Y, as the building's owner. Partnership Y promptly notified Agency X of the error. After reviewing related documents, Agency X determined that it had incorrectly listed B as the building's owner on the allocation document. Since the parties originally intended that Partnership Y would receive the allocation as the owner of the building, Agency X may correct the error without obtaining the Secretary's approval, and insert Partnership Y as the building's owner on the allocation document.

Example 2. Agency Y allocated fewer low-income housing credits for a low-income housing building than Agency Y originally intended. After the close of the calendar year of the allocation, B, the building's owner, discovered the error and promptly notified Agency Y. Agency Y reviewed relevant documents and agreed that an error had occurred. Agency Y and B must apply, as provided in paragraph (b)(3)(iii) of this section, for the Secretary's approval before Agency Y may correct the error.

(d) *Effective date.* The rules set forth in this notice of proposed rulemaking are proposed to be effective on March 5, 1993.

Michael P. Dolan,

Acting Commissioner of Internal Revenue.

[FR Doc. 92–31189 Filed 12–31–92; 8:45 am]

BILLING CODE 4830–01–M

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26 CFR Part 1

[PS–50–92]

RIN 1545–AQ93

Rules to Carry Out the Purposes of Section 42 and for Correcting Administrative Errors and Omissions; Hearing

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of a public hearing on proposed Income Tax Regulations concerning the Secretary's authority to provide guidance necessary or appropriate to carry out the purposes of section 42 and allowing State and local housing credit agencies to correct administrative errors and omissions made in connection with allocations of low-income housing credit dollar amounts and recordkeeping within a reasonable period after their discovery.

DATES: The public hearing will be held on Monday, April 5, 1993, beginning at 10 a.m. Requests to speak and outlines of oral comments must be received by Monday, March 15, 1993.

ADDRESSES: The public hearing will be held in the IRS Commissioner's Conference Room, room 3313, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Requests to speak and outlines of oral comments should be submitted to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R [PS–50–92], room 5228, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Mike Slaughter of the Regulations Unit, Assistant Chief Counsel (Corporate), 202–622–7190 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations under section 42 of the Internal Revenue Code of 1986.

The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice of proposed rulemaking and who also desire to present oral comments at the hearing on the proposed regulations should submit not later than Monday, March 15, 1993, an outline of the oral comments/testimony to be presented at the hearing and the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited to 10 minutes for an oral presentation exclusive of the time consumed by the questions from the panel for the government and answers to these questions.

Because of controlled access restrictions, attendees cannot be admitted beyond the lobby of the Internal Revenue Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying. Copies of the agenda will be available free of charge at the hearing.

By direction of the Commissioner of Internal Revenue:

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 92–31470 Filed 12–31–92; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD 92–015b]

RIN 2115–AE30

Temporary Deviations for Drawbridge Operation Requirements

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend drawbridge operation regulations to allow for temporary deviations for up to 90 days. Under current regulations, a Coast Guard District Commander may authorize a temporary deviation from a part 117 provision for a maximum of 60 days. The additional 30 days would better accommodate seasonal testing and public response surveys, and would provide additional time for a test regulation to be in effect before comments are due on the proposed change and its effectiveness.

DATES: Comments must be received on or before March 5, 1993.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G–LRA/3406)(CGD 92–015b), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001, or may be delivered to Room 3406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

The Executive Secretary maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying at Room 3406, U.S. Coast Guard Headquarters.

FOR FURTHER INFORMATION CONTACT: Ms. Marcia L. Waples, Chief, Alterations, Drawbridges, and Systems Branch (G–NBR–1), at (202) 267–0375.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking (CGD 92–015b) and the specific section of this proposal to which each comment applies, and give a reason for each comment. The Coast Guard requests that all comments and attachments be submitted in an unbound format suitable for copying and electronic filing. If not practical, a second copy of any bound material is requested. Persons wanting acknowledgement of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this proposal in view of the comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Marine Safety

Council at the address under "ADDRESSES." The request should include reasons why a hearing would be beneficial. If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the Federal Register.

Drafting Information

The principal persons involved in drafting this document are Ms. Marcia L. Waples, Project Manager, and Mr. Don Faleris, Project Counsel, Office of Chief Counsel.

Background and Purpose

Title 33, part 117 of the Code of Federal Regulations contains both general and specific requirements for drawbridge operations. In order to evaluate suggested changes to the drawbridge operation requirements, § 117.43 allows a Coast Guard District commander to authorize temporary deviations from the regulations contained in part 117, for up to 60 days. The authorized temporary deviation is meant to allow for regulations testing as a prelude to permanent regulation changes governing drawbridge operations and schedules. An issue has been raised regarding the need to revise § 117.43 because the maximum 60-day period does not consider the need to test a proposed regulation change over various lengths of seasonal periods in order to capture significant circumstances associated with seasonal waterborne traffic patterns. The 60-day limitation also does not allow for adequate public survey responses or commentary on proposed changes or other related problems not specifically addressed under part 117.

Discussion of Proposed Amendments

The proposed amendment would allow temporary deviations from drawbridge operation regulations to be authorized by a District Commander for up to 90 days, instead of the current 60 days. This will make the testing of proposed changes more effective and will increase the likelihood of more useful feedback from the affected public.

Regulatory Evaluation

This proposal is not major under Executive Order 12291 and not significant under the "Department of Transportation Regulatory Policies and Procedures" (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation is unnecessary. This proposal merely extends the allowable time for temporary changes in drawbridge operation requirements for regulatory purposes. There will be no cost to the general public. In fact, the ultimate purpose is to balance the needs of navigation and railroad and land transportation in the most effective and efficient manner possible, in order to minimize to the greatest extent practicable inconvenience and transportation and navigation costs which may be associated with delays caused by scheduling or other operating requirements in need of adjustment.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal, if adopted, will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632).

This proposal is intended to provide greater flexibility in the regulation which allows for testing proposed changes in drawbridge operations or scheduling. This proposal is largely administrative in nature, and will be infrequently used. It imposes no special expense on small businesses. Because it expects the economic impacts of this proposal to be minimal, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This proposal contains no additional collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501*et seq.*).

Federalism

The Coast Guard has analyzed this proposal under the principles and criteria contained in Executive Order 12612 and has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Under Federal law, the primary jurisdiction to regulate drawbridges across the navigable waters of the United States is vested in the Secretary of Transportation and delegated to the Coast Guard. Therefore, if this rule becomes final, the Coast Guard intends it to preempt State action addressing this subject matter.

Environment

The Coast Guard considered the environmental impact of this proposal and concluded that under section 2.B.2.g.(5) of Commandant Instruction M16475.1B, this proposal is categorically excluded from further environmental documentation because it is a Bridge Administration Program action involving the promulgation of operating requirements or procedures for drawbridges. A Categorical Exclusion Determination is available in the docket for inspection or copying where indicated under "ADDRESSES."

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons set out in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g).

2. Section 117.43 is revised to read as follows:

§ 117.43 Changes in draw operation requirements for regulatory purposes.

In order to evaluate suggested changes to the drawbridge operation requirements, the District Commander may authorize temporary deviations from the regulations in this part for periods not to exceed 90 days. Notice of these deviations is disseminated in the Local Notices to Mariners and published in the Federal Register

Dated: Dec 28, 1992.

A. Cattalini,

Acting Chief, Office of Navigation Safety and Watereway Services.

[FR Doc. 92–31913 Filed 12–31–92; 8:45 am]

BILLING CODE 4910–14–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 92–266, FCC 92–544]

Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this Notice of Proposed Rulemaking (NPRM), the Commission proposes to amend its rules to

implement sections 623, 612, and 622(c), of the Communications Act of 1934, 47 U.S.C. 543, 532 and 542(c) as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, §§ 3, 9, & 14, 106 Stat. 1460 (1992) (Cable Act of 1992). The Cable Act of 1992 directs the Commission to establish rules to govern rate regulation of cable service provided by cable systems not subject to effective competition and leased commercial access offered by cable systems to programmers.

DATES: Comments must be filed on or before January 27, 1993, and reply comments on or before February 11, 1993.

ADDRESSES: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Patrick Donovan (202) 632–1295 or Nancy Boocker (202) 632–6917, Common Carrier Bureau; Regina Harrison or Alan Aronowitz, Policy and Rules Division, Mass Media, (202) 632–7792.

SUPPLEMENTARY INFORMATION:

I. Introduction

The FCC solicits comment to help it to craft a comprehensive regulatory model that will best fulfill statutory objectives related to rate regulation for the cable industry. The NPRM describes and proposes alternative procedural and substantive regulations through which the requirements of these statutory provisions could be implemented. It also discusses the advantages and disadvantages of each alternative. The NPRM tentatively concludes that the FCC should adopt a benchmark regulatory alternative for regulation of cable service rates under which the FCC would establish a benchmark rate, or a simple formula which could be used to derive such a rate. Rates above the benchmark would be presumed unreasonable. Cost-of-service regulation on an individual system basis would be applied to cable systems seeking to justify a rate above the benchmark. The FCC solicits comment generally on how the different rate regulation proposals presented in the NPRM would affect, and be affected by, other parts of the Cable Act of 1992 addressed in separate Commission proceedings.

II. Proposed Implementation

A. Regulation of Cable Service Rates

1. General Issues

The Cable Act of 1992 directs the Commission to establish rules to govern rate regulation of cable service tiers offered by cable systems not subject to effective competition. The Commission must establish regulations that assure that rates for the basic service tier are reasonable, and standards that permit identification, in individual cases, of rates for cable programming services that are unreasonable.

The Cable Act of 1992 states that since the rate deregulation triggered by the Cable Communications Policy Act of 1984, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable subscribers. Acknowledging that since 1984 the average number of basic channels has increased from about 24 to 30, the Act still finds that average monthly rates have risen 29 percent during the same period and that the average monthly cable rate has grown almost three times as fast as the Consumer Price Index (CPI) since deregulation. The Cable Act of 1992 also requires that regulations governing rates for cable service be based on, among other factors, the rates charged by cable systems subject to effective competition. This leads to the basic question of whether the purpose and the terms of the Cable Act embody a congressional intent that our rules produce rates generally lower than those in effect when the Cable Act of 1992 was enacted (and if so, to what degree), or, rather a congressional intent that regulatory standards serve primarily as a check on prospective rate increases. To the extent Congress envisioned reductions in rates, the FCC solicits comment on the extent to which this should be accomplished for the basic service tier and/or for cable programming services. The FCC solicits comment generally on the impact of rate reductions, or of limits on prospective rate increases, on the ability of cable operators to provide service to subscribers on the basic or higher level service tiers.

The Cable Act of 1992 permits, and appears to require in some cases, a restructuring of service offerings. The FCC solicits comment on the impact of the rate regulation alternatives presented in the NPRM on the ability and incentive of cable operators to create packages of programming at different tier levels that will be useful and valuable to subscribers. The FCC also solicits comment on whether any regulatory alternative would, as a practical matter, unduly restrict the ability of cable operators to provide a full range of services on either the basic or higher level service tiers. In addition, the FCC seeks comment generally on the impact upon the cable industry, its investors, subscribers, future growth of services and of programming, and service quality of the different approaches to rate regulation that we present in the NPRM.

2. Standards and Procedures for Identification of Cable Systems Subject to Effective Competition

The Cable Act permits regulation of a cable system's subscriber rates only if this Commission finds that the cable system is "not subject to effective competition." Where effective competition does not exist, the Cable Act states that rates for the provision of "basic cable service" are to be regulated by the franchising authority (or by this Commission in circumstances discussed below), while rates for "cable programming services" shall be subject to regulation only by this Commission. The statute establishes three separate tests, any one of which, if satisfied, would determine that cable system is subject to effective competition. The first is satisfied if the households subscribing to a cable system constitute fewer than 30 percent of the households in the franchise area. The second test is met if: (i) There are at least two unaffiliated multichannel video programming distributors (one of which may be the cable system in question), each of which offers comparable video programming to at least 50 percent of the households in the franchise area, and (ii) the households subscribing to all but the largest multichannel video programming distributor exceed 15 percent of the households in the franchise area. The third way effective competition may arise is if the franchising authority in the subject franchise area is itself a multichannel video programming distributor and offers video programming to at least 50 percent of the households in that franchise area. The Commission seeks comment on the effective competition standards contained in the Cable Act.

The Commission also seeks comment on whether the standard for gauging whether households are "offered" video programming under the second and third tests should be that service is actually available to such households. The Commission plans to count "households" subscribing to or being offered cable or other video programming service on the basis of each separately billed or billable customer. The Commission seeks comment on this tentative view. Comments are also sought on sources for data needed to evaluate such criteria, and their current availability.

The Commission also seeks comment on who is "a multichannel video programming distributor" for purposes

of the second and third tests. The Cable Act defines multichannel video programming distributor as an entity who makes multiple channels of video programming available for purchase by subscribers or customers. As examples of such entities, section 602(12) of the Communications Act lists: A cable operator, a DBS satellite service provider, a television receive-only satellite program distributor, and an MMDS provider. In assessing cable competition, the Commission previously has considered whether to take into account alternative or substitute delivery services readily available to subscribers in the home. In this regard, the Commission seeks comment on whether a telephone company offering of "video dialtone" service or a television broadcast station offering multiplexed multichannel service would qualify as a "multichannel video programming distributor." A related issue on which the Commission sought comment is whether a leased access user offering compressed, multichannel service, or a leased access user or a franchising authority offering multichannel programming on the operator's leased access or PEG channels, on either a perchannel or a multiplexing basis, would be a "multichannel video programming distributor."

