bloomfield Cable Communications Board opposed the Petition by letter on behalf itself, the City of Bloomfield Hills and Bloomfield Township ("Bloomfield Opposition"). The Oppositions contain arguments identical in substance.

³*Insight Communications Company, L.P., Memorandum Opinion and Order*, DA 95-2334, (released November 13, 1995) ("*Insight Communications*").

in *Insight Communications*. None of the arguments supports imposing the costs and burdens of large system cost of service regulation on the Birmingham and Bloomfield systems.

The Oppositions also neglect to mention how the 1996 Telecommunications Act could impact this case. Booth American believes any analysis of the *Small System Order's* system size standards should at least consider the expanded small operator standards established by Congress.

II. BACKGROUND

Booth American, a family owned business, satisfies the definition of a small cable company. The Oppositions do not dispute this. All Booth American systems qualify as small cable systems except one in California and the two linked systems at issue here.⁴

The Petition does not reflect a structural reorganization at Booth American. The Company recently reorganized all of its operational units by region, not just Birmingham and Bloomfield systems. The reorganization transferred the Birmingham and Bloomfield Systems to Booth Communications of SE Michigan, a wholly-owned subsidiary. Booth American undertook the reorganization for purposes of organizational flexibility and tax compliance efficiency.

The Petition contains all other relevant background information.

III. ANALYSIS

In opposing the Petition, the LFAs present at least seven discernable arguments. Most of these arguments challenge the Commission's conclusions in the *Small System Order* and the rulings in *Insight Communications*. Other arguments challenge Booth American's analysis of relevant small system characteristics that justify granting the Petition. None of the Oppositions'

⁴Petition at 1.

arguments address why a numerical standard should prevent Booth American from the benefits of small system relief in this case. Booth American replies to each argument below. First, Booth American discusses the Petition in light of the passage of the 1996 Telecommunications Act.

A. Considering the Petition in light of the 1996 Telecommunications Act.

The 1996 Telecommunications Act has brought fundamental change to cable rate regulation. This change directly impacts Booth American. Booth American now qualifies as a small cable company under Section 301(c) of the 1996 Act.

The Oppositions neglect this essential point. Instead, the Oppositions seek the strange result of imposing large MSO rate regulation on the basic tiers of Booth American, a small cable company for which Congress has expressly provided "greater deregulation".

Booth American acknowledges that small cable company deregulation under the 1996 Act and small system regulatory relief under the *Small System Order* remain distinct. The 1996 Act does not compel the Commission to expand the small system definition for Form 1230 regulation. Still, the 1996 Act may encourage even more flexibility on small system issues. Federal law now defines a small cable company as one that serves 50,000 or fewer subscribers in any franchise area. The Commission could find that this provides additional support for Booth American's petition, particularly when the two linked systems involve six franchises that in total serve less than half the subscribers specified by Congress for a single franchise.

Booth American understands that any rule change will occur in upcoming rulemakings. Nonetheless, the 1996 Act represents a significant change in the law and a clear public policy statement that could properly influence a decision on the Petition.

B. Replies to the Oppositions' Arguments.

Against this profound change in telecommunications law and regulation, the Oppositions present seven arguments advocating imposing large system regulation on Booth American. Booth American replies in sequence below.

1. This case does not require rigid application of the principal headend standard.

The Oppositions advocate inflexible application of the principal headend standard to this case.⁵ This argument ignores both the rationale underlying the principal headend standard and one critical fact in this case: The franchises mandated headend collocation and linkage.

The Commission discussed the rationale underlying the principal headend standard in *Second Order on Reconsideration*.⁶ The Commission stated, "To use a franchise area definition would result in some segments of an integrated cable operation receiving rate treatment different from other segments of the same operation."⁷ In granting the Petition, the Commission will not jeopardize this rationale. All segments of the two linked systems will receive Form 1230 rate regulation. Moreover, granting the Petition will permit Booth American to achieve regulatory consistency with its other systems. All of Booth American's systems but one automatically qualify for small system relief.

The peculiar interrelation of the franchise requirements of the two systems presents the second reason for flexibility on the principal headend standard in this case. As shown in the Petition, independent franchise provisions resulted in the requirement that Booth American

⁵Birmingham Opposition at 2; Bloomfield Opposition at 2.

⁶MM Docket No. 92-266, FCC 94-38 (released March 30, 1994); see also *Small System Order* at ¶ 35.

⁷*Id.* at ¶ 227.

collocate the Bloomfield headend with the Birmingham headend and interconnect the two systems.⁸ The Oppositions do not dispute this. Instead, the Oppositions argue that because collocation saved some initial capital costs, the Commission should disregard the franchise mandated headend linkage as a factor.⁹ This argument misses two critical points: First, Booth American's ratebase will reflect all capital cost savings. Form 1230 rate regulation will more efficiently pass any such savings through to subscribers. Second, but for the franchise mandated headend linkage, Booth American would not have to seek special relief. These facts weigh in favor of special relief. The size of the combined systems results from local regulatory requirements. The combined systems do not provide the operational or economic benefits of a large cable system.

