§ 57.4113 [Redesignated as § 57.4112]

8. Section 57.4113, entitled "*For what purposes may grant funds be spent?*", is redesignated as § 57.4112.

§ 57.4114 [Redesignated as § 57.4113]

9. Section 57.4114, entitled "*What additional Department regulations apply to grantees?*", is redesignated as § 57.4113.

§ 57.4115 [Redesignated as § 57.4114]

10. Section 57.4115 is redesignated as 57.4114 and is revised to read as follows:

§ 57.4114 "What other audit and inspection requirements apply to grantees?"

Each entity which receives a grant under this subpart must meet the requirements of 45 CFR part 74 concerning audit and inspection.

§ 57.4116 [Redesignated as § 57.4115]

11. Section 57.4116, entitled "*Additional conditions.*", is redesignated as § 57.4115.

[FR Doc. 94–30410 Filed 12–9–94; 8:45 am]
BILLING CODE 4160–15–M

FEDERAL MARITIME COMMISSION

46 CFR Parts 514, 552, 560, and 572

[Docket No. 94–15]

New Filing Fees

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission ("Commission" or "FMC") is establishing filing fees for (1) tariffs, (2) service contract essential terms ("ETs"), (3) financial reports in the domestic offshore trades, (4) general rate increases in the domestic offshore trades, and (5) agreements. The services the Commission provides on these filings confer special benefits to identifiable members of the public.

EFFECTIVE DATE: Effective January 11, 1995, except for 46 CFR 514.21(i), which will be effective on April 1, 1995.

FOR FURTHER INFORMATION CONTACT: Jeremiah D. Hospital or George S. Smolik, Bureau of Trade Monitoring and Analysis, Federal Maritime Commission, 800 North Capitol Street NW., Washington, D.C. 20573–0001, (202) 523–5790.

SUPPLEMENTARY INFORMATION:

Proceeding

The Commission published a Notice of Proposed Rulemaking in the **Federal Register** on July 28, 1994, 59 FR 38418 ("NPR" or "Proposed Rule"),[1] proposing to establish new filing fees. In the NPR, the Commission noted that the Independent Offices Appropriation Act ("IOAA"), 31 U.S.C. 9701, permits it to establish fees for services and benefits that the Commission provides to specific recipients. The primary guidance for implementation of IOAA is Office of Management and Budget ("OMB") Circular A–25, as revised July 8, 1993. OMB Circular A–25 requires that a reasonable charge be made to each recipient for a measurable unit or amount of Federal Government service from which the recipient derives a benefit, in order that the Government recover the full cost of rendering that service. OMB Circular A–25 further provides that costs be determined or estimated from the best available records in the agency, and that cost computations shall cover the direct and indirect costs to the Government of carrying out the activity.

The NPR advised that the Commission's existing filing and service fees do not include fees for certain services that appear to provide special benefits to identifiable members of the public. The Commission, accordingly, proposed to establish several new fees to reflect the full cost of services that provide special benefits to identifiable members of the public.

Fourteen entities filed comments in response to the NPR: C V International, Inc.; Tampa Port Authority; Seariders International, Inc.; the Inter-American Discussion Agreement;[2] Puerto Rico Maritime Shipping Authority ("PRMSA");[3] Matson Navigation Company, Inc.; The Joint Carrier Group ("JCG"); Hanjin Shipping Co., Ltd.; Cari-Freight Shipping Co. Ltd.; Caribbean Shipowners Association; Lykes Bros. Steamship Co., Inc. ("Lykes"); Transportation Services Incorporated; and the Japan Conferences.[4] The National Industrial Transportation League ("NIT League")[5] filed late comments, which are considered herein.

The commenters represent a variety of industry interests: individual ocean common carriers, ocean freight conferences and other aligned agreement parties, ocean freight forwarders, non- vessel operating common carriers ("NVOCCs"), a tariff publisher, a shippers' group, and a port authority.

Discussion

Tariff and ET Filing Fees

The bulk of the comments focuses on the new fees for tariff and ET filings. Those commenters opposed to the proposed fees for tariff and ET filing primarily contend that the Commission should not require carriers to pay for filings that are mandated by law; that facilitate the administering of FMC regulations; and that, they believe, benefit the shipping public as a whole.

As regards the argument that tariff and ET filings are required by law, we would point out that the Federal Communication Commission's ("FCC") imposition of fees for processing carrier tariffs has been upheld, *Electronics Industries Ass'n* v. *FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976), as has the Interstate Commerce Commission's ("ICC") imposition of fees for processing tariffs, *Central & Southern Motor Freight Tariff Ass'n* v. *U.S.*, 777 F.2d 722, 730–36 (D.C. Cir. 1985) ("Central & Southern"). The courts in these cases upheld the agencies' assessment of tariff filing fees even though tariff filing was mandated by law.

It is also argued that carriers should not pay for such filings because the purpose of the Commission's tariff filing program is to provide rate information to shippers.[6] Carriers, however, derive identifiable benefits from tariff filing. The carrier benefits of tariff filing were explained in Central & Southern, 777 F.2d at 734, n.8, in which the court observed:

The tariff-filing requirement may contribute to industry stability in at least two ways. First, it may make secret price-cutting impossible, since tariffs are of course public records and inasmuch as a motor carrier must charge the rate specified in its tariff. Second, the requirement may make instantaneous price cuts more difficult; before lowering its rates to meet or undercut the competition, a carrier must go to the trouble of filing its new proposed rates with the ICC. These statutorily provided constraints on

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[1] On the same day, the Commission also published in the **Federal Register** (59 FR 38411) a companion Notice of Proposed Rulemaking in Docket No. 94–14, Update of Existing Filing and Service Fees.

[2] Conferences represented by the Inter-American Discussion Agreement are: the Inter-American Freight Conference; Brazil/Puerto Rico and U.S. Virgin Islands Conference; River Plate/Puerto Rico and U.S. Virgin Islands Conference; and the Inter-American Freight Conference-Pacific Coast Area.

[3] See appendix A.

[4] The Japan Conferences are: the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, the Japan-Puerto Rico & Virgin Islands Freight Conference, and their member lines.

[5] The NIT League is a voluntary organization said to represent some 1,400 shippers and groups/associations of shippers conducting industrial and/or commercial enterprises, large, medium, and small, throughout the United States and internationally.

[6] For example, JCG argue that the primary purpose of tariff filing is to ensure certainty and stability in rates that enables a shipper to obtain the rates that its competitors receive.

competition, in turn, stabilize profits of individual carriers.

Our conclusion that this increased industry stability warrants the imposition of a filing fee may appear, at first blush, inconsistent with the statement . . . that a fee may not be predicated merely upon the adoption of some practice of general benefit to the industry as a whole. Such is not the case, however. The tariff system is, in a sense, a cooperative venture, sanctioned by statute and supported by the ICC, in which each carrier agrees to publish its rates, thereby foregoing the opportunity of making secret, precipitous rate cuts that would be advantageous to the carrier in the short run. In return, all the other carriers agree to similar behavior, the result of which is to stabilize prices in the industry. As already noted, this stability is one of the chief purposes underlying the tariff-filing requirement. The ICC, by accepting a carrier's tariffs, assists that carrier in fulfilling its obligation to the other carriers, even as it assists the carrier in complying with its statutory duty. Hence, in these special circumstances, the ICC's tariff-filing services benefit the individual carrier, and not merely the industry as a whole.

While the court in Central & Southern was considering the benefits of the ICC's tariff filing program to surface carriers, its observations are applicable to ocean common carriers as well.

In the NPR, the Commission recognized that there exist public benefits from tariff and ET filings, such as increased public access to carriers' rate and service information. In cases where, as here, fees have been assessed for programs conferring both public and private benefits, reviewing courts have concluded that there need only be a special private benefit to an identifiable beneficiary to justify assessment of a fee, regardless of "incidental" public benefits.[7] The court in Central & Southern concluded that "[i]f the asserted public benefits are the necessary consequence of the agency's provision of the relevant private benefits, then the public benefits are not independent, and the agency would therefore not need to allocate any costs to the public." Central & Southern, 777 F.2d at 732.

A public benefit that results from nothing more than providing a private benefit, or is a necessary consequence of the agency's providing a private benefit, would be "incidental" to the private benefit. In contrast, an "independent" public benefit is a benefit that results from additional expense or effort above and beyond providing the private benefit. In *Engine Manufacturers Association* v. *Environmental Protection Agency and Carol M. Browner, Administrator*, 20 F.3d 1177, 1180 (D.C. Cir. 1994), the court noted that "* * * the public benefits associated with cleaner air are incidental to, not independent of, that private benefit, in the sense that they are produced at no cost beyond that required to produce the private benefit."

The difference between "independent" and "incidental" benefits has been explained in a case involving the FCC as follows:

> If the Commission, in granting an equipment type approval * * * is required to incur expenses for testing or inspection, such expenses can be charged in full to the applicant. These activities have undisputed private benefits although they may also create incidental public benefits as well. But if the agency were to engage in further activity to determine whether a piece of equipment which has already been found to have no potential for creating 'harmful interference'. . . meets standards for consumer safety it would be doing so to satisfy some independent public interest, and the charge for these additional expenses could not be included in fees imposed on equipment owners. Although there may be some private benefit in safety testing, it is not a part of the service the agency must render to the manufacturer in order for him to comply with the statute: the additional tests service an independent public interest, with only incidental private benefits.

Electronic Indus. Ass'n v. *FCC*, 554 F.2d at 1115.

Given the distinction drawn between "independent" and "incidental," the NPR invited the industry to comment on whether the public benefit of tariff and ET filings is "independent" or merely "incidental" to that of tariff and ET filers, and, if "independent," to comment on what proportion of the costs to tariff-filing and ET-filing carriers should be pro-rated to reflect any "independent" benefit to the general public.

JCG contends that the benefit to shippers from tariff and ET filings is "independent" rather than "incidental," and that filers therefore should not be required to pay the full cost of tariff and ET filings. JCG refers to the Report of the Advisory Commission on Conferences in Ocean Shipping,[8] which noted that the majority of shippers supported tariff filing provisions, and stated that the provisions:

> * * * Protect the shipper by requiring that a rate filed in a tariff be available to all shippers of like transportation characteristics * * * The notion of protecting small shippers vis-a-vis larger shipper * * * is also widespread. Small shippers focus on this particular notion of common carriage, and are concerned that larger shippers will get rates and/or services that they will not be able to get.
>
> * * * Support for [Tariff Filing and Enforcement] also came from certain shippers and shippers' associations who use the filed rate as a benchmark when negotiating service contracts. Since part of the benefit to a shipper of signing a service contract is obtaining a discount from the prevailing tariff rate, knowing the rate in advance provides an effective starting point. Shippers' associations state that they also use the tariff rate as an indicator of the benefit of a collectively negotiated service contract. Shippers' associations say they may also use the tariff to discover the value of alternative service options for their members. Since tariffs identify both the rates and the conditions of service, the information is available to the association to tailor the contract to the varying needs of its members.

JCG Comments at 13–14, quoting The Advisory Commission on Conferences in Ocean Shipping Report, at 117–118 (April 1992). JCG argues further that since the initiation, implementation, and, to a larger extent, oversight and enforcement of tariff and ET filing requirements were, and are, done for the benefit of shippers and consignees, it must be concluded that such benefits are "independent."

Similarly, Lykes questions whether the 29 cents of the 34 cent tariff filing fee covering the cost of staff review is actually for the benefit of the filers. Lykes argues that ATFI was initially proposed as being for the benefit of the shipper, and that there is an "independent" rather than "incidental" public benefit from tariff and ET filings, and that fully 50 percent of the benefits of tariff and ET filings are for the public.

JCG and Lykes recommend a 50 percent reduction in any fee to be charged to a carrier or conference, arguing that at least half of the benefit of the Commission's services can be attributed to shippers. JCG further suggests that, since Commission services also benefit the general public, 50 percent may be too high a percentage to charge filers. The Japan Conferences contend that no more than one-third of the Commission's tariff and ET filing processing costs should be borne by the carrier industry.