The Commission also seeks comment on its tentative view that it should measure penetration for purposes of the second test cumulatively, *i.e.*, by adding the subscribership of all alternative multichannel video programming distributors (other than the largest) together. In addition, the Commission ask parties to address whether any minimum amount of programming or minimum number of separate channels must be provided by an entity for it to quality as a "multichannel video programming distributor." With respect to "comparable video programming," the Commission might presume that such comparability exists under the second statutory test for effective competition if a competitor offers multiple channels of video programming and the numerical tests for the offering of and subscription to competitive service under the second test are met. The Commission seeks comment on this approach.

3. Regulation of the Basic Service Tier Rates

a. *Components of the basic service tier subject to regulation.* Under the Cable Act, each cable operator must offer its subscribers a separately available basic service tier to which subscription is required for access to "any other tier of service." Qualified franchising authorities are to be the primary regulators of rates for this basic tier of service, with the Commission regulating in certain circumstances. The statute provides that the basic service tier must include:

(1) All local commercial and noncommercial educational television and qualified low power station signals carried to meet carriage obligations imposed by sections 614 and 615 of the Cable Act;

(2) Any public, educational, and governmental access programming required by the system franchise to be provided to subscribers; and

(3) Any signal of any television broadcast station that the cable operator offers to any subscriber, unless it is a signal that is secondarily transmitted by a satellite carrier beyond the local service area of such a station.

Section 623(b)(7)(B) permits the operator to include additional video programming signals or services in the basic tier as long as the charges for their services conform to the Commission's rate regulations.

The statute requires that "must-carry" local television signals, as defined by sections 614 and 615 of the Communications Act, must be included in the basic service tier. However, the Cable Act authorizes local television stations to exercise "retransmission consent" rights in lieu of mandatory carriage. Parties are requested to comment on how the retransmission consent provisions will affect or shape the composition of the basic service tier. In particular, section 623(b)(7)(A)(iii) would appear to make any local signal carried pursuant to retransmission consent a basic tier channel. The Commission seeks comment on this tentative conclusion. The Commission also seeks comment on whether channels carried pursuant to retransmission consent would be classified as basic service channels, even if an operator had already satisfied his signal carriage obligations. The Commission also seeks comment on its tentative finding that cable operators may add any and as many video programming services to the basic tier as they wish, provided that such services are subject to basic rate regulation.

The statute defines basic service as a tier "to which subscription is required for access to any other tier of service." The Commission seeks comment on whether this language establishes a "basic buy-through" requirement, *i.e.*, whether it precludes the offering of video services completely "a la carte" and without prior subscription to the basic service tier. In particular, the Commission asks interested parties to comment on whether Congress intended to deprive consumers of the option of purchasing services, such as premium channels, or the services of a leased access programmer, on a stand-alone basis, especially in light of the plain language of the statute which limits any such "basic buy-through" to other tiers of service. In addition, the Commission interprets section 623(b)(8)(A) as precluding an operator's requiring the purchase of services in addition to the basic tier as a precondition for ordering other programming. Assuming *arguendo* that other alternative interpretations are possible, the Commission seeks comment on whether the Act would also preclude subscribers from purchasing a separate offering of a nonvideo or "institutional network" without first purchasing the basic tier.

The definition of what services are subject to rate regulation as part of the basic service tier appears to contemplate only a single tier, and to effectively amend the general "basic tier" definition that remains in the Communications Act from the 1984 Cable Act. Section 602(3) defines "basic cable service" as "*any* service tier which includes the retransmission of local television broadcast signals" (emphasis supplied). As *American Civil Liberties Union* v. *FCC*, 823 F.2d 1554 (D.C. Cir., 1987) held, under the 1984 Act, a tier of service that incorporates, in a marketing sense, the basic tier is itself also a basic tier service, although a tier added to a basic tier for a separate charge would not be considered a basic service. The Commission seeks comment on the effect of the 1992 Cable Act on the *ACLU* interpretation of basic service. In particular, it appears that the 1992 Cable Act contemplates that there be a single "basic tier" of service that is subject to local regulation and that includes the services defined in section 623(b)(7)(A) (i), (ii), (iii). If this were not the case, the anti-buy through provisions of section 623(b)(8) could be frustrated through the marketing of cumulative tiers of "basic" service. The Commission seeks comment on its tentative interpretation.

b. *Regulation of the basic service tier by local franchising authorities and the Commission.* The Cable Act of 1992 permits local franchising authorities or the Commission to regulate the rates for "basic cable service" only if effective competition does not exist. A franchising authority wishing to exert such regulatory jurisdiction must certify in writing to the Commission that: (1) The franchising authority will adopt and administer rules with respect to the

rates subject to regulation that are consistent with the regulations prescribed by the Commission; (2) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and (3) procedural laws and rules governing rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties. Such a certification filed with this Commission by a franchising authority will become effective 30 days after filing unless the Commission finds, after notice and a reasonable opportunity for the authority to comment, that the franchising authority has not met one of the three criteria listed above. If the Commission disapproves the certification, this Commission must notify the franchise authority of any revisions or modifications necessary to obtain approval. Further, if the Commission disapproves or revokes a certification, section 623(a)(6) requires this Commission to exercise the franchise authority's regulatory jurisdiction until that authority becomes qualified by filing a new certification that meets the requirements. Such new certifications become effective upon approval by this Commission, which is required to act on them within 90 days.

aa. *Jurisdictional Division.* The Commission interprets Section 623 of the Communications Act, as amended by the Cable Act, to permit local franchising authorities to regulate the rates for basic cable service in areas that are not subject to effective competition unless the Commission disallows or revokes an authority's certification. The scope of the Commission's authority to regulate basic cable service rates under the statute is less clear. The Commission tentatively concludes that it has the power to regulate basic cable service rates only if the Commission has disallowed or revoked the franchise authority's certification. The Act states that rates for basic cable service "shall be subject to regulation by a franchising authority" *or* "by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6)." Paragraph (6) of section 623(a) only permits this Commission to exercise "the franchising authority's regulatory jurisdiction" when a franchise authority's certification is disapproved or revoked, and then only until a new certification is approved. Thus, under the Commission's tentative interpretation, unless a local franchise authority seeks to assert regulatory jurisdiction over basic cable service and is unsuccessful, the Commission would have no independent authority to initiate regulation of basic service rates. The Commission seeks comment on this tentative interpretation.

Other interpretations may be possible, however. Section 623(b) mandates that the Commission ensure by regulation that the rates for the basic tier are reasonable. This section can be read as giving the Commission authority over basic cable rates in areas not subject to effective competition, including such areas in which local authorities have not sought certification from the Commission to regulate basic service rates. Under this interpretation, the Commission might exercise its jurisdiction over basic service rates through individual petitions or complaints. Alternatively, the Commission might regulate using procedures similar to those it proposes for local franchising authorities. The Commission seeks comment on this or any other alternative interpretation of the jurisdictional division established under the Cable Act. The Commission seeks comment on whether it should permit a local franchising authority to file a statement explaining why the authority cannot submit a certification, (*e.g.*, lack of personnel) and requesting that the Commission assert jurisdiction. Parties advocating this approach should explain how this is consistent with the jurisdictional framework of the Cable Act.

bb. *Finding of effective competition.* The Cable Act authorizes the Commission to "find" whether or not a cable system is subject to effective competition. The Commission proposes to base its independent findings on an initial determination of an absence of effective competition by the franchising authority. The Commission proposes to have the franchise authority submit its finding and the basis for this finding to the Commission as part of the process by which local authorities are certified to regulate basic service rates. Given the large number of franchise areas nationally and their varied competitive characteristics, this approach appears to be reasonable and realistic. First, the statute on its face states that local authorities may exercise regulatory jurisdiction over cable rates only if the authority certifies that it has "the legal authority to adopt * * * such regulations." Since the Cable Act makes the absence of effective competition a prerequisite to regulators' legal authority over basic cable rates, the Commission finds it reasonable to require that local franchising authorities provide evidence of the lack of effective competition as a threshold matter of jurisdiction. In addition, franchising authorities may be in a superior position to gather relevant local facts and to test the accuracy of operators' representations regarding competition. The Commission also expects that they will consider any data operators submit to the Commission as a result of data requests or reporting obligations. The Commission's proposal, it believes, would permit in many cases a more accurate and expeditious initial effective competition analysis than the Commission could undertake without local assistance. The Commission seeks comment on this proposal. Parties may also wish to comment on whether challenges to a determination of lack of effective competition may appropriately be made as part of a revocation proceeding under section 623(a)(5), or as part of the Commission's normal procedures for reconsideration and review. The Commission also seeks comment on whether multichannel video programming distributors who are competitors to cable systems should be required to disclose the number of their subscribers and any other data relevant to finding of effective competition; whether such information (*e.g.*, as to number of subscribers) is likely to be proprietary and subject to special protections, and if so, what that special protection should be.

The Commission also tentatively finds that the language of section 623(l)(1), which expresses the tests for the presence or absence of effective competition in terms of a "franchise area," implies that determinations that effective competition is absent should be made on a franchise-area basis. Thus, if a cable system serves more than one franchise area in a geographic region, separate effective competition determinations would have to be made for each distinct franchise area. Moreover, the Commission tentatively finds that if more than one cable system is authorized to operate in a given franchise area, the requisite effective competition analysis must be applied to each system. The Commission seeks comment on these tentative conclusions. The Commission also seeks comment on whether a determination of effective competition for cable programming services, which this Commission is charged primarily with regulating, could and should be made on a system-wide, as opposed to franchise-area, basis.

cc. *Filing of franchise authority certification.* The Commission proposes that a franchise authority intending to regulate the rates for basic cable service be required to submit a certification meeting the requirements of section 623(a)(3)(A–C), and additionally stating

the basis for its finding that its franchisee is not subject to effective competition. The Commission tentatively concludes that a standardized and simple form can and should be used for certifying to the three criteria of section 623(a)(3), and that this form should include a section for the authority's statement and explanation of its initial finding that effective competition is lacking, with reference to documentable data, including any submissions made to the Commission. The Commission seeks comment on this tentative conclusion, as well as on the specific format for such a form. The Commission also invites comment on any other administratively efficient method for certification. Parties proposing such an alternative should also explain how their proposal is consistent with the goals of the Cable Act.

Section 623(a)(3) of the Communications Act, as amended, requires that a franchising authority be able legally to adopt regulations consistent with those the Commission establishes for basic cable rate regulation. The Communications Act, as amended by the 1984 Cable Act, appears to assume that a franchise authority derives its powers, including those to regulate rates, from state law. The legislative history of the Cable Act of 1992, however, suggests that the Act itself may abrogate franchise agreements in certain circumstances to permit rate regulation consistent with Commission rules. The Commission seeks comment on whether franchising authorities derive their powers to regulate from state and local laws alone, or whether the Cable Act may itself be an independent source of authority to regulate rates. To the extent the authority is not derived from state law, are there issues that need to be addressed as to which specific authorities within state and local government are entitled to exercise this authority? The Commission asks what Congress intended by enacting section 623(a)(3)(B), if the Cable Act in fact grants franchise authorities rate regulation powers irrespective of state law. The Commission also seeks comment on whether exercise by this Commission of basic service rate regulation authority in a state prohibiting rate regulation by local authorities would in fact constitute preemption of state law. If so, the Commission also ask whether such preemption would extend to giving franchising authorities the power to regulate rates where they otherwise would be without such power, or whether it would merely, under an alternative interpretation of section 623, authorize this Commission to do so.

The Commission seeks comment on whether two or more communities served by the same cable system could file a joint certification and exercise joint regulatory jurisdiction. The Commission asks whether there are actions it should take to provide incentives for local regulators to coordinate their activities and whether such coordination should be required as part of the certification process. The Commission seeks comment on the impact of franchising authorities' decisions to proceed independently on the Act's requirement that an operator's rate structure be uniform throughout a geographic area. The Commission also solicits comment on how, under such circumstances, a cable operator might fulfill the uniform rate structure requirement.

dd. *Approval of certification by the Commission.* The Cable Act states that the written certification submitted by a franchising authority to the Commission shall be effective 30 days after it is filed, unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that (1) the authority has adopted or is administering basic cable service rate regulations that are inconsistent with those the Commission prescribes, (2) the authority lacks the legal authority to adopt, or the personnel to administer, such regulations, or (3) procedural laws and regulations applicable to the authority's rate regulation proceedings do not provide a reasonable opportunity for consideration of the views of interested parties. The Act thus contemplates that unless the Commission takes explicit action within 30 days, a certification will be effective. The Act also appears to contemplate that any decision denying certification must be made within 30 days.

Given the expedited deadlines the Act imposes, the Commission assumes that Congress did not intend that the Commission establish a full-scale pleading cycle with opportunity for interested parties, including the cable operator, to comment prior to expiration of the initial 30-day period. Thus, although the Commission proposes that each certification application be served on the franchisee, the Commission proposes to base its decision on certification on the submission by the franchising authority alone. If a certification appears defective on its face, the franchise authority will be given notice, and the opportunity to submit additional information prior to the Commission's decision. Other interested parties, including cable operators, could subsequently challenge a certification by filing a petition for revocation once a certification is effective. The Commission seeks comment on this approach, and on whether, in addition to this avenue of relief, cable operators or other interested parties would be allowed to seek reconsideration of its decision regarding the existence of effective competition and certification. The Commission also ask interested parties to comment on what procedures it might adopt for the giving of notice and the submission of additional information by a franchise authority that would enable the Commission to render decisions within the 30-day statutory period. The Commission also seeks comment on whether it would be possible and consistent with legislative intent to establish a highly expedited pleading cycle permitting interested parties, including cable operators, to comment prior to the 30-day deadline.

