

licensing policy will better enable U.S. companies to establish contacts with Vietnamese nationals and organizations to facilitate future commercial transactions at such time as the Vietnam embargo is modified to permit such transactions.

Because the Regulations involve a foreign affairs function, the Executive order on regulatory review and the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, does not apply.

List of Subjects in 31 CFR Part 500

Services, Travel restrictions, Vietnam.

For the reasons set forth in the preamble, 31 CFR part 500 is amended as set forth below:

PART 500—FOREIGN ASSETS CONTROL REGULATIONS

1. The authority citation for part 500 continues to read as follows:

Authority: 50 U.S.C. App. 1-44; E.O. 9193, 3 CFR, 1938-1943 Comp., p. 1174; E.O. 9989, 3 CFR, 1943-1948 Comp., p. 748.

Subpart E—Licenses, Authorizations and Statements of Licensing Policy

2. Section 500.566 is amended by revising the section heading, by amending paragraph (a) introductory text to revise "paragraph (b)" to read "paragraph (c) of this section", by redesignating paragraph (b) as paragraph (c) and revising it, and by adding new paragraph (b), to read as follows:

§ 500.566 Certain transactions authorized on behalf of designated nationals incident to their travel and maintenance expenses.

(b) Except as provided in paragraph (c) of this section, the following transactions are authorized on behalf of nationals of Vietnam when directly related to the orientation and training of such nationals in a third country pursuant to § 500.575:

(1) All transactions ordinarily incident to travel between Vietnam and a third country, except transactions involving a carrier that is owned, controlled, or chartered by Vietnam, or a carrier that is owned or controlled by a person subject to the jurisdiction of the United States with respect to flights into or out of Vietnam;

(2) All transactions ordinarily incident to travel and maintenance within such third country, including

payment of living expenses and the acquisition of goods for personal use;

(3) Normal banking transactions involving foreign currency drafts, traveler's checks, or other instruments negotiated incident to travel and maintenance in such third country.

(c) This section does not authorize any debit to a blocked account.

3. Section 500.575 is added to read as follows:

§ 500.575 Certain services to Vietnamese nationals authorized.

(a) Specific licenses may be issued on a case-by-case basis for the provision in the United States or a third country of business orientation or training services to Vietnamese nationals. The orientation or training program may pertain only to industrial or commercial processes, or to specific equipment and related technical data both of which are eligible for export under a general license to Country Group Y, as set forth in Supplement No. 1 to part 770 of the Export Administration Regulations, 15 CFR parts 768-799. Licenses issued pursuant to this section will not authorize Vietnamese participation in orientation and training programs with respect to specific equipment and related technical data that may not be exported under a general license to Country Group Y pursuant to the Export Administration Regulations. Training programs may involve instruction on the maintenance or operation of a particular product, but may not involve instruction in a product's design or manufacture.

Note: The transfer of mass-market software and certain technical data eligible for export to most destinations under General License GTDU to Vietnamese nationals may require additional authorization from the U.S. Department of Commerce pursuant to the Export Administration Regulations.

(b) Transactions directly incident to the travel and maintenance expenses of the Vietnamese nationals for purposes of orientation or training programs are authorized pursuant to § 500.566. Payment of salaries or other fees to Vietnamese nationals participating in orientation or training programs is not authorized. (c) Applications for specific licenses should be submitted by the orientation or training program sponsor and should include a full description of the program to be offered, including the participants, the identity of their employers, and the capacities in which the participants are employed.

Dated: July 13, 1993.

R. Richard Newcomb,
Director, Office of Foreign Assets Control.

Approved: July 31, 1993.

Ronald K. Noble,
Assistant Secretary for Enforcement.
[FR Doc. 93-29241 Filed 11-24-93; 11:18 am]

BILLING CODE 4810-25-F

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 290

[DCAA 5410.8]

Defense Contract Audit Agency (DCAA) Freedom of Information Act Program

AGENCY: Office of the Secretary, Department of Defense (DOD).

ACTION: Final rule.

SUMMARY: The Defense Contract Audit Agency is amending its implementation of the Freedom of Information Act of 1974, as amended (5 U.S.C. 552) (32 CFR part 290). This administrative change updates the availability of publications cited in the miscellaneous section of Appendix B to part 290. **DATES:** This change will be effective January 25, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. Dave Henshall, (703) 274-4400.

SUPPLEMENTARY INFORMATION: The Agency's final rule was published in the *Federal Register* on Tuesday, October 1, 1991 (56 FR 49685). It was amended on November 7, 1991 (56 FR 56932), April 27, 1992 (57 FR 15254), and July 13, 1992 (57 FR 30904).

List of Subjects in 32 CFR Part 290

Freedom of Information.

Accordingly 32 CFR part 290 is amended as follows:

PART 290—DEFENSE CONTRACT AUDIT AGENCY (DCAA) FREEDOM OF INFORMATION ACT PROGRAM

1. The authority citation for 32 CFR part 290 continues to read as follows:

Authority: 5 U.S.C. 552.

Appendix B to part 290 [Amended]

2. Appendix B to part 290 is amended by revising the entry VIRGINIA, paragraph (a) and reserving paragraph (b) to read as follows:

(a) Miscellaneous.

(1) The following publications may be obtained from the Defense Contract Audit Agency, ATTN: CMO, Cameron Station,

Alexandria, VA 22304-6178, (703) 274-5821. Since these materials are publicly available, requesters need not invoke the Freedom of Information Act to obtain copies of the publications selected.

(i) Contractor Alpha Listing. This product identifies contractors audited by the Agency by name, address, city, state, zip code, and telephone number. The alpha listing is available both in a 8 1/2" x 11" hard copy version or a 3 1/2" disk set. The disk version includes instructions for manipulating data to specific sorts (e.g. contractors by state, etc. * * *).

(ii) DCAAI 5025.2, Index of Numbered Publications, lists Agency publications.

(iii) DCAAP 1421.3, Catalog of Training Courses, lists training courses available from the Defense Contract Audit Institute. Specific training courses are also available.

(2) Although the following publication is publicly available, the memorandums listed may or may not be subject to withholding under the Freedom of Information Act. Those memorandums marked with an "(R)", denoting releasable (e.g. 94-PFD-063R), are available from the above address. However, Memorandums for Regional Directors (MRDs) marked "(NR)", meaning not releasable, cannot be obtained from this source. Requests for (NR) MRDs should be sought under the auspices of the Freedom of Information Act from the Defense Contract Audit Agency, ATTN: CMR, Cameron Station, Alexandria, VA 22304-6178.

(i) DCAAI 5025.13, Index of DCAA Memorandums for Regional Directors (MRDs), lists numbered memorandums pertaining to Agency policy, procedure, and informational topics.

(3) Requesters should plainly display the words "Freedom of Information Act Request" on the lower left hand corner of the envelope to ensure prompt handling.

(b) [Reserved].

Dated: November 24, 1993.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 93-29283 Filed 11-29-93; 8:45 am]

BILLING CODE 5000-04-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD3-3-5904; A-1-FRL-4797-6]

Approval and Promulgation of Air Quality Implementation Plans; Maryland-COMAR 26.11.19.15C; Standards for Adhesive Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maryland. This revision establishes and requires the emission standards for adhesive

application. This revision contains additions and corrections to volatile organic compound (VOC) regulations applicable in the Baltimore and Washington, DC nonattainment areas in Maryland, including Baltimore City and Anne Arundel, Baltimore, Carroll, Harford, Howard, Montgomery, and Prince George's Counties. The intended effect of this action is to approve Maryland's revised VOC regulations to correct deficiencies in Maryland's ozone SIP. This action is being taken in accordance with the SIP submittal and the provisions in the Clean Air Act (the Act) regarding SIP submittal and approval.

EFFECTIVE DATE: This rule will become effective on December 30, 1993.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; Jerry Kurtzweg ANR-443, U.S.

Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and Maryland Department of the Environment, 2500 Broening Highway, Baltimore, Maryland, 21224.

FOR FURTHER INFORMATION CONTACT: Ms. Maria A. Pino at: (215) 597-9337.

SUPPLEMENTARY INFORMATION: On February 16, 1993 (58 FR 8565), EPA published a notice of proposed rulemaking (NPR) for the State of Maryland. The NPR proposed approval of revisions to Maryland's VOC reasonably available control technology (RACT) regulations, pursuant to section 182(a)(2)(A) of the Act, U.S.C. 7511(a)(2)(A). The formal SIP revision was submitted by Maryland on April 5, 1991. Specifically, these changes pertain to COMAR 26.11.19.15C, Standards for Adhesive Application.

EPA proposed approval of COMAR 26.11.19.15C under a procedure known as parallel processing. The NPR for this rulemaking was published while Maryland was in the process of correcting an administrative error found in the version of COMAR 26.11.19.15C contained in the official April 5, 1991 SIP revision submittal. Maryland has adopted the correction to this administrative error, and formally submitted it to EPA as a SIP revision on January 18, 1993.

This action is approving into the Maryland SIP the addition of COMAR 26.11.19.15C as contained in Maryland's April 5, 1991 submittal, and the correction to COMAR 26.11.19.15C contained in Maryland's January 18,

1993 submittal. Both the April 5, 1991 and January 18, 1993 submittals contained revisions to other Maryland SIP regulations. These other SIP revisions are the subject of separate rulemaking actions. The provisions of COMAR 26.11.19.15C are summarized as follows:

(a) The adoption of a RACT regulation for honeycomb core installations which apply VOC-containing adhesive to flat aluminum sheets, which are then corrugated to produce a honeycomb structure. Honeycomb core manufacturing is a source category for which EPA has not issued a CTG, a so called "non-CTG" source category. This non-CTG RACT regulation: (1) Requires installations discharging >50 lbs VOC/day (9.125 tons/year (TPY)) to use adhesive with ≤5.8 lbs VOC/gal as applied (minus water); and (2) contains a 200 lbs VOC/day (36.5 TPY) emissions cap (COMAR 26.11.19.15C(1)).

(b) Adoption of regulations applicable to footwear manufacturing, including a maximum allowable VOC emission level (0.5 lbs VOC/pair of boots) for specialty footwear manufacturers and a requirement to maintain records and submit monthly reports to Maryland on total materials used and VOC emissions (COMAR 26.11.19.15C(2)).

(c) Adoption of a non-CTG RACT regulation for spiral tube winding and impregnating sources. This regulation prohibits spiral tube winding and impregnating installations from: (1) Using adhesive with >5 lbs VOC/gal as applied (minus water) to manufacture specialty spiral tubes, (2) using adhesive with >2.9 lbs VOC/gal as applied (minus water) to manufacture non-specialty spiral tubes, (3) discharging >200 lbs VOC/day (36.5 TPY) from any specialty spiral tube winding, or (4) using resin with >4 lbs VOC/gal as applied (minus water) (COMAR 26.11.19.15C(3)); and

(d) The adoption of a general emission standard for adhesive applications not regulated under COMAR 26.11.19.15A-C or COMAR 26.11.19.03 to .14. This regulation prohibits all adhesive application installations at the same source from discharging >3.8 lbs VOC/gal of adhesive applied (minus water) unless emissions are reduced by 80% overall if they discharge >50 lbs VOC/day (9.125 TPY) and are not otherwise regulated (COMAR 26.11.19.15C(4)).

Other specific requirements of COMAR 26.11.19.15C, Standards for Adhesive Application, and the rationale for EPA's action are explained in the NPR and the accompanying technical support document (TSD) and will not be restated here. No public comments were received on the NPR. A detailed

evaluation of these SIP revisions has been performed by EPA in a TSD for this action. A copy of this TSD is available upon request from the EPA Regional Office listed in the ADDRESSES section of this document.

Final Action

EPA is approving the addition of COMAR 26.11.19.15C, Standards for Adhesive Application, as a revision to the Maryland ozone SIP. This SIP revision was submitted to EPA on April 5, 1991. EPA is also approving a revision to COMAR 26.11.19.15C formally submitted on January 18, 1993.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 2 Action by the Regional Administrator under the procedures published in the *Federal Register* on January 19, 1989 (54 FR 2214-2225). On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 SIP revisions from the requirement of section 3 of Executive Order 12291 for a period of two years. U.S. EPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. The OMB has agreed to continue the waiver until such time as it rules on U.S. EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action, pertaining to the addition of COMAR 26.11.19.15C, Standards for Adhesive Application, into the Maryland ozone SIP, must be filed in the United States Court of Appeals for the appropriate circuit by January 31, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference,

Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Dated: September 10, 1993.

W.T. Wisniewski,
Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart V—Maryland

2. Section 52.1070 is amended by adding paragraph (c)(98) to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

(98) Revisions to the Maryland State Implementation Plan submitted on April 5, 1991 and amended on January 18, 1993 by the Maryland Department of the Environment:

(i) Incorporation by reference.
(A) Letters of April 5, 1991 and January 18, 1993 from the Maryland Department of the Environment transmitting additions and revisions to Maryland's State Implementation Plan, pertaining to volatile organic compound regulations in Maryland's air quality regulations, Code of Maryland Administrative Regulations (COMAR) 26.11.

(B) The addition of COMAR 26.11.19.15C (proposed as COMAR 10.18.19.15C), Standards for Adhesive Application, adopted by the Secretary of Health and Hygiene on June 10, 1987, effective August 10, 1987;

(C) Amendments to COMAR 26.11.19.15C adopted by the Secretary of the Environment on March 9, 1991, effective May 8, 1991; and

(D) Amendments to COMAR 26.11.19.15C(4) adopted by the Secretary of the Environment on January 18, 1992, effective February 15, 1993.