2. The Oppositions incorrectly assert that the Birmingham and Bloomfield Systems do not share small system characteristics.

The Oppositions contend that the Birmingham and Bloomfield Systems do not share relevant small system characteristics.¹⁰ On this point, the Oppositions challenge the Commission's instructions in *Small System Order* and the Bureau's analysis in *Insight Communications*.

The Commission has recognized that a strict numerical test can exclude small systems in need of relief.¹¹ To obtain waivers of the 15,000 subscriber limit, the Commission directed such systems to demonstrate that they share relevant characteristics with qualifying systems.¹²

⁸Petition at 4.

⁹Birmingham Opposition at 3; Bloomfield Opposition at 2.

¹⁰Birmingham Opposition at 2-3; Bloomfield Opposition at 3.

¹¹*Small System Order* at ¶ 36.

¹²*Id.*

The Petitions shows that the Birmingham and Bloomfield systems share the key small system characteristics of subscriber density,¹³ higher programming costs,¹⁴ higher costs relating to the operational and administrative separation of the systems,¹⁵ and significant and costly differences in PEG access, local origination programming and I-Net requirements.¹⁶ Contrary to the *Small System Order*, the Oppositions tells the Commission to ignore these small system characteristics.

The Oppositions also fail to address another key provision of the *Small System Order*. The Commission will also consider system size waivers in cases involving linkage of headends when linkage would jeopardize small system status.¹⁷ This direction from the Commission should carry extra weight in cases like this one where pre-*Small System Order* franchises required headend consolidation.

The Birmingham Opposition seizes upon the one area where the two systems differ from small system averages, regulated and premium revenue.¹⁸ This constricted view of the facts fails to address the ruling on point in *Insight Communications*. The Bureau found that an Insight system qualified as a small system despite subscriber density comparable to large system averages. The Bureau stated, "this appears to be the only way in which the Jeffersonville system

¹³Petition at 9.

¹⁴*Id.* at 10.

¹⁵*Id.* at 14.

¹⁶*Id.*

¹⁷*Small System Order* at ¶ 36.

¹⁸Birmingham Opposition at 3.

resembles a larger system."¹⁹ The Oppositions do not identify any other large system characteristics of the two systems. *Insight Communications* controls.

3. The costs of the operational and administrative separation of the Birmingham and Bloomfield Systems remain a key relevant factor.

The Petition demonstrates that higher costs directly result from the operational and administrative separation required by the two respective local franchise authority consortia.²⁰ One Opposition concedes that "this contention may be possibly justified."²¹ The Oppositions then raise two arguments why the separation of the systems should not weigh in favor of special relief. Both of these arguments suggest some lack of familiarity with business realities for a small cable company.

The Oppositions first claim that the Commission should not consider the higher costs of the separation of the systems because the same people work on both systems.²² Apparently, the local franchise authorities ("LFAs") believe that because Booth American seeks to control costs through staffing efficiency, the Commission should not grant the Petition. This argument has two principal flaws. First, a small cable company's staffing decisions have no bearing on obtaining small system status. To the contrary, the Commission might be suspect of a small cable company that maintained excess staff to create an appearance of separation between two systems. Second, the Oppositions' argument fails to acknowledge the costs to Booth American of the distinct and separate franchise requirements itemized in the Petition. Booth American employees must attend separate meetings, prepare separate operational reports, and assist with

¹⁹*Insight Communications* at ¶ 31, n. 55.

²⁰Petition at 11-14.

²¹Birmingham Opposition at 3-4.

²²Birmingham Opposition at 4; Bloomfield Opposition at 3.

costly separate audited financial reports. The LFAs require that Booth American perform these and other efforts independently for the Bloomfield system and the Birmingham system. These efforts impose substantial costs on Booth American. These costs combine with other small cable company cost pressures and make these two systems Booth American's highest cost systems.

The Oppositions also argue that the Commission should not consider the systems as separate because Booth American recently transferred the franchises to one wholly-owned subsidiary instead of two. This argument belies the substantial business savvy possessed by the LFAs and their counsel. The geographic grouping of systems in Booth American's recent restructuring offers operational, administrative and tax efficiencies. The LFAs cannot sincerely contest this. Booth American's cost-saving reorganization harmonizes with the aim of the Petition: reducing the administrative burdens and costs of providing cable service.

4. Contrary to the *Small System Order*, the Opposition argues that the Commission should not consider higher programming costs.