The Commission proposes to reflect in its rules the Cable Act requirement that, in disapproving a franchising authority's certification, the FCC notify the authority of any revisions or modifications necessary to obtain approval. The Commission tentatively concludes that denial of certification would be subject to normal procedures for reconsideration, review and appeal. If the Commission certifies an authority, it proposes to require the authority to notify each franchisee within 10 days of this decision. The Commission seeks comment on these proposals and tentative conclusions.

ee. *Revocation of certification.* Subsection 623(a)(5) requires that "upon petition by a cable operator or other interested party," the Commission "review the regulation of cable system rates by a franchising authority." If the Commission finds that the franchising authority has acted inconsistently with the requirements of section 623(a)(3), the Commission is directed to "grant appropriate relief." If, after giving the franchising authority a reasonable opportunity to comment, the Commission finds the state and local laws and regulations do not conform to Commission rules governing basic service rate regulation, the Commission must revoke the jurisdiction of such authority. The Commission interprets this subsection to require it to revoke an authority's certification whenever local or state laws are inconsistent with its regulations concerning basic service rates. However, the statute appears to contemplate other lesser remedies where local and state laws may be

facially consistent with its regulations, but the authority has applied them inconsistently, or has otherwise departed from the terms of its certification. The Commission seeks comment on this interpretation. The Commission also asks parties to comment on how their analysis of the Commission's power to act where local or state regulations are inconsistent with its rate regulations harmonizes with their analysis of the FCC's preemptive powers. Does the 1992 Cable Act give the Commission the power to preempt specific state or local laws that may conflict with the rules that the Commission establish? Can actions other than inconsistent local and state laws, which would have caused the Commission to disallow a certification in the first instance, also be the basis for revocation, or should some lesser remedy be applied? The Commission also seeks comment on what types of relief, short of revocation, it could apply. Could the Commission, for example, suspend a certification, or impose a reporting requirement on a local authority? In cases of suspension, could the Commission, consistent with the Cable Act, assume the local authority's rate regulation authority and obligations?

The Commission also proposes that a petitioner for revocation or other relief against a franchising authority serve a copy of its petition on the franchising authority, as required by statute, and that the petition contain a statement that such service was made. The Commission also proposes to permit an authority 15 days in which to file an opposition to such a petition, and a cable operator or other party ten days in which to reply. The Commission seeks comment on these proposals.

The Commission seeks comment on what procedures should apply if an operator in a particular franchise area, once not subject to effective competition, becomes subject to it. The Commission tentatively finds that a cable operator should be required to petition a franchising authority for a change in its regulatory status. This petition should be subject to public comment. A franchising authority shall promptly inform the Commission that a cable operator had petitioned for a change in regulatory status and shall forward its findings to the Commission, including the basis for those findings. If the Commission ratifies the initial determination of the franchising authority, the franchising authority would then cease regulating basic cable service rates, and its regulation of cable programming services for this system in this franchise area would also cease. Cable operators denied a change in status by a franchising authority would be entitled to seek review of that determination with this Commission, with pleadings subject to the standard filing periods. The Commission seeks comment on these tentative conclusions. The Commission also seeks comment on whether a challenge to a denial of change in status regarding effective competition could or should be made as part of a petition for revocation.

ff. *Assumption of jurisdiction by the Commission.* The Act requires that if the Commission disapproves or revokes a franchise certification, the FCC exercise the franchising authority's regulatory jurisdiction until the authority qualifies to exercise that jurisdiction by filing a new certification, and that the Commission must act on such new certification within 90 days after it is filed. The Commission seeks comment on the procedures that it should employ when it assumes a franchising authority's jurisdiction over basic service rates.

c. *Regulations governing rates of the basic service tier.* The Act requires the Commission to ensure, by regulation, that rates for the basic service tier are reasonable. Such regulations are to be designed to protect subscribers of any cable system not subject to effective competition from paying rates higher than those that would be charged if the system were subject to effective competition. In establishing regulations governing rates for the basic service tier, the Commission must seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and itself, and it may adopt formulas or other mechanisms and procedures to achieve this objective. the FCC's rate regulations must additionally take into account seven factors:

(1) The rates for cable systems that are subject to effective competition;

(2) The direct costs (and changes in such costs) of obtaining, transmitting, and providing signals carried on the basic tier including additional video programming signals or services beyond the "must carry" local broadcast television signals, and any public, educational, and governmental access programming required by the franchising authority;

(3) Only a reasonable and properly allocable portion, as determined by the Commission, of the joint and common costs of obtaining, transmitting, and providing signals on the basic service tier;

(4) Cable operator revenues from advertising on the basic tier or other consideration obtained in connection with the basic tier;

(5) The reasonably and properly allocable portion of taxes and fees imposed by any state or local authority on transactions between cable operators and subscribers or assessments of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(6) The cost of satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(7) A reasonable profit, as defined by the Commission consistent with the Commission's obligations to ensure that rates are reasonable and the goal of protecting subscribers of any cable system not subject to effective competition from paying more for basic tier service than subscribers would pay if the system were subject to effective competition.

The NPRM tentatively concludes that Congress intended the FCC to embody in its regulations a standard of reasonableness for basic tier rates that reflects a balancing of the statutory goals and enumerated factors. The NPRM further tentatively concludes that Congress intended to leave the FCC discretion to determine in its rulemaking process the comparative weight to be assigned to each of the seven factors.

The NPRM solicits comment on the extent to which Congress intended a low priced basic service tier, and the extent to which FCC rate regulations should seek to promote the availability of programming on the basic service tier beyond that minimum statutory components. If our regulations produce low rates for the basic service tier, would this in turn require us to permit more flexibility in pricing for higher tiers?

The FCC has identified two generic approaches for regulation of rates for basic tier service: benchmarking and cost-based. Because the Cable Act of 1992 directs the FCC to craft rules that will reduce burdens on cable operators, franchising authorities, the FCC, and consumers, the NPRM tentatively concludes that the FCC should not select a cost-of-service alternative as the primary mode of cable rate regulation unless it is unable to gather the information needed to develop a benchmarking alternative. The NPRM tentatively concludes that each of the benchmarking alternatives could achieve reasonable rates at lower costs and with less administrative burdens than could traditional cost-of-service regulation. The FCC nonetheless concludes that cost-of-service regulatory

principles could have a secondary role for cable operators seeking to justify the reasonableness of rates that do not meet the primary benchmarking standard.

Benchmarking. The NPRM describes a benchmark rate as a price against which a given cable system's basic tier rate would be compared. The system's rate would be presumed reasonable if it did not exceed the benchmark. Under a benchmarking approach to rate regulation, the FCC would establish a benchmark rate, or a simple formula which could be used to derive such a rate. Cable systems with rates above the benchmark price by an amount determined by the FCC would be required to reduce their rates to the benchmark level unless the system could justify a rate higher than the benchmark. The benchmark would permit identification of systems with presumptively unreasonable rates, while establishing a zone of reasonableness for systems with rates below the benchmark. The NPRM solicits comment on whether to include as a component of any benchmark alternative a price cap formula to limit how quickly systems with rates below the benchmark could raise their rates to that benchmark price.

The FCC recognizes the potential tension between the need, on the one hand, to establish an accurate benchmark using sound data collection processes and ratemaking methodologies, and the command of the Act, on the other hand, to simplify regulation. A simple formula, however, would protect consumers from excessive rates and, by eliminating the need for detailed cost-based regulation in many jurisdictions, would keep the costs of administration and compliance low. Allowing higher-cost systems to opt for cost-based regulation if the benchmark rate proved unreasonably low would provide a safety valve to prevent confiscatory rates.

Under a benchmark alternative, the FCC could separate cable systems into distinct classes based upon specified variables and then define a benchmark for each class of systems. The benchmarks might then be set forth in a matrix or table. The variables used to separate cable systems into distinct classes might include such cost-defining characteristics as: homes passed per mile, number of subscribers, number of channels, system age, miles of underground cable, terrain crossed, above average programming costs, or readily identifiable costs. Another variable could be the local price level in comparison to the national price level as measured by appropriate indexes. For each of the benchmarking alternatives discussed in the NPRM, the FCC solicits comment on what variables should be used for defining the classes of systems to which a different benchmark rate should apply. One effect of benchmarks could be to cause the rates of the systems subject to the same benchmark to converge over time to that benchmark. If we were to conclude that such a result would not be desirable, we could also permit some benchmark adjustment based upon individual system characteristics. The FCC solicits comment on whether we should permit individual system adjustment to otherwise widely applicable benchmarks and what measures should and could be established to permit such adjustments. The FCC solicits comment on appropriate indexes for local and national price levels that we could use as a variable in establishing benchmarks.

Another important adjustment factor is a general change in the cost of doing business. Such changes often are represented by the general consumer price index (CPI) or producer price index (PPI) compiled on a national or regional basis by the Bureau of the Census and Bureau of Labor Statistics. The FCC seeks comment on the tentative conclusion that a local service price index (SPI) would be more appropriate than the CPI or PPI for adjusting cable rate benchmarks, if such an index can be easily determined. The FCC also seeks comment on the composition of such a local SPI, how such an index would be created, what services should be included, where data would come from, and what geographical area is appropriate for comparison.

Cost-of-Service. Under a cost-of-service approach, the reasonableness of a cable system's rates would be determined by examination of the particular costs of the individual cable system using ratemaking principles set by the Commission. The primary advantage of a cost-based alternative is that it would permit close supervision of rates. A primary disadvantage is that it would be more burdensome on cable systems and regulatory authorities.

In addition to the benchmarking alternatives, the NPRM solicits comment on another alternative called the "Direct Cost of Signals Plus Nominal Contribution to Joint and Common Costs" for regulating basic service tier rates. The FCC solicits comment generally on which among these specific proposals should be incorporated in our comprehensive framework for regulating basic rates, and how they could be combined to govern rates for the basic service tier. The FCC also seeks comment on how these proposals might be modified to achieve more effectively the goals of section 623(b) of the Cable Act of 1992. The FCC discussed and solicited comment on several benchmark alternatives.

aa. *Benchmark alternatives—Rates charged by systems facing effective competition.* One potential benchmark would be defined using the average of rates currently charged by systems facing effective competition, as the Cable Act of 1992 defines that term. This benchmark would appear to meet the statutory goal of "protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." To use a benchmark based on rates charged by systems facing effective competition, however, the FCC would first have to identify those systems. Moreover, basic service tier rates of systems facing effective competition would reflect the different numbers of channels in different systems' basic tiers. To perform the necessary computations the FCC would thus need to know, at a minimum, the basic service tier rates and the number of channels in the basic tier for systems facing effective competition. This information would permit us to compute a single average rate.

To create benchmarks that more accurately reflect conditions facing individual systems, the FCC might seek to determine how rates vary with cost characteristics of the systems facing competition. If sufficient data were available, regression analysis or some other statistical technique could be used to determine how rates varied with such characteristics affecting costs as homes passed per mile, number of channels, number of subscribers, the relative mix of buried and overhead cable, and the factors described in section 623(b). With this information, we could create a benchmark formula based upon systems subject to effective competition that shared at least some of the regulated systems' underlying cost characteristics.

Past regulated rates. A second alternative would be to develop a benchmark for basic service tier rates based on rates charged in 1986 before the Cable Communications Policy Act of 1984 effectively prohibited local rate regulation of most cable systems. It may be acceptable to assume that rates in 1986 were reasonable because they resulted from a competitive bidding process for the franchise and subsequent rate adjustments made under local franchise authority oversight. Using

these data we could develop individual benchmark rates for systems operating in 1986 based upon the 1986 per-channel rate for their lowest tiers. Some adjustment might be made in individual cases for factors generally agreed to affect costs. For systems not operating in 1986 the FCC proposes a benchmark expressed on a per-channel basis to account for differences in the number of channels offered on the basic tier and based on the per channel rates of the systems operating in that year. The FCC requests comment on the advantages and disadvantages of using a benchmark based on past regulated rates.

Average rates of cable systems. A third alternative would use data for all cable systems operating in 1992 to develop a benchmark from the average per-channel rate for their lowest service tier. Per-channel rates would be considered reasonable if they did not exceed that average by more than some fixed amount. Systems whose rates exceeded the average rate for all systems by more than a specified amount, or by more than a specified percent, or systems which ranked among the highest few percent (*e.g.*, top 2–5%) in terms of rates would be assumed not to have rates that were reasonable. Thus, this benchmark would identify those systems whose rates were unusually high or substantially above the average.

This standard would have the advantage that data would be more readily available for calculating the benchmark, and consumers would be protected against rates far exceeding the general industry practice. Unadjusted, however, the benchmark would not reflect competition but merely average performance in the industry; if monopoly profits were reflected in the rates of at least some industry segments, they would be incorporated in the average rate. In addition, over time the average rates would be affected by regulation and would cease to be an independent measure of industry performance. The NPRM requests comment on the validity of a measure based on average industry rates. The FCC also inquires as to the best source of data for calculating the benchmark if such a standard were adopted.