(ii) Additional material.
(A) Remainder of April 5, 1991 and January 18, 1993 State submittals pertaining to COMAR 26.11.19.15C, Standards for Adhesive Application.

(B) Letter of April 17, 1992 from the Maryland Department of the Environment clarifying the intent of its April 5, 1991 letter transmitting revisions and additions to Maryland's State Implementation Plan.

(C) Letter of July 10, 1992 from the Maryland Department of the Environment clarifying Maryland's intent regarding COMAR 26.11.19.15C(4) and stating that

Maryland was working to correct the administrative error in COMAR 26.11.19.15C(4) contained in the April 5, 1991 submittal.
[FR Doc. 93-29236 Filed 11-29-93; 8:45 am]
BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter 1

[PR Docket No. 90-34; FCC 93-439]

Waivers of the Commission's Rules for Applicants in the Specialized Mobile Radio Service

AGENCY: Federal Communications Commission.

ACTION: Final rule; Petition for reconsideration.

SUMMARY: On October 21, 1992, Motorola, Inc. (Motorola) filed a Petition for Partial Further Reconsideration of the Memorandum Opinion and Order (MO&O) adopted August 4, 1992, in this proceeding. Specifically, Motorola sought reconsideration of the standard the Commission uses to evaluate short-spacing waiver requests in the Specialized Mobile Radio service. The Commission found that Motorola's concerns had been specifically addressed on reconsideration in the MO&O and, therefore, dismissed Motorola's petition.

EFFECTIVE DATE: September 15, 1993.

FOR FURTHER INFORMATION CONTACT: Steve Sharkey, Private Radio Bureau, (202) 632-7125.

SUPPLEMENTARY INFORMATION:

1. This item was adopted on September 15, 1993, and released October 27, 1993. On October 21, 1992, Motorola, Inc. (Motorola) filed a Petition for Partial Further Reconsideration (Petition) of the Memorandum Opinion and Order (MO&O) adopted August 4, 1992, in this proceeding.¹ The MO&O affirmed our Report and Order (R&O) adopted July 19, 1991,² codifying two methods of short-spacing Specialized Mobile Radio (SMR) facilities and clarifying the standard we use to evaluate short-spacing waiver requests.³ Motorola seeks reconsideration of this standard. For the following reasons we dismiss Motorola's petition.

¹ Memorandum Opinion and Order, PR Docket No. 90-34, 57 FR 43408, September 21, 1992.

² Report and Order, PR Docket No. 90-34, 56 FR 41467, August 21, 1991.

³ See 47 CFR 90.621(b) identifying the co-channel distance separation criteria for systems operating on SMRS Category frequencies.

2. Motorola petitions us to reconsider the short-spacing waiver policy for SMR stations based upon the 40/30 dBu contour protection ratio. The MO&O addressed this very issue, and affirmed the waiver standard established in the R&O.⁴ On reconsideration, we did not modify the rule adopted by the R&O. Therefore, pursuant to § 1.429(i) of the Commission's Rules, 47 CFR 1.429(i), we dismiss Motorola's Petition as repetitious.⁵ We note, however, that on March 11, 1993, we adopted a Notice of Proposed Rule Making in PR Docket No. 93-60,⁶ proposing modification of the co-channel protection criteria for all 800 MHz and 900 MHz systems regulated under 47 CFR part 90, subpart S. Because Motorola's Petition contains information relevant to the disposition of PR Docket No. 93-60, we will treat the Petition as a comment to be incorporated into the record of PR Docket No. 93-60.⁷

3. Accordingly, pursuant to the authority contained in 47 CFR 1.429(i), it is ordered that the Petition for Partial Further Reconsideration is dismissed as repetitious.

4. It is further ordered that this proceeding is terminated.

5. For further information concerning this Order, contact Steve Sharkey, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443, or Freda Lippert Thyden, Land Mobile and Microwave Division, Private Radio Bureau, (202) 632-7125.

Federal Communications Commission.
William F. Caton.

Acting Secretary.

[FR Doc. 93-29183 Filed 11-29-93; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 1

[FCC 93-448]

Format Requirements for Pleadings and Documents

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending its rules to establish a uniform standard for Commission filings. The intended

effect will ensure that parties do not circumvent the page limitations contained in other parts of the Commission's Rules by utilizing printing reduction processes.

EFFECTIVE DATE: November 30, 1993.

FOR FURTHER INFORMATION CONTACT: A. Holly Berland, Office of General Counsel, Federal Communications Commission, (202) 254-6530

SUPPLEMENTARY INFORMATION:

Order

In the matter of Amendment of § 1.49 of the Commission's Rules.

Adopted: September 17, 1993.

Released: September 29, 1993.

1. The Commission on its own motion is issuing this Order to amend § 1.49 of its rules. Section 1.49 specifies the general format requirements to which most pleadings and other documents filed with the Commission must conform. By this Order, we are amending § 1.49 to require that Commission filings utilize 10- or 12-point type print.

2. Since by definition 10- and 12-point type print consists of 10 and 12 characters per inch, respectively, adoption of the type print requirement will ensure that the page limitations for filings, contained in other sections of the Commission's rules, will not be circumvented by the use of printing reduction processes. The type print requirement adopted here also is consistent with that relating to briefs contained in § 1.50 of the Commission's rules and thus will establish a uniform standard for Commission filings.

3. Accordingly, pursuant to sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, it is ordered, That part 1 of the Commission's Rules is amended as set forth below, effective upon publication in the Federal Register. This proceeding involves agency practice and procedure, and thus the notice and comment effective date provisions of the Administrative Procedure Act are inapplicable. See 5 U.S.C. 553(b)(A), (d).

List of Subjects in 47 CFR Part 1

Administrative practice and procedure.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Change

Part 1 of Chapter 1 of title 47 of the Code of Federal Regulations is amended as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.49 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 1.49 Specifications as to pleadings and documents.

(a) All pleadings and documents filed in any proceeding shall be on A4 (21 cm × 29.7 cm) or 8.5 in × 11 in (21.6 cm × 27.9 cm) paper, and shall be type-written or prepared by mechanical processing methods, in 10- or 12-point type. * * *

* * *

[FR Doc. 93-29184 Filed 11-29-93; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 76

[MM Docket No. 92-266; FCC 93-519]

Cable Act of 1992—Rate Regulation

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: By this *Third Report and Order*, the Commission amends its Rules to require cable operators facing regulation of both the basic and cable programming services tiers to select the same method of initial rate regulation for both tiers. Specifically, the Commission will require that if an operator subject to rate regulation for the first time selects the benchmark rate-setting approach for one tier, the operator must also adopt the benchmark approach for all other tiers that become subject to regulation in the same year. This requirement is necessary to avoid inconsistent rate-setting methods of rate regulation during the initial rate-setting process.

EFFECTIVE DATE: November 30, 1993.

FOR FURTHER INFORMATION CONTACT: Amy Zoslov, (202) 632-3922, Mass Media Bureau, or Kathleen O'Brien Ham, (202) 632-7792.

SUPPLEMENTARY INFORMATION:

Synopsis of Third Report and Order

I. Introduction

1. By this Third Report and Order ("*Third R & O*") we amend § 76.922(b) of the Commission's Rules to require cable operators facing regulation of both the basic and cable programming

⁴ MO&O at 6070.

⁵ For other Commission decisions dismissing petitions for reconsideration as repetitious, See Order on Further Reconsideration, CC Docket No. 85-166, 6 FCC Rcd 76 (1991), and Order, MM Docket No. 87-121, 7 FCC Rcd 2954 (1992).

⁶ 58 FR 19397, April 14, 1993.

⁷ Subsequent to adoption of this Order a Report and Order was adopted in PR Docket No. 93-60, 58 FR 53431, October 15, 1993.

services tiers to select the same method of initial rate regulation for both tiers.¹ Specifically, the *Third R & O* will require that if an operator subject to rate regulation for the first time selects the benchmark rate-setting approach for one tier, the operator must also adopt the benchmark approach for all other tiers that become subject to regulation in the same year.² Similarly, if an operator chooses to justify rates for one regulated tier based upon a cost-of-service showing, the operator must also seek a cost-of-service determination on all other regulated tiers that same year. This requirement of applying a consistent rate evaluation approach across tiers is taken as a precautionary measure to prevent operators from engaging in retiering and cost-shifting strategies during the initial rate-setting process that would undermine the tier neutral rate-setting principles underlying the benchmark regulatory framework.³

II. Background

2. In the *Rate Order*, we established a benchmark and price cap approach as the primary method for setting the rates of regulated cable services.⁴ We based our adoption of this regulatory regime on an evaluation of its advantages over traditional cost-of-service regulation. Under the benchmark approach, existing rates for cable service are compared to a benchmark that reflects the rates charged by cable systems that are subject to effective competition, with a given number of subscribers, regulated channels, and satellite-delivered signals. Once initial rates are determined by comparison to the benchmark, rates are governed on a going-forward basis by a price cap mechanism. The price cap permits annual adjustments for inflation and a recovery of increases in external costs, including programming costs, costs of

franchise requirements, taxes, and franchise fees. As a "backstop" to the benchmark/price cap approach, we established an opportunity for cable operators to justify rates above benchmark or capped levels based on costs. In this regard, we recently sought comment on adoption of uniform cost-of-service standards for application to this alternative method of rate determination.⁵

3. The Commission also determined in the *Rate Order* that the regulatory framework for rate regulation based on the benchmark approach should be "tier neutral." In other words, we stated that we would apply the same substantive standard for calculating reasonable rates for both the basic and cable programming services tiers. The practical outcome of this approach is that it achieves a permitted charge per channel that, prior to adjustments for inflation and external costs, is the same for all tiers of regulated service. We found this approach to be preferable to one that would, for example, suppress rates for the basic service tier and allow higher earnings for cable programming services tiers. In this regard, we determined that the potential benefits of a low-priced basic tier were outweighed by the fact that such an approach would create incentives for cable operators to move programming to higher tiers where they would charge higher rates to the detriment of subscribers. We also indicated that different rate standards for the basic and cable programming services tiers could significantly increase the complexity of rate regulation.⁶

4. In the *Rate Order*, we did not specify whether a cable operator is permitted to choose the cost-of-service approach for one tier and the benchmark approach for another regulated tier, or whether parallel treatment for both tiers is required in setting initial rates. Several parties identified this as a problem on reconsideration for our *Rate Order* and we issued a *Third Further Notice of Proposed Rulemaking* ("Third Further NPRM") seeking comment on the

matter.⁷ Specifically, we requested comment on whether cable operators should be permitted to choose the cost-of-service approach for one regulated tier of cable service and the benchmark approach for another regulated cable service tier, or whether consistent treatment for both tiers is required in setting initial rates. We tentatively concluded that cable operators should be required to elect the same regulatory approach for all regulated tiers. Thus, if a system became subject to regulation at the local level, and sought to justify its basic service rates using the benchmark system, the reasonableness of its cable programming services rates would also be based on the benchmark, if the Commission were considering a complaint filed against those rates. In reaching this tentative conclusion, we sought to prevent cable operators from moving more expensive programming services from the benchmark-regulated tier to the tier regulated by a cost-of-service showing and ultimately recovering more than compensatory rates. We tentatively concluded that this was the best way to preserve the tier neutral approach to rate setting adopted in the *Rate Order*.⁸

5. We also requested comment on what procedural requirements, if any, we should adopt to provide for coordination between local franchising authorities and the Commission in the event that a cable operator chooses to make concurrent cost-of-service showings before each jurisdiction. We inquired as to whether we should require that the determination of one jurisdiction will govern, or be given considerable weight in setting rates for the tier subject to the oversight of the other jurisdiction. We solicited comment on whether cable operators should be allowed to switch from benchmarking to cost-of-service and vice-versa. We also questioned whether we should impose a specific timetable for any sort of "switching" activity that is allowed.⁹

III. Comments

6. In response to the *Third Further NPRM*, cable operator commenters uniformly oppose enforcement of a consistent rate approach for all regulated tiers.¹⁰ They make four primary arguments in support of their position. First, they argue that allowing

¹ See the rule amendments.

² Thus, an operator that becomes subject to basic rate regulation on December 1, 1993 and selects the benchmark rate-setting approach must also choose the benchmark approach if the operator becomes subject to regulation of its non-basic tiers at any time up until December 1, 1994. Upon expiration of this one year time frame after initial rates have been set, the operator can adopt different rate determination methods for its service tiers.

³ In order to avoid the application of inconsistent rate-setting methods by operators during this early phase of rate regulation when initial permitted per channel charges are being established, we find the need to make the rule changes adopted herein operative immediately. Accordingly, we find good cause for making our amendments to Section 76.922(b) effective upon publication in the Federal Register. 5 U.S.C. Section 553(d)(3).

⁴ See *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993) ("Rate Order"), 58 FR 29736, May 21, 1993.

⁵ See *Notice of Proposed Rulemaking* in MM Docket No. 93-215, FCC 93-353 (released July 16, 1993), 58 FR 40762 (July 30, 1993) ("Cost-of-Service Notice").

⁶ The benchmark formula is based on prices that are averaged across all tiers of regulated services. We indicated in the *Rate Order* that a "tier neutral" per channel rate calculated as an average of charges across all tiers and compared to the benchmark is simpler for cable operators and regulators to administer and would discourage the shifting of programming services away from the basic services tier. *Rate Order*, 8 FCC Rcd at 5759-60 and n. 501.