These comments, urging that tariff and ET filing confer public benefits that are "independent" rather than "incidental," have merit. In Electronics Industries, the court observed that if an agency engages in further activity beyond that which is required to ensure statutory compliance, in order to satisfy some "independent" public interest, the charges for these additional efforts could not be included in fees assessed

[7] See *Electronic Industries Ass'n* v. *FCC*, 554 F.2d at 1114–5; Centeral & Southern, 777 F.2d at 731–32.

[8] The Advisory Commission on Conferences in Ocean Shipping was established pursuant to section 18(d) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1717(d), to conduct a comprehensive study of conferences in ocean shipping. The Advisory Commission issued a final report in April, 1992.

to private applicants. Some elements of the Commission's tariff filing program go beyond those that are necessary to ensure compliance with statutory tariff filing requirements,[9] and instead are designed to confer a benefit on the shipping public. Specifically, the requirement in 46 CFR 514.15(a) that carriers file algorithms with their tariffs facilitates shipper calculation of total applicable freight charges.

Similarly, the Commission incurs additional costs by carefully reviewing each tariff commodity description to make tariffs clearer and more accessible to the shipping public. This review goes beyond what is required by the statutory tariff filing provisions. The current practice of extensively reviewing commodity descriptions represents an additional cost and confers an independent public benefit.

At this time, it is not possible to quantify the amount of Commission costs in reviewing tariff and ET filings that are attributable to the provision of an independent public benefit. Therefore, it appears that the approach urged by the commenters—that is, the even division of these costs between filers and the public at large—is the most equitable way of resolving the issue. Consequently, the Commission is reducing the proposed tariff and ET filing fees by 50 percent.

Commenters have argued that the imposition of any tariff filing fee is an undue burden on the ocean transportation industry. They point out that the proposed filing fees would be a significant additional cost to what they have already spent to convert their tariffs to the ATFI system. Commenters also submit that the tariff filing fee could prompt carriers to file tariff information in a more generic manner, and could have a chilling effect on the filing of independent actions.

Based on the Commission's own assessment and the broad industry position that tariff and ET filing fees impose an undue burden on the industry, the Commission will seek an OMB exception for imposing these fees. Under OMB Circular A–25, an agency may request that OMB grant the agency an exception from OMB's general policy of assessing fees, permitting the agency to forego assessing fees if conditions exist to justify an exception.

In addition to those discussed above, respondents comment on a number of other issues concerning tariff and ET filing fees. These are addressed below.

JCG, PRMSA, and the Japan Conferences raise questions about the Commission's methodology in calculating the proposed fees. JCG and the Japan Conferences question the Commission's methodology as being less than thorough, and argue that the Commission was unclear in describing its time allocation methodology.[10]

As explained in the NPR, the Commission employed the best available data to calculate the proposed filing fees, employing inhouse surveys to determine the time and cost involved in providing particular services. Extensive time and motion studies are not necessarily required. See Central & Southern, 777 F.2d at 736–37. OMB Circular A–25 provides that the "full cost [of a service] shall be determined or estimated from the best available records of the agency, and new cost accounting systems need not be established solely for this purpose [setting fees]." Section 6d(1)(e). The Commission need only provide "some reasonable basis for its conclusions." Engine Manufacturers, 20 F. 3d at 1177 The methodology employed by the Commission satisfies this standard.[11]

In addition to providing an extensive explanation of the Commission's methodology to calculate its proposed fees, the NPR also indicated that a detailed summary of the data used to arrive at the proposed fees was available to the public from the Commission. To our knowledge, only one commenter availed itself of this opportunity.

In response to the comment that it is premature to implement a user fee for ATFI, the Commission explained in the NPR that OMB directed the Commission to pursue establishing a tariff filing fee in 1994. Further, the Commission employed the best available data to calculate the proposed fees. Moreover, the Commission intends to periodically update tariff filing fees, adjusting for changes in costs as warranted.

The Japan Conferences question the Commission's calculations of indirect costs assignable to fee-related services. They further question why the Commission included the proportional costs of several FMC bureaus and offices[12] that are only peripherally involved with tariff filing, suggesting that such expenses be reduced by at least 50 percent.[13]

As explained in the NPR, the FMC generally adopted the ICC's methodology for determining indirect costs because the ICC's fee schedule and methodologies have been reviewed by the courts and generally deemed acceptable.[14] See Central & Southern, 777 F.2d at 722. Although we developed an indirect cost methodology based on the ICC's experience, we nevertheless deducted a number of expenses to calculate the FMC's indirect costs. For example, the ICC employs an indirect cost item for operations overhead, which apportions senior executive time across fee-generating activities. Because we were able to account for senior executive time in each service item, a separate overhead item would be redundant. Accordingly, this ICC component was not included in the FMC's calculations. Additionally, in calculating our indirect costs, we deducted certain expenses that have no nexus with any fee activity from the office general and administrative component of the indirect cost calculation (*e.g.*, buying Census data).

In light of appeals court precedent supporting the methodology employed in calculating the FMC's indirect costs, and because of the attention given to include only those expenses that are relevant to our indirect cost calculations, the Japan Conferences' arguments are rejected.

JCG also states that a tariff filing fee may act as a disincentive to taking independent action by conference members, and further, that it could lead carriers and conferences to delay tariff filing at the expense of clarity. The Japan Conferences recommend that the Commission calculate a flat per-tariff or per-carrier/conference fee that would not have, they contend, a disabling effect on the independent action process or commodity-based tariffs. Similarly, JCG urges the Commission to consider establishing a fixed annual fee for each tariff filed to avoid repeat billings and collections and to reduce both Commission and conference/carrier administrative time and costs. JCG

[9] Section 8 of the 1984 Act, 46 U.S.C. app. 1707; section 502 of P.L. 102–582, 46 U.S.C. app. 1707a.

[10] JCG contends that it is premature to propose user fees based on services provided under a system, *i.e.*, ATFI, that is still being developed and the costs now being incurred are probably not an accurate measure of what should be allocated.

[11] See also *National Association of Broadcasters v Federal Communications Commission*, 554 F.2d 1118, 1130 (D.C. Cir. 1976), nothing that "[t]he ability to recoup both direct and indirect costs to the Government does allow for some range and latitute in effecting a reasonable attribution of costs."

[12] Office of the Commissioners, General Counsel, Bureau of Administration, and Bureau of Trade Monitoring and Analysis.

[13] The Japan Conferences urge that the proportional cost of the Office of the Secretary be entirely deducted from the indirect cost calculation.

[14] The Japan Conference also point out that the Commission's indirect costs, calculated at 99.5 percent of direct costs, is more than 50 percent higher than the ICC's indirect costs reviewed in Central & Southern, supra 777 F.2d at 726–27. However, the Japan Conferences fail to take into account that the ICC's indirect costs cited in Central & Southern were calculated almost ten years ago, and that the ICC's current indirect cost factor is 100.8 percent, slightly higher than that of the FMC.

contends that a flat fee would also create a certainty for filers from the standpoint of knowing the annual fees that will be paid for tariff filing activities.

Administrative costs may decline if the Commission implements a flat annual fee for tariff filing. A flat annual fee for tariff filing, therefore, has some appeal. Further study would be required, however, to determine the level of a cost-based fee. Also, adoption of a flat fee is beyond the scope of this rulemaking.

Lykes argues that the Commission should reserve a certain percentage of any user fees assessed for system enhancement in the future, thereby addressing a certain lack of flexibility in the current system. According to Lykes, these enhanced capabilities should include simultaneous multiple tariff access, better definition and capabilities for inland table construction and utilization, and inclusion of transport mode in through single factor rate filings. Whatever its merit otherwise, Lykes' suggestion is irreconcilable with the IOAA and OMB Circular A–25, which instruct that user fee collections not be used to offset costs of activities that are not related to the specific service the Commission is performing for an identifiable recipient.

The Japan Conferences comment that ATFI contractor costs should be pro-rated between filing and retrieval expenses, otherwise the Commission will be charging twice for the same service. As explained in the NPR, only that portion of the ATFI system cost allocated to filers was included in the proposed filing fee. Because there is no double billing of contractor costs, the Japan Conferences' concerns are unfounded.

Hanjin Shipping Co., Ltd. ("Hanjin") contends that the proposed fees constitute a tax on international trade because such fees fail to consider international comity, that is, other countries do not require such filings and fees. Hanjin argues that the Commission should not impose burdensome fees in the United States, where no such fees are assessed by foreign governments on carriers operating there. Contrary to Hanjin's assertions, the proposed tariff filing fee is not a tax. The fee is designed to recover the full cost to the Commission of performing a service that provides tariff filers with a special benefit, as mandated by OMB Circular A–25. In *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345, 351 (1974), the Court held that the assessment of specific charges to specific individuals or companies was "within the boundaries of the 'fee' system and away from the domain of 'taxes'."

The Tampa Port Authority urges that public entities, like itself, be exempted from tariff filing fees because they are exempted from the Commission's subscription fees. Exempting port authorities from paying subscription fees is a courtesy provided by the Commission, since port authorities typically request Commission issuances for informational purposes. However, tariff filing provides a specific benefit to members of the shipping public, including port authorities, similar to that gained by private entities. No distinction would appear to exist between the status of public and private tariff filers to justify the exemption of port authorities from filing fees.

To address other matters raised concerning tariff and ET filings, the Commission clarifies that: (1) The tariff and ET filing fee will apply even if the filing or ET is subsequently rejected; (2) billing for ETs will be based on a set of terms for an individual service contract rather than on each term in the set, *e.g.*, a filer of a service contract who files a set of ten essential terms for that contract will be billed a total of $1.65, not $16.50; (3) billing for tariff filing will be done according to a filer's logon identification number; and (4) to the extent possible, the Commission intends to bill filers on a monthly basis.

Agreement Filing Fees

Several commenters contend that they should not be required to pay the full cost of agreement filing because of the broad public benefit associated with such filings, but do not elaborate on the nature and extent of this public benefit. They also state that the proposed agreement filing fees will discourage regular compliance and encourage withholding important changes until such time as several changes can be filed in a single amendment.

As stated in the NPR, the processing of agreements benefits the filing parties because of the concomitant antitrust immunity conferred by the Shipping Act, 1916, 46 U.S.C. app. § 801 *et seq.*, and the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.* Agreements enable joint ratemaking or cost-cutting measures to accrue to the benefit of the signatory parties. The sales revenues or cost savings, or both, can add up to millions of dollars for one carrier, let alone several carriers. While carrier savings may eventually benefit the public, that benefit is incidental to the private benefits enjoyed by the parties to agreements filed under the Shipping Acts. Concerns that the proposed filing fee will have a dampening effect on filing agreements, or amendments thereto, are speculative at best and do not weigh against imposing the proposed filing fee.

General Rate Increase Filing Fee

Several commenters oppose the proposed filing fee for general rate increases ("GRIs") in the domestic offshore trade, contending that such filings are for the public benefit, and that the full cost of such review should not be borne by the carrier.[15] However the proposed filing fee is based on the full cost to the Commission of processing GRI filings, and not on the broader incidental benefits associated with a regulated domestic offshore trade.[16] Further, Commission review of GRIs benefits filers, in that it ensures that they comply with statutory requirements of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. section 843 *et. seq.*, *i.e.*, that filed rates be just and reasonable.

The Commission believes that carriers operating in the domestic offshore trades receive a clear and definite benefit from GRIs, and that any public benefit flowing from Commission review of such filings is "incidental" to the benefits accruing to the filers. The benefits to carriers include their potential for increased revenues, and assistance in meeting their statutory duty to charge "just and reasonable" rates. Therefore, reduction of the GRI filing fee to account for public benefit is not warranted.

Matson Navigation Company, Inc. ("Matson") regards the imposition of a new filing fee at this time as untimely It points out that the Commission is considering revisions of its methodology for determining the reasonableness of a carrier's GRIs.[17] Matson states that the new GRI fee is based on historic cost data and that there is no indication in the NPR that the Commission has yet made an analysis of what the costs will be under the proposed revised methodology. The Commission is therefore urged to defer implementation of its GRI filing fee proposal until it has developed sufficient cost experience under the new methodology to justify imposition of such a fee.

Matson's concerns themselves appear untimely, as any new GRI methodology

[15] PRMSA comments that the filing of GRIs is part of the regulatory regimen established for the benefit of the public—to ensure that the shipping public is treated fairly and without discrimination.

[16] The NPR explained how filers of GRIs in the domestic offshore trades specifically benefit because of the potential for increased revenues.