Cost-of-Service Benchmark. Under this approach to developing a benchmark, the FCC would use engineering, operating, programming and other cost data gathered in this rulemaking to construct the costs of an "ideal" or "typical" cable system or systems, possibly on a per channel or per subscriber basis. This approach could produce a benchmark roughly related to cost without requiring detailed examination of actual costs of individual systems. For this reason, this approach might be a useful alternative if implementation of other benchmark alternatives prove infeasible to implement. We seek comment on the feasibility and desirability of developing and applying a benchmark based upon constructing "ideal" or "typical" system costs. Parties supporting this approach should submit specific and detailed cost data to be included in such a benchmark, along with detailed information about how the data were developed, including data sources, validity, and reliability.

Price Caps. A price cap benchmark would be a formula set by the FCC to define reasonable increases in rates for the basic tier. For this reason, we would not intend to use the price cap formula to assess initially whether a system's rates were reasonable. The price cap formula would instead govern changes to rates that have been found reasonable under some other alternative, either based upon cost-of-service or another benchmark alternative.

A price cap formula permits the regulated company to adjust its prices when certain variables contained in the price cap formula change. The price cap formula would apply to an existing rate and would control changes to the cable system's prices over time. The FCC solicits comment on the price cap alternative and whether it should make it a component of a comprehensive regulatory scheme for rates.

If we adopt a price cap alternative to govern rates for the basic tier, we would propose to define and to control rate changes permitted under this alternative. We will additionally need to determine how and when to revise the cap, and select an appropriate price index to include among permitted adjustments. The FCC seeks comment on whether and, if so, how a price cap formula might accommodate rate adjustments to reflect: changes in subscriber penetration, channel capacity, the nationwide level of prices, the relative contribution of regulated revenues to total cable revenues, franchise fees and requirements, and other factors relevant to the Act's regulatory objectives.

bb. *Individual system cost-based alternatives—Direct costs of signals plus nominal contribution to joint and common costs.* Under this alternative, the FCC would prescribe guidelines for basic service tier rate regulation by the local franchise authority that used an individual system's costs to define reasonable rates. Cable systems would be required to keep their accounting records according to generally accepted accounting principles (GAAP) and to provide those records, as requested, to the local franchising authority.

The franchise authority would be required to find reasonable basic service tier rates that allowed recovery of at least the direct costs of the channels in the basic tier. The FCC envisions that the major component of such direct costs would be programming costs, including both payments to cable networks and retransmission fees to broadcast stations. Allowing cable systems to pass the former costs through to subscribers might reduce operators' incentive to remove highly valued programming from the basic tier. Whatever equipment used and operating costs incurred to activate additional individual channels in this tier would also be covered.

In addition, the rates for the basic service tier would include a nominal contribution to the joint and common costs of the system as a whole. Under the statute, basic service tier rates can recover "only such portion of the joint and common costs * * * as is * * * reasonably and properly allocable to the basic service tier." This requirement would set an upper bound on basic service tier rates that could be considered reasonable under Commission guidelines. Within this limit, the FCC has several options for treatment of joint and common costs in basic service tier regulation. The FCC could set guidelines that resulted in rates that recovered far less than the fully distributed cost of providing the service in order to provide assurance of service for lower income viewers. Alternatively, the FCC could set guidelines that would permit higher basic service tier rates in order not to discourage offering of a broader basic service tier with a larger number of channels, including popular cable channels. This alternative would, however, require more elaborate cost allocation rules. Rules that the FCC might apply to the allocation of joint and common costs, and to the determination of allowable costs, are proposed in appendix A of the NPRM. The FCC might also leave to the franchise authority some discretion in setting the level of basic service tier rates. The FCC requests comment on the proposal to adopt FCC guidelines for cost-based basic service tier rate regulation.

Cost-of-Service. Under this alternative, a cable system's rates would be reviewed using the established standards of cost-of-service regulation traditionally applied to public utilities. The broad principles of cost-of-service regulation are well established. While these principles could be implemented

in a rigorous fashion with extensive cost-accounting requirements, the FCC believes such an approach would be inconsistent with legislative intent. For this reason, the FCC proposes to use simplified cost-accounting requirements described in appendix A of the NPRM if cost-of-service regulation becomes a component of our comprehensive model for regulating cable rates.

Under cost-of-service, companies can meet service demand because service revenues may be set to cover operating expenses and capital costs. Because cost-based rates only compensate for the cost of providing service, if the cost-of-service regulation is properly applied, companies cannot extract monopoly rents from consumers. Cost-of-service regulation also imposes high costs on the regulators and regulatees. The FCC is concerned that cost-of-service accounting may require a significant (and potentially expensive) departure from current industry accounting practices. The FCC seeks comment on the relative advantages and disadvantages of applying cost-of-service regulation to the basic tier.

The FCC additionally seeks comment on the impact of cost-of-service regulation on the cable industry. The NPRM asks how such regulation would affect the ability of cable operators to expand their channel capacity and program offerings. The FCC also seeks comment on the implications of cost-of-service ratemaking on the industry's ability to recover its investment, including goodwill, and to service its current capital debt. The FCC also requests comment on whether we would need to include transition mechanisms if we were to adopt a cost-of-service regulatory model.

If cost-of-service ratemaking is used as a "safety net" to allow cable operators to defend rates challenged under a benchmark test, the FCC believes that the efficiency of the appeal process could be greatly improved if we established standards for the showings that should be made in such an appeal process. The NPRM notes that cost-of-service regulation requires the regulatory authority to make determinations relating to four major cost components: Rate base, the cost of capital, depreciation, and operating expenses. It also generally requires rules to govern the design of rates once determinations have been made in these four areas. In order to establish standards for the showings that should be made by cable systems seeking to defend rates higher than the benchmark, the FCC proposes to adopt guidelines in each of these areas. The FCC solicits comment on what requirements it would need to adopt in these areas and on the impact on the cable industry and subscribers of those requirements. The NPRM sets forth in more detail in appendix B the issues in each of these four areas that would require resolution for cost-of-service regulation to be implemented.

d. *Regulation of rates for equipment.* The Cable Act of 1992 directs the FCC to establish standards for setting, on the basic of actual cost, the rate for installation and lease of equipment used by subscribers to receive the basic service tier, including converter boxes and remote control units, and installation and lease of monthly connections for additional television receivers.

Based on the language and legislative history of section 623(b)(3), the FCC tentatively concludes that Congress intended to separate rates for equipment and installations from other basic tier rates. The FCC also tentatively concludes that, to be consistent with the statute's intent, the rates for installation should not be bundled with rates for the lease of equipment. The FCC believes that this unbundling could help to establish an environment in which a competitive market for equipment and installation may develop. The NPRM seeks comment on these tentative conclusions, especially on the feasibility of a competitive market for installation services.

Although the FCC tentatively concludes that equipment covered under this section of the Act includes the converter box, remote control unit, connections for additional television receivers, and wiring other inside cabling, the NPRM seeks comment on the extent of this coverage. The FCC believes that our rules should clarify the relationship between section 623(b)(3), which requires regulating, on the basis of actual cost, "equipment used for the basic tier," and section 623(c), requiring regulations for cable programing services, which includes the installation or rental of equipment use for the receipt of such programming services. For the latter, the FCC must establish standards for determining whether the rates are unreasonable and, as for basic tier service, cost is to be only one of several factors to consider.

On the one hand, it appears that Congress may not have intended to limit regulation, on the basis of actual cost, to that equipment only used for basic tier service. On the other hand, the Act includes equipment and installation in the definition of cable programming services. If the FCC assumes that Congress intended different standards for determining the reasonableness of rates for equipment used to receive cable programming services, it is unclear how to treat equipment that is used for the provision of both basic tier service and cable programming services. Therefore, the FCC requests comment identifying any equipment not used for basic tier service and the extent to which the actual cost standard of section 623(b)(3) controls the rates charged for equipment used for more than just basic tier service. The FCC solicits comment on whether the only equipment that should be subject to section 623(b)(3) should be equipment that is necessary to receive basic service tier programming, and whether equipment, if any, use only to receive cable programming service would not be subject to section 623(b)(3).

The FCC proposes requiring operators to base charges for equipment covered by section 623(b)(3) on direct costs, and indirect cost allocations, including reasonable general administrative loading and a reasonable profit. Cable operators would amortize the cost of equipment over the average life of that equipment to determine the monthly equipment rate. The cost of maintaining and servicing equipment should be factored into leased rates for equipment. If the FCC adopts a cost-of-service showing requirement for basic tier rates, cable companies could allocate a share of the general administrative overhead expenses on the same basis that they allocate to basic tier services, which would simplify the rate setting process for equipment. If the FCC adopts the proposal that basic tier rates include only a nominal contribution to overhead, it is unclear whether the same loading should apply to equipment. It appears that Congress intended low rates for equipment and installation, but Congress might have intended actual costs to include a share of joint and common costs allocated using a fully distributed cost methodology. The NPRM seek comment on which allocation rule would more accurately reflect congressional intent concerning rates for equipment covered by section 623(b)(3).

Alternatively, cable operators may wish to sell equipment to their customers. The sale may occur as a one-time payment or over a period of time. The Act, however, appears to contemplate that cable operators would be limited to recovery of actual costs, however, the FCC defines that term. The FCC recognizes that actual costs may vary depending on the length of payment schedule. The purchaser would probably be independently responsible for repair of the equipment, unless a service contract were also

purchased. In addition, cable operators may have a competitive advantage as an alternative market for cable equipment develops because customers will not have or may not know of other equipment supplies. Therefore, the FCC asks whether customers purchasing on time from the cable operator should be permitted to change their minds and purchase equipment from an alternative source.

We propose determining the actual costs for installation on the same basis as for equipment. Because the FCC believes that this determination will require allocating many joint and common costs, it proposes not to prescribe any allocation rules but rather to require the cable operator to bear the burden of showing its implementation of those general allocation rules to be reasonable. To the extent that installation costs have traditionally been recovered through a one-time charge, and because the length of time a subscriber will continue service is unpredictable, it appears reasonable that companies be permitted to continue recovering these costs as one-time charges.

The FCC recognizes that costs for installation will vary depending on whether the dwelling has inside cabling already. It may thus be more reasonable to require two installation rates, one for previously wired dwellings and one rate for new inside cabling. This could encourage competition, especially for simple installations (or customers could do it themselves). The FCC requests comment on whether costs vary enough to reasonably require cable operators to develop two separate rates for installation or use an average rate and whether that decision should be left to the discretion of the local franchising authority.

Many operators charge less than actual costs for service installation as part of their marketing efforts. The FCC seeks comment on whether section 623(b)(3) reflects a legislative intent to prohibit such promotional offerings.

Section 623(b)(3)(B) also specifically directs the Commission to establish, on the basis of actual cost, rates for installation and monthly use of connections for additional television receivers. The FCC tentatively concludes that cable operators should use the same cost methodology they use for installation of other equipment to calculate the rates for installation of connections for additional receivers. If additional connections are installed at the same time a subscriber's initial service is installed, the FCC proposes that cable operators be limited to recovering the incremental costs of the additional installation.

e. *Costs of franchise requirements.* The statute requires that regulations governing the basic service tier shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other service required under the franchise.

The NPRM tentatively concludes that the purpose of this statutory requirement is to assure the establishment of standards that will permit the cable operator to identify on subscriber bills pursuant to section 622(c)(2) the amount of the bill attributable to franchise requirements. The FCC does not interpret this section as mandating that it establish separate cost-based charges apart from those for the basic service tier generally for either the customer or the users of public, educational, and governmental channels for costs attributable to franchise requirements. The NPRM solicits comment on this tentative conclusion. The NPRM further tentatively concludes that the FCC should require that the costs attributable to satisfying franchise requirements should include (1) any direct costs of providing any services required under the franchise, (2) the sum of per channel costs for the number of channels used to meet franchise requirements for public, educational, and governmental channels, and (3) a reasonable allocation of overhead.

f. *Customer changes.* The Cable Act of 1992 requires that regulations for the basic tier also include standards and procedures to prevent unreasonable charges for changing equipment or service tiers. Charges for changing the service tier must be based on cost.

The FCC tentatively concludes that Congress intended to broadly protect subscribers from unreasonable charges for changes in service tiers. The FCC tentatively concludes, therefore, that regulations adopted to implement section 623(b)(5)(C) should apply to any changes at the request of the subscriber in the number of service tiers received by the subscriber after installation of initial service. The NPRM tentatively proposes to require that charges for changing service tiers not exceed a nominal amount "when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method." The FCC seeks comment on whether and, if so, at what level we should set the nominal amount when this condition is met.

To otherwise assure that subscribers do not pay unreasonable charges for changes in service tiers not effected by coded entry on a computer terminal or by other simple methods, the FCC solicits comment on two alternatives. First, the FCC could require that charges be based on the actual costs of making service tier changes at the subscriber's request including any direct costs and a reasonable allocation of indirect costs and overhead and a reasonable profit. Under the second alternative, as for changes effected by coded entry on a computer terminal, the FCC could require that charges for changes in services tiers effected by other means recover only nominal costs.

The FCC also solicits comment on applying these alternatives to define reasonable charges for changing equipment. The FCC seeks comment on our tentative conclusions and proposals relating to customer changes and on how best to implement them. In addition, the NPRM requests comment on whether the implementation of this rulemaking could encourage customers to change service tiers.

g. *Implementation and enforcement.* The Cable Act requires that the Commission's regulations regarding basic service rates include procedures for implementation by cable operators, for enforcement by franchising authorities, and for expeditious resolution of disputes between cable operators and franchising authorities. The Commission must also establish regulations to assure that subscribers are informed that basic service is available to them and that a cable operator notify franchising authorities 30 days in advance of any proposed increase in rates for the basic service tier. The Commission seeks comment on an expeditious way to trigger initial review of a cable operator's current basic tier rate once a local franchising authority has been certified to regulate those rates. One alternative would be to require that the operator file its schedule of basic tier rates with the franchising authority within a relatively brief period. The Commission believes that a deadline should apply to review of both an operator's initial filing and any later-filed proposed rate increases and service changes that involve rates increases. After expiration of the deadline, proposed rates would be presumed reasonable absent a negative finding. The Commission seeks comment on whether a deadline for a franchising authority to act on proposed rate increases would be appropriate, and if so, what time period would best balance the need for expiration with the need to

render an informed and judicious rate determination.

