

47 CFR Part 73

[MM Docket No. 89-18; RM-6510, RM-6586, RM-6725]

Radio Broadcasting Services; Clinton, Saint Pauls, Southern Pines, NC, Chesterfield, SC

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of C. Curtis Sigmon, allots Channel 297A to Chesterfield, South Carolina, as the community's first local FM service. At the request of Muirfield Broadcasting, Inc., the Commission substitutes Channel 295C2 for Channel 296A at Southern Pines, North Carolina, modifies its license for Station WIOZ(FM) to specify operation on the higher powered channel, substitutes Channel 297A for Channel 295A at Saint Pauls, North Carolina, and orders Lumbee Regional Development Association, Inc., the applicant for the Saint Pauls channel to amend its application (BPH-880727MN) to specify the alternate Class A channel. The request of Sampson Broadcasting Co., Inc., to substitute Channel 295C2 for Channel 296A at Clinton, North Carolina, and modify its license for Station WCLN-FM to specify operation on the higher powered channel is denied. See 54 FR 7453, February 21, 1989. With this action, this proceeding is terminated.

DATES: Effective August 30, 1991. The window period for filing applications for Channel 297A at Chesterfield, South Carolina, will open on September 3, 1991, and close on October 3, 1991.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 89-18, adopted June 24, 1991, and released July 16, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

Channel 297A can be substituted for Channel 295A at Saint Pauls in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.2 miles) southeast, the

site specified in Lumbee Regional Development Association, Inc.'s application. Channel 295C2 can be substituted for Channel 296A at Southern Pines in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.9 kilometers (4.9 miles) west to accommodate Muirfield's desired transmitter site. Channel 297A can be allotted to Chesterfield in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. The coordinates for Channel 297A at Saint Pauls are North Latitude 34-42-59 and West Longitude 78-56-51. The coordinates for Channel 295C2 at Southern Pines are 35-09-04 and 79-28-40. The coordinates for Channel 297A at Chesterfield are 34-44-06 and 80-05-18.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments under North Carolina is amended by removing Channel 295A and adding Channel 297A at Saint Pauls and by removing Channel 296A and adding Channel 295C2 at Southern Pines.

3. Section 73.202(b), the FM Table of Allotments under South Carolina, is amended by adding Chesterfield, Channel 297A.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-17279 Filed 7-19-91; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 90-649; Rm-7563]

Television Broadcasting Services; Roseburg, OR

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of KMTR, Inc., allots Channel 46 to Roseburg, Oregon, as the community's third local commercial television channel. See 58 FR 1780, January 17, 1991. In addition, petitioner may amend its pending application for Channel 36 at

Roseburg (BPH-900413KH) without loss of cut-off protection. Channel 46 can be allotted to Roseburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.5 kilometers (10.3 miles) south to avoid the Portland "freeze" area. The coordinates for Channel 46 at Roseburg are 43-04-15 and West Longitude 123-23-18. With this action, this proceeding is terminated.

EFFECTIVE DATE: August 30, 1991.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 90-649, adopted June 25, 1991, and released July 16, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center (202) 452-1422, 1714 21st Street NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Television broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.606 [Amended]

2. Section 73.606(b), the Table of TV Allotments under Oregon, is amended by adding Channel 46+ at Roseburg.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-17280 Filed 7-19-91; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 76

[MM Docket Nos. 90-4, 84-1296, FCC 91-184]

Cable Service; Effective Competition Standard for Cable Basic Service Rates

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order modifies the Commission's rule that defines what constitutes "effective competition" to cable service. In the

absence of effective competition, a franchising authority is permitted to regulate basic cable service rates. The Report and Order also adopts new rules for the regulation of basic cable rates in such cases. In the Notice of Proposed Rule Making (55 FR 4208, February 7, 1990) and the Further Notice of Proposed Rule Making (56 FR 406, January 4, 1991), the Commission found that the existing three signal standard for determining whether a cable system is subject to effective competition no longer reflects the realities of the cable industry and the broader video marketplace. Under the new rules, effective competition would exist and local authority to regulate basic service rates would be preempted if either of the following conditions are met: (1) Six unduplicated over-the-air broadcast television signals are available in the entire cable community; or (2) an independently owned, competing multichannel video delivery service is available to 50 percent of the homes passed by the incumbent cable system and subscribed to by at least 10 percent of the homes passed by the alternative provider within the incumbent cable system's service area. The Report and Order also resolves related issues raised by the City of Dubuque, Iowa, in its petition for reconsideration of the existing rules adopted in MM Docket No. 84-1296. This action is part of a combined Report and Order and Second Further Notice of Proposed Rule Making that seeks additional comments on whether the elimination of signal carriage requirements for cable television systems since the Cable Act was enacted in 1984 undermines the effective competition.