The LFAs find "particularly disturbing" Booth American's suggestion that higher programming costs weigh in favor of granting the Petition.²³ One Opposition concludes that "Booth's reliance on its inability to obtain the kind of programming discounts available to larger MSOs in support of its Petition appears entirely inappropriate."²⁴ This assertion neglects the Commission's direction in the *Small System Order*. The Commission specifically identified "lack of programming or equipment discounts" as a relevant factor in assessing petitions for special relief.²⁵ On this issue, the LFAs disagree with the Commission, not Booth American.

²³Birmingham Opposition at 5-6; Bloomfield Opposition at 3.

²⁴Birmingham Opposition at 6.

²⁵*Small System Order* at ¶ 36.

In Booth American's case, this issue is especially relevant. First, as shown in the Petition, the gap period in external cost pass through forced Booth American to absorb about \$750,000 in programming cost increases.²⁶ These increases resulted when Booth American no longer benefitted from Heritage/TCI's programming discounts. Booth American has had to absorb these costs, costs directly caused by Booth's status as a small cable company. Contrary to the Oppositions, higher license fees provide substantial and appropriate support for the special relief in this case.

The Oppositions also imply that Booth American pledged to absorb programming costs following its acquisition of Heritage/TCI's interest in January 1993. Booth American must clarify one important point: Booth American *has* absorbed about \$750,000 in programming cost increases. This represents a \$31.25 per subscriber savings for the LFAs' constituents. These costs will *never* be passed to subscribers. Nonetheless, these costs add to the small company cost pressures on Booth American and, in part, justify easing regulatory burdens and costs.

5. The Oppositions ignore the Commission's conclusions concerning the burdens and costs of large system rate regulation on small cable companies.

Both in meetings with Booth American and in the Oppositions, LFA representatives have complained that Booth has not quantified the reduction in regulatory costs offered through small system regulation.²⁷ Apparently, the LFAs believe Booth American should pay for a comparative cost study to justify reducing the costs of regulation. Booth American reiterates here what it has told the LFAs: Booth American would engage in meaningless speculation in trying to estimate the costs of large system cost of service rate regulation. Most of the costs of large system cost of service showings result from how a particular LFA decides to administer

²⁶Petition at 10.

²⁷See Birmingham Opposition at 7; Bloomfield Opposition at 3.

the process. Booth American's decision not to finance a comparative cost study should not weigh against its Petition. The Commission has already addressed the issue of the burdens and costs of large MSO regulation on small cable companies.

In the *Small System Order*, the Commission stated:

[M]any operators claim that our rules place an inordinate hardship upon them in terms of the labor and other resources that must be devoted to ensuring compliance. Such comments suggest that some operators may be facing the dilemma of desiring to impose rates that our cost-of-service rules may well permit, but at the same time being averse to risking the resources that a cost-of-service showing entails since they cannot be guaranteed that the showing will be successful. In crafting the relief we adopt today, we have attempted to alleviate both the substantive and the procedural burdens of which smaller cable companies complain.²⁸

The Commission has already concluded that the costs of large system rate regulation place unnecessary burdens on small cable companies. Apparently, the LFAs remain unconvinced. The LFAs disagreement is with the Commission, not Booth American.

6. The Commission has already settled the potential rate increase issue.

The Oppositions raise the specter of potential rate increases:

The Board [surmises] that the chief thrust motivating the Petition is the rate increases which Booth believes may more readily flow (and which would have a materially beneficial impact on Booth's financial position) if the Board found itself less able to establish the impropriety of any such rate increases.²⁹

Similarly, the Oppositions contend that the procedural protections for qualifying small systems do not serve the public interest because "the Board's ability to establish the propriety or impropriety of such increases will be adversely affected, a result which the Board deems

²⁸*Small System Order* at ¶¶ 55-56.

²⁹Birmingham Opposition at 7.

opposed to the interests of its member communities and their subscriber constituents."³⁰ The Commission has already responded to identical arguments in *Insight Communications*:

The *Small System Order* specifically allows qualifying small systems to justify potentially higher rates using the small system cost-of-service methodology. Higher rates for quality small systems is an anticipated result of small system rate relief. The County's letter simply mentions this potential outcome without contesting the reasons behind Insight's request for status as a small system.³¹

The LFAs claimed "irritation" with rate increases provides no grounds to deny the Petition. The Commission has recognized that small system rate regulation may result in rate increases where justified.

7. The Commission has already settled the LFA's public policy arguments.

The Oppositions claim that streamlined Form 1230 rate regulation does not serve the public interest.³² Without specifying how, the LFAs argue that granting the Petition will adversely affect their ability to establish the propriety or impropriety of rate increases.³³ Again, the LFAs argument is with the *Small System Order*, not Booth American. The Commission has expressly addressed how Form 1230 rate regulation results in reasonable rates and protects subscribers' interests.³⁴

IV. CONCLUSION AND REQUESTED RELIEF

The Oppositions advocate a regulatory anachronism. Congress and the Commission are either eliminating or reducing cable rate regulation. The Oppositions seek the opposite.