⁷ See *Third Further Notice* in MM Docket No. 92-266, FCC 93-428 (released Aug. 27, 1993), 58 FR 46737 (Sept. 2, 1993).

⁸ *Id.* at paras. 146-152. See also *Rate Order*, 8 FCC Rcd at 5759.

⁹ *Third Further NPRM* at paras. 146-52.

¹⁰ See Appendix for a complete list of commenting parties.

operators to choose between the different rate-setting methods for the different tiers does not promote "gaming" because the Commission can consider overall costs and rates for all regulated services in setting rates for the cable programming services tier. Second, they contend that the Commission's price cap rules provide a disincentive to shift costs between tiers. Third, they argue that consistent rate treatment abandons the Cable Act's dichotomy between local and federal regulation of the different tiers. Fourth, they believe that requiring a consistent rate-setting approach will promote more cost-of-service showings for the tiers for which the cable operator would otherwise have adopted the benchmark approach.¹¹

7. Holding the opposite view on this issue, municipalities and one telephone company support enforcement of a consistent rate-setting methodology. These commenters argue that such a requirement will reduce hidden costs passed on to subscribers due to "gaming"; lead to fewer cost-of-service proceedings, which will only be initiated if the benchmarks overall are inadequate; and promote the same initial permitted per-channel rates on each tier.¹²

8. Commenters' suggestions on procedural requirements were varied in nature. These suggestions include: (1) Consolidating all cost-of-service hearings at the Commission; (2) requiring the sharing of cost-of-service data between the franchising authorities and the Commission; (3) allowing either the local franchising authority or the Commission to use the other jurisdiction's rate determination as binding or informative; and (4) requiring notification to all other local jurisdictions in which the same company has initiated a cost-of-service proceeding for the purpose of consolidation.¹³ The commenters

generally advocate imposing some type of time limitation on a consistent rate structure requirement, suggesting that cable operators should be able to switch from one rate-setting method to another after a period of six months¹⁴, one year¹⁵, or whenever there is a reasonable basis for doing so.¹⁶

IV. Decision

9. After carefully considering the record before us, we affirm our tentative conclusion that cable operators facing regulation of the basic and cable programming services tiers should be required to select the same method of initial rate-setting for both tiers. Thus, if a cable operator's basic service tier becomes subject to regulation at the local level (or in some instances, at the federal level), and the cable operator selects the benchmark approach, it must also adopt the benchmark approach if its cable programming services tier becomes subject to a complaint at the Commission within the same year. Similarly, if the cable operator chooses to make a cost-of-service showing in response to regulation of the basic service tier, then the operator must also make a cost-of-service showing in response to a cable programming services complaint filed within that year. On balance, we believe this approach is a necessary part of the tier neutral and rate averaging principles built into the benchmark system, particularly because it eliminates the incentive for cable operators to shift costs among tiers to the detriment of consumers.

10. Requiring operators to select the same rate determination method for all regulated tiers when initial rates are being set is necessary because it bolsters our ability to ensure that subscribers to all regulated tiers of service pay reasonable rates. Asymmetric treatment of the two tiers would hamper the ability of both local franchising authorities and the Commission to apply the benchmark's permitted per channel rate in a consistent manner across tiers. In particular, operators able to choose a different rate-setting approach for each of its cable services tiers could selectively apply the benchmark in a manner that would enable the operator to charge higher overall rates than would be allowed if either the benchmark or the cost-of-

service approach had been applied consistently across all program tiers. Specifically, an operator could re-tier its services and place its most expensive programming on the tier regulated by a cost-of-service determination. The operator would then be allowed to charge a per channel rate for the low cost tier based on the benchmark (which is an average rate) that actually far exceeds its costs for that tier (and, thus, the rate it would be able to charge under a cost-of-service showing). At the same time, the operator may be able to charge a higher-than-benchmark rate for the other service tier through a cost-of-service showing, based on its higher costs for that tier. The end result would be rates that exceed the reasonableness standard set forth in the 1992 Cable Act.¹⁷ Thus, we conclude that a requirement that operators apply consistent rate-setting approaches across tiers is needed to uphold the concept of tier neutrality and prevent cost-shifting, thereby making the process of setting initial benchmark rates work effectively and as intended.¹⁸ We will, however, review this policy after 18 months to determine whether it is necessary and appropriate to serve the purposes for which we are adopting it.

11. Additionally, we note that we are restricting our requirement that operators must use the same rate-setting method to one year from the date that the operator first becomes subject to regulation at either the local or federal level. Thus, after the expiration of its first year of initial rate regulation on a service tier, an operator is free to adopt different rate determination methods for its other service tiers. We take this approach for two reasons. First, we have given operators the ability to use either of two rate-setting methodologies on the possibility that there may be some systems for which benchmark rates may not provide adequate recompense because of that system's particular cost structure. Any system's cost structure

¹⁷ Indeed, in the *First Order On Reconsideration*, we stated that one reason for the adoption of tier neutrality was to eliminate any incentive for operators to move services to other tiers where they could charge relatively higher prices without necessarily corresponding higher costs. See *First Order On Reconsideration* in MM Docket No. 92-266, FCC 93-428 (58 FR 46718, September 2, 1993) (released August 27, 1993) at para. 31. See also *Rate Order* at para. 196.

¹⁸ We have adopted similar safeguards to address concerns of cost-shifting in other regulatory contexts. See, e.g., *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6819 (para. 271) 1990, *recon.*, 6 FCC Rcd 2537 (1991), *off'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993) (Commission adopted "all-or-nothing" rule to eliminate incentive for local exchange carriers to shift costs from affiliates subject to price cap regulation to rate of return affiliates).

¹¹ See e.g., Comments of Cablevision Industries Corp., et al. ("Joint Parties") at 11-14; National Cable Television Association ("NCTA") at 15-17; Telecommunications, Inc. ("TCI") at 4-9; Continental Cablevision ("Continental") at 2-5; Media General Cable of Fairfax County, Inc. ("Media General") at 2-3; Time Warner Entertainment Co., L.P. ("Time Warner"); Falcon Cable TV, et al. ("Falcon") at 14-17; Cable Operators and Associations ("Cable Operators") at 6. See also Reply Comments of Continental at 11-12; Joint Parties at 10-12; Time Warner at 6-7.

¹² See, e.g., Comments of Municipal Franchising Authorities ("MFA") at 3-7; Austin, Texas, et al. ("Coalition") at 9-13; National Association of Telecommunications Officers and Advisors, et al. ("NATOA") at 11-12; New York State Commission on Cable Television ("New York") at 5-7; GTE Service Corp. ("GTE") at 10-11. See also Reply Comments of Coalition at 15-18; GTE at 7-10.

¹³ See e.g., Comments of MFA at 7-8; Massachusetts Community Antenna Television

Commission ("MCATC") at 8; NATOA at 12-14. See also Reply Comments of Joint Parties at 13-14; KBLCOM, et al., at 1-3; Viacom International, Inc. at 9-11.

¹⁴ Comments of Falcon at 18.

¹⁵ See Comments of NATOA at 11 n.6.

¹⁶ See, e.g., Comments of Coalition at 11-12; Time Warner at 10.

may vary substantially over time, however, so that a rate-setting methodology that is appropriate at the initial date of regulation for both tiers of service may not be appropriate much later for both tiers of service. Moreover, after the initial rates have been set for a tier, those rates will change over time, pursuant to the going forward rules governing rate increases. As this occurs, our concern for tier neutrality in rates and rate-setting will likely not be as acute as in this period of transition to regulation. We recognize that over time, the cost structure of cable services from tier to tier may legitimately evolve to the point where consistent rate treatment across tiers might be overly restrictive. Accordingly, we have decided to grant cable operators the flexibility to use different rate-setting methods across tiers after the passage of one year of initial rate regulation so that bona fide structural and operational changes may be made as rate-making proceeds.

12. We take this opportunity to respond to the specific arguments that cable operators have made in support of differential treatment of basic and cable programming tiers. The first is that a tier-neutral approach is not necessary to achieve the goals of rate regulation. Specifically, cable commenters contend that as long as regulators are entitled to consider a cable system's overall costs and rates for all regulated services, then operators will be unable to shift costs from tier to tier.¹⁹ One commenter suggests that the Commission should require any operator who elects cost-of-service treatment of the non-basic tier to demonstrate that its overall return for both basic and cable programming services is reasonable.²⁰

13. We acknowledge that, in reviewing the cost-of-service showings made by operators for cable services, regulators will need to examine how costs are allocated among the regulated tiers. We have adopted and are in the process of developing additional cost allocation rules that will help to accomplish this goal.²¹ However, even with cost allocation rules in place, the Commission, in evaluating a cost-of-service showing for non-basic service, cannot call into question the rates charged for basic service without undermining the Cable Act's shared jurisdictional scheme. Basic tier rates generally are regulated by local franchising authorities. Therefore, in most instances, even where we uncover

unreasonable cost-shifting, we could not compel the operators to justify their rates across all tiers and adjust them accordingly.²²

14. The second argument made by cable commenters has to do with the creation of rules that remove incentives for cost-shifting. Specifically, cable commenters argue that they have no incentive to manipulate the rate process under the Commission's price cap regime. Specifically, they allege that since operators can pass through programming costs directly to subscribers as external to the benchmark rates, they can effectively recover such costs without having to shift them disproportionately to the tier regulated by cost-of-service.²³ They also observe that if an operator attempts to lower its programming costs on the basic tier, the Commission's external price cap adjustment rules require the operator to decrease the price of its basic service to reflect the reduction in costs.²⁴ Thus, operators believe it is not possible for them to manipulate costs between tiers under price cap rate regulation.

15. These arguments address the ability of operators potentially to manipulate the rate process in the context of our future price cap regime, but they do not address the probability that operators might engage in such practices now, while initial rates are being set. We believe that a tier-neutral approach is important to diminish any incentive or opportunity for operators to manipulate the initial rate-setting process to warrant the adoption of a requirement of consistent rate approaches as a solution to the problem.

²² If we required operators electing cost-of-service for the upper tier and benchmark for the lower tier to justify their overall return for both basic and cable programming services, as Continental Cablevision suggests, we would effectively be imposing a cost-of-service showing for both services. Not only would this be undermining the jurisdiction of the local franchising authority to regulate rates, but it would also be second-guessing the authority's benchmark analysis. The Cable Act vests in franchising authorities the primary responsibility to regulate basic rates and only in limited instances do we regulate basic rates. See *Rate Order* at para. 55.

²³ NCTA Comments at 16; TCI Comments at 8. We reject TCI's argument that the Commission's proposed solutions to the "gaming" problem come "dangerously close to taking editorial control over the placement of programming." TCI Comments at 8. To the extent that TCI raises First Amendment concerns, we have found that rate regulation under the 1992 Cable Act pursuant to content-neutral standards does not implicate the First Amendment. See *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd at 5588 n. 30. (1993). See also *Daniels Cablevision, Inc. v. FCC*, Civil Action No. 92-2292, slip op. at 13 (D.D.C. Sept. 16, 1993) (holding that the rate regulation provisions of the 1992 Cable Act are compatible with the First Amendment).

²⁴ TCI Comments at 16.

As the cable operators suggest, the future price cap regime may effectively prevent operators from shifting basic service programming costs to the non-basic tier. As we gain experience in rate regulation, we will reevaluate our position in light of these arguments. For the time being, however, we will require consistent rate approaches across tiers to guard against cost-shifting retreating strategies that subvert the initial rate-setting process.

16. We are also not persuaded that consistent rate treatment abandons the Cable Act's dichotomy between local and federal regulation of the different tiers, as cable operators allege. We have previously rejected the argument that the statute requires different substantive rate-setting standards.²⁵ As we have observed before, the Cable Act establishes different procedural regulatory schemes rather than a dichotomy of substantive rate standards for the regulation of service tiers. Accordingly, the statute's procedural dichotomy does not require that we allow cable operators to pick and choose substantive rate-setting standards.

17. Cable commenters also have not demonstrated that requiring consistent rate-setting across tiers will increase the number of cost-of-service showings made either at the Commission or at the local level. Indeed, other commenters contend the opposite.²⁶ We expect cable operators to submit cost-of-service showings in every case where such a showing is essential to ensure that systems are allowed to recover their costs plus a reasonable return. Furthermore, even if consistent rate treatment were to produce a greater number of cost-of-service proceedings, the preservation of the tier neutral benchmark system and the protection it affords subscribers (i.e., elimination of the incentive for operators to shift costs), outweighs the administrative burden posed by such additional proceedings.

18. In essence, the cable operators urge us to allow them flexibility to pick and choose between benchmark and cost-of-service regulation in order to enable them to maximize total revenues derived from all regulated tiers. However, as we have noted previously in this docket, there is no "constitutional or statutory requirement that the Commission's regulatory scheme must enable operators to select the option that maximizes their

¹⁹ Joint Parties Comments at 12; Continental Cablevision Comments at 4; Media General Comments at 3.

²⁰ Continental Cablevision Comments at 4.

²¹ See *Cost-of-Service Notice* supra at note 5.

²⁵ See *Rate Order*, 8 FCC Rcd at 5875-76; *First Order on Reconsideration* at paras. 31-36.