EFFECTIVE DATES: October 25, 1991, pending approval by the Office of Management and Budget. A document announcing the effective date will be published in the Federal Register at a later date.

FOR FURTHER INFORMATION CONTACT: Marcia Glauberman, Mass Media Bureau, Policy and Rules Division, (202) 632-3410.

SUPPLEMENTARY INFORMATION: The following collection of information contained in these rules has been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act. Copies of the submission may be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1114 21st Street NW., Washington, DC 20036. Persons wishing to comment on this information collection should direct their comments to Jonas Neihardt, (202) 395-4814, Office

of Management and Budget, room 3235 NEOB, Washington, DC 20503. A copy of any comments should also be sent to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554. For further information contact Judy Boley, Federal Communications Commission, (202) 632-7513.

OMB Number: 3060-0416.

Title: Section 76.33, Standards for rate regulation.

Action: Revision.

Respondents: State or local governments, businesses (including small businesses).

Frequency Response: On occasion.

Estimated Annual Response: 32,100 responses; 17.63 hours per response; 566,000 hours total.

Needs and Uses: Section 76.33(a) requires documentation to be filed with the Commission by cable operators and franchising authorities which would enable the Commission to resolve disputes concerning the applicability of the signal availability standard. Section 76.33(b) requires the franchising authority to give formal notice to the public when establishing any rate for the provision of basic cable service by cable systems and to make a written statement when a decision on a rate matter is made. The formal notice is used by the public so that they may be provided an opportunity to make their views known at the local level on any rate provisions concerning cable service. The requirement for a written decision will ensure that local authorities are cognizant of and apply the standards for rate regulation required by the Commission.

This is a synopsis of the Commission's Report and Order in MM Docket Nos. 90-4 and 84-1296 adopted June 13, 1991, and released July 12, 1991. The complete text of this Report and Order is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1114 21st Street NW., Washington, DC.

Synopsis of Report and Order

1. Under the Cable Communications Policy Act of 1984 (Cable Act), in the absence of effective competition, a franchising authority has the discretion to regulate the rates charged for basic cable service. The Commission, in this Report and Order, modifies its rules to define the existence of "effective competition" for purposes of regulating basic cable service rates. For those

cable systems whose basic service rates are regulated by their franchising authorities, the Commission will require that in setting or approving, rates, franchising authorities allow cable operators to earn a "fair return" on investment.

2. Section 623 of the Cable Act permits, but does not require, franchising authorities to regulate basic cable service rates only in those situations where the cable system is not subject to "effective competition." The Cable Act directed the Commission to define the circumstances in which a cable system is not subject to effective competition and to establish standards for the regulation of basic cable rates by local franchising authorities in such cases. In 1985, the Commission determined that the availability of three unduplicated over-the-air broadcast television signals is the appropriate test. The Cable Act also requires the Commission to periodically review its regulations, taking into account developments in technology. The Commission's Notice of Proposed Rule Making (Notice) initiating this proceeding was intended to review the rules regarding the regulation of basic cable service rates in light of changed circumstances in the video marketplace since the three signal standard was adopted. The resulting record led the Commission to believe that an effective competition standard based on three over-the-air broadcast signals no longer reflected the realities of the cable industry and the broader video marketplace. However, since the Notice did not seek comment on specific proposals, the Commission adopted a Further Notice of Proposed Rule Making (Further Notice) which proposed a multiple-option test for identifying effective competition. The Further Notice also requested comment on proposals to amend the standard for rate regulation by local franchising authorities in cable communities not subject to effective competition.