Another alternative would be to establish relatively brief notice periods (*e.g.*, 60 or 90 days) after which an increase would become effective unless a franchising authority had rejected it, but also to allow for the tolling of the franchising authority's deadline in particular circumstances. The disadvantage to this second alternative is that it might deprive the public of new services and the operator of a reasonable price increase for long periods of time. The Commission also observes that in some areas, a franchising authority's rate determination may be subject to review by a higher level of local or state authority, further delaying a final determination. A third possibility, might be to permit rate increases to go into effect automatically after the 30-day notice period expires. The Commission seeks comment on these various alternatives, on any other commenters suggest for implementing basic tier rate regulation, and particularly on the time constraints that should govern determinations on proposed rate increases. The Commission also seeks comment, depending on the ratemaking methodology adopted, on whether certain price changes caused by factors outside the operator's control, should not be deemed price "increases" subject to the notice requirement. Such increases might thus be permitted to be passed through without prior regulatory review. Those advocating such an approach should fully discuss its relationship to the ratemaking methodology they recommend.

The Commission seeks comment on how to achieve expedition in ratemaking procedures while at the same time ensuring that all parties received the due process to which they are entitled. To ensure that interested parties have an adequate opportunity to comment, the Commission proposes to require that an operator notify subscribers in writing of a proposed rate increase at approximately the same time it notifies the franchising authority, *i.e.*, at the billing cycle closest to 30 days before any proposed increase is effective. The Commission also proposes to permit any interested parties, including subscribers, to participate in the local authority's ratemaking decisions. The Commission seeks comment on this proposal, on what the appropriate pleading cycle might be, and on how such a cycle could be harmonized with the statutory goal that disputes between cable operators and franchising authorities be resolved expeditiously. The Commission also purposes to require the operator, for its initial filing and any subsequently proposed rate increase, to show that its submission complies with section 623 and the Commission's implementing regulations.

Given the statutory emphasis on expedition, the Commission does not propose to provide for formal hearings on proposed rate increases or rate-related disputes. The Commission also proposes to require the authority to issue a written initial decision explaining its disposition of each rate increase request. The Commission proposes also to adopt rules allowing local authorities to obtain additional information from operators requesting a rate increase and to establish proprietary information procedures analogous to those proposed below for cable programming service complaints. The Commission seeks comment on these tentative conclusions and proposals. The Commission also asks interested parties to comment on what oversight procedures franchising authorities may need to ensure compliance with the Cable Act.

When franchising authorities regulate rates for basic cable service consistent with the Act, they would be in the best position to monitor an operator's compliance with the Commission's regulations. Consequently, the Commission tentatively finds that enforcement of cable regulation should occur at the local level in these circumstances. The Commission seeks comment on whether a franchising authority has the power under the Cable Act, if it denies a rate increase, to set a rate for basic cable service itself, or whether formulation of a new rate should be left to the cable operator. The Commission also seeks comment on whether, in the event an operator should fail to comply with a rate decision, the Cable Act gives an authority the power to order refunds, or whether the authority must obtain an order from a court or other governmental entity with the power to order refunds. In order to obtain a refund, would an authority have to employ special procedures to ensure that the due process rights of an operator were not violated? The Commission also seeks comment on what forms of relief would be available under local law. For those authorities with franchise agreements that do not provide for rate regulation, could franchise agreements be revoked or not renewed for lack of compliance with rate decisions? The Commission seeks comment on whether other remedies, such as fines, would be available under state or local law. The Commission also seeks comment on whether it could impose forfeitures upon cable operators failing to comply with local authorities' determinations that were consistent with its basic service rate regulations.

The Commission invites interested parties to comment on the appropriate forum for appeals of local authorities' rate decisions. One approach would be to rely on the local courts, and not this Commission, to resolve what is essentially a local dispute between an operator or subscriber and a franchising authority. An alternative would be for this Commission to resolve such disputes. This approach might assure a more uniform interpretation of the standards and procedures adopted pursuant to the Cable Act. The Commission seeks comment on these alternatives. In particular, the Commission asks whether the jurisdictional framework of the Cable Act permits it exercise jurisdiction over an authority's decision in the absence of its disallowing or revoking its certification. The Commission has already asked whether the Cable Act gives it jurisdiction over basic cable service rates if franchising authorities do not seek certification. The Commission seeks comment here on whether, if it asserts jurisdiction over basic service rates in cases of disapproval or revocation of certification, the Commission should apply the same procedures to basic service rate petitions as those it would apply to cable programming services complaints, whether it should apply procedures more closely analogous to those proposed for local franchising authority's regulation of basic service rates (see below), or whether some combination of the two would be most appropriate.

The Cable Act also requires that the Commission establish rules to assure that operators inform subscribers that a basic service tier is available. The Commission tentatively concludes that it should require the operator to give initial written notice of basic tier availability to existing subscribers within 90 days or three billing cycles from the effective date of the Commission's rules governing cable rates. Additionally, the Commission proposes to require operators to notify subscribers in any sales information distributed prior to installation and hookup and at the time of installation. The Commission seeks comment on this proposal. The Commission also seeks comment on the appropriate format and content of any such notice. In addition, the Commission seeks comment on any other means by which it can ensure that

subscribers receive meaningful notice of basic tier availability.

4. Regulation of Cable Programming Services

a. *Regulations governing rates.* The Cable Act of 1992 requires that the FCC establish criteria for identifying, in individual cases, rates for the acquisition and distribution of cable programming services that are unreasonable. The statute provides that in establishing such criteria the FCC must consider:

(1) Rates for similarly situated systems taking into account similarities in costs and other relevant factors;

(2) Rates of systems subject to effective competition;

(3) The history of rates for the system including their relationship to changes in general consumer prices;

(4) The systems' rates as a whole for all cable services;

(5) Capital operating costs of the system; and

(6) Advertising revenues.

The statute also permits the FCC to consider other relevant factors.

The FCC tentatively concludes that the statute intends for the FCC to establish criteria to govern the determination in an individual case of whether rates for cable programming service are unreasonable based on a reasoned balancing of the factors enumerated in the statute and other factors that the FCC in its discretion may choose to consider.

With the exception of the "Direct Costs of Signals Nominal/Contribution to Joint and Common Costs" alternative, all previously described regulatory alternatives that could be used for the basic service tier could also be used to determine in individual cases whether rates for cable programming service are unreasonable. The FCC believes that the advantages and disadvantages of regulatory approaches and alternatives previously discussed for basic tier service are equally applicable to cable programming service. As with the basic service tier, the NPRM concludes that traditional cost-of-service regulation would not be the best alternative to select as the primary method of regulating rates for cable programming services. The FCC seeks comment on this tentative conclusion and on which alternatives it should incorporate in the comprehensive plan we will adopt for regulating cable programming service rates.

The FCC is aware that is must balance (a) the need to ensure that cable rates are relatively low and do not include monopoly rents, against (b) the need to ensure that cable systems earn a reasonable return so that they can continue to attract capital necessary to operate and to expand the services they provide to their subscribers. To the extent that local or state regulation of basic rates constrains the revenue and profits obtained from the basic tier, cable operators may seek to earn relatively more revenue and higher profits on their programming services beyond the basic tier. Hence, there may be a tradeoff between the severity of the restrictions that may be placed on basic tier rates and rates for other programming services. The FCC seeks comment on how this tradeoff can best be made in our cable rate regulations.

The Cable Act defines "cable programming service" as any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.

Thus, cable programming service encompasses all video "tiered" programming, other than that included in the basic service tier, and would exclude all pay-per-channel or per-program material. As noted in the legislative history of the Cable Act, some cable systems are "experimenting with 'multiplexing'—the offering of multiple channels of commonly-identified video programming as a separate tier (*e.g.*, HBO1, HBO2 and HBO3)." The FCC thus proposes to exclude from the definition of "cable programming service," pay-per-channel or pay-per-program services offered on a multiplexed or time-shifted basis. The NPRM seeks comment on whether, for a tiered offering of a multiplexed premium service to be exempt from rate regulation, the multiple channels offered would have to consist of essentially the same programming offered on a time-shifted basis.

b. *Complaint procedures; rate reduction and refund procedures for rates found to be unreasonable.* The Cable Act requires that the Commission establish "fair and expeditious procedures" for receiving, considering and resolving complaints from "any subscriber, franchising authority, or other relevant State or local government entity" alleging that rates for cable programming services are unreasonable pursuant to our rules. The statute specifically states that the Commission must specify the minimum showing required for a complaint to obtain Commission consideration and resolution. A complaint is timely only if filed during the 180-day period following the effective date of the Commission's regulations governing unreasonable rates for cable programming services or within a reasonable period of time after the cable operator changes its rates. This time constraint on filing complaints also applies to complaints concerning changes in rates that result from changes in the system's service tiers.

The legislative history indicates that Congress intended the Commission's regulations not to be "so technical or complicated as to require subscribers to retain the services of a lawyer to file a complaint and obtain Commission consideration of the reasonableness of the rate in question." The Commission thus plans to devise procedures that are not only fair to all parties, but are also simple and expeditious. One alternative is to require that complaints concisely state facts showing how an operator has violated the Commission's rate regulations. The Commission recognizes, however, that the ratemaking methodology it adopts, even if very simple, may not be readily accessible to the ordinary subscriber. In addition, the legislative history indicates that Congress deliberately excluded the requirement that a complaint demonstrate a "prima facie case". Thus, if the Commission adopted this requirement, and a subscriber's complaint failed to conform, the Commission might, instead of dismissing it out of hand, send the subscriber an informational letter describing what a complaint should state, and permitting refiling within a set period, for example, 30 days. The filing of the first complaint would act to toll the time limit on complaints. On the other hand, although rigorous technical requirements should not be imposed, this Commission and cable operators need assurance that the Commission's procedures permit only genuine allegations of illegal rates to go forward, and do not permit complaints that are frivolous or lack any serious substantive allegation to proceed.

A second alternative, therefore, is to set an even simpler standard for a subscriber complaint, and to make this a minimum standard which would have to be met in order to avoid dismissal. We observe that if a straightforward benchmark approach is adopted, a statement of facts showing that rates were above the benchmark might be easily done by a layman. The complaint would have to allege that the complainant was a subscriber of a cable system named in the complaint, and also state the name of the franchising authority. The simplicity of this second approach would facilitate the filing of subscriber complaints. However, it

might not give the cable operator sufficient notice of the precise claims made, and might place greater demands on Commission staff seeking to determine the issues and resolve the dispute. It also might not adequately screen frivolous or unsubstantiated complaints. The Commission seeks comment on these two alternative standards for defining the minimum showing required for substantive complaints. The Commission also invites additional suggestions.

Interested parties are also asked to comment on specific forms or language that might be standardized for use by subscribers in filing rate-related complaints. The Commission also asks for comment on how such standardized information might be made widely available. For example, should it be given to local franchising authorities for local distribution? The Commission also seeks comment on whether complaints filed by franchising authorities or parties represented by counsel could or should be held to a different pleading standard, and if so, what that standard should be. The Commission also seeks comment on whether subscribers should be permitted, or required, to obtain a franchising authority's decision or concurrence as a precondition to the filing of a valid complaint. Parties advocating such an approach are asked to reconcile it with the specific provision in the Act permitting subscribers, as well as relevant governmental entities, to file complaints.

The Commission proposes to require that all complaints be served on both the cable operator and the franchising authority by the complaining parties. After a complaint is served, an operator would have a reasonable period of time in which to file a response. Based on the complaint and response, the Commission would make a determination of whether a complainant had made a minimum showing to permit the case to go forward. Once the Commission has determined, based on a review of the two documents, that a minimum showing of a violation of its rules had been established, the Commission would issue an order asking for further information from the operator, and setting a further pleading schedule, if necessary. At this point the operator would have the burden of producing evidence to disprove the allegations. This alternative should prove expeditious and easy for non-lawyers to use. The Commission seeks comment on these tentative conclusions and proposals. In particular, the Commission asks interested parties to comment on what the appropriate pleading cycle should be, taking into account the statute's dual objectives of expedition and fairness. Alternatively, the Commission seeks comment on whether it should require that cable operators answer complaints that the Commission has determined are in good faith and raise a genuine substantive issue. Under this approach, a cable operator would not be required to respond automatically to complaints. Rather, the Commission (or the subscriber) would notify the operator of a complaint after it had been initially reviewed by Commission staff and found to meet this minimum showing.

The Cable Act provides that, with one exception, the Commission's procedures for cable programming service complaints shall be available only to those filing within a "reasonable period" after a change in rates, including a change resulting from a tiering change. The Commission tentatively finds that a time limit of 30 days from the time that a subscriber receive notification of such a rate change would provide adequate opportunity for a subscriber to formulate a complaint under the simplified procedures the Commission contemplates. The Commission seeks comment on whether this would be a reasonable period of time within the meaning of the statute. The Commission also asks for comment on whether it should allow an additional 30 days if the Commission requires the concurrence of a franchising authority for the filing of a complaint. Section 623(c)(3) excepts from the "reasonable period of time" requirement complaints filed within 180 days following the effective date of the Commission's regulations concerning cable programming service rates. During this period, subscribers and other interested parties will have become familiar with the Commission's new regulations. The Commission thus interprets this exception to permit subscribers to complain of any cable programming services rates within that 180-day period, regardless of when those rates were initially effective. After this 180-day period passes, subscribers would be held to the 30-day time limitation. The Commission seeks comment on these tentative conclusions.