[17] See Docket No. 94–07, Financial Reporting Requirements and Rate-Of-Return Methodology in the Domestic Offshore Trades, 59 FR 67 (April 7 1994).

is some time away. If and when the Commission changes methodologies, the cost of processing GRIs under the new method will be studied and adjustment made accordingly. For now, the Commission still employs the current method for determining the reasonableness of GRIs, and the proposed fee reflects the current cost to the Commission of analyzing GRIs.

PRMSA comments that including the agency's general and administrative costs and other indirect costs (many of which PRMSA sees as not pertaining to the cost of processing a GRI) is unreasonable and improper. It argues that carriers should not be required to pay Government overhead, which includes matters such as travel, furniture and other expenses of the Commission, and which have little bearing on the processing of those documents. At a maximum, PRMSA urges that the industry should pay only those costs that are directly related to GRI review.

As explained in the NPR, the Commission employed the best available data to calculate the proposed filing fees, employing surveys to determine the time and cost involved in providing particular services. The courts have leaned toward reasonableness in attributing costs, not necessarily exactitude.[18] Furthermore, the Commission's method for allocating indirect costs follows what has been generally accepted in Central & Southern. Finally, the Commission deducted certain expenses from its indirect cost calculations so that only relevant expenses remained in calculating the proposed fees.

PRMSA claims that the Commission's proposal to cover the full cost of GRI filings is arbitrary because recouping the full cost does not extend to other types of filings such as formal complaints, petitions, and informal complaints, none of which include the Administrative Law Judges' or Hearing Counsel's time.

The Commission's method for the assessment of user fees for GRI filings is similar to the approach used for other Commission activities. The proposed fees for filing formal complaints, petitions, and informal complaints do not include any cost for adjudicatory functions that they may require.[19] Similarly, the proposed fees for GRI and agreement filings do not include any cost for adjudicatory functions. The filing fee for GRIs only covers the analytical staff work in reviewing GRIs.

Finally, PRMSA contends that the Commission's GRI fee of $11,951 is inconsistent with the fees charged by other agencies. PRMSA cites the ICC, which charges a fee of $7,700 to process requests for nationwide and regional collectively filed GRIs under 49 CFR 1002.2(f). FMC review of GRI filings in the domestic offshore trade is distinct in both purpose and resource requirements from the ICC's processing of GRIs. Further, while the FMC adopted the approach used by the ICC in developing a methodology for determining indirect costs, we recognized the need to develop our own fees due to differing cost structures between the two agencies.

The proposed fees concerning applications filed by carriers in the domestic offshore trades, requesting permission to deviate from annual reporting requirements, did not elicit any comment and are adopted as final.

Based on the foregoing, the Commission is adopting as final the proposed new fees, as amended herein. Because the Commission finds that there is an "independent" public benefit associated with tariff and ET filings, the Commission is reducing by half the tariff filing fee to $.17 per filing object, and the ET filing fee to $1.65 per set. See Appendix B for a summary of the new fees established in this proceeding.

To permit sufficient time to develop, test, and implement billing procedures for collecting tariff and ET filing fees, the Commission is delaying the effective date for those fees to April 1, 1995.

In keeping with OMB guidelines, the Commission intends to update its fees on an annual basis. In updating its fees, the Commission will incorporate changes in the wages and salaries of its employees into direct labor costs associated with its services, and recalculate its indirect costs (overhead) based on current costs.

In the NPR, the Commission certified, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the Proposed Rule would not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units, and small governmental jurisdictions. The Commission did recognize, however, that the proposed new fees may have an impact on the shipping industry, but not of the magnitude that would be contrary to the requirements of the Regulatory Flexibility Act.

As mentioned earlier, commenters argue that the proposed tariff and ET filing fees would significantly increase their cost of doing business, and that this additional cost coupled with what they have already spent to convert their paper tariffs to the ATFI system represents an undue burden on the industry.

Under the Regulatory Flexibility Act, agencies may examine alternatives to minimize the economic burden of proposed rules on an industry. Given the obligation to assess fees imposed on the FMC by the IOAA and OMB Circular A–25, the Commission finds that there are no viable alternatives, and that the proposed tariff and ET filing fees, as amended herein, are the least burdensome choice for the Commission.

Although there is no apparent alternative that would minimize the economic burden of tariff and ET filing fees on the industry and achieve the Commission's regulatory objective, the Commission is pursuing, nevertheless, an OMB exception, which would permit the Commission to forego collecting these fees. If the Commission receives a favorable response, the Commission will remove these fees from its rules.

This final rule does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1980, as amended. Therefore, OMB review is not required.

List of Subjects

46 CFR Part 514

Freight, Harbors, Maritime carriers, and Reporting and recordkeeping requirements.

46 CFR Part 552

Maritime carriers, Reporting and recordkeeping requirements, and Uniform System of Accounts.

46 CFR Part 560

Administrative practice and procedure, Antitrust, Freight, Maritime carriers, Penalties, and Reporting and recordkeeping requirements.

46 CFR Part 572

Administrative practice and procedure, Maritime carriers, and Reporting and recordkeeping requirements.

Pursuant to 5 U.S.C. 553, the Independent Offices Appropriations Act, 31 U.S.C. 9701, and section 17 of the Shipping Act of 1984, 46 U.S.C. app. 1716, the Commission amends title 46 of the Code of Federal Regulations as follows:

[18] See Engine Manufacturers Association, 20 F.3d at 1177.

[19] As the Commission explained in the NPR, enforcement activities are not deemed appropriate for assessing fees because they are adjudicatory functions that have broad public significance and a quasi-judicial impact.

PART 514—TARIFFS AND SERVICE CONTRACTS

1. The authority citation for Part 514 continues to read as follows:

Authority: 5 U.S.C. 552 and 553; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814–817(a), 820, 833a, 841a, 843, 844, 845, 845a, 845b, 847, 1702–1712, 1714–1716, 1718, 1721 and 1722; and sec. 2(b) of Pub. L. 101–92, 103 Stat. 601.

* * * * *

2. In § 514.1, the heading is revised and a new paragraph (f) is added to read as follows:

* * * * *

§ 514.1 Scope, purpose, requirements, penalties and fees.

* * * * *

(f) *Filing fee.* Under the authority of the Independent Offices Appropriation Act, 31 U.S.C. 9701, the Commission assesses a filing fee for ATFI filings. See § 514.21(i) for filing fees.

3. In § 514.21, paragraph (i) is added to read as follows:

§ 514.21 User charges.

* * * * *

(i) *Tariff filing fee.* The fee for tariff filing in either the foreign or domestic offshore commerce of the United States shall be 17 cents per filing object; the fee for filing service contract essential terms shall be $1.65 per filing set.

PART 552—FINANCIAL REPORTS OF VESSEL OPERATING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE TRADES

4. The authority citation for Part 552 is revised to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 817(a), 820, 841a, 843, 844, 845, 845a, and 847.

5. In § 552.2, the heading is revised, and new paragraphs (c)(3), (d)(3), and (f)(3) are added and a sentence is added at the end of the paragraph (e) to read as follows:

* * * * *

§ 552.2 General requirements and fees.

* * * * *

(c) * * *

(3) Applications shall be accompanied by remittance of a $55 filing fee.

(d) * * *

(3) Applications shall be accompanied by remittance of a $165 filing fee.

(e) * * * Applications shall be accompanied by remittance of a $103 filing fee.

(f) * * *

(3) The filing of proposed rate changes described in this paragraph shall be accompanied by remittance of a $11,951 filing fee.

* * * * *

PART 560—AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916

6. The authority citation for Part 560 is revised to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 814, 817(a), 820, 821, 833a and 841a.

Subpart C—Exemptions

* * * * *

7. The following identical text is added as §§ 560.302(c), 560.303(c), 560.304(c), 560.305(c), 560.306(f), 560.307(g), 560.308(c), and 560.309(d), reading as follows:

* * * * *

( ) The filing fee for such agreements is described in section 560.401(c).

* * * * *

Subpart D—Filing and Form of Agreements

* * * * *

8. In § 560.401, the heading is revised and a new paragraph (c) is added to read as follows:

* * * * *

§ 560.401 Filing of Agreements; fees.

* * * * *

(c) Agreement filings for Commission action requiring detailed justification and review by the Commission shall be accompanied by remittance of a $1,402 filing fee; agreement filings for Commission action not requiring detailed justification, but requiring review by the Commission, shall be accompanied by remittance of a $695 filing fee; and, agreement filings for terminal and carrier exempt agreements shall be accompanied by remittance of a $120 filing fee.

PART 572—AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

9. The authority citation for Part 572 is revised to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 1701–1707, 1709–1710, 1712 and 1714–1717.

Subpart C—Exemptions

10. The following identical text is added as §§ 572.302(d), 572.303(c), 572.304(c), 572.305(c), 572.306(f), 572.307(g), 572.308(e), 572.309(c), 572.310(c), and 572.311(d) reading as follows:

* * * * *

( ) The filing fee for such agreements is described in § 572.401(f).

* * * * *

11. In § 572.401, the reading is revised, and a new paragraph (f) is added to read as follows:

* * * * *

§ 572.401 Filing of agreements; filing fees.

* * * * *

(f) Agreement filings for Commission action requiring an Information Form and review by the Commission shall be accompanied by remittance of a $1,402 filing fee; agreement filings for Commission action not requiring an Information Form, but requiring review by the Commission, shall be accompanied by remittance of a $695 filing fee; agreement filings reviewed under delegated authority shall be accompanied by remittance of a $353 filing fee; and agreement filings for terminal and carrier exempt agreements shall be accompanied by remittance of a $120 filing fee.

By the Commission.

Joseph C. Polking,

Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A

Conferences and Discussion Agreements and the ATFI Working Group Represented by the Joint Carrier Group

Asia North American Eastbound Rate Agreement
Colombia Discussion Agreement
Hispaniola Discussion Agreement
Inter-American Discussion Agreement
Inter-American Freight Conference
Inter-American Freight Conference Pacific Coast Area
Inter-American Freight Conference Puerto Rico and U.S. Virgin Islands
Inter-American Freight Conference River Plate/Puerto Rico and U.S. Virgin Islands/River Plate
Israel Trade Conference
Jamaica Discussion Agreement
Latin American Shipping Services Agreement
Mediterranean/North Pacific Freight Conference
Mediterranean/Puerto Rico Conference
Pacific Coast/Australia-New Zealand Tariff Bureau
PANAM Discussion Agreement
Southeastern Caribbean Discussion Agreement
South Europe American Conference
The 8900 Lines Agreement
Transpacific Westbound Rate Agreement
U.S. Atlantic & Gulf/Australia-New Zealanc Conference
U.S. Atlantic & Gulf Hispaniola Freight Association

U.S. Atlantic & Gulf Port/Eastern Mediterranean North Africa Freight Conference
U.S. Atlantic & Gulf/Southeastern Caribbean Freight Agreement
U.S./Panama Freight Association
Venezuelan American Maritime Association
West Coast of South America Agreement
West Coast of South America Discussion Agreement
Westbound Transpacific Stabilization Agreement

ATFI Working Group

American West African Freight Conference
Caribbean and Central America Discussion Agreement
The 8900 Lines Agreement
Inter-American Discussion Agreement
Inter-American Freight Conference
Israel Trade Conference
South Europe American Conference
Trans-Atlantic Agreement
Transpacific Westbound Rate Agreement
U.S. Atlantic & Gulf/Australia-New Zealand Conference

Appendix B

Federal Maritime Commission, Summary of New Fees

CFR citation	Application or service	New fee
Part 514—Tariffs and Service Contracts		
514.21(i)	Tariff filing	17 cents per filing object.
	Filing a set of service contract essential terms.	$1.65 per filing set.
Part 552—Financial Reports of Vessel Operating Common Carriers by Water in the Domestic Offshore Trades		
552.2(f)	General Rate Increase.	$11,951
552.2(c)	Application for Extension of Time for Filing.	55
552.2(d)	Application for Submission of Alternative Data.	165
552.2(e)	Application for Waiver of Detailed Reporting Requirements.	103
Part 560—Agreements by Common Carriers and Other Persons Subject to the Shipping Act, 1916		
560.401(c)	Agreement Filings Requiring Detailed Justification and Commission Action.	1,402
	Agreement Filings not Requiring Detailed Justification but Requiring Commission Action.	695
	Agreement Filing for Terminal and Carrier Exempt Agreements.	120
Part 572—Agreements by Common Carriers and Other Persons Subject to the Shipping Act of 1984		
572.401(f)	Agreement Filings Requiring Information Form and Commission Action.	1,402
	Agreement Filings not Requiring Information Form but Requiring Commission Action.	695
	Agreement Filing Reviewed Under Delegated Authority.	353
	Agreement Filing for Terminal and Carrier Exempt Agreements.	120