3. The Cable Act requires the Commission to look at competition for the limited purpose of determining in what situations rate regulation of basic cable service may take place. When the Commission adopted the three signal standard in 1985, the programming provided by basic cable service primarily consisted of retransmitted local, over-the-air broadcast television signals. Thus, the Commission concluded that a standard based on the reception of terrestrial television signals would provide a reasonable benchmark for determining the presence of effective competition for basic cable service. In

both the Notice and Further Notice, the Commission concluded that a review of the standard is appropriate because basic cable service had become more than the retransmission of local broadcast signals and often included a wide range of programming services. Since that time, press accounts report that some cable systems have reduced the size of their basic service package and moved some of the more costly program services to "expanded basic" tiers. Cable operators clearly have the general right to move individual cable services among tiers, and they may do so in their efforts to find the optimal mix of program services and prices. The programming services offering exclusive sports and other events not available over-the-air are those most likely to be removed from basic tiers as a result of high costs. That cable operators have the ability to remove such programming from the basic tier—and the evidence that many are doing so—reaffirms the Commission's view that a sufficient complement of over-the-air signals provides an acceptable competitive check on the ability of cable operators to raise their prices for basic cable service.

4. In the Further Notice, the Commission found that there are a number of ways to measure the presence or absence of effective competition because cable market power might derive from a variety of sources, the influence of which depends on local circumstances. In the Further Notice, the Commission proposed a multiple-option effective competition standard. Under the proposed standard, a cable system that met any of three criteria would be presumed to face effective competition and would be exempt from rate regulation by its franchising authority.

5. The first component of the proposed multiple-option effective competition standard is a signal/penetration test that would require that at least six unduplicated over-the-air broadcast signals be available in the cable community and that cable penetration be less than 50 percent. In the Report and Order, the Commission adopts only the six signal standard of the proposed test. The Commission's selection of a six over-the-air signal standard is intended to be conservative enough to ensure a complement of signals adequate to provide effective competition to the signal retransmission function of the basic tier, yet not so conservative as to cause unnecessary regulation.

6. With respect to determining the availability of over-the-air signals in the cable community, the Commission will

generally continue to use the existing signal criteria to determine whether the six signal threshold has been met. Thus, a cable system will be deemed to face effective competition if at least six unduplicated broadcast television signals are available over the entire cable community, although the same six signals need not provide service to the entire community. The Commission will count all unduplicated over-the-air broadcast services available in the cable community including: Full service commercial stations, full service noncommercial stations, satellite stations, television translators and low power television stations. The *prima facie* standard of signal availability for full service stations will be based on predicted Grade B contours or significantly viewed status in the cable community. The *prima facie* standard of signal availability for television translator stations and low power stations will depend on their coverage areas based on their predicted protected contours.

7. The Commission initially recommended that a cable penetration criterion be considered along with the six signal complement to reflect the "antenna service" source of cable market power. After reviewing the record, the Commission has determined that no useful purpose would be served by subjecting additional cable systems to rate regulations where six signals are indeed available. The Commission finds that cable penetration is not a reliable indicator of either over-the-air signal quality or of cable market power. As commenters indicate, cable penetration is determined by a number of factors other than the quality of off-the-air signal reception. Commenters also point out numerous examples where basic cable rates do not vary directly with cable penetration levels.

8. In communities lacking six over-the-air signals, an incumbent cable system may also be subject to effective competition if another multichannel provider offers multiple channel options. Consequently, the second component of the proposed effective competition standard would consider the availability of a competing, independently-owned, multichannel video delivery service in the cable community. In order to determine whether the alternative video provider is sufficiently "available" in the cable community and whether consumers view it as a substitute for the incumbent cable system, the Commission proposed benchmarks of at least 50 percent availability and at least 10 percent penetration.

9. A significant majority of commenters support this proposal. The Commission adopts the multichannel test as proposed. The Commission believes that the following standards—50 percent availability among homes passed by the incumbent cable system and subscribed to by at least 10 percent of all homes passed by the alternative video delivery service within the incumbent cable system's service areas—are reasonable benchmarks for determining when a cable system faces effective competition from multichannel service providers. The Commission will consider providers of a competing cable service, a multichannel, multipoint distribution system (MMDS), satellite master antenna television (SMATV), home satellite dishes (HSD) and direct broadcast satellite services (DBS) as multichannel competitors for purposes of applying the multichannel competitor test because these alternatives provide a variety of programming services with many of the characteristics of local stations and provide for reception of local over-the-air stations.

10. Regarding the calculation of availability and penetration of alternative video delivery services, the Commission does not find it necessary to differentiate among alternative delivery services. To determine the availability of competing video services, the number of homes passed by at least one of these alternative delivery services should be tallied and expressed as a percentage of the number of homes passed by the incumbent cable system. Similarly, the penetration of alternative delivery services should be calculated by combining the number of subscribers to all available services and calculating the penetration on the basis of the homes passed by both an alternative provider and the incumbent cable system. The Commission also adopts the attribution criteria in § 76.50 of the rules to define an "independently-owned" multichannel competitor.