²⁶ See supra note 12.

financial position."²⁷ Moreover, as discussed above, the cable operators' proposal would undermine our policies regarding tier neutrality and cost shifting, which are designed to protect consumers from excessive rates. We therefore will require cable operators to use a consistent method of rate-setting for all regulated tiers during the first year of regulation.

19. For any cable operators that have become subject to regulation of basic or cable programming services and have filed rate justifications before the effective date of the amendment to Section 76.922(b) adopted herein, we will apply the following procedures. Where the cable operator has selected one rate-setting approach for one tier, the operator is bound to select the same rate-setting approach for all other tiers that become subject to regulation within one year of the date of initial regulation. Any such cable operator will have thirty (30) days from the effective date of this *Third R & O* to change a rate-setting justification filed prior to the effective date of this order. In such cases, the amended filing will govern initial rates as of the date it is filed. In this circumstance, the operator may rely, if it chooses, on its initial rate justification to justify its rates from September 1, 1993, (when potential refund liability would begin) until the date of its amended filing. Where a cable operator has already filed justifications for both basic and cable programming service tiers, and has selected different rate-setting approaches for different tiers of service, we will require such operators to establish consistent rate-setting methodologies for the period after the effective date of this order. Specifically, in such cases, the operator must refile within thirty (30) days of the effective date of this order, the rate-setting approach for one of the tiers, and this rate-setting election will govern initial rates for that tier as of the date it is filed. As in the first circumstance described above, cable operators who have filed inconsistent rate justifications may rely on those initial rate justifications to justify rates from September 1, 1993, until the date of their amended filings.

20. Finally, because we are not requiring consistent rate justification indefinitely, we perceive no need to adopt rules today to govern the sharing of cost-of-service data among franchising authorities or between franchising authorities and the Commission. Rather, as we stated in the

Rate Order at para. 149, we will review the franchising authority's cost-of-service determination on appeal pursuant to Section 76.944 of our rules to determine if there is a rational basis for that decision. To resolve any uniformity problems, if there is a complaint on file at the Commission regarding cable programming services tier rates at the same time an appeal is filed, we will endeavor to consider the complaint and the appeal simultaneously. We will, however, reverse the franchising authority's determination, and remand the case to the franchising authority, only if there is a misapplication of an existing Commission rule or policy.²⁸ If the Commission makes a determination on a cable programming services complaint based on a cost-of-service showing, the local franchising authority should use the analysis developed by the Commission with respect to the allocation of costs among tiers when evaluating any subsequent cost-of-service showing for the basic tier.

V. Administrative Matters

21. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis with respect to the *Third Report and Order* is as follows:

Need and purpose for this action: This action is taken to preserve the integrity of the tier neutrality and rate averaging principles underlying the benchmark regulatory approach established in the *Report and Order* and *Further Notice of Proposed Rulemaking* in MM Docket 92-266.

Summary of issues raised by comments in response to the Initial Regulatory Flexibility Analysis: No comments were received in response to the request for comments to the Initial Regulatory Flexibility Analysis.

Significant alternatives considered and rejected: The Commission considered and rejected allowing cable operators to choose different rate-setting methods across tiers when establishing initial rates.

VI. Ordering Clauses

22. Accordingly, it is Ordered That, pursuant to authority granted in Sections 4(i), 4(j), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j),

²⁸ Although this may on occasion result in different resolutions of question of fact by the Commission and the local franchising authority, this is a result contemplated by the Act in creating a dual jurisdiction regulatory scheme for cable rates. Moreover, we anticipate that in most cases, the second regulator will be informed by the decision reached by the first regulator.

303(r), and 543, this *Third Report and Order* is Adopted amending Part 76 of the Commission's rules, 47 CFR Part 76, as indicated.

23. It is further ordered That, the Secretary shall send a copy of this *Third Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

24. It is further ordered That the requirements and regulations established in this *Third Report and Order* shall become effective upon publication in the Federal Register.²⁹

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.
William F. Caton,
Acting Secretary.

Rule Change

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 CABLE TELEVISION SERVICE

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

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 553 as amended, 106 Stat. 1460.

2. Section 76.922 is amended by revising paragraph (b)(1)(i) and the introductory text of paragraph (b)(1)(ii) to read as follows:

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

* * *

(b) * * *

(1) The permitted per channel charge on the initial date of regulation shall be, at the election of the cable operator, either

(i) A charge determined pursuant to a cost-of-service proceeding; or

(ii) The charge specified in paragraphs (b)(1)(i) (A), (B) or (C) of this section as applicable. Provided, however, that if within one year of becoming subject to initial regulation of one service tier, a cable operator becomes subject to initial regulation of another service tier or tiers, the cable operator must elect the same method of determining the permitted per channel charge for all

²⁹ For reasons set forth in note 3 *supra*, we find good cause for making our amendments to Section 76.922(b) effective upon publication in the Federal Register. See 5 U.S.C. 553(d)(3).

²⁷ See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rod 5585, 5588 (1993), 58 FR 43816, August 18, 1993.

regulated service tiers. The cable operator must maintain a consistent method for determining the permitted per channel charge across all service tiers for a period of one year from the date that the cable operator first becomes subject to regulation on either the basic service or cable programming service tiers.

* * * * *

Appendix

Note: This appendix will not appear in the Code of Federal Regulations.

Comments

MM Docket No. 92-266

Austin, Texas, *et. al*
Cable Operators and Associations
Cablevision Industries, *et. al*
Community Antenna Television Association
Continental Cablevision, Inc.
Falcon Cable TV, *et. al*
GTE Service Corporation
Massachusetts Community Antenna
Television Commission
Media General Cable of Fairfax County, Inc.
Municipal Franchising Authorities
National Association of Telecommunications
Officers and Advisors, *et. al*
National Cable Television Association
New York State Commission on Cable
Television
Tele-Communications, Inc.
Time Warner Entertainment Co., L.P.

Reply Comments

Austin, Texas, *et. al*
Cable Industries Corp., *et. al*
Continental Cablevision, Inc.
GTE Service Corporation
KBLCOM, *et. al*
Media General Cable of Fairfax County, Inc.
National Cable Television Association
Time Warner Entertainment Co., L.P.
Viacom International, Inc.

[FR Doc. 93-29325 Filed 11-29-93; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR parts 37 and 38

[Docket No. 48463]

RIN 2105-AB53

Transportation for Individuals with Disabilities

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Final rule.

SUMMARY: The Department is amending its rules implementing the Americans with Disabilities Act (ADA) in several respects. The first change would extend until July 1994 the compliance date for retrofitting key rail station platforms

with detectable warnings. The second modification would except a particular model of lifts from the requirement that transportation providers permit standees to use lifts. The third change would modify the Department's procedures for responding to requests for equivalent facilitation determinations. The fourth change clarifies the responsibility of transit providers to make seat or wheelchair securement space available to people who need it. The fifth amendment would reflect a recent statutory change in the name of the Department's transit agency from the Urban Mass Transportation Administration (UMTA) to the Federal Transit Administration (FTA). The sixth change would modify the good faith efforts that Amtrak and commuter rail operators would have to make in order to lease used rail vehicles. The Department is also making two minor technical corrections to its rule establishing standards for accessible vehicles.

EFFECTIVE DATE: This rule is effective December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., room 10424, Washington, DC. 20590. (202) 366-9306 (voice); (202) 755-7687 (TDD). Copies of the final rule are available in alternative formats on request.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Department published its notice of proposed rulemaking (NPRM) on the issues covered by this rule on November 17, 1992. At the request of commenters, the original January 19, 1993, comment closing date was extended through February 19, 1993. The Department received over 550 comments on the NPRM, most of which came from individuals with disabilities or organizations representing them, state and local agencies working on disability matters, state and local transportation agencies, and equipment manufacturers.

I. Detectable Warnings

Background

Under appendix A of part 37, which adopts as part of a DOT regulation the Architectural and Transportation Barriers Compliance Board (Access Board) guidelines for accessible facilities, sections 10.3.1 and 10.3.2, require that an accessible rail station have a 24-inch wide detectable warning strip running the entire length of the platform edge. The warning strip must

include a pattern of "truncated domes" (i.e., small raised rounded surfaces) as required by section 4.29 of appendix A. The purpose of the detectable warning is to inform blind or visually impaired passengers that they are nearing the platform edge. The warning must be of a contrasting color (i.e., dark vs. light) and texture (i.e., truncated domes vs. smooth surface), as well as (in the case of interior surfaces) differing from the platform in resiliency and sound-on-cane contact.

The Department stated in the NPRM that having an adequate detectable warning system to warn blind and visually impaired passengers that they are near a platform edge is a vital safety matter for these passengers. For example, in one rapid rail system lacking adequate detectable warnings, according to testimony from blind passengers at a 1992 public hearing on the system's proposed key station plan, 15 blind or visually impaired passengers have fallen off the platform in recent years (at least one of them was killed by a train). At the same time, the Department was aware that rail operators had expressed a number of concerns about the detectable warnings requirement. For example, a petition that the Access Board and the Department received, prior to the issuance of the NPRM, from several rail operators cited what they called "extraordinary costs" and unanswered questions about the materials' "durability, maintainability * * * safety, and usability by persons with visual and mobility impairments." The petition requested that the detectable warnings standard be suspended, pending further research.

In issuing the NPRM, the Department stated that the existing design for detectable warnings standard fulfills detectability and safety requirements. Nevertheless, the Department said that rail operators may have legitimate concerns about the installation of detectable warning materials as they retrofit key stations for accessibility. These concerns include the possibility of adhesive failures and "lift-off" (i.e., the corners of segments of the materials may come up) as well as durability. For example, if the corners of a tile segment curl up, people can trip on them. If passengers expect detectable warning materials to be on the edge of the entire platform, and several feet of material is missing because the adhesive has failed, someone could fall off the platform because the expected warning was absent.

In the NPRM, the Department emphasized that its concerns were neither about the basic design of the

detectable warnings or their usefulness to people with vision impairments. Rather, they went to the question of how best to apply detectable warning materials to an existing station platform in a retrofit situation. The Department said that these concerns do not apply with the same force to a new construction situation, where detectable warnings can be made an integral part of the platform design (e.g., through concrete stamping or other methods not involving retrofit). The NPRM also noted that the Department's concerns did not relate to the cost of installing detectable warnings in key stations. To the extent that installation of detectable warnings involves an extraordinarily expensive structural change to a particular station, the rail operator could use the cost of the installation as part of its rationale for requesting an extension of time to make the key station accessible.

The Department's proposal was based on a belief that rail operators may need additional time to resolve concerns over adhesion, durability, and maintainability of detectable warning materials in the context of key station modifications. Consequently, the NPRM proposed to extend for 18 months the key station compliance date with respect to detectable warnings. Under the present rule, except where the Department has extended time for completion of modifications to a key station, rail operators had to make key stations accessible by July 26, 1993. This means, of course, that detectable warnings were to be in place by that date. Under the proposal, rail operators would have had until January 26, 1995, to complete installation of detectable warnings.

Comments

A substantial number of commenters opposed the Department's proposal, asserting that the detectable warnings requirement, as written, should go into effect without any postponement. We received this comment from 101 commenters, 80 of whom were disability organizations or individuals with disabilities. These were primarily, but not exclusively, from the blind community. Thirteen of the remaining comments were from manufacturers of detectable warnings and associated products, with four from state or local agencies working on disability matters and two each from state or local transportation agencies and other commenters.

The comments from the disability community emphasized the safety need for detectable warnings, particularly for blind and visually impaired persons.

They mentioned numerous cases of persons falling off platforms in various rail systems (18 in a system other than the one mentioned in the NPRM), sometimes resulting in death or injury. These situations, some of which were recounted by fall victims themselves in detail, were in addition to cases in which visually-impaired passengers almost fell off, or had become very fearful of walking on, rail station platforms.

Some letters mentioned the need for detectable warnings for persons who use dogs, as well as those who use canes, as a mobility aid. A number mentioned the crowded, noisy, distracting atmosphere of rush hour train stations as being a situation in which a tactile cue like a detectable warning is particularly important. Comments mentioned successful experiences with detectable warnings in some systems. They also asked why we seemed to assume that detectable warnings shouldn't be installed until we were sure they were maintenance-free, when we do not assume this for any other component of a rail system.

The manufacturers said that the problems the NPRM had cited with adhesion, lift-up, etc. of detectable warning materials had been the result of a combination of first-generation materials and improper installation and/or maintenance by rail properties. Current products (including some developed specifically for the rail platform market), they asserted, had solved these problems, and no delay in installation requirements was needed.

Fourteen commenters supported the NPRM provision as drafted. Nine of these were state or local transportation agencies, four were disability community commenters, and one was a state or local agency working on disability matters. Seven additional commenters favored longer delays.

The basic view of these commenters was that the proposed extension of the completion date was needed to address the concerns cited in the NPRM. In particular, transit authorities said that safety (e.g., a potential tripping hazard), durability, and maintainability questions about detectable warnings had not been answered satisfactorily. (Since few transit authorities have actually installed detectable warnings to date, most commenters could not assert that they had directly experienced problems, however.) One rail operator cited a 1991 study performed by a consultant for DOT that noted a number of problems that had occurred in early installations of detectable warnings. Some commenters expressed particular concern about detectable warnings at

outdoor stations in the winter, with respect to snow and ice removal and potential slipping hazards to passengers.