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 63

[CC Docket No. 87–266; FCC 94–269]

Telephone Company-Cable Television Cross-Ownership Rules and Regulatory Procedures for Video Dialtone Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In a *Memorandum Opinion and Order on Reconsideration* in Common Carrier Docket 87–266, the Commission substantially affirmed the *Second Report and Order*, while modifying and clarifying that Order in various respects. Among the more significant actions, we first reaffirm the basic video dialtone regulatory construct adopted in the *Second Report and Order*. Local exchange carriers (LECs) offering video dialtone service must make available a common carrier platform that provides sufficient capacity to serve multiple video programmers, and may not allocate all or substantially all analog capacity to a single "anchor programmer." Second, we clarify and modify our video dialtone policy to help ensure that telephone ratepayers do not have to bear the costs of video dialtone. These measures should also protect cable operators from potential anticompetitive actions by LECs, stemming from LEC incentives and opportunities to price video dialtone service unreasonably low relative to the cost of providing such service. For instance, we set forth specific guidance for application of our pricing rules to ensure that interstate video dialtone rates cover video dialtone costs—both the incremental costs of video dialtone and a reasonable allocation of shared plant costs and overheads. We also establish a data collection program to monitor the impact of video dialtone deployment on local rates as well as on separation results. Third, we modify our assertion of exclusive jurisdiction over all video dialtone services to recognize that states have jurisdiction over intrastate video dialtone services. This modification should provide a sound jurisdictional basis for the exercise of federal and state regulatory authority over video dialtone services. Finally, we issue a *Third Further Notice of Proposed Rulemaking* seeking additional information and comment on various issues not adequately addressed in the record currently before us.

EFFECTIVE DATE: January 11, 1995 except that paragraphs 7, 80, 85, and 86 of this **Federal Register** Summary shall be effective March 14, 1995.

FOR FURTHER INFORMATION CONTACT: Jane Jackson, (202) 418–1593 or Gary Phillips, (202) 418–1573, Policy and Program Planning Division, Common Carrier Bureau.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Memorandum Opinion and Order on Reconsideration* in Common Carrier Docket 87–266: Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54–63.58, adopted October 20, 1994, and released November 7, 1994. The complete text of this *Memorandum Opinion and Order on Reconsideration* is available for inspection and copying, Monday through Friday, 9 a.m.–4:30 p.m., in the FCC Reference Room (room 239), 1919 M Street NW., Washington, DC 20554. The complete text of the *Memorandum Opinion and Order on*

Reconsideration may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street NW., suite 140, Washington, DC 20037, (202) 857–3800.

Paperwork Reduction Act

1. In the *Memorandum Opinion and Order on Reconsideration*, the Commission added video dialtone service to the basic service categories for which it requires that LECs report installation and maintenance activities. In addition, the Commission required that each of the Bell Operating Companies (BOCs) and GTE Service Corporation (GTE) to file, by March 14, 1995, a detailed description of the types of CPNI to which it anticipates having access as a provider of video dialtone service. The Commission directed the BOCs and GTE to explain how they would plan to use such information in marketing video dialtone services to video programmers or consumers. The Commission also required LECs providing video dialtone service to notify the Chief of the Common Carrier Bureau, of any anticipated or existing capacity shortfall in their video dialtone platform and of plans for addressing such shortfall. Such notice must be provided within thirty days after the LEC becomes aware of an anticipated shortfall or within five days after denying capacity to a video programmer, whichever occurs first. The public reporting burden for these collections of information is estimated to average approximately 200 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing these collections of information. Send comments regarding this burden estimate or any other aspect of these collections of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Branch, Paperwork Reduction Project (3060–0149), Washington, DC 20554 and to the Office of Management and Budget, Paperwork Reduction (3060–0149), Washington, DC 20503.

Synopsis of Memorandum Opinion and Order on Reconsideration

2. The *Memorandum Opinion and Order on Reconsideration* clarifies or modifies the *Second Report and Order*, 57 FR 41106 (September 9, 1992), in several respects. These modifications are consistent with the Commission's intent to eliminate artificial regulatory barriers to competitive entry and to efficient investment, thereby facilitating competition in video delivery services, promoting investment in infrastructure, and fostering greater diversity in video programming.

A. Sufficient Capacity to Serve Multiple Service Providers

3. We affirm our requirement that telephone companies wishing to offer video dialtone service must make available a basic common carrier platform offering sufficient capacity to serve multiple video programmers. This requirement will enable multiple video programmers to obtain access on nondiscriminatory terms to LEC video delivery capabilities, thereby fostering new and diverse sources of video programming and generating competition in the provision of such programming to end users. Such competition will be generated both among users of the video dialtone platform and among such users and video programmers that use other systems, such as cable systems, to distribute their products to end users in the same geographic area.

4. We also affirm our requirement that video dialtone common carrier platforms offer sufficient capacity to serve multiple video programmers. Without this requirement, video dialtone would not be as effective in achieving our goal of fostering a diversity of information sources to the public. This goal was and remains one of the key purposes of our video dialtone policy.

5. We reject requests that LECs be permitted to allocate all or substantially all analog capacity to a single "anchor programmer." These requests appear to be premised on the assumption that only analog capacity allows a viable alternative to cable service in the short term. To grant these requests would thus be inconsistent with the common carrier model for video dialtone and our requirement that LECs offer sufficient capacity to accommodate multiple video programmers.

6. Finally, we affirm our expandability requirement, subject to the modification discussed below. This requirement, we believe, compounds the benefits of video dialtone by ensuring greater diversity in the sources of video programming and fostering infrastructure development. This requirement is also a critical factor in reducing the ability of LECs to discriminate in their provision of video dialtone service.

7. While we affirm our capacity and expandability requirements, we take this opportunity to elaborate on the scope of the expandability obligation. As critical as this obligation is to our video dialtone construct, it would not be reasonable to require LECs to expand to meet all demand, regardless of technical and economic considerations. Indeed, such a requirement might well discourage LECs from constructing and operating video dialtone systems because of the risk of excessive idle investment. We therefore clarify that, under our video dialtone requirements, LECs are required to expand whenever, and to the extent that, expansion is technically feasible and economically reasonable. A LEC may not refuse to expand simply because it does not wish to permit video programmers to offer certain types of video programming on its video dialtone system. We will address claims by LECs that expansion is not technically feasible and economically reasonable on a case-by-case basis in light of all relevant circumstances. In this review process, we will look to all relevant information and data, including the capacity offered on other video dialtone systems, data relating to demand for video delivery in the LEC's region or in comparable regions, and technical data. To monitor LEC progress in expanding capacity and to ensure that LECs expand in accordance with the standards set forth herein, we require LECs to notify the Chief of the Common Carrier Bureau of any anticipated or existing capacity shortfall and of plans for addressing such shortfall. Such notice must be provided within thirty days after the LEC becomes aware of an anticipated capacity shortfall or within five days after denying capacity to a video programmer, whichever occurs first. To the extent a LEC concludes that expansion is not technically feasible or economically reasonable at that time, the LEC must explain in detail the basis for its determination and indicate when it anticipates expansion would be technically feasible and economically reasonable.

B. Acquisition of Cable Facilities

8. We substantially affirm our decision in the *Second Report and Order*, to prohibit telephone companies from acquiring cable facilities in their telephone service areas for the provision of video dialtone. We believe that generally retaining the ban will benefit the public by promoting greater competition in the delivery of video services, increasing the diversity of video programming, and advancing the national communications infrastructure At the same time, however, we recognize that the ban may effectively preclude the deployment of video dialtone systems in markets that cannot support an additional wired video

delivery system and could in those markets impede our goal of eliminating regulatory barriers to investment. In the *Third Further Notice of Proposed Rulemaking*, we seek information and comment that would permit us to develop criteria for identifying those markets. We also propose to amend our rules so that these criteria serve as the basis for either an automatic exception to the ban or a presumption that the ban should not apply.

9. In general, opponents of the ban assert that it is an inefficient and counterproductive means of implementing video dialtone, and one that is likely to deter widespread deployment of video dialtone. Contrary to these assertions, we believe that retaining the ban in areas where facilities-based competition is viable will spur the development of competitive wire-based video delivery systems, thereby offering significant benefits to consumers. First, the added competition will likely provide a check on both cable and video dialtone rates. LECs that charge too much for video dialtone delivery services will face the risk that video programmers will forgo video dialtone service and rely on cable systems for distribution of their product. To the extent that competition can provide a check on video dialtone rates, video programmers will be able to lower their rates to consumers. This, in turn, would constrain cable rates. Second, competition between cable operators and LECs would give both incentives to invest in infrastructure and develop new and innovative services to increase the attractiveness of their products to consumers. Third, the availability of additional distribution systems would offer increased channel capacity, thereby fostering greater diversity of programming options for consumers. Retaining the ban could also facilitate the development of competitive local telephone networks by cable operators.

10. By contrast, if we eliminate the ban, LECs might seek to acquire cable systems in their service areas to eliminate competition in the provision of video delivery services. They might also have incentives to acquire cable facilities to eliminate a likely competitor in the provision of local telephone services. At the same time, elimination of the ban would unacceptably increase cable operator's incentives to move their video programming to a LEC's video dialtone system, rather than make the changes necessary to respond effectively to competition. We therefore disagree with parties who argue that eliminating the ban would allow market forces to dictate the deployment of video dialtone technology.

11. While we thus generally retain the ban on acquisitions of cable facilities for provision of video dialtone, we conclude that allowing telephone companies to lease cable company drop wires, if the lease is limited in scope and duration, should be permitted. Our prohibition on acquisitions of in-region cable facilities is intended generally to encourage the development of competing LEC and cable video delivery systems. We do not believe that permitting LECs to lease drop wires from a cable operator for a limited term of three years on a non-exclusive basis will impede the realization of this goal. In particular, we do not believe that any revenues that a cable operator may derive from such leases would be sufficient to affect materially its decision to use video dialtone or provide a competitive transmission service. Moreover, permitting LECs to lease cable drops could accelerate the delivery of video dialtone services to end users and thus increase competition in the video marketplace. Therefore, we do not prohibit such leasing arrangements, provided they are executed for non-renewable terms no longer than three years. At the conclusion of the three-year period, LECs are prohibited from acquiring the cable drop wires.

12. We also prohibit LECs from acquiring exclusive rights to use cable drops. Specifically, LECs may not unreasonably restrict the access of any video programmer to leased cable drops, nor may they restrict cable operators from providing to third parties drops not covered by the LEC lease. We will require any LEC proposing to lease cable drop wires to describe in its Section 214 video dialtone application the material terms of that lease, including the cost of the lease to the LEC. We will scrutinize these terms to ensure that they are reasonable and, in particular, do not undermine our goal of promoting competitive wire-based video systems.

C. Ownership Affiliation Standards

13. We affirm the ownership affiliation standard of up to 5%, as adopted in the *Second Report and Order*. We modify the *Second Report and Order*, however, by defining more clearly the application of the standard. For example, we hold that, while a nonvoting ownership interest, which confers no power to control or influence decision making, may not implicate the purposes of the mass media multiple ownership rules, that same interest may raise concern about incentives for discrimination. The same could be true for a 49% interest in an entity with a single majority shareholder. In light of these different goals, we decline to apply all aspects of the mass media multiple ownership rules to video dialtone. We do, however, modify the *Second Report and Order*, by clarifying that the provisions of our mass media multiple ownership standards relating to vertical ownership chains, not involving investment companies, do apply in the video dialtone context. While the *Second Report and Order* did not specifically address this issue, these rules are essential to ensure that LECs cannot avoid ownership limitations by using intervening corporate entities. We also hold that, consistent with the statutory prohibition on provision by LECs of video programming to subscribers in their telephone service areas, an LEC may not hold an ownership interest of 5% or greater in a video programmer that offers service in the LEC's telephone service area. For purposes of the video dialtone rules, we define a video programmer as any person who provides video programming directly, or indirectly through an affiliate, to subscribers. Any entity shall be deemed to "provide" video programming if it determines how video programming is presented for sale to subscribers, including making decisions concerning the bundling or "tiering" of the programming or the price, terms, or conditions on which the programming is offered to subscribers.