11. In the Further Notice, the Commission proposed a competitive behavior test that it believed could balance consumer interests in receiving cable service at reasonable rates and its desire to avoid unnecessary regulation in those situations where cable system rates have been restrained by market conditions. After analyzing the record, the Commission has decided not to include a competitive behavior test as a component of the effective competition standard. While it continues to believe that cable operators whose basic service rates appear to be competitively constrained should not be subject to

unnecessary regulation, the Commission finds that it would be difficult to establish benchmarks that would objectively measure whether a cable system is operating in a competitive manner. It is unlikely that there is a single competitive rate for any complement of cable service or one average per-channel price that consistently reflects competitive behavior because the cost of providing basic service differs among cable systems. The Commission concedes that it is not able to overcome the practical problems associated with establishing a competitive behavior test and, thus, will not adopt such a test.

12. In the Cable Act, Congress also required the Commission to establish standards applicable to regulation of basic cable service rates by local franchising authorities for cable systems not subject to effective competition as defined by the Commission. Currently, the Commission requires that any franchising authority exercising its right to establish rates for basic cable service: (1) give formal notice to the public; (2) provide an opportunity for interested parties to make their views known; and (3) make a formal statement, including a summary explanation, when a decision is made. In view of the substantive rates standards that the Commission is adopting in this Report and Order, these procedural standards are amended to explicitly require a written statement that explains any franchising authority decision on a cable rate matter. Any such statement need only set forth the factors considered and reasoning applied to the relevant issues that resulted in the decision, including those factors and issues included in the new substantive rate standards.

13. Under existing rules, local franchising authorities exercise discretion that is governed by the statute when determining the appropriate basic service rate for cable systems that do not face effective competition. In the Further Notice, the Commission proposed that franchising authorities apply a "fair return" standard when regulating basic cable rates. The evidence in the record indicates that substantive standards are needed to avoid recurrence of the past abuses of the rate-making power. Thus, the Commission adopts the "fair return" on investment standard that, in addition to a reasonable profit, will take into account capital, basic cable programming, customer service, labor and ancillary costs attributable to obtaining and retransmitting signals carried on the basic tier as well as changes in such costs and the cost of

any requirements made by the franchising authority that do not relate directly to provision of cable service. The automatic five percent annual increase would apply before any franchising authority would become involved in rate regulation. Thereafter, these standards would govern all franchising authority rate determinations. However, the Commission does not adopt any particular rate-setting methodology to implement this standard, finding that reliance upon local communities to determine or approve specific rates is appropriate because each cable system operates under its own franchise agreement and is subject to different costs. This "fair return" on investment standard should simultaneously assist franchising authorities in determining the factors appropriate to consider when setting basic cable rates, preserve their control over the cable rates in their communities and assure them the flexibility to consider other relevant factors. Finally, the Commission adopts its proposal that disputes in applying this standard be directly appealable to the courts rather than to this Commission.

14. In the Further Notice, the Commission proposed to delegate to the franchising authority in the first instance the authority to determine whether a cable system meets the new effective competition standard, with direct review of such determinations by this Commission via the provision of § 76.33(c) of the rules. In addition, the Further Notice sought comment regarding standards for determining the presence of broadcast signals in conjunction with requests for waivers of the *prima facie* showing of the existence of effective competition.

15. The Commission will continue to delegate to the franchising authority the responsibility to determine whether a cable system meets the new effective competition standard. The Commission also will retain § 76.33 of the rules, which permits any party seeking to establish either the presence or absence of effective competition to petition the Commission in accordance with special relief provisions of § 76.7. Further, the Commission will retain the existing rules relating to the submission of engineering studies showing actual signal availability by parties seeking to rebut the predicted Grade B standard of signal availability for full service stations. The Commission clarifies the rules relating to the submission of engineering studies by parties seeking a waiver of the standard of signal availability for translators. Parties will

now be required to submit engineering studies that show the actual protected contour of such signals, as defined in § 74.707 of the rules, using the methodology specified in § 73.686. These standards will also apply for low power television stations. However, the Commission has determined that it lacks authority to require one party to pay for the litigation-related expenses of another, and eliminates the existing rule regarding the reimbursement of the cost of engineering studies.