The Commission also seeks comment on how to treat information which may be necessary to a decision, but which the cable operator regards as proprietary. The Commission's existing rules authorize the withholding of trade secrets or confidential financial or commercial information from routine disclosure to the public. As a general matter, however, the Commission believes the burden should be firmly on the cable operator involved to demonstrate that significant competitive injury might result from any disclosure of information used in the rate regulation process and that as full a disclosure as is reasonably possible should be mandated. The Commission seeks comment on whether its existing rules would be adequate in a cable rate dispute, and whether they are sufficiently flexible to permit an opposing party to have access to the information necessary for its case. In particular, the Commission also asks whether it should devise procedures permitting the parties to a dispute limited access to proprietary information in specific cases, and in what cases such limited access would be appropriate. Should the Commission permit an operator to redact confidential information in the first instance, with Commission staff retaining the ability to seek further information if necessary? In such cases, should the Commission confine distribution of such information to designated representatives of parties and Commission staff? The Commission also invites comment on the types of information relevant to a cable rate determination which would likely be considered proprietary by any of the parties involved, and in particular, on any special problems that may arise from use of data proprietary to third parties.

Once a decision is made, the Commission seeks comment on what types of relief are available. The Commission assumes that its authority under the Cable Act to prevent unreasonable rates at a minimum authorizes it to order prospective reductions of rates it has found to be unreasonable. The Commission proposes to require operators to make such reduction promptly, such as, for example, within 30 days of a Commission decision finding existing rates unreasonable. The Commission seeks comment on this tentative conclusion and proposal. In addition, the Commission asks interested parties to comment on whether its ability to order prospective rate reductions would extend to prescription of specific rates.

The Commission tentatively finds that its authority under section 623(c)(2)(C) permits it to reduce rates determined to be unreasonable and to refund to subscribers the portion of such rates found to be unreasonable that subscribers paid after the filing of a complaint. The Commission proposes in the first instance to determine the amount of overcharge and to order a refund to the actual subscribers who paid this overage. It may, however, be

administratively infeasible or unreasonably burdensome to determine the actual subscribers who paid the unreasonable rate. In such cases, the Commission proposes to order a prospective percentage reduction in the unreasonable service rate to cover the cumulative overcharge, and to have that reduction made in the bills sent to the class of subscribers that had been unjustly charged. This reduction would be in addition to the rate reduction necessary to eliminate prospective overcharges, and would end when compensation for the overcharge had been made. The Commission interprets its authority under section 623(c) as permitting it to reduce rates for the class of subscribers who paid for a service the rate for which was determined to be unreasonable, even if this finding was based upon a complaint filed by a single subscriber. The Commission believes that this construction is necessary to fulfill the purposes of this statutory provision. The Commission seeks comment on these tentative findings and proposals.

The Commission seeks comment on how best to device procedures that will be simple and informal, while at the same time safeguarding the due process rights of all parties involved. One option would be to treat cable programming service complaints as informal adjudications, and apply the streamlined procedures outlined just above. If this option were adopted, would it also be advisable to adopt relaxed (*e.g.*, permit but disclose) *ex parte* rules to facilitate staff resolution of a dispute in which presumably non-lawyers were participating? Another approach might be to style cable programming services complaints as ratemaking proceedings, using procedures analogous to those followed in our tariff review process. These procedures would be the sole means by which the Cable Act empowers the Commission to regulate cable programming service rates, and would determine liability for overcharges on a prospective basis only (from the time the complaint was filed). They thus reasonably could be analogized to ratemaking proceedings. Under this option, the Commission would also consider cable programming service proceedings to be non-restricted proceedings under its *ex parte* rules, subject to "permit but disclose" *ex parte* obligations. This approach would give Commission staff maximum flexibility to gather relevant information, flexibility particularly helpful in disputes where one or more parties were not represented by counsel. This approach thus also serves the Commission's objective of crafting procedures which do not require parties to have professional representation. The Commission seeks comment on these proposed alternative approaches to complaint procedures and on whether they would adequately accommodate the various policy objectives and legal constraints just articulated. Should it be necessary to establish more formal proceedings in cases involving factual disputes or potential refund liability, the Commission seeks comment on how it might accomplish this and still make these proceedings accessible to non-lawyers and to parties located in areas distant from Commission offices in Washington, DC. The commission also seeks comment on whether alternative dispute resolution would be one possible solution, should the parties agree to employ it.

Once relief is ordered, the Commission must ensure that its decision is properly effectuated. The Commission seeks comment on whether operators should be required to certify that they have implemented the Commission's decision. The Commission tentatively finds that noncomplying operators would be subject to forfeitures. The Commission seeks comment on this tentative conclusion, and on other remedies, such as reporting requirements, that may be appropriate in specific circumstances.

5. Provisions Applicable to Cable Service Generally

a. *Geographically uniform rate structure.* The Cable Act of 1992 requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."

In accordance with the above provision of the Cable Act, the NPRM proposes to incorporate into implementing regulations a provision that cable systems must have a uniform rate structure throughout the geographic area served by the cable system. The NPRM solicits comment generally on the extent to which cable operators' ability to establish service categories with separate rates and terms and conditions of service is limited by the requirement for a geographically uniform rate structure. The NPRM also seeks information on the extent to which cable operators currently enter into special service arrangements with some customers or types of customers, such as long-term service contracts with certain types of customers with discounted rates and other special terms and conditions. In addition, the FCC solicits comment on whether cable operators should be afforded the flexibility to establish *bona fide* service categories with separate rates and service terms and conditions.

The FCC tentatively concludes that the statutory requirement of a geographically uniform rate structure does not prohibit establishment of reasonable categories of service with separate rates and terms and conditions of service. The FCC tentatively concludes that the requirement for a uniform rate structure should be read in conjunction with the amendments to section 623(e), which authorize regulatory authorities to prohibit discrimination, but do not require that they do so.

The NPRM seeks comment on the meaning of the term "geographic area" as used in this section of the Act. One possible interpretation is that Congress intended this phrase to mean a franchise area. The FCC recognizes, however, that many cable systems provide service for more than one franchise area. If Congress intended to limit the meaning of geographic area to a franchise area, it could have used the less ambiguous term.

If the FCC assumes that geographic area refers to an area greater than a franchise, the Act appears to limit the region to the contiguous area served by the cable system. Under this more inclusive interpretation, the FCC would require a uniform rate structure throughout a cable system. The NPRM requests comment on whether Congress intended to require or to permit cross-subsidization to maintain uniform rates within a cable system. The FCC solicits comment on the advantages and disadvantages generally of interpreting geographic area as synonymous with franchise area or as referring to a greater area.

b. *Discrimination.* The Cable Act permits local and federal authorities to prohibit discrimination in provision of cable service, except that (1) cable operators may establish reasonable discounts for senior citizens or other economically disadvantaged groups, and (2) local and federal authorities may regulate installation or rental of equipment for the hearing impaired. Based on this provision, the Commission tentatively concludes that it should explicitly permit the discounts contemplated in the statute. Local authorities would also be free to adopt anti-discrimination provisions consistent with the statute and the Commission's implementing regulations. The Commission seeks comment on these tentative conclusions. The Commission seeks

comment in particular on whether differences in rates among different classes of customers based on differences in costs of providing services should not be prohibited under this provision. The Commission also seeks comment on what economically disadvantaged groups other than senior citizens may be awarded reasonable discounts by cable operators. The Act does not preclude local authorities from adopting regulations concerning equipment and installation which facilitate reception by the hearing impaired that are consistent with the other provisions of the Cable Act. In addition, the Commission asks whether there is any need at this time to adopt specific rules at the federal level as well.

c. *Negative option billing.* The Cable Act provides that an operator may not charge a subscriber for "any service or equipment that the subscriber has not affirmatively requested by name." The Act further provides that a subscriber's failure to refuse a proposal to provide such service or equipment "shall not be deemed to be an affirmative request for such service or equipment." The legislative history indicates that Congress did not intend this section to apply to "changes in the mix of programming services that are included in various tiers of cable service." The Commission interprets this provision to mean that, in order to be billed for any cable service (either tiers or individually priced programs or channels) or equipment, a subscriber previously must have affirmatively requested that particular service or equipment. A cable operator may not take a subscriber's inaction following the operator's proposal to provide such service or equipment as an affirmative request for the same. The Commission tentatively concludes that an affirmative request for service or equipment may occur orally or in writing so that subscribers are given flexibility to order by either method. The Commission also tentatively concludes that an operator should not be permitted to charge for any service or equipment provided in violation of section 623(f) of the Act and the Commission's implementing rules. The Commission seeks comment on this tentative conclusion. The Commission also seeks comment on whether disputes between the operator and subscriber arising under this provision would primarily be subject to resolution in the local courts. This remedy would be in addition to the forfeiture provisions applicable to the operator that fails to comply with section 623(f) and the Commission's implementing rules. The Commission remains concerned, however, that its enforcement procedures be adequate to correct any practices or patterns on the part of operators that violate the Commission's rules, and seeks comment on how the Commission can ensure its ability to do so.

The legislative history states that section 623(f) does not apply to "changes in the mix of programming services that are included in various tiers of cable service." The Commission seeks comment on the types of tier changes that may be made without violating the negative option billing restriction and in particular, whether such tier changes must be revenue neutral. Can they involve additions or deletions of services? The Commission tentatively finds that a change in the composition of a tier that was accompanied by a price increase justified under its rate regulations would not be subject to the negative option billing prohibition. The Commission believes that this interpretation will avoid an undesirable stalemate in system offerings, to the public's detriment. The Commission also does not believe that Congress intended the negative option billing provision to apply to system-wide upgrades in equipment accompanied by a justified price increase. Otherwise the provision might discourage operators from making beneficial system improvements. However, the Commission also seeks comment on whether subscribers should be given 30-days notice of changes in tier composition or in system equipment, that are accompanied by a price increase. The Commission also seeks comment on the interplay between the negative option billing provision and the prohibition on evasions pursuant to section 623(h).

The Commission also seeks comment on how this provision should apply to initial implementation of the basic cable service rate structure. For example, an operator may have been offering a basic service consisting of more channels than are now required under the Cable Act's definition of basic service. It may now effectively be required to split its former basic service into the Act's formulation of basic service and an expanded basic tier. If some subscribers do not affirmatively request both basic and expanded basic, the Commission seeks comment on whether the operator may nevertheless continue to bill them at the old rate. What if the operator has also changed the rates?

d. *Collection of information.* The statute requires cable operators to file annually with the FCC or franchising authorities, as appropriate, beginning one year from the date of enactment, such financial information as is necessary to administer and enforce rate regulation.

The information that regulators will need to assure that they can effectively administer and enforce the requirements of section 623 will be determined by the alternative that we ultimately adopt. In order to assure that the FCC can adopt a collection of information requirement that will permit effective administration and enforcement of section 623, it is proposing to collect on an annual basis the information specified in appendix C of the NPRM and the information collected by the Commission in the Order, MM Docket No. 92–266, FCC 92–545, adopted December 10, 1992. The FCC will also need to collect information concerning rates of systems subject, and not subject, to effective competition to enable us to publish the annual reports on average prices required by section 623(k).

The FCC solicits comment generally on the appropriate scope of information that it should collect pursuant to section 623(k). The FCC solicits comment on the availability of the information specified in appendix C of the NPRM, on whether cable systems will ordinarily have developed this information, and the burdens that the collection of this information would impose. To the extent this information is not already developed by cable systems, the NPRM solicits comment on the extent to which the FCC should require that they develop it, and on time periods that the FCC should permit for its development. The FCC solicits comment on whether it should require the information specified in appendix C of the NPRM to be submitted by every cable system. Alternatively, the NPRM seeks comment on whether the FCC should rely instead on a sampling of systems, and, if so, what sampling methodology it should use. The NRPM also solicits comment on whether, in order to reduce burdens on systems with 1000 or fewer subscribers, the FCC should require less information, or no information, from such systems.

e. *Prevention of evasions.* The Cable Act requires the Commission to promulgate regulations that will prevent evasion of its rate regulation provisions and, specifically, evasions resulting from retiering. The statute requires that the Commission periodically review these regulations. The Commission proposes generally to prohibit evasion of its rate regulations by cable operators. The Commission proposes to allow interested parties to avail themselves of the expedited procedures the Commission establishes for rate relief to

seek redress of evasions of its rate regulations. The Commission plans to periodically review the standards it establishes pursuant to this subsection, with the first review occurring two years from the rules' effective date, and with periodic reviews every three years thereafter. The Commission seeks comment on these proposals.