³⁰Birmingham Petition at 9; see also Bloomfield Opposition at 3.

³¹*Insight Communications* at ¶ 13.

³²Birmingham Petition at 9; Bloomfield Petition at 13.

³³Birmingham Petition at 9; Bloomfield Petition at 13.

³⁴*Small System Order* at ¶¶ 26, 55-58.

The Oppositions do not present any arguments that warrant imposing large MSO rate regulation on Booth American. On the other hand, Booth American has shown that the Birmingham and Bloomfield systems are particularly high cost systems and would qualify for small system relief absent the common headend. In light of these factors, and considering the expansion of small system deregulation in the 1996 Telecommunications Act, a grant of the Petition is appropriate and will serve the public interest.

Booth American respectfully requests that the Commission deny the Oppositions and grant its Petition.

Respectfully submitted,

BOOTH AMERICAN COMPANY

By: _____



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CERTIFICATE OF SERVICE

I, Patricia Monroe, a secretary at the law firm of Howard & Howard Attorneys, P.C., hereby declare that the Reply of Booth American Company was sent on the 8th day of March, 1996 by first class and certified mail, return receipt requested and postage prepaid, to the following:

Mr. Donald H. Gillis
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Communications Board,
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Ms. Kathy Marorta
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Franklin, MI 48025

The undersigned further declares that on the 8th day of March, 1996 the above-referred to document was sent via Federal Express to:

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

and that in a second Federal Express envelope eleven individual envelopes were sent, each containing a copy of the above-referred to document and a copy of the March 8, 1996 letter directed to Mr. Caton. The eleven envelopes were addressed as follows:

Ms. Meredith Jones
Chief
Cable Services Bureau
Federal Communications Commission
1919 M Street NW
Washington DC 20554

Mr. Gregory Vogt
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Federal Communications Commission
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Chairman Reed Hundt
c/o Mr. John Nakahata
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Commissioner Andrew Barrett
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Dated: March 8, 1996


Patricia Monroe

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CERTIFICATION

I am Laura Petterle, Director of Operations for Booth American Company. I certify that I have read the attached Reply, that I am generally familiar with the matters addressed and understand the purpose of the document. I further certify that the factual statements set forth are correct to the best of my knowledge, information and belief.

Dated: 3/8/96

Laura Petterle
Laura Petterle

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

September 14, 1998

OFFICE OF
MANAGING DIRECTOR

Eric E. Breisach, Esquire
Christopher C. Cinnamon, Esquire
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The Phoenix Building, Suite 500
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DOCKET FILE COPY ORIGINAL

Re: Booth American Company
Fee Control # 9512118205128007

Dear Messrs. Breisach and Cinnamon:

This will respond to your request for waiver and refund of the filing fee submitted on behalf of Booth American Company ("Booth") in connection with its petition for special relief.

You have represented, and our records reflect, that Booth is the parent company of Booth Communications of Birmingham ("Birmingham System") and Booth Communications of Bloomfield ("Bloomfield System"), which share a common headend mandated by a franchise agreement. You have further represented that Booth sought "small systems" status for the Birmingham and Bloomfield Systems for the purpose of rate and related administrative relief under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 7393 (1995) ("*Small Systems Order*").

In the *Small Systems Order*, the Commission expanded the definition of small cable systems to include cable systems serving 15,000 or fewer subscribers that were owned by cable companies serving collectively 400,000 or fewer subscribers. See 47 C.F.R. §§ 76.901(c) and (e). The Commission expanded the definition of qualifying small cable systems and companies "to encompass the broader range of operators" in need of rate and other administrative relief, in recognition of the fact "that a large number of smaller cable operators face difficult challenges in attempting simultaneously to provide good service to subscribers, to charge reasonable rates, to upgrade networks, and to prepare for potential competition." 10 FCC Rcd at 7406.