16. In the Notice, the Commission noted that any new rules it may adopt would likely authorize more franchising authorities to regulate the basic service rates of their local cable television systems. The Commission asked commenters to consider whether there was any action it could or should take that would prevent cable systems from engaging in strategic behavior (*e.g.*, raising rates or retiering) that would contravene the intent of any new rules during the time between adoption of new rules and their implementation. In the Report and Order, the Commission concludes that it lacks authority to roll back basic service rates that were increased by a cable system that faced effective competition under the rules that existed at the time of the increase. The Cable Act clearly specifies that rates may only be regulated when the cable system does not face effective competition as defined by the Commission. With respect to retiering, section 625 of the Cable Act explicitly and narrowly proscribes this Commission's and franchising authorities' ability to interfere in decisions by cable companies regarding unregulated tiers of service, which would include all tiers prior to institution of regulation. Thus, while the Commission recognizes that retiering in anticipation of regulation may affect the number of services offered on the basic tier, the Commission finds that the Cable Act clearly prevents any action by the Commission in this regard. Accordingly, no provisions regarding retiering prior to the imposition of rate regulation will be adopted.

17. In addition, the Report and Order resolves issues raised by the City of Dubuque, Iowa (Dubuque), in its petition for reconsideration of the Commission's Second Report and Order in MM Docket No. 84-1296, 53 FR 17049 (1988). In the Second Report and Order, the Commission modified the manner in which signal availability was measured in response to the decision in *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (DC Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988), which found, in part,

that the standard for measuring signal availability was arbitrary and capricious. In its petition for reconsideration, Dubuque argues that: (1) The audience surveys conducted to establish a signal's availability based on its significantly viewed status should be adjusted to reflect population densities; (2) the methodology specified for field strength measurements to determine actual signal availability in the cable community in waiver proceedings should taken into account population densities, not merely geographic areas; (3) procedures should be adopted to challenge a significant viewing survey (or waiver petition); and (4) the cost reimbursement rule should be modified to include legal costs as well as engineering costs.

18. In the Report and Order, the Commission rejects the revised methodology for significant viewing surveys proposed by Dubuque because it would inject a new, costly, burdensome and complicated element in the significant viewing standard that would not be needed in most instances in order to prepare a valid survey. The Commission also is not persuaded that it is necessary to modify the requirements of field strength studies to account for population densities throughout the cable community because a properly executed field strength study would rarely indicate that a signal is receivable in the cable community when, in fact, only a minority of the cable community's population can actually receive the signal. The Commission notes that the §§ 76.54(c) and 76.7(d) already permit interested parties to comment on any potential or actual problems associated with a significant viewing survey before it is undertaken or after a completed survey is submitted for review. Thus, no additional procedures are needed to challenge a significant viewing survey. Finally, since the Commission is eliminating its cost reimbursement rule in the Report and Order, the proposal to include legal fees is rejected. Accordingly, the Commission denies Dubuque's petition for reconsideration.

Final Regulatory Flexibility Statement

19. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, it is certified that this decision will have a significant impact on a substantial number of small entities because it will affect cable system operators by redefining effective competition, the basis for determining whether a system may be regulated by a local franchising authority.

20. The Secretary shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to

the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub.L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 et seq., (1981)).

21. Accordingly, *it is ordered* That pursuant to the authority contained in sections 4(i), 303 and 543(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303 and 543(b)(3), part 76 of the Commission's rules, 47 CFR part 76, *is amended* as set forth below.

22. *It is ordered* That the rules set forth below will be effective October 25, 1991, pending approval by the Office of Management and Budget.

23. *It is further ordered* That the petition for reconsideration filed by the City of Dubuque, Iowa, is denied and the proceeding in MM Docket No. 84-1296 is terminated.

List of Subjects in 47 CFR Part 76

Cable television.

Amendatory text

Part 76 of chapter I of title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 154(f), 303 and 543(b)(3).

2. Section 76.33 is amended by revising paragraphs (a) and (b) to read as follows:

§ 76.33 Standards for rate regulation.