14. We clarify that our cross-ownership rules do not prohibit LECs from owning video programming, even programming that another, independent programmer (*i.e.*, a programmer neither owned nor controlled by the LEC) provides over the LEC's video dialtone system. Nor is any LEC prohibited from owning entities that provide video programming outside its service area. LECs may not, however, provide or distribute any video programming directly to subscribers in their telephone service area. Further, LECs may not hold a cognizable ownership interest, as defined above, in any entity that provides video programming directly to subscribers in their telephone service area.

D. Non-Ownership Relationships and Activities Between Telephone Companies and Video Programmers

15. We affirm our decision to permit LECs to enter into non-ownership relationships that exceed a carrier-user relationship with video programmers, but modify our rules in this area in several respects. We relax these rules in two respects: First, we permit LECs to offer enhanced and other nonregulated services related to video programming to any video programmer, in areas

substantially served by a video dialtone platform, without regard to whether the video programmer purchasing such services has a nexus to that platform. An area shall be considered substantially served by a video dialtone platform if video dialtone service is available to a significant majority—*i.e.*, 70%—of the households in that area. Second, we permit LECs to enter into certain other types of non-ownership relationships with video programmers who are not franchised cable operators, without regard to the existence of a video dialtone platform.

16. We also tighten the non-ownership rules in two respects. First, we generally prohibit LECs from exceeding the carrier-user relationship in their telephone service area with franchised cable operators, except to provide enhanced or other nonregulated services related to the provision of video programming in areas substantially served by a video dialtone platform, or to lease cable drop wires. Second, we generally prohibit affiliations between LECs and any video programmer for the purpose of operating a basic video dialtone platform.

17. We relax our non-ownership rules as described above because those rules as originally structured appear to be more restrictive than necessary to achieve our objectives. In the *Second Report and Order*, we permitted LECs to exceed the carrier-user relationship with a video programmer, but only if that programmer was a customer of, interconnected with, or shared the construction or operation of the basic video dialtone platfrom. In requiring this connection, we explained that we believed it necessary "to assure that, in exceeding the current carrier-user relationship, telephone companies will both provide the basic platform to video programmers and use it as the basis for their own participation in the video marketplace." We were concerned that, absent this link, telephone companies might forego investing in video dialtone, limiting themselves instead to providing services on existing cable facilities.

18. We conclude that our goal of encouraging LECs to build and use basic video dialtone platforms can be achieved without requiring that purchasers of LEC enhanced or other nonregulated services related to the provision of video programming maintain a nexus to those platforms. So long as a LEC has built a basic platform that satisfies our video dialtone requirements, and that is available in a particular video programmer's service area, there is no public interest justification for prohibiting the LEC from offering enhanced or other nonregulated services to that video programmer, even if the programmer has no nexus to the platform. Indeed, permitting that video programmer to purchase such services from the LEC expands the range of potential customers of LEC enhanced and nonregulated services, thereby increasing LEC incentives to build video dialtone systems. At the same time, permitting LECs to provide services to video programmers who have no nexus to a video dialtone platform, including cable operators, benefits video programmers by enabling them to take advantage of such services, even if they choose not to use video dialtone as their transmission medium.

19. We recognize that a video programmer's service area often will not coincide precisely with the area served by a video dialtone platform. For example, a cable operator's franchise service area that substantially overlaps a video dialtone service area may include households outside the video dialtone service area. In that situation, so long as the LEC has made video dialtone available to a significant majority of the households in the area in which the cable company seeks enhanced or other nonregulated services from the LEC, there would be no reason to prohibit the LEC from providing enhanced or other nonregulated services to that cable operator. We therefore hold that LECs may provide enhanced and other nonregulated services within their telephone service area to a video programmer if video dialtone is available to a significant majority of the households in the area in which the video programmer seeks such services. We also hold that, for purposes of applying this rule, 70% of the households in the area in which a video programmer seeks enhanced or other nonregulated services would constitute a "significant majority." We acknowledge that this seventy percent standard is not the only standard that we could have adopted. We believe, however, that this standard is reasonable because it does require that video dialtone be available to a significant majority of households within the area in which the video programmer seeks to take LEC nonregulated services and thus provides LECs with the necessary incentives to deploy video dialtone.

20. We also permit LECs to enter into certain other non-ownership relationships (*e.g.*, joint ventures and debt financing) within their service area with video programmers who are not cable operators, without regard to the existence of a video dialtone platform. Eliminating the requirement that LECs build a video dialtone platform before establishing these other relationships will not compromise our goal of encouraging video dialtone deployment. The revenues offered by a video dialtone system, including the ability of LECs to provide enhanced and other nonregulated services in areas substantially served by video dialtone, should provide ample incentives for LECs to construct video dialtone platforms. Indeed, it is not clear that the rule adopted in the *Second Report and Order*, would further the goal of ensuring widespread deployment of video dialtone systems. Under that rule, it could be argued that a LEC could enter into a non-ownership relationship with any video programmer who had a nexus to a single video dialtone platform of that LEC. Thus, for example, a LEC could provide debt financing to a national video programmer if that programmer offered one program on one video dialtone platform operated by that LEC. We do not believe that this required nexus has a sufficiently compelling relationship to our goals to retain it.

21. While we thus liberalize our non-ownership relationship rules in certain respects, we also narrow these rules in other respects. First, we generally prohibit LECs from exceeding the carrier-user relationship in their telephone service area with any franchised cable operator, except (as described above) to provide enhanced or other nonregulated services related to the provision of video programming in an area substantially served by a video dialtone platform, or to lease cable drop wires. One of the primary goals of this proceeding is to lay the groundwork for the development of competition in wire based video delivery services. We believe that allowing a broad range of affiliations between LECs and cable operators in a LEC's telephone service area could undermine this goal. For example, permitting LECs and cable operators to construct or operate jointly a video dialtone platform could encourage cable operators to abandon their facilities in favor of the video dialtone platform. Indeed, we consider it highly unlikely that a cable operator would participate in the construction or operation of a video dialtone system unless it planned to use or was using that platform. In that event, the public would lose the benefit of competition provided by the cable system. Conversely, LECs might be inclined to underwrite a cable operator instead of building competing video distribution systems. Moreover, even in markets in which LECs build video dialtone

systems, incentives to compete vigorously could be tempered by debt financing, joint ventures, and other non-ownership relationships with the cable operator. We are particularly concerned about that possibility given that, in the near-term, the LEC and cable operator are likely to be the only two wire-based video systems in most markets. Under the circumstances, the risks of anticompetitive consequences outweigh any public gain that could be offered by permitting such relationships.

22. Second, we generally prohibit cable operators or any other video programmers from participating in the operation of a basic video dialtone platform. Unlike LECs, which are subject to Title II of the Communications Act, and, in the case of the largest LECs, nonstructural safeguards designed to prevent or reveal discrimination, video programmers are subject to no Title II nondiscrimination obligations or requirements. We therefore conclude that, without special safeguards, permitting video programmers wide latitude in participating in the operation of the basic video dialtone platform raises too great a risk of discrimination. Nevertheless, we may permit discrete roles for video programmers in operating the video dialtone platform if we conclude that the benefits of permitting such roles outweigh any risk of discrimination that they raise.

23. These modifications, aside, we otherwise affirm our rules governing non-ownership affiliations. We also affirm that we are not statutorily precluded from allowing LECs to exceed the carrier-user relationship in providing video dialtone service.

24. To summarize, LECs may provide enhanced or other nonregulated services related to the provision of video programming to any video programmer, including a cable operator, in areas substantially served by a video dialtone platform. LECs may also enter into other types of non-ownership relationships with video programmers that are not franchised cable operators, except that they generally may not jointly operate the video dialtone platform. LECs may not, however, otherwise exceed the carrier-user relationship in their telephone service area with franchised cable operators, except to lease cable drop wires. We believe that these modifications of the non-ownership affiliation rules make them more consistent with our overall video dialtone policies.

25. We note that LECs remain unrestricted in the provision of enhanced or other nonregulated services unrelated to the provision of video programming, whether within or outside the LEC service area. LECs also remain unrestricted in the provision of video programming directly to subscribers outside their service area. Finally, for purposes of our non-ownership affiliation rules, we will treat debt that is convertible to stock as non-cognizable unless the interest is converted, or, based on an analysis of the specific facts involved, we conclude that the interest confers control over a video programmer. This is consistent with our treatment of convertible debt in other areas. Moreover, to the extent the equity interest would be impermissible, LECs would be unable lawfully to convert the debt. Therefore, it is proper to view it as debt, rather than equity, unless and until any such conversion occurs.

E. Definition of Video Programming

26. We affirm our interpretation of the statutory definition of video programming set forth in the *Second Report and Order*. We believe that the Commission's interpretation most closely comports with congressional intent in enacting the 1984 Cable Act. We also affirm the Commission's conclusion that video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming.

F. Federal and State Jurisdiction

27. We modify our assertion in the *Second Report and Order*, of exclusive jurisdiction over all video dialtone services. We hold that we have exclusive jurisdiction over only interstate video dialtone services, which include services involving delivery of video communications that are part of a continuous stream of communication provided at least partially by means of radio waves. We hold that states have jurisdiction over intrastate video dialtone services.

28. In *General Telephone of California v. FCC*, the court held that channel service provided by a LEC for a cable operator, formerly known as a community antenna television operator, is "an integral component in an indivisible dissemination system which forms an interstate channel of communication from the broadcaster to the viewer." The court held that the Commission has exclusive jurisdiction over LEC provision of services that form part of a broadcast transmission. Because broadcasting is inherently interstate, the court held, LEC delivery of signals that have been broadcast over radio waves is interstate, even if the LEC delivers such signals over physically intrastate facilities.

29. Consistent with *General Telephone of California v. FCC*, we conclude that broadcast or other radio-based video signals delivered by a LEC over a video dialtone system constitute an integral part of an interstate radio transmission service. Accordingly, we have exclusive jurisdiction over video dialtone services involving delivery of video communications that are part of a continuous stream of communication provided at least partially by means of radio waves. A determination of whether certain other, non-radio-based video dialtone services are interstate and thus within our exclusive jurisdiction depends upon the nature of the communication, as in the telephone context. For example, we have exclusive jurisdiction over all video dialtone services provided between two or more states because such services are interstate. In contrast, under Section 2(b) of the Communications Act, states retain authority to regulate intrastate video dialtone service to the extent such regulation has not been preempted by the Commission under the standards set forth in *Louisiana Public Service Commission v. FCC* and its progeny. For example, states have jurisdiction over the delivery by wire of video programming between a video library and an end-user located within the same state, as part of a video-on-demand service.

30. While we do not in this proceeding preempt any state regulation of intrastate video dialtone services, we note that we have already preempted certain state regulations of BOC provision of enhanced services in the *BOC Safeguards Order*, 57 FR 4373 (February 5, 1992). In that decision, we preempted any state regulation requiring (1) Separation of facilities and personnel to provide the intrastate portion of jurisdictionally mixed enhanced services; or (2) prior authorization for use of Customer Proprietary Network Information (CPNI) whenever such authorization is not required by our rules. Because we have explicitly applied our existing enhanced services safeguards to video dialtone, state regulation in the areas preempted in the *BOC Safeguards Order*, are also preempted by that decision in the video dialtone context. We reject various parties' requests for broader preemption at this time, but we will consider preempting any state regulation of intrastate video dialtone service that is not severable from interstate service if such regulation would negate federal policy

G. Section 214 Process

31. We now affirm our decision to require LECs to obtain approval pursuant to Section 214 of the Act before beginning construction of video dialtone facilities or offering video dialtone service. We reject arguments that we lack authority to require such approval or that we should refrain from exercising that authority at this time. Because video dialtone is based upon new and evolving technologies, the Section 214 process is critical to our ability to ensure that video dialtone is implemented in a manner that best serves the public interest. Nevertheless, we permit LECs to seek generic approval of those aspects of a video dialtone system that do not require case-by-case review. In addition, we anticipate that, over time, as the service evolves and precedents are established, it may no longer be necessary to require the same level of Section 214 scrutiny to future video dialtone offerings. We will consider, at that time, on our own motion or on petitions of parties, streamlining our Section 214 requirements for video dialtone offerings.