In the *Small Systems Order*, the Commission stated that petitions for special relief would be entertained for cable systems and companies that exceed the subscriber caps, but nevertheless share the same relevant characteristics and thus would benefit from the same rate and administrative relief. 10 FCC Rcd at 7412-13. The Cable Bureau found that Booth collectively served 142,000 subscribers, well below the 400,000 subscriber cap; but that Birmingham System served 10,660 subscribers; that Bloomfield System served 13,635 subscribers, and that collectively the Birmingham System and the Bloomfield System, which share a common headend, served 24,295 subscribers. See *Memorandum Opinion and Order*, DA 97-2015

Messrs. Breisach and Cinnamon
Page 2

(September 18, 1997). The Cable Bureau determined that even though the collective subscribership of the parent company was well below the subscriber cap for small cable companies; that the Birmingham System and the Bloomfield Systems must be considered a single integrated cable system under the *Small Systems Order*; and that with a combined subscribership of 24,295, the single integrated system greatly exceeded the subscriber cap for small systems and "more closely resemble[d] a larger system than a small system;" and that Booth thus was not entitled to regulatory treatment afforded small systems. *See Memorandum Opinion and Order*, DA 97-2015, ¶19 (September 18, 1997). The Cable Bureau denied Booth's petition for special relief. *Id.*

With respect to Booth's fee waiver request, the Commission did provide small cable systems and companies relief from section 9 regulatory fees, by establishing an assessment formula based upon the exact subscriber count, thereby relieving small cable systems and companies from "bearing a disproportionate burden of the aggregate cable service regulatory fee imposed upon the industry as a whole." *See Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 9 FCC Rcd 5333, 5368 (1994); *see also Small Systems Order*, 10 FCC Rcd at 7398. The Commission, however, did not declare a policy or adopt new rules that would nullify Booth's petition for special relief. *See* 47 C.F.R. § 1.1113(a)(4). In absence of such a declaration or adoption of such rules, the Commission may only waive the section 8 filing fee requirement upon a showing of good cause and a finding that the public interest will be served thereby. *See* 47 U.S.C. § 158(d)(2); *see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Reconciliation Act of 1985*, 2 FCC Rcd 947, 961 (1987); 47 C.F.R. § 1.1117(a). In its petition for waiver of the \$910.00 section 8 filing fee, Booth represents that the payment of costly filing fee represents a considerable expense for, and undermines the *Small Systems Order*, which was intended to afford regulatory relief to, small cable companies.

It appears that Booth's waiver and refund request, thus, is based on an assertion of compelling financial hardship. For financial hardship, a more detailed showing is required to establish good cause. For instance, Booth should submit information such as a balance sheet, profit and loss statement, and/or a cash flow projection. At this juncture, Booth has neither made a sufficient showing of good cause, nor has it shown that the public interest would be served by a waiver of the filing fee requirement.

Booth's petition for waiver and refund of the filing fee requirement accordingly is denied without prejudice. If you have any questions concerning this matter, please contact the Chief, Fee Section, at (202) 418-1995.

Sincerely,


Mark Reger
Chief Financial Officer

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

In the Matter of)	
)	
Booth American Company)	CSR 4637-D
)	
Petition for Special Relief)	

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1997

Released: August 1, 1997

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we address a petition for special relief ("Petition"), in which Booth American Company ("Booth") seeks a waiver of the Commission's rules to the extent necessary to permit Booth to establish regulated cable rates on behalf of a consolidated system of its Boone system and its Alpine system in North Carolina in accordance with the small system cost-of-service methodology adopted in the *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266 and 93-215 ("*Small System Order*").¹ No oppositions were filed in this proceeding.

2. Section 623(i) of the Communications Act of 1934, as amended ("Communications Act"), requires that the Commission design rate regulations that reduce the administrative burdens and the cost of regulatory compliance for cable systems with 1,000 or fewer subscribers.² Accordingly, 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 to certain systems that exceed the 1,000-subscriber standard.⁴ These systems were

¹ FCC 95-196, 10 FCC Rcd 7393 (1995). Booth also filed a petition seeking a waiver of the \$910 filing fee that it was required to submit under 47 C.F.R. § 1.1106. Because this issue falls within the purview of the Commission's Office of the Managing Director, we have forwarded this request to that office for resolution.

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); *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); *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).

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

deemed eligible for small system rate relief because they were found to face 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 the appropriate point of demarcation for purposes of providing for substantive and procedural regulatory relief.⁸

4. Rate relief provided under the *Small System Order* and the Commission's rules is also available only to a small system that is affiliated with 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 investment necessary to maintain and improve service.¹¹ In addition, the Commission determined that cable companies that exceeded the small company definition "are better able to absorb the costs and burdens of regulation due to their expanded administrative and technical resources."¹²

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.*

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

⁷ *Id.* at 7408.

⁸ *Id.*

⁹ *Id.* A small system is deemed affiliated with 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.

¹¹ *Id.* at 7411.

¹² *Id.* at 7409.