(a) A franchising authority is delegated the authority in the first instance to determine whether effective competition, as defined in this paragraph, exists in its community. When disputes arise regarding the franchising authority's initial determination, the presumption in a proceeding before the Commission will be that effective competition does not exist. A franchising authority may regulate the rates of a cable system subject to the following conditions (cable systems that were subject to rate regulation prior to this date will remain subject to that regulation pending demonstration that they may not be regulated pursuant to this section):

(1) Only basic cable service as defined in § 76.5(ii) may be regulated;

(2) Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever any one of the following conditions are met:

(i) 100 percent of the cable community receives service from at least six

unduplicated broadcast television signals. It is not necessary that the same six signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in § 73.683 of the rules) or if they are significantly viewed within the cable community, as defined in § 76.54 (b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station is to be counted in the same manner as a full service station, except that its coverage area shall be based on its predicted protected contour as specified in § 74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B contour or significantly viewed signal within the cable community. A low power television station is to be counted in the same manner as a full service station, except that its coverage area shall be based on its predicted protected contour as specified in § 74.707 of the rules, provided it does not duplicate, as defined in the note below, another station counted in the same community.

Note: For purposes of this section, "duplicated broadcast television signal" is defined as one which does not simultaneously duplicate more than 50 percent of another signal's weekly prime time schedule pursuant to the definition of "prime time" provided in § 76.5(n).

(ii) An independently owned, multichannel video delivery service is available to at least 50 percent of the homes passed by the incumbent cable system (*i.e.*, the number of homes to which cable service is currently available whether or not a given household subscribes to cable service), and at least 10 percent of all homes passed by the alternative system within the incumbent cable system's service area actually subscribe to the service. Video delivery services that may be counted include a competing cable system, a multichannel, multipoint distribution system (MMDS), satellite master antenna television (SMATV), home satellite dishes (HSD), and direct broadcast satellite services (DBS). It is not necessary that the same multichannel video deliver service be available throughout the area. Availability of a competing multichannel video delivery system will be determined by dividing the number of homes passed by an alternative delivery service by the number of homes passed by the incumbent cable system and expressed as a percentage. The penetration of alternative video delivery services will be calculated by combining

the number of subscribers to all available services and expressing that number as a percentage of the homes passed by both an alternative provider and the incumbent cable system. Availability and penetration information for the competing multichannel video delivery services may be obtained from publicly available sources, from the operator directly, or from specifically undertaken audits. DBS will be considered to be available to the entire United States when any one such system service becomes operational.

Note: For purposes of this section, an MMDS service is considered to be "independently owned" if it meets the criteria contained in § 21.912 of the rules. The following services will be considered to be "independently owned" if cable system ownership (including all parties under common control) does not exceed the criteria contained in § 76.501 of the rules: SMATV, HSD, and DBS.

(3) The Commission may grant waivers of the effective competition standard where the filing party submits one or more of the following showings, as appropriate:

(i) The availability of full service broadcast signal(s) with engineering studies in accordance with § 73.686 of the Commission's rules or by other showings that such Grade B level signals are (or are not) in fact available within the community. In performing the engineering studies noted above, cluster measurements, as provided in § 73.686(b)(2)(viii) of this chapter, may be taken in place of mobile runs as provided in § 73.686(b)(2)(v) of this chapter. The availability of translator(s) or low power television station(s) with engineering studies in accordance with § 73.686 of this chapter or other showings that show the protected contour of such signals, as defined in § 74.707 of this chapter. In conducting these engineering studies, cluster measurements as provided in § 73.686(b)(2)(viii) of this chapter may be taken in place of the mobile runs as provided in § 73.686(b)(2)(v) of this chapter. Any party intending to obtain a study must first inform the other party and provide it an opportunity to negotiate a resolution.

(ii) The penetration of a competing cable system based on a survey of cable households passed and cable subscribers or more recent data;

(iii) The availability or penetration of alternative video delivery technologies

specified in § 76.33(a)(2)(ii) with additional information, or relevant information with respect to alternative video delivery technologies not included in § 76.33(a)(2)(ii). The availability of MMDS may be demonstrated by a showing of its protected contour as specified in § 21.902 (d) and (e) of the rules.

(4) When a cable system not subject to effective competition becomes subject to effective competition due to any change in market conditions, the right of the local franchising authority to regulate the basic cable service rates of such cable system shall terminate immediately. A cable system, once determined to be subject to effective competition after the effective date of this section, shall not be subject to regulation for sixty days after any change in market conditions which would cause it to be determined not to be subject to effective competition. In instances where disputes arise between a cable system and a franchising authority regarding the changed circumstances, the status quo shall be maintained with respect to its regulatory status until the matter is resolved either by the parties or the Commission. However, if it is subsequently determined that the cable system does not face effective competition, the franchising authority may require the cable operator to rebate to subscribers the excess basic service rates charged during the pendency of appeal with interest, determined on the basis of the existing rate applicable to federal income tax refunds and payments, to compensate for the excess revenues collected when the cable system properly may have been regulated.