Some commenters pointed out that the American National Standards Institute (ANSI) had not adopted a detectable warnings standard, drawing the conclusion that this placed the viability of the current Federal standard in question. Others said that they did not want to spend substantial sums of money on detectable warnings until there was certainty about what design would best answer the concerns that have been raised. Two organizations that represent a constituency consisting primarily of persons with mobility impairments said that additional research was needed on the issue of whether detectable warnings were an obstacle or hazard to persons with mobility impairments.

In support of its request for an indefinite, or, alternatively, five-year, postponement of the requirement, a rail operator cited the need to look at safety, durability, and maintainability issues, which it said current DOT research has not addressed. It said that while new products have been developed, they have not yet been independently tested. Another transit property also asked for a 5-year delay, while a third suggested making the requirement effective in July 1995, to coincide with the one-car-per-train requirement. Making the requirements effective at the same time made sense, they said, because they relate to an accessible car-station interface. Four rail operators suggested that the 18 months should start to run from the time that FTA or the Access Board completed its research on detectable warnings.

A few comments alluded to reported opposition to detectable warnings on the part of one organization representing individuals with visual impairments. However, this organization did not comment on the NPRM, and there were no comments to the NPRM from any blind or visually impaired individuals or organizations representing them opposing detectable warnings on rail station platform edges.

Among other comments on this subject, one of the rail operators mentioned above thought that the postponement should apply to new and altered platforms as well as those being retrofitted. It also mentioned a technical safety concern relating to the interface of the detectable warning strip and the yellow safety stripe at the platform edge. A disability community commenter suggested handrails, as well as detectable warnings, at intervals along platforms. Another commenter said the Access Board specification for

detectable warnings should be made more precise, and that the "pathfinder" design had some international acceptance. A transit provider said that, in case the Access Board changed its standard, detectable warnings that had been installed in the meantime should be grandfathered.

DOT Response

This issue is a difficult one, because the comments favoring and opposing the proposed 18-month delay both make reasonable and persuasive points. It is important to remember that the NPRM never raised the issue of *whether* detectable warnings should be installed on rail platform edges, only the issue of *when* installation should be completed. The discussion below pertains to this timing issue.

While manufacturers' and consumers' comments assert that cited problems concerning the materials have largely been solved, it is clear that rail operators are not persuaded that their concerns about installation, safety, durability, and maintainability have been fully addressed. From a transportation policy point of view, requiring materials to be installed without providing a reasonable amount of time for rail operators to resolve these very practical issues could be counterproductive. Disability group comments expressing concern about the effects of detectable warnings on transit accessibility for persons with mobility impairments are also worthy of consideration. Finally, the need of transit properties for time to determine which specific detectable warning product is best for their systems and to go through their procurement processes is reasonable to take into account.

The rulemaking record also provides a sound basis for the propositions that detectable warnings address a significant safety need for persons with impaired vision and that an effective tactile cue that a person is reaching the platform edge is very important, particularly given factors in the rail station environment that may diminish the utility of aural and other cues to persons with impaired vision. It is fair to conclude from comments to the rule that one of the consequences of having a serious visual impairment is the need to concentrate very hard on mobility and orientation matters that sighted persons handle routinely. All it takes is a brief moment of fatigue, or distraction, or disorientation, in the complex and sometimes confusing environment of a rail station, and even a very experienced blind rail system user can make what, in context, is a fatal misstep. Detectable warnings can prevent that last mistaken step.

The drop-offs at the edges of rail station platforms create a clear, documented, and unacceptable hazard to persons with visual impairments. The Department believes that existing research adequately documents the detectability of warning materials meeting or exceeding the current Access Board requirement, and, therefore, that the materials will mitigate this hazard. These factors make a persuasive case for not unduly postponing the installation of detectable warning materials that can prevent death, injuries, and narrow escapes of the kind cited in the record.

The case of installing detectable warnings sooner, rather than later, is made stronger by three publicly reported deaths of visually impaired passengers in the time since the comment period for this rulemaking closed, of which the Department takes notice. In none of these cases did the platform edge have a detectable warning. In Boston, a blind individual received fatal injuries when she fell off a platform and received a shock from the electrified "third rail." According to a press report of the incident, the individual asserted that, had a detectable warning strip been in place, her fall would have been prevented. In New York, a blind passenger using a guide dog fell off a platform and was killed by an oncoming train. In this case, according to a press report, the platform's edge was "marked with abrasive material" in an attempt to provide a warning to persons with vision impairments. It is the Department's understanding that this material involves a flat, painted-on surface with a sandpaper-like texture, which does not meet the Federal standard for a detectable warning. In the most recent case, a visually impaired individual apparently fell onto the tracks of a Maryland commuter rail system and was also fatally injured by a train. In addition, in December 1992, a visually impaired passenger fell to the tracks on Baltimore's subway system, and was struck and injured by a train.

The 1991 study referred to by a commenter ("Innovative Solutions for Disabled Transit Accessibility" Thomas J. McGean, October 1991) evaluates detectable warning materials that had been installed up to that time. The study affirms the excellent detectability of materials meeting Federal standards. The study does not point to any safety problems created by the materials for passengers, beyond those that can be inferred from "lift-off." Different transit properties that have installed the tiles reported different experiences with cleaning and maintenance, some reporting substantial difficulty and

others having few problems. (The study suggests that frequent cleaning is important.) Lift-off problems were reported in some stations (for example, one BART station had a high lift-off rate, of about a third of tiles after 18 months, while other BART stations had low lift-off rates in the 1-10 percent range.) The study identified cleaning, maintenance, and installation deficiencies as factors leading to lift-off, in addition to adhesive failure and temperature effects. The study also noted ongoing efforts at improving detectable warning materials. The conclusion the Department draws from this study is that there are documented practical problems with the installation and maintenance of some detectable warning materials, which it is necessary for transit properties to address if their installation of detectable warnings is to be successful. However, nothing in the study suggests that these problems appear insuperable; nor does the study suggest that a prolonged period of time (e.g., five years) is needed for rail operators to solve these problems.

Any decision in a matter of this kind requires the Department to strike a balance between the legitimate concerns that commenters have expressed. We believe that a reasonable balance is best achieved, in this case, by allowing transit authorities a limited period of time to resolve practical problems concerning detectable warnings. Doing so will increase the likelihood that, when installed, detectable warnings do their intended job well without creating unnecessary problems for either passengers or transit providers. In other words, we believe it is more important to do the job right than to do it immediately. Given the urgency of the concerns expressed by disability community comments and the strong safety rationale for installing detectable warnings, the Department will not adopt the proposed 18-month extension, however.

The Department will extend the required completion date for the installation of detectable warnings in existing key stations to July 26, 1994. The Department believes that this period should give transit properties sufficient time to work out the installation and related problems to which the comments referred, without unduly delaying the addition of this important safety feature. The Department encourages rail operators to install detectable warnings before the required date.

This extension applies only to detectable warnings. Other key station accessibility requirements, if not covered by a time extension for

"extraordinarily expensive" changes, must still have been completed by July 26, 1993. For any key station modification which, because of an extension of time for extraordinarily expensive changes, does not have to be completed until after July 26, 1994, detectable warnings would have to be installed on the same date as other modifications had to be completed.

The existing detectable warning requirement, without change or postponement, will continue to apply to construction of new stations and alterations of existing stations platforms. One commenter suggested that the postponement apply here, as well. Given that installation methods not raising the technical problems said to affect retrofit are possible in this situation (even though retrofit-like methods could also be used), the Department does not believe that a postponement is necessary.

The Department believes that, given the safety-related reasons for a detectable warning requirement documented in the rulemaking record, deleting the requirement postponing it indefinitely, or postponing it for a lengthy period (e.g., five years) would be inadvisable. (Deletion or indefinite suspension, in any case, would appear to exceed the scope of the notice for this rulemaking.) Moreover, unlike the falls of visually-impaired persons from platforms, allegations mentioned by some commenters that properly installed detectable warnings cause safety problems (e.g., for persons using crutches or walkers, or pedestrians wearing high heels) are not supported by any evidence of these problems actually having occurred. It would not be appropriate for the Department to indefinitely suspend a requirement that addresses a known safety problem on the basis of speculation about a safety problem that has not been shown to exist.

The Department is aware that the Access Board (along with the Department of Justice and Department of Transportation) proposed to suspend, until January 1995, the requirement for detectable warnings in contexts such as curb ramps and parking lots, with the expectation of conducting further research. The Access Board's proposed action does not apply to detectable warnings on rail platform edges. Even should the ultimate result of the Access Board's rulemaking process be to delete or modify the requirement for detectable warnings in other contexts, there would not be any inconsistency between the Access Board guidelines and DOT regulations, since the guidelines serve

as minimum requirements that DOT may exceed in its standards.

The situations covered by the Access Board proposal are distinguishable from the situation of rail platform edges, and a decision by the Access Board to delete the detectable warning requirement in the former would not affect the requirement in the latter for detectable warnings on platform edges, particularly given the safety consequences of falls from rail station platforms. The Department is free to consider safety or reliability information that may be developed by the Access Board as it reviews detectable warnings.

If, as the result of research the Department is conducting, or further research or determinations by the Access Board, some change in the technical standard for detectable warnings may be indicated, the Department is free to propose changes, which can exceed the minimum requirements of the Access Board guidelines. If the technical standard changes at this or any future point, the Department could, in appropriate situations, apply the grandfathering provision in the Department's ADA rule (49 CFR 37.9) to avoid making rail operators re-install detectable warnings meeting the revised standard.

We decline to adopt suggestions that the completion date for installation of detectable warnings be established only after certain research is completed. Rail properties need to begin working now with manufacturers and construction contractors to ensure that materials are installed in the way that best serves everyone's interest in adhesion, durability, and maintainability. (It is our understanding that a number of rail properties have begun this task.) It is not fair to burden research with the expectation that it will solve all practical problems, which probably are best worked out in actual planning and installation. The extension we have provided in this rule should be adequate to permit an aggressive effort by rail properties to address successfully practical concerns about installation. We also do not believe there is a strong connection between the July 1995 one car per train deadline (which pertains mostly to making service for persons with mobility impairments accessible) and the installation of detectable warnings (which pertains mostly to making platforms safe for visually impaired passengers).

In response to the disability group concerns about possible problems detectable warnings may create for people with mobility impairments, the FTA is available to work with rail properties that have installed or are

testing detectable warning systems (and users of these systems who have mobility impairments) to determine whether such problems exist and merit any change in the detectable warning requirement. The ability to gather this information is an additional reason for providing the extension.

The Department believes that one commenter's concerns about the relationship of the yellow safety strip or "bumpers" (i.e., strips of material along the outward-facing edges of platforms to protect the rail cars and platform edges from abrasion) on some of its platforms can be addressed successfully without regulatory change, and the Department will work with rail operators to that end. Safety railings on platforms, while perhaps useful for safety of visually impaired passengers, could create crowding and obstacles for other passengers, and might not be practical given that train doors do not always stop at the same point on a platform.

II. Use of Lifts by Standees

Background

The background of this issue is the following: § 37.165 of the Department's final ADA rule (49 CFR part 37; 56 FR 45584, 45640; September 6, 1991) provides that

The entity shall permit individuals with disabilities who do not use wheelchairs, including standees, to use a vehicle's lift or ramp to enter the vehicle.

In the preamble to the final rule, the Department made the following comments on the origin of this provision:

In the NPRM, the Department neglected to discuss the use of lifts by standees, an oversight that was brought to our attention by a substantial number of disability community commenters. Some comments from transit providers suggested there be limits on the use of lifts by standees (e.g., only where there are handrails, only in a wheelchair provided by the transit authority). Other transit provider comments opposed all standee lift use on safety grounds.

Consistent with requirements of the ADA discussed above, persons who use canes or walkers and other standees with disabilities who cannot readily climb steps into a vehicle must be permitted to use lifts. This is important, among other reasons, because based on the premise that standees can use lifts, the Access Board found it unnecessary to establish a standard for stair riser heights in vehicles that use lifts. Lifts meeting Access Board standards will have handrails. We have some doubts about the practicality of providers carrying wheelchairs on their vehicles to use for standees who are trying to access a vehicle via the lift. (56 FR 45618).

The explanatory appendix to part 37 made the following comment on the regulatory requirement:

People using canes or walkers and other standees with disabilities who do not use wheelchairs but have difficulty using steps (e.g., an elderly person who can walk on a plane without use of a mobility aid but cannot raise his or her legs sufficiently to climb bus steps) must also be permitted to use the lift, on request. (56 FR 45755).

Before the issuance of the NPRM, the Department of Transportation received a number of inquiries from transportation providers concerning whether the regulatory provision on standees applies to all existing bus lifts, or only to lifts meeting the requirements of 49 CFR part 38 (the Department's adoption as its standards of the Architectural and Transportation Barriers Compliance Board accessibility guidelines for vehicles). The concern expressed by these providers was essentially that some older models of lifts have no handrails or other means of preventing a standee user from losing his or her balance and falling while the lift is in operation. For safety and liability reasons, they would prefer not to carry standees on such lifts. DOT staff were also contacted by a disability group representative who believes that standees should be accommodated on all lifts.

The NPRM proposed to modify the existing regulatory language to require transit providers to allow standees on lifts which meet part 38 specifications, or which are equipped with handrails or other devices that can assist standees in maintaining their balance. The Department sought comment on whether this change would improve safety significantly, what the effect would be on consumer access to vehicles, and any other measures that could mitigate any potential safety problems involved with the use of existing lifts while having less significant effects on access.