1 FCC Authority to Require Section 214 Certification

32. As an initial matter, we conclude that the Commission has jurisdiction to require LECs to obtain Section 214 certification to upgrade existing facilities to provide video dialtone. Section 214(a) requires a carrier to obtain certification before constructing or extending a line it will use for interstate communications. Even facilities that are wholly located within a state are interstate for Section 214 purposes, if a LEC uses those facilities at least in part for interstate communications.

33. We conclude further that an upgrade of LEC facilities to offer video dialtone service constitutes the establishment or extension of a "line" pursuant to Section 214. In 1944, Congress amended Section 214 to define "line" as a "channel of communication established by appropriate equipment * * *" Because video dialtone systems create new channels of communication, the systems constitute the establishment of lines under Section 214.

34. We also conclude that video dialtone systems involve "new construction." The exemption in Section 214 for "any installation, replacement, or other changes in plant, operation, or equipment, other than new construction" applies only if no new construction occurs, or any new construction or installation is minor The upgrading of existing facilities to be used for video dialtone thus does not fall within this exemption.

35. Furthermore, we conclude that new construction occurs even when LECs upgrade existing facilities to provide video dialtone through the addition of small amounts of equipment, because such upgrades enable the LECs to offer a new and different type of interstate service. Section 214 requires a carrier to obtain certification before upgrading existing intrastate facilities for interstate service. Thus, upgrading customer loops, which are currently used primarily for intrastate local exchange service, to provide video dialtone service, constitutes "new construction," and Section 214 certification is required. Moreover, because the construction of video dialtone systems does not constitute the construction of "local, branch, or terminal lines not exceeding ten miles in length," we reject arguments that we should apply the statutory exemption contained in Section 214(a)(2) of the Communications Act to LEC video dialtone Section 214 applications.

2. Elimination or Streamlining of Section 214 Requirement for Video Dialtone

36. We decline to eliminate or streamline the Section 214 certification process at this time. We reject arguments that the tariff review process is at this time, by itself, an adequate mechanism for overseeing video dialtone deployment. Because video dialtone is an emerging technology, and because we anticipate and encourage variations in networks, architectures, technology, and services, many important policy issues would likely be raised only in connection with specific video dialtone proposals. Therefore, streamlining our Section 214 process could preclude us from properly overseeing video dialtone deployment.

37. For similar reasons, we also decline to limit the type of construction or deployment subject to full Section 214 review. Particularly during the early stages of video dialtone implementation, even those applications that propose previously approved architectures may pose other issues that warrant careful consideration in the context of that specific proposal.

38. While we do not streamline our Section 214 process at this time, we will consider generic applications for approval of those aspects of a Section 214 application that do not require case-by-case consideration. These generic applications can serve to narrow the range of issues to be considered in the Section 214 process. We also note that we anticipate that, as video dialtone evolves, and we develop a body of precedent governing its implementation, the Section 214 process may become a less critical vehicle for identifying and addressing policy issues, thereby making streamlining appropriate at that time.

39. Finally, as another possible means of expediting the Section 214 process, we direct the Bureau to consider whether it would serve the public interest to clarify in a Public Notice the basic information that the Commission requires in a video dialtone Section 214 application. We note that the Bureau has found it necessary to request additional information from LECs in connection with the Bureau's review of virtually every application that has been filed for Section 214 authorization to construct a commercial video dialtone system. Further clarification of the information required in a Section 214 application could help LECs avoid the delays that necessarily result when applications have to be supplemented.

3. Delaying Section 214 Certifications

40. We determined in the *Second Report and Order*, and affirm now that our existing rules and safeguards generally will prevent improper cross-subsidization and discrimination by LECs in the provision of video dialtone. Therefore, we do not believe that an additional comprehensive review of these rules is necessary prior to the implementation of video dialtone service. Indeed, to the extent that any further changes in these rules may be necessary, permitting deployment of video dialtone should provide us with a better basis for fashioning such changes. While we thus decline to defer consideration of Section 214 applications pending a comprehensive review of our rules, we will condition the granting of each Section 214 certificate on implementation of any accounting and other safeguards that we have adopted or subsequently adopt.

H. Cross-Subsidy/Pricing Issues

1. Overview

41. We conclude that initial video dialtone service offerings by LECs subject to price cap regulation should be subject to the existing price cap rules. Proceeding under existing price cap rules is consistent with eliminating regulatory barriers and distorted incentives to efficient investment in telecommunications facilities, thereby serving our goals of increasing video services competition and investment in telecommunications infrastructure, and

promoting greater diversity of video programming. We also conclude that these rules, as further delineated below, should protect telephone ratepayers from improperly subsidizing video dialtone service.

42. As Joint Petitioners point out, LECs, along with other telecommunications providers, may, over time, invest billions of dollars to build a modern telecommunications infrastructure. We share their concern regarding possible effects of video dialtone investment on basic regulated telephone rates, and possible anticompetitive results with respect to cable television service and other multichannel video programming distributors. We are committed to implementing video dialtone in a manner that does not subject basic telephone ratepayers to unreasonable rate increases or allow improper cross-subsidization. We do not, however, agree that ratepayer protection requires that this Commission adopt comprehensive, video dialtone-specific accounting and cost allocation rules before authorizing video dialtone services.

43. Contrary to the arguments of the Joint Petitioners, this Commission's actions in authorizing interstate video dialtone services will not require increases in telephone rates on the order of $20 per month to pay for the cost of a nationwide fiber-to-the-home network. No LEC Section 214 application for video dialtone service has proposed a fiber-to-the-home architecture, and it appears unlikely based on the record that anyone will. In addition, where integrated networks are proposed, much of the investment will be used in the provision of intrastate telephone services, and will require the necessary state regulatory approvals. We also note that investment in video dialtone will, of necessity, proceed over a period of years, permitting Federal and State regulators to monitor the results of the initial deployments and take any actions that might be needed to prevent large amounts of video dialtone investment from being improperly shifted to ratepayers.

44. We decline, however, to adopt technology-specific cost accounting rules. The record in this proceeding demonstrates that such cost accounting rules can be rapidly overtaken by technological or marketplace changes. Joint Petitioners, for example, supported in their pleadings the establishment of accounts to identify loop investment as either copper or fiber. Such accounts, had we adopted them in 1992, would no longer serve the purposes envisioned by their proponents because carriers have since that time developed proposals to incorporate a third transmission medium, coaxial cable, into the loop.

45. While we do not propose to amend Parts 32, 64, 36, and 69 of our rules before authorizing video dialtone services, we find that adjustments are necessary to fit video dialtone into our regulatory program. These adjustments, which will be implemented on a case-by-case basis and do not require further rulemaking at this time, are explained below.

46. We view the price cap regulatory regime, and not the Part 36/Part 69 cost allocation scheme, as our primary means of protecting the telephone customers of price cap LECs from unreasonably high rates. Under price caps, a LEC has no guarantee that it will be able to recover increased costs in telephone rates. Its incentive to "shift" costs from video dialtone to regulated telephone services is thus greatly reduced.

47. In addition, the price cap baskets and service categories limit the extent to which price reductions in one service can be offset by price increases in another. We conclude that a separate price caps basket for video dialtone services may be necessary both to protect interstate telephone ratepayers and to deter anti-competitive pricing of video dialtone services. Therefore, in the *Price Caps Performance Review* docket, 59 FR 23042 (May 4, 1994), we will seek comment on a proposal to establish that basket.

48. We recognize that LECs under rate base/rate of return regulation (ROR) or the optional incentive plan may also wish to develop video dialtone services. Such carriers will bear the burden of demonstrating to us how they will ensure that the costs of video dialtone will not be improperly recovered in the rates charged for other interstate services. They, like the price cap LECs, will also be required to comply with the other safeguards adopted in the *Memorandum Opinion and Order on Reconsideration.*

49. We deny requests by parties that seek a comprehensive examination of both jurisdictional separations and access charge rules in this proceeding. As explained above, we believe our existing rules adequately protect consumers against improper cross-subsidy and anti-competitive activity at this time. As video dialtone systems are implemented and we gain more experience with this new service, we can amend our rules if necessary or appropriate to address unanticipated problems or results. We agree that long-term video dialtone cost allocation issues would be a part of any comprehensive review of Parts 36 or 69. We do not think, however, that the public interest would be well served by postponing for consumers the benefits that video dialtone services may offer pending the commencement and completion of such proceedings. Therefore, and for the reasons discussed in more detail below, we reject requests for adoption of video dialtone-specific accounting, cost allocation, separations, and pricing rules prior to granting video dialtone authorizations.

2. Part 32—Uniform System Accounts for Telecommunications Companies

50. We reject the parties' requests that we amend our accounting rules to require carriers providing video dialtone to segregate all video plant investment in new Part 32 accounts or separate subaccounts. Part 32 accounting rules were designed to create a stable basic account structure that would not require modifications as technologies, services, or reporting requirements change.

51. We further conclude that, in the case of video dialtone, our regulatory information needs can be satisfied without making permanent changes to the accounting system at this time. Because it would help our monitoring effort and tariff review process to have a record of LEC video dialtone costs, we hereby require that LECs offering video dialtone identify all video dialtone costs by establishing two sets of subsidiary accounting records: one to capture the revenues, investments and expenses wholly dedicated to video dialtone, the other to capture any revenues, investments and expenses that are shared between video dialtone and the provision of other services. These accounting records will also assist state regulators in assuring that video dialtone costs are not improperly included in local rates. LECs authorized to provide video dialtone must file a summary of these subsidiary records with the Commission on a quarterly basis. All video dialtone Section 214 authorizations will be conditioned upon compliance with this requirement. We delegate to the Chief, Common Carrier Bureau, the authority to determine the content and format of the subsidiary accounting records as well as the quarterly reports.

3. Part 64—Separation of Regulated and Nonregulated Costs

52. We reject claims that we should amend Part 64 because current rules would not prevent LECs from improperly subsidizing video dialtone nonregulated services. To the contrary, we conclude that existing Part 64 rules

do not require modification to prevent such an outcome.

53. The *Joint Cost* rules set forth in Part 64 were formulated to accommodate new enhanced services offerings in an increasingly competitive telecommunications environment. Part 64, for the most part, does not prescribe cost categories or allocation factors. Rather, each carrier selects, subject to public comment and Commission review, the cost pools and allocators it needs to identify the costs of all of its nonregulated activities. The Commission chose this approach because it believed that the mix of nonregulated activities and the organizational structure would vary widely from carrier to carrier, and that a single, prescribed manual could not adequately encompass the possible variations. No party has shown that video dialtone-related nonregulated products and services will exhibit, initially, less variety than other nonregulated activities, or will be more amenable to uniform treatment. Similarly, parties that object to the aggregation of video dialtone-related nonregulated costs with the costs of other nonregulated activities fail to explain what valid regulatory purpose of this Commission would be served by revisiting our determination in the *Joint Cost Order*, 52 FR 6557 (March 4, 1987), to avoid product-specific cost allocations to nonregulated products and services. Therefore, we decline to promulgate video dialtone-specific cost allocation rules for nonregulated activities related to video dialtone service at this time. However, we may require uniformity in the video dialtone cost allocation procedures in the future as we gain experience with video dialtone services and LEC Part 32 subsidiary accounting records.

54. Under our rules, interested parties, as well as the Commission, will have ample opportunity to review the application of Part 64 to video dialtone-related nonregulated offerings. All LECs with $100 million or more in annual operating revenues are required to keep their current Part 64 Cost Allocation Manuals (CAMs) on file with this Commission. To assist State regulators and other interested parties in tracking video dialtone-related CAM filings, we hereby require that any LEC receiving authorization to provide video dialtone file CAM amendments within thirty days after the effective date of the Section 214 authorization and at least sixty days prior to providing nonregulated products or services related to video dialtone. Video dialtone-related CAM amendments are subject to public comment and will be closely scrutinized by the Commission. Changes to time reporting procedures, cost apportionment tables, and the affiliate transactions statement can, if necessary, be suspended for up to 180 days, after which the Bureau may either allow the new procedures to become effective or prescribe different procedures.