(5) Franchising authorities setting regulated basic cable service rates pursuant to this section shall allow a fair return on investment taking into account appropriate costs, including, but not necessarily limited to, capital costs, basic cable programming, customer service, labor, and ancillary costs attributable to obtaining and transmitting signals carried on the basic tier, increases in such costs, and the cost of any franchise-imposed requirements not directly related to the provision of cable service, as well as a reasonable profit. Franchising authorities shall presume the reasonableness of documented increases in those basic cable cost factors itemized in this "fair return on investment" standard.

Franchising authorities shall retain the discretion to deny a proposed rate increase, but they shall be required to provide substantial written evidence supporting any decision to deny recovery of bona fide, documented increases in these itemized costs of providing basic cable service. Appeal of a franchising authority's decision shall be made to the state court with jurisdiction over such matters.

(b) In establishing any rate for the provision of basic cable service by cable systems subject to paragraph (a) of this section, the franchising authority shall:

(1) Give formal notice to the public;

(2) Provide an opportunity for interested parties to make their views known, at least through written submissions; and,

(3) Make a formal statement (including summary explanation) when a decision on a rate matter is made, and issue a written decision.

* * * * *

3. Section 76.54 is amended by revising paragraph (c) to read as follows:

§ 76.54 Significantly viewed signals; method to be followed for special showings.

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. Furthermore, if a survey is undertaken pursuant to the provisions of § 76.33(a)(2)(i) of the rules, notice shall also be served on the franchising authority. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

* * * * *

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 91-17102 Filed 7-19-91; 8:45 am]

BILLING CODE 6712-01-M

Proposed Rules

Federal Register

Vol. 56, No. 140

Monday, July 22, 1991

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 906

[Docket No. FV-91-410PR]

Oranges and Grapefruit Grown in Lower Rio Grande Valley in Texas; Proposed 1991-92 Expenses and Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes authorizing expenditures for the 1991-92 fiscal period (August 1-July 31) for the Texas Valley Citrus Committee (TVCC), established under Marketing Order No. 906. This proposed action is needed by the TVCC to pay anticipated marketing order expenses. The proposed action would enable the TVCC to continue to perform its duties and the order to operate.

DATES: Comments must be received by August 1, 1991.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule to: Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456. Three copies of all written material shall be submitted, and they will be made available for public inspection in the office of the Docket Clerk during regular business hours. All comments should reference the docket number and the date and page number of this issue of the Federal Register.

FOR FURTHER INFORMATION CONTACT: Gary D. Rasmussen, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456, telephone 202-475-3918.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Agreement and Marketing Order No. 906, both as amended (7 CFR part 906),

regulating the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas. This agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation 1512-1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are about 135 handlers subject to regulation under the marketing order for oranges and grapefruit grown in Texas, and about 2,500 orange and grapefruit producers in Texas. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of these handlers and producers may be classified as small entities.

The marketing order for Texas oranges and grapefruit, administered by the Department, requires that an annual budget of expenses be prepared by the TVCC and submitted to the Department for approval. The members of the TVCC are handlers and producers of Texas oranges and grapefruit. They are familiar with the TVCC's needs and with the costs for goods, services, and personnel in their local area and are thus in a position to formulate an appropriate budget. The budget is formulated and discussed in public meetings. Thus, all directly affected

persons have an opportunity to participate and provide input.

The recommended budget is usually acted upon by the TVCC shortly before a season starts, or during the season when changes are needed, and expenses are incurred on a continuous basis. Therefore, budget approvals must be expedited so that the TVCC will have funds to pay its expenses.

The Texas Valley Citrus Committee (TVCC) met on June 18, 1991, and unanimously recommended a 1991-92 budget with expenditures of \$102,250. Of this total, \$46,000 is for administration of the marketing order and \$56,250 is for administration of TexaSweat Citrus Advertising, Inc. (TCAI). TCAI has carried out the TVCC's advertising and promotion program for the past several seasons and plans limited public relations activities for 1991-92. Budgeted expenditures for 1990-91 were \$107,810.