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, is more streamlined than the standard cost-of-service methodology available to cable operators generally. In addition, the small system rules include substantive differences from the standard cost-of-service rules to take account of the proportionately higher costs of providing service faced by small systems. Eligible systems establish their rates under this methodology by completing and filing FCC Form 1230. In order to qualify for the small system cost-of-service methodology, systems and companies must meet the new size standards as of either the effective date of the *Small System Order*, or on the date thereafter when they file the documents necessary to elect the relief they seek.¹⁴

6. Cable systems that fail to meet the numerical definition of a small system, or whose operators do not qualify as small cable companies, may submit petitions for special relief requesting that the Commission grant a waiver of its rules to enable the petitioning systems to utilize the various forms of rate relief available to small systems owned by small cable companies.¹⁵ The Commission stated that petitioners should demonstrate that they "share relevant characteristics with qualifying systems."¹⁶ Other potentially pertinent factors include the degree by which the system fails to satisfy either or both definitions and evidence of increased costs (e.g., lack of programming or equipment discounts) faced by the operator.¹⁷ If the system fails to qualify for relief based on its affiliation with a larger cable company, the Commission will consider "the degree to which that affiliation exceeds our affiliation standards, and whether other attributes of the system warrant that it be treated as a small system notwithstanding the percentage ownership of the affiliate."¹⁸ The Commission also stated that "a qualifying system that seeks to obtain programming from a neighboring system by way of a fiber optic link, but that is concerned that interconnection of the two systems may jeopardize its status as a stand-alone small system, may file a petition for special relief to ask the Commission to find that it is eligible for small system relief."¹⁹ The Commission specifically stated that this list of relevant factors was not exclusive and invited petitioners to support their petitions with any other information and arguments they deemed relevant.²⁰

II. THE PETITION

7. According to its Petition, Booth operates cable systems serving fewer than 142,000 subscribers across six states. Booth explains that consolidating the headends of two of its systems in

¹³ *Id.* at 7418-28.

¹⁴ *Id.* at 7413. The effective date of the *Small System Order* was August 21, 1995.

¹⁵ *Id.* at 7412-13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 7413.

²⁰ *Id.*

North Carolina -- its Boone system and its Alpine system -- into the headend for the Boone system will reduce operating costs and will enable centralized service functions. It will also lower the cost of purchasing equipment needed to expand program offerings.²¹ Prior to consolidation, the Boone system served approximately 11,200 subscribers and the Alpine system served approximately 8,300 subscribers.

8. Thus, standing alone, the Boone system and the Alpine system separately qualify for small system regulatory treatment. Each system serves fewer than 15,000 subscribers and is affiliated with a small cable company serving fewer than 400,000 subscribers. After headend consolidation, the combined entity -- the High Country system -- will serve a total of about 19,600 subscribers.²² Booth argues that, despite its subscriber total, the High Country system will still share the attributes of a typical small system, including "a higher proportion of revenue from regulated service, low subscriber density, higher costs, and the need for relief from administrative burdens and costs."²³ Booth asserts that the characteristics of the High Country system will closely resemble other systems entitled to small system treatment -- the relevant characteristics being an average subscriber density of 27 subscribers per mile, an average monthly regulated revenue of \$0.53 per channel per subscriber, and an average annual premium revenue of \$27.33 per subscriber.²⁴ Furthermore, Booth claims that its cost structure reflects that of a small cable company, emphasizing that it does not benefit from programming discounts received by larger multiple system operators.²⁵ Moreover, Booth notes the relatively costly nature of operating the High Country system in a rural and mountainous area.²⁶ Booth also argues that relief from having to file multiple cost-of-service filings would significantly reduce the administrative burdens and costs for both the company and the relevant local franchising authorities.²⁷

9. In addition, Booth contends that the High Country system should be granted small system treatment because its subscriber total does not exceed the 15,000 subscriber limit by a significant amount. It notes that the Commission, in *Insight Communications Company, L.P. ("Insight")*,²⁸ granted small

²¹ Petition at 1-3.

²² *Id.* at 3-4. Booth filed its Petition prior to consolidation of the Boone and Alpine systems which, according to a letter subsequently filed by Booth, was completed in January 1997. Letter dated June 23, 1997 from Christopher C. Cinnamon, counsel for Booth, to Julie Buchanan, Cable Services Bureau, Federal Communications Commission. According to a recent letter filed by Booth, the consolidated system serves 19,454 subscribers and has an average subscriber density of 21 subscribers per mile, an average monthly regulated revenue per subscriber per channel of \$0.50, and an average annual premium revenue per subscriber of \$26.80. Letter dated June 12, 1997 from Christopher C. Cinnamon, counsel for Booth, to Julie Buchanan, Cable Services Bureau, Federal Communications Commission.

²³ *Id.* at 7.

²⁴ *Id.* at 8-9.

²⁵ *Id.* at 9.

²⁶ *Id.*

²⁷ *Id.* at 10.