4. Part 36—Jurisdictional Separations

55. We decline the parties' requests that we institute at this time Federal-State Joint Board proceedings to amend our Part 36 jurisdictional separations rules for video dialtone service. For the time being, LECs will allocate regulated video dialtone investment and expenses between the State and Federal jurisdictions in accordance with existing rules. To ensure that our decisions do not have untoward effects outside of our regulatory jurisdiction, we are directing the Common Carrier Bureau to monitor the impact of video dialtone on separations results and on intrastate local telephone rates, and to report its findings periodically to this Commission. This course of action will provide us and State regulators with the practical experience and the data necessary to make appropriate decisions concerning the future of the Part 36 rules.

56. Joint Petitioners and others have complained that existing separations rules would assign to the States 75% of increased loop costs attributable to video dialtone, but no video dialtone revenues. This argument is premised on our jurisdictional determination in the *Second Report and Order*, which we now modify on reconsideration. Thus, regulated video dialtone services of a purely intrastate nature may be tariffed in the intrastate jurisdiction. The availability of intrastate video dialtone revenues should help offset any increase in intrastate costs caused by LEC provision of video dialtone services and help prevent any local rate increases.

57. In declining to institute a Joint Board proceeding to address issues raised by the particular video dialtone proposals now pending before the Commission, we do not mean to imply that we will never revisit Part 36. Indeed, it appears likely that, as telecommunications networks and the marketplace evolve, the separations rules will require revision. In our judgment, however, it is too soon to begin proceedings to propose specific rule changes in this area. Video dialtone is but the first of what we expect to be an array of broadband services, and the current video dialtone proposals may or may not be representative of the manner in which those services will use network facilities, or of the jurisdictional mix of those services. Under these circumstances, scarce Federal and State regulatory resources should not be expended to craft separations rules tailored to video dialtone.

58. We will take the following steps to help ensure that local telephone ratepayers are not being harmed by the advent of video dialtone—a preeminent concern of State commenters. We direct the Common Carrier Bureau to develop a data collection program that will track the impact of video dialtone on both separations results and intrastate telephone rates. As part of this program, the Bureau will require all carriers offering video dialtone to submit detailed explanations of how they are applying the Part 36 rules, as well as Parts 32, 61, and 64, to video dialtone investments and expenses. The Bureau will report is results periodically so that this Commission and State regulators can determine when and if rule changes or other actions appear necessary.

59. We also will open an inquiry proceeding focusing on a matter of paramount concern to both Federal and State regulators—the implications for the jurisdictional separations process of the introduction of new technologies, including broadband technology, into LEC networks. This proceeding will provide a forum for exploring the broader separations policy issues raised by continuing changes in network technology, of which video dialtone is but one example. The inquiry also will be a vehicle for updating, in light of actual video dialtone experience, the record created in the instant proceeding. We strongly encourage active State commission involvement in our inquiry and seek to establish a dialogue between State and Federal regulators on these issues. The information we gather in this inquiry could serve as a basis for future rulemaking proposals as we examine our existing rules in light of the evolving nature of LEC networks.

60. State commissions, of course, bear the primary responsibility for ensuring that intrastate rates are reasonable. We emphasize that neither our decisions in this proceeding nor our actions on the various video dialtone Section 214 applications preempt the State commissions from disallowing from local telephone service rates any video dialtone-related costs that do not meet their own standards for inclusion in rates.

61. Finally, some parties contend that Section 410(c) of the Communications Act legally compels us to refer all separations issues, including use of common plant for video dialtone, to a

Joint Board. Although Section 410(c) requires the Commission to refer separations issues to a Joint Board upon instituting a notice and comment rulemaking proceeding, we are not proposing to modify any separations rules here but are simply applying our existing rules. We conclude that we have the authority to apply existing jurisdictional separations rules during the initial phase of video dialtone service deployment. Our initial determinations regarding implementation of existing jurisdictional separations to video dialtone are, of course, subject to revision as we gain further experience with video dialtone.

5. Part 69—Access Charge-Cost Allocations and Rate Structure

62. We conclude that access to the basic video dialtone platform is a form of interstate access to the extent it is used to route interstate video programming to end users. We also conclude that a separate access charge category for video dialtone may be desirable to help ensure that interstate video dialtone costs are not recovered through charges for access services provided to interexchange carriers.

63. We decline, however, to prescribe a new rate element or to initiate a notice of proposed rulemaking at this time. We recognize that the access charge rules define rate elements established for traditional telephone facilities. Video dialtone may use both new and existing network facilities to deliver services in ways not contemplated at the time the Part 69 rules were written. Because video dialtone is a nascent service, though, and in light of the wide variety of possible video dialtone architectures LECs may employ, we find that there is a significant risk that any uniform rate structure we would prescribe now would fail to produce rate elements that logically match each carrier's video dialtone offering.

64. Instead, as the Commission has done in the past with other new services, we will require local telephone companies that wish to offer video dialtone services to file petitions for waiver of our Part 69 rules prior to the establishment of a permanent video dialtone rate structure. The waiver process, as an interim solution, will afford all interested parties an opportunity to participate, and challenge or support the rate structure proposed by the local telephone company. The waiver process will also provide a forum for reviewing the cost allocation proposals of ROR and optional incentive plan carriers.

6. Part 61—Price Cap Treatment

65. We conclude that price cap local telephone companies should continue to be subject to the existing price cap rules for their provision of video dialtone services.

66. We also conclude that video dialtone service is a "new service" under our price cap rules. New services are services that "add to the range of options already available to customers." In contrast to restructured services, which involve the rearrangement of existing services, video dialtone adds to the range of options for customers because multiple video programmers will have access to a basic common carrier platform for the first time. Video dialtone thus differs from a carriers's provision of channel service or other video transport services.

67. Local telephone companies will be required to make a cost-based showing under the price caps new services test to establish initial video dialtone prices. As explained below, this test, as applied in established tariff review processes, provides an adequate vehicle for full consideration of the reasonableness of proposed video dialtone rates. We therefore find it unnecessary to initiate a rulemaking to develop new, video dialtone-specific tariffing requirements. We also conclude that, given our current dearth of experience with video dialtone tariffs, it would be both premature and counterproductive to attempt to promulgate such rules at this time. The first few tariff proceedings will provide a far more concrete and realistic factual context for future decision making than would be developed in a general rulemaking proceeding.

68. *Application of the LEC Price Cap New Services Test.* We decline to amend the new services test specifically for video dialtone services. The Commission currently has generally applicable rules in place that specify the cost support that must be submitted with any new service tariff, including a video dialtone tariff. Pursuant to these rules, carriers must submit engineering studies, time and wage studies, or other cost accounting studies to identify the direct costs of video dialtone. LECs have proposed a number of different network architectures for video dialtone, and there are wide variations in the manner in which, and the degree to which, LECs are proposing to integrate their video dialtone systems with their telephone networks. This diversity and experimentation, which we view as beneficial to the development of a modern telecommunications infrastructure, precludes us from adopting a one-size-fits-all rule for the identification of video dialtone direct costs. The tariff review process, which includes the possibility of tariff investigations under Section 204(a), will allow close examination of each LEC proposal and enable us to require such cost information as may be necessary to evaluate each proposal. If the application of our existing rules has unintended consequences, or if the process reveals systematic problems, we will revisit our determination to rely on existing procedures.

69. We conclude, however, that it is important that we provide more specific guidance regarding the identification of direct costs in video dialtone tariffs than is ordinarily given. LECs may, over time, make large investments to upgrade their networks for video dialtone and other broadband services. The large amounts of investment involved, and the serious concerns about cross-subsidization expressed in the record of the instant proceeding, suggest that video dialtone rates will be subject to intense scrutiny. We conclude that the video dialtone tariff review process will proceed more smoothly, and LECs and interested parties will be able to participate more constructively, if they better understand our expectations in advance of tariff filings.

70. Because video dialtone is an essential component of a multichannel video service that will compete directly with cable television operators and other multichannel video programming providers, LECs may have an incentive to understate the direct costs of the service in order to set unreasonably low prices and engage in cross-subsidization. Therefore, as explained below, we will require the LECs to submit with their video dialtone tariffs a more detailed and complete identification of direct costs than we have generally required in other new services filings.

71. Under our established practice, direct costs include the costs and cost components associated with the primary plant investment that is used to provide the service. In the case of video dialtone, some of these plant costs will be incremental costs associated with plant dedicated to video dialtone service. The direct costs of video dialtone will also include any incremental costs that are associated with shared plant used to provide video dialtone and other services, that is, costs of shared plant that are caused by the carrier's decision to offer video dialtone service. In reviewing video dialtone tariffs, we will scrutinize the basis on which those costs are identified and included in the proposed charges for video dialtone services. We recognize

and accept the challenges inherent in determining which costs are truly the consequences of a carrier s decision to provide video dialtone service, *i.e.*, are incremental costs

72. Moreover, we expect LECs to include in direct costs a reasonable allocation of other costs that are associated with shared plant used to provide video dialtone and other services. We will scrutinize the basis on which those costs are identified and included in the proposed charges. An LEC allocating an extremely low proportion of these other costs of shared plant to video dialtone will be expected to provide a strong justification for that approach, and we do not anticipate accepting a 0% allocation of the common costs of shared plant as reasonable.

73. Ordinarily carriers decide, in the first instance, whether to include in their direct cost studies any categories of costs (investment and expenses) in addition to primary plant. For video dialtone, however, we direct carriers to treat costs in other accounts as direct costs if those costs are reasonably identifiable as incremental costs of video dialtone service. Examples of accounts that might include reasonably identifiable incremental costs of video dialtone are those to which carriers book costs associated with land, buildings, network administration, testing, engineering, plant operations administration, product management, sales, advertising, customer services, and legal.

74. For purposes of the new services test, all costs not treated as direct costs are classified as overheads. Carriers bear the burden of justifying why their overhead loadings do not produce a final rate that is unreasonably high. As with shared plant, we will also require a strong justification for allocation of extremely low overheads to video dialtone service, and would not anticipate accepting a 0% allocation of overhead as reasonable. At the same time, we emphasize that we are not seeking to saddle video dialtone with an unreasonable proportion of overheads and other common costs. We hope and expect that video dialtone will be a successful service in the marketplace, and therefore contribute to the recovery of common costs. We recognize that imposing excessive cost burdens on video dialtone could diminish demand and possibly overall revenues and thereby thwart these objectives. Accordingly, the effects of price changes on video dialtone demand should be given due consideration in determining what constitutes a reasonable allocation of common costs and overheads. In this regard, we will scrutinize the basis for claims and projections of demand elasticities submitted in support of proposed video dialtone rates. And, of course, our rules will provide interested parties ample opportunity to comment on these claims and projections.

75. In implementing this specific guidance, we direct the Chief, Common Carrier Bureau, to ensure that video dialtone carriers file all the information necessary for purposes of evaluating the costs of providing video dialtone service and the reasonableness of the proposed cost allocations and overhead loadings. We further direct the Chief, Common Carrier Bureau, to consider whether the Bureau should adopt specific minimum requirements, including the possible use of standardized formats, for the supporting documentation that video dialtone providers must furnish with their proposed tariffs. We note that the Bureau previously has adopted such requirements in connection with the LECs' annual access tariff filings, as well as tariffs filed to provide specific services, such as Open Network Architecture (ONA) and Expanded Interconnection services. The goal of any such requirements would be to make the review of video dialtone tariffs by the Bureau and interested members of the public more expeditious and less costly. In addition to making the tariff review process more accessible to interested parties, the establishment of minimum standard format and information requirements would facilitate their ability to participate in a meaningful way.

76. We tentatively conclude that a separate price cap basket for video dialtone would help prevent improper cross-subsidization by preventing local telephone companies from offsetting a price reduction for video dialtone service with an increase in rates for other regulated interstate services. However, it is not necessary to establish this basket now, on an interim basis. Because no tariffs for permanent video dialtone service have yet been filed, it is unlikely that any such tariff will go into effect prior to January 1, 1995. July 1, 1996 is thus the earliest date on which a video dialtone service could be included in a price cap index. We therefore will seek comment on establishing a separate price cap basket for video dialtone service in a supplemental notice in the *LEC Price Cap Performance Review*.