The TVCC's proposed 1991-92 expenditures are similar in size and scope to those of last fiscal year and are at a level needed to keep the marketing order functioning until Texas citrus production further recovers and increased supplies of fruit become available for the commercial market. The 1991-92 season Texas citrus crop is expected to be relatively small, due to long term damage to the citrus groves caused by a severe freeze in December of 1989. Due to the small expected crop, the TVCC recommended that no assessment rate be established for the 1991-92 fiscal year, the same recommendation it made last year for the 1990-91 season.

The TVCC plans to use funds from its reserve and an estimated \$25,000 in interest income to finance its 1991-92 expenditures. The TVCC estimates that its reserve fund will amount to about \$458,600 on July 31, 1991, which is more than adequate to cover the anticipated deficit.

Based on the foregoing, the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

A comment period of 10 days is deemed appropriate for this action. Since TVCC expenses are incurred on a continuous basis during the entire fiscal period, approval of the proposed expenditure authorization must be expedited.

List of Subjects in 7 CFR Part 906

Grapefruit, Marketing agreements and orders, Oranges, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, it is proposed that 7 CFR part 906 be amended as follows:

PART 906—ORANGES AND GRAPEFRUIT GROWN IN LOWER RIO GRANDE VALLEY IN TEXAS

1. The authority citation for 7 CFR part 906 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. A new § 906.231 is added to read as follows:

§ 906.231 Expenses.

Expenses of \$102,250 by the Texas Valley Citrus Committee are authorized for the fiscal period ending on July 31, 1992.

Dated: July 16, 1991.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division.

[FR Doc. 91-17362 Filed 7-19-91; 8:45 am]

BILLING CODE 3410-02-M

7 CFR Part 927

[Docket No. FV-91-413 PR]

Proposed Expenses and Assessment Rate for Marketing Order Covering Winter Pears Grown in Oregon, Washington, and California

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would authorize expenditures and establish an assessment rate under Marketing Order 927 for the 1991-92 fiscal period (July 1-June 30). The proposal is needed for the Winter Pear Control Committee (committee) to incur operating expenses during the 1991-92 fiscal year and to collect funds during that year to pay those expenses. This would facilitate program operations. Funds to administer this program are derived from assessments on handlers.

DATES: Comments must be received by August 1, 1991.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room

2525-S, Washington, DC 20090-6456. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Patrick Packnett, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456, telephone 202-475-3862.

SUPPLEMENTARY INFORMATION: This rule is proposed under Marketing Agreement and Marketing Order No. 927 (7 CFR part 927) regulating the handling of winter pears grown in Oregon, Washington, and California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This proposed rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation 1512-1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

Approximately 90 handlers of winter pears are subject to regulation under this marketing order each season. There are approximately 1,800 winter pear producers in Washington, Oregon, and California. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of the handlers and producers of winter pears may be classified as small entities.

The winter pear marketing order, administered by the Department, requires that the assessment rate for a particular fiscal year shall apply to all

assessable pears handled from the beginning of such year. An annual budget of expenses is prepared by the committee and submitted to the Department for approval. The members of the committee are handlers and producers of winter pears. They are familiar with the committee's needs and with the costs for goods, services, and personnel in their local area and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by the committee is derived by dividing anticipated expenses by expected shipments of pears (in standard boxes or equivalents). Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committee shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited so that the committee will have funds to pay its expenses.

The committee met on May 31, 1991, and unanimously recommended 1991-92 fiscal year expenditures of \$5,130,616 and an assessment rate of \$0.38 per standard box, or equivalent, of assessable pears shipped under M.O. 927. In comparison, 1990-91 fiscal year budgeted expenditures were \$4,943,738 and the assessment rate was \$0.315.

Major expenditure items this year in comparison to 1990-91 budgeted expenditures (in parentheses) are \$4,305,000 (\$3,859,775) for paid advertising, \$128,176 (\$317,767) for contingencies to cover unanticipated expenses, and \$246,000 (\$350,861) for research designed to improve winter pear yields and quality. The committee has budgeted \$145,000 for industry development, of which \$100,000 would be held in reserve for use in the event of any consumer related industry crisis. The balance of \$45,000 would cover consultant services provided by the Northwest Horticultural Council. The remaining expenses are primarily for program administration and are budgeted at about last year's amounts.

Assessment income for the 1991-92 fiscal year is expected to total \$4,674,000 based on shipments of 12,300,000 packed boxes of pears. Other available funds, including \$32,408 in prior year