As the legislative history contemplates, the Commission proposes to prohibit retiering that "shift[s] cable programs out of the basic service tier into other packages" and causes an unjustified increase in rates to subscribers for cable service. At the same time, the Cable Act of 1992 permits, and indeed appears to require in some cases, a restructuring of service offerings. Thus, the Commission proposes to prohibit retiering which actually results in an increase in regulated rates inconsistent with the regulations it establishes. Thus, retiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with the Commission's rate regulations would not be deemed an evasion. The Commission seeks comment on this proposal. It is also possible that our substantive rate regulations will lessen the potential for evasions through retiering as well. Should the Commission adopt the same rate regulation regime for both the basic tier and cable programming services, this uniformity of approach might eliminate the incentive for operators to move services from basic to cable programming services tiers in order to evade rate regulation. The Commission seeks comment on the interplay between its substantive rate regulation responsibility and its obligation to adopt rules preventing evasions. The Commission also seeks comment on whether it needs to establish specific rules regarding evasions of rate regulation through charges for changes in equipment, particularly in light of the specific rules the Commission is adopting regarding such charges. Finally, the Commission seeks comment on other specific evasive acts and practices that should be prohibited. For example, the Commission seeks comment on whether retiering and repricing of cable services between the effective date of the Act and the implementation of these regulations could, if found to be unreasonable or evasive, raise specific concerns under the Commission's proposed enforcement scheme.

f. *Small business burdens.* The Cable Act requires that the Commission develop and prescribe cable rate regulations that reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers. The Commission seeks comment on how best to effectuate this statutory requirement. The Commission's current rules exempt operators of cable systems of fewer than 1000 subscribers from certain administrative requirements. The Commission similarly could exempt cable systems of fewer than 1000 subscribers from certain administrative burdens associated with the rate regulations it establishes. Depending on the substantive ratemaking standard adopted, the Commission might, for example, exempt small systems from certain accounting requirements or the obligation to submit certain data. With respect to the data collection requirements of the Act, the Commission might rely on external sources of data or, if necessary, special studies instead of requiring individual reports from small systems. The Commission seeks comment on this general proposal, as well as on the specific requirements from which small systems might appropriately be exempted. Parties are also invited to comment on other alternatives, *e.g.*, the filing of abbreviated reports or other streamlining of administrative obligations that also might be appropriate. The Commission also seeks comment on ways it might coordinate any administrative requirements with the actual operations of small cable systems.

The Commission also seeks comment on whether it should exempt small systems from any substantive or procedural rate regulation requirements and, if so, which ones. The Commission's current rules exempt small systems from network non-duplication protection requirements, syndicated exclusivity rules, and from certain technical standards and performance testing requirements. A community unit having fewer than 1000 subscribers currently is exempt from the sports broadcast blackout rule. Are there requirements in the Commission's proposed rate regulation regime from which small systems may also appropriately be exempt? In this regard, the Commission also seeks comment on whether it should establish a presumption that systems with under 1000 subscribers are, because of the underlying costs involved and the small base over which these costs can be spread, unlikely to be earning returns or charging rates that could effectively be altered to the benefit of subscribers through detailed regulatory oversight. A second option might be to permit small companies to certify their compliance with the Commission's rate regulations. A third option might be to tailor the Commission's rate regulations specifically to small companies. The Commission might, for example, devise basic cable rate regulations that assure that high-cost small systems will be able to fully recover their costs. The Commission seeks comment on these substantive approaches to alleviating regulatory burdens on small systems and on whether they harmonize with the general objectives of the Cable Act. In addition, the Commission might exempt small systems from certain procedural requirements, including, for example, the filing of rate schedules. The Commission might also modify requirements such as burden of proof or information production for small systems in contested cases. The Commission seeks comment on these procedural approaches to alleviating regulatory burdens on small systems.

Finally, in making some or all of these small system exceptions, should the Commission distinguish between independently owned stand-alone systems of under 1000 subscribers and systems of under 1000 subscribers which are owned by a large MSO? Although the plain language of the statute makes no such distinction, the Commission questions whether systems in the latter case need such regulatory protection. A small cable system affiliated with an MSO may enjoy advantages such as program discounts or access to corporate resources that stand-alone small systems do not, and thus may not need the protection section 623(i) offers. It might also be appropriate to distinguish between larger and smaller MSOs if the Commission distinguished between MSO and independently-owned systems. For example, the Commission might distinguish a system directly or indirectly owned by a cable operator that directly or indirectly owns other cable systems, which altogether serve some specific number of subscribers. Parties advocating such an option are encouraged to suggest specific subscriber numbers that might serve to distinguish large from small MSOs.

With the exception of the sports blackout rule, the size of a cable system is determined under the Commission's current rules according to the number of subscribers served by a single integrated headend. In contrast, the community unit measurement used in the sports blackout rule defines a system in a

narrower manner, according to what is essentially the cable franchise area. Use of the single integrated headend might help ensure that what is in practice a large system fully capable of meeting the Commission's requirements does not qualify merely because it covers numerous franchise areas, each under 1,000 subscribers. The Commission seeks comment on whether either of these two definitions might be appropriately applied in the context of rate regulation of small cable systems. The Commission also asks interested parties to suggest any alternative definitions they believe would be appropriate under the Cable Act. Finally, the Commission seeks comment on whether a system's qualifying for small system treatment should be based upon the average number of subscribers over a period of years, rather than the number of subscribers as of a specific date. The former standard would avoid abrupt or frequent changes in regulatory status resulting from seasonal or other brief fluctuations in the subscriber base.

g. *Grandfathering of rate agreements.* The Cable Act provides that the statute and its implementing regulations do not supersede franchising agreements made before July 1, 1990 that authorize regulation of basic cable service rates if there was not effective competition as of that date. The provision states that such agreements are to remain in effect "during the term" of such agreements. The Commission tentatively concludes that this provision authorizes a franchising authority with a franchise agreement executed before July 1, 1990, that was regulating basic cable rates at that time to continue regulating basic cable rates for the remaining term of that agreement without certification from this Commission. The Commission tentatively concludes that such franchising authorities (who are not required to apply for certification) should nevertheless be required to notify this Commission that they intend to continue to regulate basic cable rates under the provisions of section 623(j). This notification will give the Commission the information it needs to compile the annual reports on average prices required under the Cable Act. The Commission seeks comment on these tentative conclusions. The Commission also seeks comment on whether an agreement that falls within the terms of section 623(j) would supersede Commission regulations governing the rates for cable programming services that are not part of the basic tier as defined in the agreement and thus not subject to regulation under the agreement. The Commission also seeks comment on how franchising authorities now regulating rates and that are not covered by the grandfathering provision just discussed should make the transition to rate regulation under the Commission's new rules.

h. *Reports on average prices.* The statute requires the Commission to publish annual statistical reports comparing charges for the basic tier, cable programming services, and equipment by cable systems subject to, with those charges by systems not subject to effective competition. In order to comply with these requirements, the Commission will need to collect certain cable system data. These data include rates charged for basic cable service, expanded basic service, and other cable programming; and fees for converter boxes, remote control units, program guides, installation and disconnection charges, and any other charges for equipment or service. Because the Commission may wish to compare systems of similar sizes or other characteristics, the Commission proposes also to collect information on system size (measured by number of subscribers), system channel capacity, and possibly other characteristics such as percent of distribution plant above or below ground, length of distribution plant, and subscriber density per mile. The Commission envisions that the annual statistical report will consist of a compilation of the above data elements.

There are a number of possible ways to collect the specific data. Trade publications such as the Cable Fact Book collect much of the data we require, but such data are collected on a voluntary basis and are not always complete for each individual cable system. It appears to be necessary, therefore, to require cable operators to submit certain information directly to the Commission on a regular basis. Such information obtained directly from cable operators would be reliable, complete and comparable. The Commission requests comment on the specific data to be collected. For example, should the data submitted be on a per system rather than a per franchise basis? Further, the Commission notes that the data it proposes to collect for the annual report on rates may duplicate in part the data needed to carry out the ongoing rate regulations provisions of the Cable Act. In addition, depending on the particular rate standard the Commission ultimately adopts, the Commission may also need data on various costs and other financial information. The Commission tentatively concludes that it should combine all data requirements on a single form and requests comment on that conclusion.

The Commission realizes that annual collection of data will be costly for both the industry and the Commission. One option for minimizing these costs would be to collect data from a sample of cable systems rather than from the industry as a whole. The Commission seeks comment on how to identify systems subject to effective competition. The Commission seeks comment on this issue. Finally, commerters are invited to suggest other ways the Commission may obtain the data needed to fulfill the annual reporting requirements specified in section 623 (k).

i. *Definitions.* The statute includes definitions of effective competition, cable programming service, and multichannel video programming distributor. In order to implement the statutory definitions and rules to incorporate these terms, the NPRM proposes to adopt the definitions without change. The FCC solicits comment on this proposal. The FCC additionally solicit comment on whether it should establish any additional definitions in our rules.

j. *Effective date.* The statute provides that the amendments to section 623 establishing rate regulation of cable systems not subject to effective competition shall be effective 180 days from the date of enactment. The statute gives the FCC authority to prescribe regulations effective on the date of enactment. The statue expressly requires the FCC to establish regulations concerning rates for the basic service tier, rates for cable programming service, and prevention of evasions within 180 days of enactment.

In order to assure that the FCC meet the statutory deadline for implementing regulations, we propose to adopt implementing rules prior to April 3, 1993 and to make them effective as rapidly thereafter as is reasonably feasible. The NPRM seeks comment on this proposal and on what if any interim requirements may be necessary as the rules come into force. The FCC has tentatively concluded that, while its regulations must be in place 180 days from the date of enactment, the statute does not require that all implementing steps that cable systems must take to meet the obligations of the statute or our rules must be completed on that date.

D. Leased Commercial Access

1. Statutory Requirements

Section 612 of the Communication Act states that its purpose is to assure that the widest possible diversity of information sources is made available to

the public from cable systems in a manner consistent with growth and development of cable systems. The amendments to section 612 of the Communications Act contained in the Cable Act of 1992 add an additional purpose to the section: To promote competition in the delivery of diverse sources of video programming. Other amendments to section 612 grant the Commission authority: To determine the maximum allowable rates that a cable operator may establish for leased commercial access, including the rate charged for billing and collection services; to establish reasonable terms and conditions for commercial use of the system, including those to govern billing and collection; and to establish procedures for expedited resolution of disputes concerning rates or carriage. The FCC is required within 180 days of enactment to adopt regulations exercising authority in these areas.

2. Discussion

a. *Maximum reasonable rates.* The language of section 612, as amended by the Cable Act of 1992, that governs leased commercial access does not limit its application to only cable systems not subject to effective competition as the Act defines that term. Accordingly, the FCC tentatively concludes that our regulations governing the maximum reasonable rate for leased commercial access will apply to all cable systems. The NPRM also tentatively concludes that the Cable Act of 1992 does not necessarily require cable operators to provide billing and collection services. Rather, the FCC believes that Congress intended only that we establish regulations governing the maximum rate for such services if an operator chooses to offer them. The FCC also tentatively concludes that it should require that any charges for billing and collection services that a cable operator may elect to provide be unbundled from other charges for leased commercial access.

The FCC has initially identified three alternative standards for determining maximum reasonable rates for leased commercial access and for billing and collection services: Reliance on benchmark rates based on costs of typical cable systems, reliance on the cost-of-service principles, and reliance on the marketplace where effective competition exists. A fourth possibility, not explored in detail in the NPRM but on which comments are solicited, would be for the FCC to establish a mechanism or formula under which subscriber rates for the basic service tier and/or cable programming services could be used to compute a rate for leased commercial access. Additionally, the NPRM seeks comment on whether we should establish additional rate ceilings to govern rates for not-for-profit programmers.

Benchmark Based on Typical System Costs. Under this alternative, rates for leased commercial access would be governed by a benchmark based on costs incurred by a typical or ideal cable system for constructing and operating channel capacity. Such a benchmark would be particularly useful for cable systems whose rates for basic tier service and cable programming service were not subject to individual system cost-based regulation, possibly because they also met a benchmark.

Cost-of-Service. Under this alternative, the maximum reasonable rates for leased commercial access and for billing and collection services would be designed to recover the costs of providing those services. Under this alternative, the FCC would require that the maximum reasonable rate would be based on all direct costs, an allocation of the joint and common costs of access and of providing other cable services, an allocation of general and administrative overheads, and a reasonable profit determined under cost-of-service regulatory principles that were previously discussed. Should the FCC select the cost-of-service alternative, the NPRM solicits comment on whether the FCC should require a fully distributed cost methodology to identify the joint and common costs to be recovered through rates for leased channel access or for billing and collection services.

Marketplace Rates. Under this alternative, the FCC would determine that where a competitive market exists for leased commercial access or for billing and collection services there would be no prescribed price or ratemaking methodology. The FCC solicits comment on this approach generally and, in particular, on whether it is consistent with congressional intent and whether the Cable Act of 1992 authorizes us to rely on market forces to set such maximum rates. The NPRM also solicits comment on the extent to which a competitive market for leased commercial access currently exists. The NPRM solicits comment on whether the billing and collection services that were considered by the Commission in connection with telephone companies are the same as, or relevant to determining proper treatment of, the billing and collection services that cable systems might offer in connection with leased commercial access.

Special Rates for Not-for-Profit Programmers. The NPRM solicits comment generally on the need for special rates for not-for-profit programmers. The NPRM seeks comment on whether the Cable Act of 1992 empowers the FCC to set a lower maximum rate for leased commercial access for not-for-profit programmers, and ask whether this could help assure the diversity of programming sources on cable systems sought by the drafters of Section 612. The FCC asks to what extent it can permit costs of providing leased commercial access to not-for-profit programmers to be recovered from other leased access customers or from cable subscribers on all tiers generally.