Comments

This issue attracted, by far, the greatest number of comments of any issue raised by the NPRM. A total of 434 commenters opposed the NPRM's proposal, asserting that the existing regulatory provision should be retained. The bulk of these—388 comments—were from individuals with disabilities or organizations representing them. Many of these letters appeared to be generated by a letter-writing campaign organized by the Disability Rights Education and Defense Fund (DREDF), whose comment is probably the most thorough and typical statement of the disability community's objections to the proposal.

The DREDF comment asserted, first, that there was no documentation of

actual safety problems—data or even anecdotes—necessitating a restriction on the kinds of lifts that standees should be allowed to use. It is inappropriate under a nondiscrimination statute like the ADA, DREDF argued, to restrict the availability of a service to persons with disabilities based only on speculation or apprehension about possible risks. DREDF also cited ADA legislative history favoring use of lifts by standees, the practices of some transit agencies which allow standees to use lifts, extra costs to paratransit systems if ridership on fixed route systems by standees were limited, and a general concern that ADA regulations' protections should not be weakened. DREDF also alluded to a DOT study which found that standees could use lifts successfully.

Five transit agencies noted that they provided lift service to standees without significant problems. Thirty-one state and local agencies working with disability matters, three private transportation providers, three members of Congress (Senators Harkin and Kennedy and Representative Mineta), and four other commenters also advocated not changing the existing rule.

Seventeen commenters supported restricting the access of standees to lifts. Thirteen of these, including ten state or local transportation agencies, supported the NPRM proposal. (An equipment manufacturer, a person with a disability, and one other commenter also took this position). Four transit agencies went further, asserting that standees should be permitted to use only those buses that fully meet the requirements of 49 CFR part 38 (the Department's ADA vehicle standards). The latter group of commenters said that, in a vehicle that did not meet part 38 standards, there were safety concerns relating to door height, smoothness of operation etc. that continued to exist even if the lift had a handrail.

The main point of all commenters supporting a restriction on the use of lifts by standees was the safety risk that they believe to exist. That is, they were concerned that passengers would lose their balance and fall, hit their head, or otherwise suffer injury, as the result of using the lift. These commenters, while making clear their concern about safety, did not present any data or anecdotal information that would demonstrate that an actual safety problem existed. Their focus was on what could happen.

One partial exception to this pattern was a comment from the New York State Public Transportation Safety Board (PTSB). PTSB described, in some detail, how the design and operation of a particular lift model (a front door

"arc" lift manufactured by EEC, Inc., Model 141) could create specific hazards for standees. The problematical features of this lift, as described by the PTSB, include an unusually low head clearance, the tilting action of the lift as it enters the bus, and a "pit" between the lift and the bus entrance when the lift is fully raised but has not entered the bus. All of these, in PTSB's view, present clear safety hazards to standees. The Department understands that this lift model is no longer being manufactured, but remains in use on some buses.

Three commenters suggested that buses carry an on-board wheelchair that standees could choose to use. Five requested that handrails be retrofitted on existing lifts, and one commenter opposed this idea. One disability community commenter said it was inappropriate for a transit authority to require a standee to use the handrail (i.e., because it might be more dangerous for the passenger to release his or her grip on a walker or crutch to grasp the handrail); one transit authority wanted to be able to impose such a requirement. A disability community commenter suggested that if a passenger decided using a lift was too dangerous, that passenger should be eligible for paratransit.

DOT Response

The key point in the comments, from the Department's point of view, is the absence of information documenting a safety problem resulting from standees' use of lifts. The ADA is a nondiscrimination statute, intended to ensure, among other things, that people with disabilities have access to transportation services. To permit a transportation provider to exclude a category of persons with disabilities from using a device that provides access to a vehicle on the basis of a perceived safety hazard, absent information in the rulemaking record that the hazard is real, would be inconsistent with the statute (c.f., the discussion of the transportation of three-wheeled mobility devices in the preamble to the Department's September 6, 1991, final ADA rule (56 FR 45617)). While we understand the concerns of transit agency commenters about the potential safety risks that may be involved, the Department does not have a basis in the rulemaking record for authorizing a restriction on lift use by standees.

The DOT study alluded to by commenters, with some qualifications, does support the proposition that standees may use lifts safely and successfully. The qualifications are that, in the situations studied, both drivers

and standee users were trained in the proper use of lifts, handrails were available on the lifts, and operators were not required to transport a standee who refused to use the handrail. The Department strongly urges such training programs to transit providers, both as a way of improving customer service and of reducing any risks which transit providers believe may be created by the use of lifts by standees.

With the exception noted below, the existing § 37.165(g)—which requires transportation providers to permit standees to use lifts, without restriction—will remain in effect. The one exception concerns the EEC, Inc. "arc" lift cited in the New York PTSS comment. The information cited in the comment—which is consistent with the Department's information about this lift model—provides a reasonable basis for believing that its operation may be particularly hazardous to standees. For this reason, the final rule will permit transit providers who operate buses having this lift model to deny its use to standees (who would, of course, be eligible for paratransit as a result). The transit provider would notify users (e.g., via signage on affected buses) that this particular bus lift was not available to standees.

Transit providers may, if they choose, provide additional accommodations, such as retrofitted handrails on existing lifts or on-board wheelchairs. The Department encourages the use of such accommodations, in the interest of improving safe and convenient service to passengers. We do not believe that such accommodations should be required, however. Requirements by transportation providers that passengers use a particular accommodation are also inappropriate under the ADA. For example, if a transit authority provides an on-board wheelchair for use by standees on lifts, the transit authority could not insist that a standee sit in the wheelchair in order to use the lift.

III. Equivalent Facilitation

Background

Part 38 and appendix A to part 37 both contain provisions concerning equivalent facilitation. The language reads as follows:

Departures from particular technical and scoping requirements of these guidelines by the use of other designs or technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility [vehicle]. (49 CFR part 37, Appendix A, § 2.2; 49 CFR part 38, 38.2)

Further, 49 CFR 37.7 and 37.9 establish a procedure through which an entity

may obtain a determination of equivalent facilitation for vehicles and facilities, respectively:

For purposes of implementing the equivalent facilitation provision * * * a determination of compliance will be made by the (Federal Transit) Administrator or the Federal Railroad Administrator, as applicable, on a case-by-case basis. An entity wishing to employ equivalent facilitation * * * shall submit a request to UMTA or FRA, as applicable, and include the following information: (list of five items of information).

When it drafted these provisions, the Department contemplated a small number of requests from transit providers concerning individual facility or vehicle problems on which flexibility in applying accessibility standards could be provided without negative effects on accessibility. The Department, instead, received a substantial number of requests for equivalent facilitation determinations from manufacturers relating to approvals of particular products. The NPRM proposed to amend the rule to reflect this situation, allowing equivalent facilitation requests to be made by manufacturers and by transportation entities in other modes.

In drafting the existing regulatory language, the Department also assumed that equivalent facilitation requests would be made in the rail and transit contexts. Consequently, the rule gives equivalent facilitation authority to the FTA and FRA Administrators. There could be other situations in which requests were made pertaining to airport, highway, or other DOT programs. To cover these situations, we proposed changing the rule to authorize the Administrator of the concerned operating Administration to make such a determination, with the concurrence of the Assistant Secretary for Policy and International Affairs in order to ensure consistency.

The NPRM also proposed to clarify the public participation obligations of parties asking for equivalent facilitation determinations. The obligations would differ depending on whether the requester is a transportation entity or a manufacturer (in the latter case, the requirement would be a consultation requirement, since there is not a single community whose representatives could be involved in the normal sense of public participation).

Comments

Commenters had a variety of points of view on this proposal. Sixteen commenters—including both transportation agencies and disability community commenters, among others—favored the NPRM's proposal.

Most of these commenters did not provide a detailed basis for their position, essentially endorsing the NPRM's rationale. One of these commenters opposed the public hearing requirement, while another said public participation should receive greater emphasis.

Nine commenters, eight of whom were equipment manufacturers, said that there should not be separate equivalent facilitation procedures for public and private entities. They viewed the separate provision for private entities (such as manufacturers) as being a less stringent standard, which would allow manufacturers to circumvent the standards in the rule. The less stringent standard could also encourage misleading or unethical practices, they said. They suggested that public and private entities be subject to the same procedures. One of these commenters simply said that the current rule should be left in place, without change. Two manufacturers thought equivalent facilitation should be deleted from the rule altogether.

Four state or local transportation agencies asked that FTA (or perhaps APTA) publish, in the *Federal Register* or elsewhere, its approvals of requests for equivalent facilitation, so that other transit authorities would know what products or accommodations were acceptable.

Other comments addressed a variety of concerns. One transit authority thought it should be able to self-certify as to an equivalent facilitation, without FTA approval. A manufacturer said it should not have to consult with disability groups: it had tried, and had a hard time finding anyone who would respond or who was technically qualified to help. A transit authority and an "elderly and handicapped" advisory committee sought assurance that transit authorities and advisory committees, respectively, would be part of the public participation process. Other commenters expressed concern about delay (one suggesting a 90-day FTA deadline) or about misleading manufacturer claims of "DOT approved" products.

Four commenters—three disability community commenters and one manufacturer—said that there should be no equivalent facilitation available for detectable warning materials. The main reason for this was that, in the commenters' view, detectable warning materials need to be uniform nationwide. Moreover, some fairly subtle differences among designs could produce differences in effectiveness that might not be apparent to manufacturers or DOT.

DOT Response

The first issue to be considered is whether the Department should continue making equivalent facilitation determinations. The Department of Justice and the Access Board do not. In non-transportation contexts, if a facility owner determines that it has made an equivalent facilitation, it need not seek approval or confirmation from any Federal agency. The facility owner simply makes its own determination, which may be challenged in court or administrative proceedings as failing to comply with ADA requirements. The commenters who suggested that DOT not make equivalent facilitation determinations are suggesting, in effect, that DOT adopt this approach.

Taking this approach would have the advantage of reducing the Department's administrative workload. However, the Department continues to believe that making equivalent facilitation determinations available also has important advantages. It is a way of encouraging innovation and the application of newer technologies. It is a way of providing needed flexibility as entities find ways to achieve accessibility in ways that differ from existing design standards. It is a way of providing a reasonable sense of security to regulated parties that accessibility modifications they make will comply with ADA requirements. Making decisions about equivalent facilitation in advance, through an agency administrative process, seems more efficient than making them after the fact, through litigation.

For these reasons, the Department will continue to make equivalent facilitation determinations. We believe the changes to the process suggested in the NPRM—concerning the ability of the various DOT operating administrations to make these determinations and having different procedural steps for manufacturers and transportation providers—are reasonable. Manufacturers and transit providers are different kinds of entities, in different situations (e.g., a transit authority has a local "public" for which it makes sense to hold a public hearing; a manufacturer probably does not). Consequently, we have not adopted the comments of manufacturers that opposed different procedures for manufacturers and transportation providers. While the procedures differ, the substantive standard is not less stringent for manufacturers: any party seeking a determination of equivalent facilitation must convince the Department that its proposal really results in equivalent or greater access. If manufacturers or other

parties have a problem in obtaining disability group input, they can document their efforts as part of their application for an equivalent facilitation determination. The Department can also attempt to assist in obtaining disability group input.

The equivalent facilitation sections for vehicles and facilities are basically parallel. In view of the close relationship between the coverage of airport facilities under the ADA, section 504 of the Rehabilitation Act, and the Air Carrier Access Act, the Department is clarifying the facilities section to specifically include requests for equivalent facilitation that arise concerning airport facilities under all three statutes. Since the situation of air carriers making equivalent facilitation requests concerning facilities at public airports is very similar to that of the airport sponsors themselves, we decided to apply the same procedural requirements to both.

The Department believes that the suggestion to publish its equivalent facilitation determinations is a good one. While it need not be part of this rule, the Department will take appropriate steps to provide general notice of these decisions. The Department will also endeavor to respond to requests for equivalent facilitation as soon as possible. A regulatory deadline would not be that useful, in our view.

We do not believe that it is necessary to prohibit applications for equivalent facilitation concerning detectable warnings. Equivalent facilitation is a useful provision of the Access Board guidelines and the Department's rules that applies to all accessibility features. Technology and product differentiation in the detectable warnings field does not stand still, and equivalent facilitation is an appropriate means to recognize evolution and innovation in these products. At the same time, as a matter of policy, the Department will scrutinize closely applications for equivalent facilitation concerning detectable warning materials to make sure that, in all respects, a proposed "equivalent" material truly provides equal or greater detectability and safety benefits. The uniformity considerations mentioned by commenters will be taken into account in this process.

The Department also wants to clarify an equivalent facilitation decision it had earlier made concerning detectable warnings. Engineered Plastics, Inc. (EPI) requested a finding of equivalent facilitation for its detectable warning product, "Armor-Tile." This product did not meet the original Access Board design requirement for detectable

warnings. On January 10, 1992, the FTA Administrator determined that the criteria under 49 CFR 37.9 had been met, and he advised EPI that the detectability of the Armor-Tile warning strip was equivalent to those meeting the Access Board guidelines.

At the time the Access Board guidelines were published, the specifications for detectable warning surfaces were ambiguous, particularly concerning the pattern and design of the surfaces. This was due, in part, to the absence of a diagram illustrating the required pattern. Several manufacturers of detectable warning surfaces requested clarification. The FTA Administrator sent letter to a number of manufacturers to inform them that their designs appeared to meet the dimensional requirements intended by the Access Board.