²⁸ 11 FCC Rcd 1270 (Cable Serv. Bur. 1995).

system treatment to a system serving 18,000 subscribers over seven franchise areas. According to Booth, the High Country system exceeds the subscriber level of the *Insight* system by only 2,000 subscribers and serves subscribers across 16 rural franchises.²⁹

III. DISCUSSION

10. As discussed above, a cable system that is entitled to small system relief is a system serving 15,000 or fewer subscribers that is not owned by a cable company serving more than 400,000 subscribers over all of its systems.³⁰ Because Booth has approximately 142,000 subscribers, the High Country system is affiliated with a small cable company with a total subscribership of less than 400,000. However, the system serves approximately 19,600 subscribers. Thus, the issue in this case is whether the Commission should waive the 15,000 subscriber limit used to define a small system under its rules.

11. Our decision in *Insight* is instructive. In that decision, we granted small system status to three systems serving 16,348, 16,328 and 17,798 subscribers respectively.³¹ Even though those systems had subscriber totals in excess of the 15,000 ceiling, we determined that they were entitled to small system relief because they had many of the defining characteristics of small systems. For instance, the *Insight* systems generated between \$45 and \$52 per subscriber in annual premium revenues, a range closer to the small system average than the average for large systems.³² In addition, their subscriber density, ranging from 31 to 35 subscribers per mile, was close to the average density for small systems identified in the *Small System Order*.³³

12. Similarly, the High Country system possesses the same character as the typical small system described in the *Small System Order*. The average annual premium revenue per subscriber of \$27.33 falls well below the average of \$41 for small systems and also below the averages for the systems granted relief in *Insight*. Moreover, the average number of subscribers per mile served by the High Country system of 27 is less than the average density level of 35.3 identified for small systems in the *Small System Order* and also less than the density level of systems granted relief in the *Insight* case. Furthermore, the High Country system faces higher costs than a typical cable system due to the lack of programming discounts and the expense of operating in a rural and mountainous area. Although the average monthly regulated revenue of \$0.53 per channel per subscriber for the High Country system is closer to the average of \$0.44 for larger systems than the average of \$0.86 for small systems, we do not believe that this single variance is sufficient to disqualify it for small system relief. Thus, we agree with Booth's unopposed claim that the consolidation of the Boone and Alpine headends maintains the small system character of the individual systems prior to the consolidation.

²⁹ Petition at 11.

³⁰ *Small System Order*, 10 FCC Rcd. at 7406.

³¹ *Insight*, 11 FCC Rcd at 1274.

³² *Id.*

³³ *Id.*

13. In addition, we note that the degree to which a system fails to meet the technical definition of a small system is relevant to our determination that a waiver from the technical requirements is justified.³⁴ Although the High Country system exceeds the 15,000 ceiling by more than 4,000 subscribers, the margin above the ceiling is not significantly above the level of excess deemed acceptable in *Insight*. Finally, as we stated in *Inter Mountain Cable, Inc. ("Inter Mountain")*, the Commission seeks to encourage the interconnection of multiple small systems where subscribers will benefit.³⁵ According to Booth, the consolidation of the Boone and Alpine headends will provide benefits to subscribers by resulting in better customer service, expanded programming, and improved operating efficiencies.³⁶ Thus, as in *Inter Mountain*, granting small system regulatory relief will further the Commission's goal.³⁷ Therefore, for all of the above reasons, we will grant Booth's Petition.

IV. SCOPE OF THE WAIVER

14. As a result of our grant of the Petition, Booth's High Country system shall be deemed a small system for purposes of rate regulation. Accordingly, to the extent that High Country's BST and/or CPST offerings are subject to rate regulation,³⁸ rates for the High Country system may be set in accordance with the small system cost-of-service methodology.

15. We next must determine the duration of the waiver. In the *Small System Order*, after establishing the new small system and small cable company definitions, the Commission stated:

To qualify for any existing form of [small system] relief, systems and companies must meet the new size standards as of either the effective date of this order or on the date thereafter when they file whatever documentation is necessary to elect the relief they seek, at their election. . . . A system that is eligible for small system relief on either of the dates described above shall remain eligible for so long as the system has 15,000 or fewer subscribers, regardless of a change in the status of the company that owns the system. Thus, a qualifying system will remain

³⁴ *Small System Order*, 10 FCC Rcd at 7412.

³⁵ 11 FCC Rcd 7081, 7086 (Cable Serv. Bur. 1996).

³⁶ Petition at 3.

³⁷ See *Inter Mountain*, 11 FCC Rcd at 7086.