In addition to the above proposals, the NPRM solicits comment on whether we need to take any measures to assure that our regulations governing maximum resale rates for leased commercial access are fulfilling the statutory objectives of section 612. The NPRM solicits comment on relying on the complaint process to monitor the effectiveness of our regulations. Alternatively, or in addition to the complaint process, the FCC could establish a reporting requirement that will enable us to track the use of leased commercial access and rates charged for that use.

b. *Reasonable terms and conditions of use.* Section 612(c)(4)(A)(ii) requires the Commission to "establish reasonable terms and conditions" for commercial use of leased access cable channels. In enacting this Section, Congress was particularly concerned that leased access programmers be offered a "genuine outlet" for their product. Thus, the Commission seeks comment on whether it needs to address in its rules tier location, channel position, and time scheduling for leased access use. The Commission also seeks comment on how such an alternative could be fashioned so that it intruded minimally upon programming decisions negotiated by private parties and on the discretion of the cable operator with respect to channel positioning and configuration of its system. However, the general prohibition on the cable operator's exercising editorial control over leased access remains intact, and Congress has expressed concern over providing leased access programmers "genuine outlet." Thus, the Commission seeks comment on the appropriate scope of the operator's discretion regarding tiering and channel location for leased access.

The Commission tentatively concludes that it should establish guidelines for technical standards and conditions for leased access. The Commission proposes to require that operators apply the same technical standards they apply to programs to be carried on public, educational, and governmental access channels to leased

access programs. Thus, an operator could not reject for technical reasons a program for leased access airing if it would not reject the program for the same reasons for airing on public, educational or governmental access channels. The Commission seeks comment on this proposal. The Commission also seeks comment on what, if any, technical and production facilities the cable operator should be expected to offer leased access users. The Commission also asks when the operator should be able to require posting of a bond or deposit, and what the impact of any bond or deposit requirement would be on programmers' ability to secure access to leased channels.

While the Communications Act does not give cable operators editorial control over leased access programming, the Cable Act does permit operators to prohibit or to channel indecent material on leased access channels. The Commission is presently considering how to implement these provisions of the Act. The Commission proposes generally to prohibit a cable operator from setting terms or conditions for leased access use based on content. The Commission proposes to except from this prohibition those terms and conditions relating to indecent material that would be consistent with the Cable Act and the implementing regulations the Commission ultimately adopts. In addition, as provided in existing section 612(c)(3) of the Communications Act, an operator may consider content "to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel separately by an unaffiliated person." The Commission seeks comment on this approach.

Existing section 612(c)(1) provides that an operator shall establish prices, terms and conditions for leased access to an unaffiliated user at least sufficient to ensure that such use "not adversely affect the operation, financial condition, or market development of the cable system." The Commission seeks comment on how to ensure that regulations it establishes for leased access terms and conditions are consistent with this provision and do not undermine the financial condition of the cable system, while at the same time harmonizing with the statutory provisions governing the maximum rate for leased access. The legislative history of the 1984 Act indicates that Congress contemplated different treatment of leased access providers, who by definition are unaffiliated with the operator, and of affiliated entities who may also lease a channel or have an equivalent arrangement. It is unclear whether in passing the 1992 Cable Act, and requiring us to establish reasonable terms and conditions for leased access use, Congress intended to reinforce or reduce such differentiation. The Commission thus seeks comment on whether it has the authority to require and, if so, whether it should require operators to apply the same terms and conditions to the leasing of channel capacity by both affiliated and nonaffiliated users. If so, would this requirement extend to services such as billing and collection? The Commission also seeks comment on how its regulations might permit the beneficial discrimination which Congress considered might be necessary to establish terms and conditions that might be needed, for example, by non-profit program suppliers. The Commission also seeks comment on whether there is any need to reconcile the amendments made by the Cable Act of 1992 with the existing statute and its underlying objective of promoting diversity. For example, one may speculate that if rates for leased access are low enough, unaffiliated programmers may seek to move their program offerings from other channels to those set-aside for leased access, thereby diminishing the number of channels available for leased access without adding to the diversity of programming offered on the system. The Commission seeks comment on the probability of such migration occurring, the likely impact of such actions, and whether there is any need to take regulatory action at this time to prevent it.

c. *Procedures for expedited resolution of disputes.* The Cable Act requires that the Commission establish procedures "for the expedited resolution of disputes concerning rates or carriage" of leased access. The legislative history of section 612(c)(4)(A) indicates that Congress believed that existing provisions of the Cable Act of 1984 entitling aggrieved leased access users to bring action in federal district court or file complaints at the Commission were too cumbersome. Congress believed these provisions, together with the imposition of a high burden of proof on access users, may have led to limited demand for leased access. One means of fulfilling Congressional intent to increase use of leased access channels would be to streamline this Commission's dispute resolution procedures for aggrieved leased access users. Thus, the Commission proposes to permit an aggrieved access user to file a petition for relief alleging that an operator's rates or terms and conditions for use of leased access capacity violate the Commission's rules. Should the Commission determine that a *prima facie* case of violation of its rules has been made, the burden of production would then shift to the operator to disprove the allegations. At this stage, the Commission might also issue an order requesting further information from the operator, under procedures analogous to those established for complaints of unreasonable rates. The Commission seeks comment on this approach.

The Commission proposes that if a petitioner has made out a *prima facie* case of a violation of its rules promulgated pursuant to Section 612(c), this case would be sufficient to rebut the presumption established in the 1984 Cable Act that the prices, terms and conditions for leased access are reasonable. If such allegations are proven, they would constitute clear and convincing evidence of unreasonable practices or rates and meet the burden of proof imposed under the Act. The Commission seeks comment on this proposal. The Commission also seeks comment on alternative approaches to reconciling the provisions of the 1984 Act (which presume that the operator's good faith prices, terms and conditions are reasonable) with the provisions of the 1992 Act (which require the Commission to establish reasonable terms and conditions and to determine maximum reasonable rates for leased access).

As a matter of general policy, the Commission also believes that parties should bring complaints to the Commission's attention in a timely manner. This policy will help to guard against determinations based on a stale record, as well as forestall development of any patterns of abuse. The Commission also proposes to give oral rulings in those situations in which time is of the essence, to be followed by a written formal ruling. The Commission seeks comment on what types of cases might be appropriate for such emergency treatment. The Commission tentatively finds that rate disputes, which are generally complex in nature, should not be the subject of emergency action at the Commission. The Commission believes that it would be possible in such cases to devise procedures that will enable a user to have access before a Commission decision is made. The Commission proposes to require that the user provide some form of security, *e.g.*, establish an escrow account, while the rate dispute is being determined, and seeks comment

on the fairness of this procedure to all parties involved.

The Commission seeks comment on the use of Alternative Dispute Resolution ("ADR") for leased access petitions filed at the Commission. The legislative history reflects concern that "cumbersome" administrative procedures may have limited usefulness for leased access. In light of this history, when the circumstances of a given case are fairly straightforward, the Commission tentatively concludes that ADR may be the most appropriate means of resolving conflicts by providing both expedition and cost-effectiveness. The Commission also assumes that it could be made available to parties in the franchise area in which they are located, adding the benefit of geographic convenience in such cases. The election of mediation by the parties would be purely voluntary under the Administrative Dispute Resolution Act, 5 U.S.C. 582(c) (1990). The Commission seeks comment on this approach, and on whether the Commission should encourage its use. The Commission also seeks comment on whether parties should be permitted to elect ADR at the outset of a dispute or whether election should take place only at the time the Commission rules that a *prima facie* case has been established. The Commission also seeks suggestions on what types of disputes would be most suitable for ADR. Specifically, the Commission seeks comment on whether conflicts concerning rates, credit terms, technical quality, or other terms or conditions would reasonably lend themselves to resolution by mediation, or whether certain categories of disputes would be better resolved by other means.

The Commission also seeks comment on whether and how it might enlist the assistance of local franchising authorities in resolving leased access disputes. The Commission thus asks whether parties should be permitted to seek resolution of leased access disputes by franchising authorities. The Commission seeks comment on whether this option should be voluntary, or possibly be required as a prerequisite to review by this Commission. On the latter point, the Commission seeks comment on whether such a requirement would be consistent with the language and intent of the Cable Act. Finally, the Commission seeks comment on what types of leased access disputes may be suitable for franchising authority resolution.

d. *Leased access for quality minority programming and qualified educational programming.* The Cable Act permits a cable operator to place programming from a qualified minority or educational programming source on up to 33 percent of the cable system's designated leased access channels. Programming already carried by a cable system as of July 1, 1990 does not qualify as minority or educational programming for purposes of this section. The Act defines a qualified minority programming source as one that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned, as the term minority is defined in section 309(i)(3)(C)(ii) of the Communications Act. The Act defines a qualified educational programming source as one that devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding $15 million. The Commission proposes to adopt this subsection as part of its rules. The Cable Act defines "minority" with reference to section 309(i)(3)(C)(ii) of the Communications Act, which identifies Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders as minority groups. The Commission thus tentatively finds that, for purposes of the minority programming provision, programming that covers "minority viewpoints" or is "directed at members of minority groups" would have to cover the viewpoints of or be targeted to members of the above-listed groups. The Commission seeks comment on this proposal and tentative conclusion. The Commission also proposes to reflect the statutory definition of educational programming source described above in its rules. The Commission seeks comment on this proposal.

The Act qualifies minority and educational programming sources for leased access under this section if they devote "substantially all" of their programming to the coverage of minority viewpoints or to educational or instructional programming. The Commission seeks comment on the amount or proportion of programming necessary to fulfill this requirement.

C. Subscriber Bill Itemization

Section 622(c) of the Communications Act, as amended by the Cable Act, permits a cable operator to itemize, on separate lines on each regular subscriber bill, (1) the amount of that bill attributable to the franchise fee, together with the identity of the franchising authority to which the fee is paid, (2) the amount attributable to the support or use of public, educational, or governmental channels which is required under a franchise agreement, and (3) the amount of the total bill attributable to any other governmental assessments on transactions between the operator and the subscriber. The Conference Report states that an amendment was made to the legislation to clarify that itemization must be done in a manner consistent with the Commission's regulations implementing section 623. The House Report indicates that only direct and verifiable costs within the above-listed categories may be so itemized. Section 623 provides that rules governing basic service rates shall take into account "the reasonably and properly allocable portion" of amounts assessed as franchise fees, taxes, or governmental charges assessed on operator/subscriber transactions, and any amount required to satisfy franchise requirements to support public, educational, or governmental channels, or the use of such channels under a franchise. The Commission seeks comment on the possible differences and the interrelationships between section 622(c) and section 623. The House Report also indicates that Congress explicitly intended that such costs be itemized as part of the total bill, but not separately billed. The Commission proposes to reflect this Congressional intent in its rules incorporating section 622(c). The Commission seeks comment on this proposal, and on any other regulations that may be necessary to adequately implement this provision.

Initial Regulatory Flexibility Act Analysis

Pursuant to section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Public Law No. 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

Reason for action. The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service, including rates for equipment and installation, and procedures for implementation and enforcement of those rules. The Cable Act of 1992 also requires the Commission to establish criteria for identifying unreasonable rates for cable programming services, and procedures for resolving complaints regarding cable programming services. In addition, the statute requires the Commission to establish rules for determining the reasonable terms and conditions and maximum reasonable rates for leased commercial assess, including billing and collection.

Objectives. To propose rules to implement sections 3 and 14 and those portions of section 9 pertaining to rate regulation, of the Cable Television Consumer Protection and Competition Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

Legal basis. Action as proposed for this rulemaking is contained in sections 4(i), 4(j), 303(r), 612(c), 622(c) and 623 of the Communications Act of 1934, as amended.

Description, potential impact and number of small entities affected. Until we receive more data, we are unable to estimate the number of small cable systems that would be affected by any of the proposals discussed in the Notice of Proposed Rulemaking. We have, however, attempted to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by section 3(i) of the Cable Act of 1992.

Reporting, record keeping and other compliance requirements. The proposals under consideration in this Notice of Proposed Rulemaking include the possibility of new reporting and record keeping requirements for cable systems.

Federal rules which overlap, duplicate or conflict with this rule. None.

Any significant alternatives minimizing impact on small entities and consistent with stated objectives. Wherever possible, the Notice proposes general rules, or alternative rules for small systems, to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 3(i) of the Cable Act of 1992.

Paperwork Reduction Act

The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

Procedural Provisions

For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contracts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft Order proposing a substantive disposition of the proceeding is placed on the Commission's Open Meeting Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between a person outside this Commission and a Commissioner or a member of this Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on this Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of the oral presentation, that written summary must be served on this Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally § 1.1231 of the Commission's Rules, 47 CFR 1.1231.

Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 & 1.419, interested parties may file comments on or before January 27, 1993, and reply comments on or before February 11, 1993. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should sent comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

Ordering Clauses

Accordingly, *it is ordered*, That, pursuant to sections 4(i), 4(j), 303(r), 612(c), 622(c) and 623 of the Communications Act of 1934, 47 U.S.C. 154(i), 154(j), 303(r), 532(c), 543, notice is hereby given of adoption of proposed regulatory changes and amendments to the Commission's rules and regulations in accordance with the proposals, discussions, and statements of issues in this Notice of Proposed Rulemaking, and that comment is sought regarding such proposals, discussion, and statements of issues.

It is further ordered, That a rulemaking proceeding is instituted to implement sections 623, 612, and 622(c) of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992.

It is further ordered, That commenters shall address in a separate section of their comments issues concerning leased commercial access raised in paragraphs 144–73 of the NPRM.

List of Subjects for 47 CFR Part 76

Cable Television, Reporting and recordkeeping requirements.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 92–31839 Filed 12–31–92; 8:45 am]

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