The FTA has learned that some manufacturers have been marketing products as "U.S. Government-Approved" or "ADA-Approved." Other firms claim that their products comply, even though the products differ from those diagrams which were submitted to FTA. The FTA never intended its letters to be used as product endorsements or certifications of compliance. Any such use of these letters, or reliance on these letters in marketing materials, is unauthorized, and potential customers for these products should disregard claims of this kind. The final rule specifically bars claims by manufacturers that an equivalent facilitation determination constitutes a product endorsement by the Department.

Since the FTA issued these letters, the Access Board published Bulletin #1 in May 1992, clarifying many of the ambiguities left by its original guidelines and containing a diagram illustrating the pattern prescribed for detectable warning surfaces. Bulletin #1 also contains a list of products which are claimed by their manufacturers to meet the technical specifications for detectable warnings, but the Access Board neither reviews products for compliance nor certifies the suitability of such products or systems for the purposes for which they are intended.

The Department believes that the ambiguities in the original Access Board guidelines have been resolved by Bulletin #1, and that FTA letters concerning compliance with the Access Board requirements are no longer necessary. Prospective purchasers are advised to evaluate carefully all proposed products and designs against the Access Board requirements for compliance with technical

specifications, applications, designs, and installations.

IV. Obligation To Ensure the Availability of Seating

Background

An FTA regulation (49 CFR 609.15(d)) requires FTA-assisted public transit authorities to designate priority seating near the front of vehicles for elderly and handicapped persons. Parts 37 and 38 require wheelchair securement locations in vehicles, though transit providers may have fold-down seats that other persons can use when there are no wheelchair users on the vehicle. Transit providers have asked the Department whether they have an obligation under the ADA to direct other passengers to move from designated priority seats or from fold-down seats over a wheelchair securement location when a passenger with a disability enters the vehicle.

There are reasons to have such a requirement. For example, a wheelchair user may not be able to use a bus safely and securely if he or she does not have access to the securement location. An ambulatory person with a disability may be unable to stand for long periods, meaning that the person would be effectively denied access to transportation if he or she could not sit down on a crowded bus. It is not enough, under the ADA, to permit a passenger with a disability to enter a vehicle; the person must be able to use the vehicle for transportation. The availability of seating or securement space is an integral part of accessibility (i.e., having a vehicle that is "readily * * * usable by" an individual with a disability).

To clarify this point, the NPRM proposed adding to § 37.167 a new paragraph spelling out this obligation, which would apply to private as well as public transportation entities.

Comments

Twenty-six commenters favored the NPRM approach. The proposal received support from both disability community commenters (12) and state or local transportation agencies (10), with the remainder of comments (4) coming from state or local agencies working on disability matters. These commenters generally viewed the proposal as a necessary step to make sure that passengers with disabilities actually received transportation service they could use. Only one commenter, a person with a disability, opposed the proposal, saying it could cause litigation and a backlash against disabled riders.

There were several suggestions for refining the NPRM proposal, some of

which came from some of the same commenters who endorsed the proposal in general. Nine transit agencies and one state or local agency working on disability matters suggested that the final rule require the driver to ask someone sitting in a priority seat to move, or to make good faith efforts to clear the seat, but not to have to enforce the request. Some of these commenters expressed the concern that requiring enforcement could lead to confrontations between drivers and passengers or could disrupt service.

Two commenters suggested that it would help matters if the standard language on the sign above the priority seats was reworded to say that other passengers were expected to move if a disabled person showed up and needed the space. Two commenters suggested that, when possible, the driver seat disabled passengers on the right side of the bus, so that the driver could see if a passenger had problems with the securement device or needed a stop announcement. One transit agency asked that the rule state that non-disabled passengers do not have to get off the bus to let a disabled passenger on.

One transit agency suggested explicitly excluding paratransit vans used for passengers with disabilities from this policy. A disability community commenter objected to the "to the extent practicable" clause for rail systems. Commenters also asked for more clarification or guidance on certain subjects. Four transit agencies asked for guidance on how to identify people with hidden disabilities for priority seating purposes (one of these commenters suggested that such passengers self-disclose). Three transit agencies asked how to prioritize among different disabled passengers (e.g., ambulatory vs. non-ambulatory). One of these commenters also asked for guidance on how to treat non-disabled personal care attendants who may want to sit next to a disabled passenger.

DOT Response

Virtually all commenters supported the proposal, agreeing with the rationale articulated above. The Department will adopt the proposal, believing that requests by drivers that other passengers move from priority seats will assist in making transportation genuinely accessible for passengers with disabilities. At the same time, given the modification discussed below, it will not impose onerous new duties on transit personnel.

We agree with the commenters who suggested modifying the proposal to specify that drivers or other personnel

on vehicles not be required to enforce a request for someone to move from a priority seat (e.g., by physically removing a recalcitrant passenger or parking the bus and calling the police.) This "ask, don't tell" approach should help to avoid confrontations and disruptions of service while resulting in seating being made available for passengers who need priority seating in the vast majority of instances. The rule would not impose a uniform procedure; each transit system may devise a means best suited to its operations to carry out the requirement. It would be appropriate for transit operators to establish a mechanism based on local circumstances, consultation with drivers, and input from the local community. The FTA will oversee such mechanisms as part of the triennial review process.

We also agree with the commenters who suggested that priority seating signs should specify that non-disabled persons should move to make room for someone who needs a priority seat. This will inform passengers that such a request may be made and that they should comply. The requirement will apply to newly acquired vehicles and to new or replacement signs in existing vehicles.

The Department is not making other suggested changes in the regulatory language, believing that reasonable implementation of the provision can address the issues commenters raised. As a matter of guidance, we believe it is reasonable that if a passenger with a "hidden" disability wants a driver to ask someone to make room for use of a priority seat, the individual should tell the driver about the disability. A driver cannot be expected to intuit the existence of a disability that is not apparent. A personal care attendant (as distinct from a friend or traveling companion) should be permitted to sit near a person with a disability, since the attendant may be needed to perform personal tasks for the individual with a disability during the course of the ride.

Priority seats are intended for people with disabilities in general; a seat near the front of the bus may be as important to a blind individual as to an individual with a mobility impairment. Obviously, a wheelchair user needs access to a securement location. It is appropriate for a driver, under this provision, to ask an ambulatory passenger with a disability to move to clear a wheelchair securement location when needed to accommodate a wheelchair user. If a van is being used for specialized paratransit service for individuals with disabilities, then this provision—which addresses only to those vehicles covered by FTA

regulations concerning priority seating—would not apply.

The language which applies the "driver request" provision to rail systems only to the extent practicable seems necessary. If, as in many systems, the only transit employee aboard the train is in the driver's compartment in the front car, the employee will not be in a position to see who is sitting in a priority seat in the third car in the train, let alone ask someone to move from it. If there are conductors or other transit personnel present in the passenger compartments, they would make the request when they saw a situation calling for it.

V. Name Change

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) changed the name of the former Urban Mass Transportation Administration (UMTA) to Federal Transit Administration (FTA). The NPRM proposed updating the terms used in the Department's ADA rules to conform to the ISTEA changes. FTA previously made this change for all the regulations in Subchapter VI of Title 49 of the Code of Federal Regulations. However, the ADA regulation is in Subchapter I of that Title. Not surprisingly, there were few comments on this matter; a handful of commenters noted it approvingly. The Department is adopting this proposal without change.

VI. Lease of Used Rail Cars by Amtrak and Commuter Rail Operators

Background

Section 37.87 of the Department's ADA regulation provides that when Amtrak or a commuter authority purchases or leases or used intercity or commuter rail car, it must either obtain an accessible car or demonstrate the good faith efforts it has made to do so. These good faith efforts are the same that apply to purchases of used rolling stock (e.g., buses) by mass transit systems—an initial solicitation for accessible vehicles, a nationwide search for accessible vehicles, including advertising in trade publications and contacting trade associations.

Before the NPRM was issued, Amtrak told DOT staff that this provision is not appropriate in an important situation in which it leases rail cars. Frequently (e.g., at holiday times or other high-demand periods), Amtrak must obtain additional cars from nearby commuter rail authorities on short notice for a short period of time. For example, Amtrak may need a certain number of cars to carry overflow traffic at Thanksgiving or Christmas on the

Northeast Corridor. Amtrak may have a standing reimbursable agreement with Boston or Washington/Baltimore area commuter authorities to borrow commuter rail cars on short notice in these situations. There is no time to make a nationwide search or advertise in trade publications, and no point in seeking cars from distant commuter authorities (which may not meet dimensional requirements for Northeast Corridor service and which would take too long to arrive).

To accommodate this situation, the Department proposed to add a new paragraph to this section, which would allow good faith efforts to be documented in a different way. For a short-term lease of commuter rail cars (i.e., for a period of seven days or less; the Department sought comment on whether this is the appropriate period), Amtrak and commuter authorities could have, in standing agreements with one another, a provision requiring available accessible cars to be provided before other cars in the donor agency's fleet. The proposal would also require that if the borrower had a choice of obtaining cars from more than one source, it would obtain the cars from a source that had accessible cars before it obtained inaccessible cars from the other source.

For example, suppose there is a standing agreement between Amtrak and Commuter Authority B. The agreement would provide that when Amtrak borrowed cars from B, B would make available and Amtrak would take its accessible cars first, to the extent they are available (e.g., B would not have to provide cars that were in the repair shop or that it was impossible to make available for Amtrak's use in a timely fashion). Also, if Amtrak could obtain cars for a particular area of its service from both Commuter Authority B and Commuter Authority C, and C had more accessible cars available than B, Amtrak would borrow C's accessible cars before it borrowed inaccessible cars from B.

Comments

Eleven commenters (eight disability community commenters, Amtrak and one other transit provider, and one state or local agency working on disability matters) favored the NPRM approach. Other commenters suggested adding safeguards to ensure accessibility. One disability community commenter and one state or local agency working on disability matters recommended that, regardless of other considerations, each train always have at least one accessible car (after July 1995, presumably). Another disability community commenter suggested a requirement that

the lease of rail cars by Amtrak not be permitted to decrease the overall percentage of Amtrak's fleet that was accessible (i.e., that if Amtrak leased inaccessible cars from a commuter authority, Amtrak would have to obtain accessible cars elsewhere in order to maintain the same percentage of accessibility in its fleet that it had before the lease).

DOT Response

The Department will adopt the proposed provision, which appears workable both to Amtrak and disability community commenters. We do not believe it is necessary to add language concerning the "one car per train" requirement. The existing rule's one car per train requirement applies, after July 1995, both to Amtrak and the commuter authorities involved. Every train that Amtrak or a commuter authority operates after that date will have to have an accessible car. Even when Amtrak leases an entire consist from a commuter authority after that date, the consist will necessarily include at least one accessible car, assuming the commuter authority lessor is in compliance with the rule. We assume that Amtrak would prefer to lease trains from commuter authorities that comply with their ADA obligations. Given the differences between the bus and rail contexts, and the specific requirements that the ADA applies to rail, it does not seem appropriate to apply the "don't diminish fleet accessibility percentage" rule to this situation.

VII. Automatic Fare Vending Machines

Background

In Appendix A to part 37, section 10.3.1(7) requires automatic fare vending equipment and related devices to conform, among other things, to the requirements of sections 4.34.2–4.34.4, concerning automated teller machines (ATMs). Last fall, the Access Board proposed amending its guidelines for ATMs. See 57 FR 41006, September 8, 1992. The proposed changes concerned the "reach range" (e.g., how far a person must reach to operate the controls) of ATMs. The ADA requires the Department to adopt standards consistent with the Access Board guidelines. In the NPRM, the Department sought comment on how the proposed Access Board ATM standard modifications would affect automatic fare vending and collection systems.

Comments

Nine commenters supported the NPRM proposal to adopt the Access

Board proposed amendment for ATMs, which would also apply to fare vending systems. These commenters included four disability community commenters, two transit agencies, two state or local agencies working on disability matters, and one consultant. One commenter said that, if the specifications were changed, existing models of fare vending systems had installed should be grandfathered, so that retrofit was not necessary.

Five commenters (four transit agencies and a manufacturer) said that the purpose and design of fare vending machines were different enough from those of ATMs to warrant a different standard, at least with respect to some specifications. Five commenters (one of the above transit agencies plus four of the commenters who favored the NPRM provision) said that additional provision (e.g., a voice synthesizer system) was needed on fare vending systems to serve persons with visual impairments.

DOT Response

The Department believes that the Access Board proposal, which focuses on the reach range requirements for ATMs, is reasonable for fare vending machines as well. The two types of machines are similar enough in the operations that consumers must perform that the same requirements make sense in both contexts. Those commenters who asserted that the two types of machines should have different requirements did not provide sufficient information on which the Department or the Access Board could base a separate standard.

The Access Board standard already requires information about the machines to be provided in a way that persons with impaired vision can use; specifying a voice synthesis capability does not seem necessary and is, in any event, beyond the scope of a proposal focusing on reach range. The Department would apply 49 CFR 37.9, concerning grandfathering, to fare vending systems that meet the current ADA standard in the same way as that section applies to other features of transportation facilities.

In a joint Access Board/DOT rule issued prior to this document, the Department adopted the proposal discussed above. The comments to this docket were considered in context of that rulemaking and were reflected in its preamble. Because this action had already been taken, it is not necessary for this document to further amend the regulatory text.