³⁸ As of the 1996 Act's enactment on February 8, 1996, rate regulation does not apply to a small cable operator with respect to CPSTs, or a BST that was the only service tier subject to regulation as of December 31, 1994. For purposes of this provision, a "small cable operator" is defined as one that, directly or through an affiliate, serves in the aggregate fewer than 615,000 subscribers and is not affiliated with any entity whose gross annual revenues exceed \$250,000,000. 47 U.S.C. § 543(m); *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85, 11 FCC Rcd 5937, 5947 (1996). As discussed above, small system relief under our rules is available only to systems that serve fewer than 15,000 subscribers and are not affiliated with a cable operator that serves more than 400,000 subscribers, absent a waiver. See *supra* paras. 3-4. Accordingly, a rate complaint that is filed concerning a cable system that is deemed a small system under our rules may not invoke rate regulation of the system's CPST, or of its BST if the BST was the only service tier subject to regulation as of December 31, 1994.

eligible for relief even if the company owning the system subsequently exceeds the 400,000 subscriber cap. Likewise, a system that qualifies shall remain eligible for relief even if it is subsequently acquired by a company that serves a total of more than 400,000 subscribers.³⁹

16. The Commission adopted this grandfathering treatment for qualifying systems to enhance their value "in the eyes of operators and, more importantly, lenders and investors."⁴⁰ As the Commission stated: "The enhanced value of the system thus will strengthen its viability and actually increase its ability to remain independent if it so chooses."⁴¹

17. Upon exceeding the 15,000 subscriber threshold, a system that has established its rates in accordance with the small system cost-of-service methodology:

. . . may maintain its then existing rates. However, any further adjustments shall not reflect increases in external costs, inflation or channel additions until the system has re-established initial permitted rates in accordance with our benchmark or cost-of-service rules.⁴²

18. Since the High Country system exceeds 15,000 subscribers, there is no obvious numerical limit to serve as a cutoff for its continued eligibility for small system treatment. However, it is reasonable to presume that the system will continue to grow. Thus, we must place some duration on the waiver, since the alternative would be to grant small system status indefinitely, regardless of the eventual size of the system. This latter alternative is clearly inconsistent with the Commission's decision to limit small system relief to systems that are in need of it due to their relatively small size.

19. Therefore, as we have ordered in the context of a similar waiver situation, the Booth waiver will terminate two years from the date of this order, subject to the conditions set forth below.⁴³ During the waiver period, Booth may file only one Form 1230 for each franchise area it serves. This should afford Booth adequate regulatory certainty for the foreseeable future, while still ensuring that the system is not permitted to charge rates indefinitely under a scheme designed for smaller systems. Of course, Booth may seek continued eligibility for small system treatment by filing a petition for special relief at the end of the waiver period.

³⁹ *Small System Order*, 10 FCC Rcd at 7413. The quoted text was discussing a system's initial and continuing eligibility for "any existing form of relief," which did not include the small system cost-of-service methodology. However, later in the order the Commission applied the same eligibility standards to that methodology as well. *Id.* at 7427-28.

⁴⁰ *Id.* at 7413.

⁴¹ *Id.*

⁴² *Id.* at 7427-28.

⁴³ *See Insight*, 11 FCC Rcd at 1274-76.

20. Limiting the waiver period to two years means that any Form 1230 to be filed by Booth must be submitted with the appropriate regulatory authorities within two years of the date of this order. In any franchise area where the system is currently subject to regulation, Booth may reestablish its maximum permitted rates by filing Form 1230 at any time in the next two years. Where the system is not currently subject to regulation but becomes subject to regulation within the next two years, Booth then may file Form 1230 within the normal response time. Where the system is not now subject to regulation, and does not become subject to regulation until more than two years from now, Booth will not be eligible for small system treatment under this waiver.

21. After filing its initial Form 1230 and giving the required notice, Booth may set its actual rates in the franchise area at any level that does not exceed the maximum rate, subject to the standard rate review process. Subsequent increases, not to exceed the maximum rate established by the Form 1230, shall be permitted, subject to the 30 days' notice requirement of the Commission's rules.⁴⁴ As noted, the maximum rate established by the initial Form 1230 shall be a cap on the system's rates during the waiver period. If the system reaches that cap and subsequently wishes to raise rates further, it will have to justify the rate increase in accordance with our standard benchmark or cost-of-service rules. Alternatively, the system can file another petition for special relief and seek continued treatment as a small system. Limiting Booth to a single Form 1230 filing for each franchise area provides further assurance that the system will not have grown too large to be establishing rates under the small system cost-of-service methodology.

V. ORDERING CLAUSES

22. Accordingly, **IT IS ORDERED** that the Petition for Special Relief filed by Booth American Company with respect to the consolidation of its Alpine and Boone systems is hereby **GRANTED**.

23. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules.⁴⁵

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

⁴⁴ *Small System Order*, 10 FCC Rcd at 7426. Under the small system rules, rate increases taken after the initial Form 1230 has been approved are not subject to further regulatory review, as long as the rate is no higher than that permitted by the previously-filed form. *Id.*

⁴⁵ 47 C.F.R. § 0.321.