VIII. Technical Corrections to 49 CFR Part 38

In the course of preparing this document, DOT staff noticed two technical errors in 49 CFR part 38. The first was the designation of the last paragraph of § 38.113 (concerning signage) as (3), rather than (e). The second was the omission of part of the language concerning wheelchair locations in § 38.125(d)(2). This language should parallel that of § 38.95(d). The rule makes these corrections, which have no substantive effects.

Regulatory Analyses and Notices

This rule is not a significant rule under the Executive Order on Regulatory Planning and Review. It is a significant rule under the Department's Regulatory Policies and Procedures, since it amends the Department's Americans with Disabilities Act rule, which is a significant rule. We expect economic impacts to be minimal, so we have not prepared a regulatory evaluation. There are no Federalism impacts sufficient to warrant the preparation of a Federalism assessment. The Department certifies that the rule will not have a significant economic impact on a substantial number of small entities. This is because the economic effects of the rule in general should be minimal; to the extent that the rule reduces costs (e.g., by delaying the requirement for completing the installation of detectable warnings), this beneficial effect will affect only large entities.

Issued this 25th day of October, 1993, at Washington, D.C.

Federico Peña,

Secretary of Transportation.

For the reasons set forth in the Preamble, the Department of Transportation amends 49 CFR parts 37 and 38 as follows:

PART 37—[AMENDED]

1. The authority citation for 49 CFR part 37 continues to read as follows:

Authority: Americans with Disabilities Act of 1990 (42 U.S.C. 12101–12213); 49 U.S.C. 322.

2. In 49 CFR part 37, the words "Urban Mass Transportation Administration" are changed to the words "Federal Transit Administration" in every instance in which those words appear; the letters "UMTA" are changed to the letters "FTA" in every instance in which those letters appear; and the words "UMT Act" and "Urban Mass Transportation Act" are changed to the words "FT Act" and "Federal Transit

Act" in every instance in which those words appear, and the definition of "FT Act" is moved to the proper alphabetical order.

3. In § 37.7, paragraph(b) is revised to read as follows:

§ 37.7 Standards for accessible vehicles.

(b)(1) For purposes of implementing the equivalent facilitation provision in § 38.2 of this subtitle, the following parties may submit to the Administrator of the applicable operating administration a request for a determination of equivalent facilitation:

(i) A public or private entity that provides transportation services and is subject to the provisions of subpart D or subpart E this part; or

(ii) The manufacturer of a vehicle or a vehicle component or subsystem to be used by such entity to comply with this part.

(2) The requesting party shall provide the following information with its request:

(i) Entity name, address, contact person and telephone;

(ii) Specific provision of part 38 of this subtitle with which the entity is unable to comply;

(iii) Reasons for inability to comply;

(iv) Alternative method of compliance, with demonstration of how the alternative meets or exceeds the level of accessibility or usability of the vehicle provided in part 38 of this subtitle; and

(v) Documentation of the public participation used in developing an alternative method of compliance.

(3) In the case of a request by a public entity that provides transportation services subject to the provisions of subpart D of this part, the required public participation shall include the following:

(i) The entity shall contact individuals with disabilities and groups representing them in the community. Consultation with these individuals and groups shall take place at all stages of the development of the request for equivalent facilitation. All documents and other information concerning the request shall be available, upon request, to members of the public.

(ii) The entity shall make its proposed request available for public comment before the request is made final or transmitted to DOT. In making the request available for public review, the entity shall ensure that it is available, upon request, in accessible formats.

(iii) The entity shall sponsor at least one public hearing on the request and shall provide adequate notice of the hearing, including advertisement in

appropriate media, such as newspapers of general and special interest circulation and radio announcements.

(4) In the case of a request by a private entity that provides transportation services subject to the provisions of subpart E of this part or a manufacturer, the private entity or manufacturer shall consult, in person, in writing, or by other appropriate means, with representatives of national and local organizations representing people with those disabilities who would be affected by the request.

(5) A determination of compliance will be made by the Administrator of the concerned operating administration on a case-by-case basis, with the concurrence of the Assistant Secretary for Policy and International Affairs.

(6) Determinations of equivalent facilitation are made only with respect to vehicles or vehicle components used in the provision of transportation services covered by subpart D or subpart E of this part, and pertain only to the specific situation concerning which the determination is made. Entities shall not cite these determinations as indicating that a product or method constitute equivalent facilitations in situations other than those to which the determinations specifically pertain. Entities shall not claim that a determination of equivalent facilitation indicates approval or endorsement of any product or method by the Federal government, the Department of Transportation, or any of its operating administrations.

4. In § 37.9, paragraph (d) is revised to read as follows:

§ 37.9 Standards for accessible transportation facilities.

(d)(1) For purposes of implementing the equivalent facilitation provision in section 2.2 of appendix A to this part, the following parties may submit to the Administrator of the applicable operating administration a request for a determination of equivalent facilitation:

(i)(A) A public or private entity that provides transportation facilities subject to the provisions of subpart C this part, or other appropriate party with the concurrence of the Administrator;

(ii) With respect to airport facilities, an entity that is an airport operator subject to the requirements of 49 CFR part 27 or regulations implementing the Americans with Disabilities Act, an air carrier subject to the requirements of 14 CFR part 382, or other appropriate party with the concurrence of the Administrator.

(B) The manufacturer of a product or accessibility feature to be used in the facility of such entity to comply with this part.

(2) The requesting party shall provide the following information with its request:

(i) Entity name, address, contact person and telephone;

(ii) Specific provision of appendix A to this part with which the entity is unable to comply;

(iii) Reasons for inability to comply;

(iv) Alternative method of compliance, with demonstration of how the alternative meets or exceeds the level of accessibility or usability of the vehicle provided in appendix A to this part; and

(v) Documentation of the public participation used in developing an alternative method of compliance.

(3) In the case of a request by a public entity that provides transportation facilities (including an airport operator), or a request by an air carrier with respect to airport facilities, the required public participation shall include the following:

(i) The entity shall contact individuals with disabilities and groups representing them in the community. Consultation with these individuals and groups shall take place at all stages of the development of the request for equivalent facilitation. All documents and other information concerning the request shall be available, upon request, to members of the public.

(ii) The entity shall make its proposed request available for public comment before the request is made final or transmitted to DOT. In making the request available for public review, the entity shall ensure that it is available, upon request, in accessible formats.

(iii) The entity shall sponsor at least one public hearing on the request and shall provide adequate notice of the hearing, including advertisement in appropriate media, such as newspapers of general and special interest circulation and radio announcements.

(4) In the case of a request by a manufacturer or a private entity other than an air carrier, the manufacturer or private entity shall consult, in person, in writing, or by other appropriate means, with representatives of national and local organizations representing people with those disabilities who would be affected by the request.

(5) A determination of compliance will be made by the Administrator of the concerned operating administration on a case-by-case basis, with the concurrence of the Assistant Secretary for Policy and International Affairs.

(6) Determinations of equivalent facilitation are made only with respect to transportation facilities, and pertain only to the specific situation concerning which the determination is made.

Entities shall not cite these determinations as indicating that a product or method constitute equivalent facilitations in situations other than those to which the determinations specifically pertain. Entities shall not claim that a determination of equivalent facilitation indicates approval or endorsement of any product or method by the Federal government, the Department of Transportation, or any of its operating administrations.

5. Section 37.47(c)(1) is revised to read as follows:

§ 37.47 Key stations in light and rapid rail systems.

(c)(1) Unless an entity receives an extension under paragraph (c)(2) of this section, the public entity shall achieve accessibility of key stations as soon as possible, but in no case later than July 26, 1993, except that an entity is not required to complete installation of detectable warnings required by section 10.3.2(2) of appendix A to this part until July 26, 1994.

6. Section 37.51(c)(1) is revised to read as follows:

§ 37.51 Key stations in commuter rail systems.

(c)(1) Except as provided in this paragraph, the responsible person(s) shall achieve accessibility of key stations as soon as possible, but in no case later than July 26, 1993, except that an entity is not required to complete installation of detectable warnings required by section 10.3.2(2) of appendix A to this part until July 26, 1994.

7. Section 37.87 is amended by redesignating the present paragraph (d) as paragraph (e) and adding a new paragraph (d) to read as follows:

§ 37.87 Purchase or lease of used intercity and commuter rail cars.

(d) When Amtrak or a commuter authority leases a used intercity or commuter rail car for a period of seven days or less, Amtrak or the commuter authority may make and document good faith efforts as provided in this paragraph instead of in the ways provided in paragraph (c) of this section:

(1) By having and implementing, in its agreement with any intercity railroad or commuter authority that serves as a source of used intercity or commuter rail cars for a lease of seven days or less, a provision requiring that the lessor provide all available accessible rail cars before providing any inaccessible rail cars.

(2) By documenting that, when there is more than one source of intercity or commuter rail cars for a lease of seven days or less, the lessee has obtained all available accessible intercity or commuter rail cars from all sources before obtaining inaccessible intercity or commuter rail cars from any source.

8. In § 37.165, paragraph (g) is revised to read as follows:

§ 37.165 Lift and securement use.

(g) The entity shall permit individuals with disabilities who do not use wheelchairs, including standees, to use a vehicle's lift or ramp to enter the vehicle. *Provided*, that an entity is not required to permit such individuals to use a lift Model 141 manufactured by EEC, Inc. If the entity chooses not to allow such individuals to use such a lift, it shall clearly notify consumers of this fact by signage on the exterior of the vehicle (adjacent to and of equivalent size with the accessibility symbol).

9. In § 37.167, a new paragraph (j) is added, to read as follows:

§ 37.167 Other service requirements.

(j)(1) When an individual with a disability enters a vehicle, and because of a disability, the individual needs to sit in a seat or occupy a wheelchair securement location, the entity shall ask the following persons to move in order to allow the individual with a disability to occupy the seat or securement location:

(i) Individuals, except other individuals with a disability or elderly persons, sitting in a location designated as priority seating for elderly and handicapped persons (or other seat as necessary);

(ii) Individuals sitting in or a fold-down or other movable seat in a wheelchair securement location.

(2) This requirement applies to light rail, rapid rail, and commuter rail systems only to the extent practicable.

(3) The entity is not required to enforce the request that other passengers move from priority seating areas or wheelchair securement locations.

(4) In all signage designating priority seating areas for elderly persons and persons with disabilities, or designating

wheelchair securement areas, the entity shall include language informing persons sitting in these locations that they should comply with requests by transit provider personnel to vacate their seats to make room for an individual with a disability. This requirement applies to all fixed route vehicles when they are acquired by the entity or to new or replacement signage in the entity's existing fixed route vehicles.

PART 38—[AMENDED]

10. The authority citation for 49 CFR part 38 is revised to read as follows:

Authority: Americans with Disabilities Act of 1990 (42 U.S.C. 12101–12213); 49 U.S.C. 322.

§ 38.113 [Amended]

11. The last paragraph of § 38.113, entitled *Signage* and currently designated as paragraph (3), is redesignated as paragraph (e).

12. In § 38.125, paragraph (d)(2) is revised to read as follows:

§ 38.125 Mobility aid accessibility.

(d) * * *

(2) *Wheelchair or mobility aid spaces.* Spaces for persons who wish to remain in their wheelchairs or mobility aids shall have a minimum clear floor space 48 inches by 30 inches. Such spaces shall adjoin, and may overlap, an accessible path. Not more than 6 inches of the required clear floor space may be accommodated for footrests under another seat provided there is a minimum of 9 inches from the floor to the lowest part of the seat overhanging the space. Seating spaces may have fold-down or removable seats to accommodate other passengers when a wheelchair or mobility aid user is not occupying the area, provided the seats, when folded up, do not obstruct the clear floor space provided (See Fig. 2).

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INTERSTATE COMMERCE COMMISSION

49 CFR Part 1180

[Ex Parte No. 282; Sub-No. 17]

Railroad Consolidation Procedures: Definition of, and Requirements Applicable to, "Significant" Transactions

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: The Commission is revising the definition of "significant transaction" in rail carrier consolidation cases, and is eliminating certain requirements currently applicable to applications seeking approval of significant transactions. The revised definition will rationalize the rail carrier consolidation scheme, and the reduction of required information will relieve rail carriers of the burden of submitting information not relevant to the statutory standard applicable to such cases.

EFFECTIVE DATE: This action is effective on December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar (202) 927–5660; TDD for hearing impaired: (202) 927–5721.

SUPPLEMENTARY INFORMATION: On August 10, 1992, at 57 FR 35559, we requested comments on our proposals (1) to revise the 49 CFR 1180.2(b) "significant transaction" definition, and (2) to reduce the required contents of applications seeking approval for significant transactions.

Comments were filed by the Association of American Railroads (on behalf of itself and its member railroads) and by Patrick W. Simmons (on behalf of the Illinois Legislative Board of the United Transportation Union).

We have concluded that the 49 CFR 1180.2(b) "significant transaction" definition should be revised, and that the required contents of significant transaction applications should be reduced, as we proposed.

For further information, see the Commission's printed decision. To obtain a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. Assistance for the hearing impaired is available through TDD service (202) 927–5721.

We reaffirm our preliminary conclusion that this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

We also reaffirm our preliminary conclusion that this action will not have a significant impact on a substantial number of small entities. The revision of the "significant transaction" definition merely rationalizes our analysis of the dividing line between significant transactions and minor transactions. The reduction of the required contents of significant transaction applications may have a limited impact on small