77. At this time we will not address the merits of whether basket-by-basket earnings calculation should be required. We recognize that investment in video dialtone facilities may generate costs that will have an impact on sharing. Issues regarding sharing, however, are being examined in the *LEC Price Cap Performance Review*. In the near term, we will continue to determine sharing and lower end adjustments on an overall interstate basis.

I. Two-level Regulatory Framework and Application of Other Enhanced Service Safeguards

78. We now affirm our decision in the *Second Report and Order*, to adopt a two-level regulatory framework for video dialtone services and to require the BOCs and GTE to comply with our existing enhanced services safeguards. In adopting a two-level regulatory framework, we noted that this dichotomy tracks our existing regulatory framework for LEC basic and enhanced services. We do not think the public interest would be well-served by adopting a different set of rules for video dialtone services, particularly given that LECs will provide both video and non-video offerings through these systems. Moreover, the two-level framework should promote competition and broaden consumer choice. The level-one common carrier platform will enable multiple video service providers, for the first time, to obtain access on a nondiscriminatory basis to the basic network functions that will allow such service providers to distribute their services to consumers. Requiring LECs to offer nonregulated services subject to existing safeguards for the provision of such services will help ensure that LECs are not able to compete unfairly with other enhanced service providers and that LECs cannot bundle enhanced and nonregulated services with basic services in order to impede competition.

79. We also affirm the Commission's decision to apply existing enhanced service safeguards to BOC and GTE provision of nonregulated level-two video dialtone services. No party offers any new evidence or argument that would persuade us that this decision should be revised.

80. We also reject arguments that we should adopt more stringent requirements at this time, such as requiring LECs to offer all level-two services through a separate subsidiary. Here again, commenters have raised no new issues or arguments. We have found that separate subsidiary requirements for enhanced services impose inefficiencies and other costs, and that discrimination and cross-subsidization can be policed adequately through less onerous means. No party has shown that provision of video-related enhanced services, which at this time do not include video programming itself, is so fundamentally different from

provision of other enhanced services as to require a different regulatory regime. We do, however, make one minor change to our nonstructural safeguards. Currently, the BOCs and GTE must file nondiscrimination reports on their installation and maintenance of 49 categories of basic services. To adapt this requirement to video dialtone, we require the BOCs and GTE to add an additional service category for video dialtone delivery service. We note that the United States Court of Appeals for the Ninth Circuit recently vacated in part and remanded the *BOC Safeguards Order*, on the ground that the Commission had not adequately explained how, without full unbundling of BOC networks under ONA, discrimination could be prevented in the absence of structural safeguards. We delegate to the Common Carrier Bureau authority to establish interim measures to govern BOC provision of enhanced services, including video dialtone-related enhanced services, if and when this decision becomes effective.

81. Finally, in the *Second Report and Order*, we stated that we would review our video dialtone rules and policies in 1995. Such review no longer appears to be necessary in light of the detailed examination we have undertaken in the *Memorandum Opinion and Order on Reconsideration* of those rules and policies, as well as our continuing work on major video dialtone issues through the CPNI data request and the *Third Further Notice of Proposed Rulemaking*. Indeed, we are concerned that the regulatory uncertainty that could stem from another comprehensive review of video dialtone rules and policies could discourage video dialtone deployment pending that review. For these reasons, we will not initiate a formal review of our video dialtone rules and policies in 1995. Nevertheless, we will continue to monitor the evolution of video dialtone and oversee its implementation in specific applications through the Section 214 process and the tariff review process. In addition, if in the future it becomes apparent that we should modify aspects of our video dialtone rules and policies, we will initiate a proceeding to do so.

J. Joint Marketing and Customer Proprietary Network Information

82. We affirm our decision to permit LECs to engage in joint marketing of basic and enhanced video dialtone services, as well as of basic video and nonvideo services. We also affirm our decision to apply existing CPNI rules to video dialtone at this time. Nevertheless, we direct the BOCs and GTE, the carriers to which our CPNI rules currently apply, to provide us with additional information about the kinds of CPNI to which they will have access as a result of providing video dialtone service so that we may obtain a better record in assessing whether existing CPNI rules best balance the various interests that are implicated by the use of CPNI in the video dialtone context.

83. We permit LECs to engage in joint marketing of basic and enhanced video services, and of basic video and nonvideo services, because we believe that the benefits of permitting joint marketing outweigh any adverse effect on competition. Joint marketing can offer consumers the convenience of one-stop shopping both for basic telephone and video dialtone services and for basic and enhanced video dialtone services. Through joint marketing, LECs will be able to increase customer awareness not only of the video dialtone system generally, but of enhanced features and functions available on that system. This awareness will benefit programmer-customers as well as end users and result in greater usage of the video dialtone platform. At the same time, LECs will be able to market video dialtone services in the most efficient manner possible, avoiding the costs imposed by structural separation.

84. The record in this proceeding does not support a finding that joint marketing of video and telephony services will have an anticompetitive impact on the provision of video programming services to end users. While consumers moving to a new residence typically arrange for telephone service prior to or immediately after the move, they also will be arranging for other services at that time, including video programming services. No one has shown that the first call placed is necessarily to the telephone company. More significantly, the cable operator, not the telephone company, will be the incumbent video programming provider in the market. We believe that consumers today are likely to be aware that they may order video programming services from the local cable operator. We also believe that they will do so if the cable operator's rates and programming are preferable to those offered by programmers on the video dialtone network. Simply because telephone companies may sometimes have an initial contact with consumers changing residences in our view does not demonstrate a likely anticompetitive effect or warrant a prohibition on joint marketing. We also note that the extent to which LECs will market basic video dialtone service to end users is unclear, particularly since in some video dialtone applications, LECs have proposed to charge their programmer-customers, but not end users, for basic video dialtone service. Moreover, since telephone companies, as common carriers, are prohibited from favoring a particular video programmer's product, the ability of LECs to market video dialtone services to consumers will be constrained in any event. By contrast, cable companies with authorization to provide telephone service can jointly market video and telephony services without restrictions on favoring particular video programmers.

85. We also apply to video dialtone, at this time, our existing CPNI rules, which were recently upheld by the United States Court of Appeals for the Ninth Circuit in *California* v. *FCC*. No party has provided evidence that existing CPNI rules do not properly balance our CPNI goals relating to privacy, efficiency, and competitive equity in the video dialtone context. Nevertheless, because of the significant privacy issues that are potentially implicated by video dialtone-related CPNI, we believe we should obtain additional information about such CPNI so that we may carefully assess whether existing CPNI rules sufficiently protect customer privacy in the video dialtone context. For example, we seek information as to whether LECs, in providing video dialtone, will have access to information about the types of programming that each customer views. This information would raise greater privacy concerns than other CPNI, which does not generally include information about the content of customer communications. We are also interested in assessing the competitive value of CPNI obtained from video dialtone, as well as the extent to which access to this information promotes the efficient provision of regulated and nonregulated services by LECs.

86. In order to obtain a better record for addressing these issues, we direct each of the BOCs and GTE to file, within ninety days of publication of a summary of the *Memorandum Opinion and Order on Reconsideration* in the **Federal Register**, a detailed description of the types of CPNI to which it anticipates having access as a provider of video dialtone service. We also direct each to explain how it would plan to use such information in marketing video dialtone services to video programmers or consumers. Other interested parties, including, but not limited to, independent LECs, may also file at that time any information responsive to these issues. After this information is filed, we will issue a public notice establishing a supplemental pleading

cycle that will give all interested parties the opportunity to comment. Based on this record we will then reassess whether the public interest would be served by modifying existing CPNI rules for video dialtone service and propose any changes in those rules that may be warranted.

K. Preferential Access to Video Dialtone

87. In the *Second Report and Order*, we decided not to mandate preferential treatment for certain classes of video programmers largely because we concluded that mandatory preferential treatment is generally inconsistent with a Title II common carrier regime, the cornerstone of which is the provision of service to the public on the basis of rates, terms, and conditions that are not unreasonably discriminatory. We still have concerns about this issue. A system of discounts or free access for certain video programmers could also introduce economic distortions that would restrict demand for video dialtone service. For these and other legal and policy reasons, mandating preferential rates for any specific class of programmer may not be compatible with the public interest. On the other hand, however, the continued availability of diverse sources of programming clearly serves the public interest.

88. We have recognized exceptions to the general principle of nondiscrimination in the provision of common carrier services. These exceptions have been based upon a compelling showing of need and strong public policy concerns. Based on our review of the record, we conclude that we do not currently have a sound basis for determining whether a similar exception should be made here, and if so, for which programmers, and to what extent. In the *Third Further Notice of Proposed Rulemaking*, we seek comment on these issues. We also seek comment on whether a proposal by Bell Atlantic that seeks to permit LECs voluntarily to provide preferential rates to certain classes of programmers is or could be lawful.

L. Special Incentives

89. The petitioners have not presented any persuasive basis for the Commission to modify its decision in the *Second Report and Order*, regarding special incentives. In particular, they have not persuaded us that our existing practices for prescribing depreciation rates pose an impediment to the deployment of new technologies. Under our existing rules, the Commission reviews the depreciation rates of each carrier on a three year rotating cycle. Carriers may also seek interim updates of their depreciation rates. Based on a review of a variety of service life indicators, the Commission establishes depreciation rates for each major category of plant designed to recover the carrier's investment over the plant's projected remaining life. In the case of telephone plant, based on the most recent (1993) depreciation represcription order, the average remaining life is 9 years and approximately 40 percent of the original cost of those facilities has already been taken as depreciation expense. We believe that our existing practices are adequate to respond to any acceleration in the rate of technological change in the provision of loop facilities. We also note that to date we have received more than thirty video dialtone applications proposing use of advanced broadband networks. These applications provide evidence that the measures we have taken in this proceeding to eliminate artificial regulatory constraints will by themselves promote investment in broadband networks and that special incentives are unnecessary.

M. Recommendation to Congress

90. Although petitions for reconsideration do not lie against reports to Congress, we nevertheless take this opportunity to affirm our recommendation that Congress amend the 1984 Cable Act to permit LECs to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards. As we noted in the *Second Report and Order*, the 1984 Cable Act's ban on LEC provision of video programming was originally enacted to prevent LECs from establishing a monopoly position in the provision of video services. Given the enormous growth of the cable industry during the past decade, the risk of telephone companies preemptively eliminating competition in the video marketplace has lessened significantly. While there remains some risk of anticompetitive behavior by the LECs, we affirm our finding that this risk can and should instead be addressed through our video dialtone framework and other appropriate regulatory safeguards.

Final Regulatory Flexibility Analysis Statement

91. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, the Commission considered whether this decision could disadvantage small non-vertically integrated cable systems, wireless cable systems, and broadcasters because it could supplant these video distribution mechanisms. The Commission also considered whether this decision could threaten small businesses involved in the video rental market by eliminating the current video distribution chain. On the basis of the record, however, the Commission determined that the public interest in a competitive video marketplace, increased opportunities for development of an advanced infrastructure and the promotion of a diversity of video services, would be best served by permitting local telephone companies to offer video dialtone.

92. Copies of the final regulatory flexibility analysis are available for inspection and copying, Monday through Friday, 9 a.m.–4:30 p.m., in the FCC Dockets Reference Room (Room 239), 1919 M Street NW., Washington, DC 20554. The added final regulatory flexibility analysis may also be purchased, as part of the *Memorandum Opinion and Order on Reconsideration*, from the Commission's copy contractor, ITS, Inc., room 246, 1919 M St. NW., Washington, DC 20037. See 5 U.S.C. 604(b).

Ordering Clauses

93. *It is ordered* that, pursuant to sections 1, 4, 201–205, 214, and 220 of the Communications Act of 1934, as amended, and Section 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. 151, 154, 201–205, 214, 220, 533, the *Memorandum Opinion and Order on Reconsideration*, affirming in part, and modifying in part, the *Second Report and Order* is adopted.

94. *It is further ordered* that, the Petition for Rulemaking filed by CFA and NCTA is *denied in part* and *granted in part* to the extent indicated in the *Memorandum Opinion and Order on Reconsideration*.

List of Subjects in 47 CFR Part 63

Cable television, Communications common carriers, Reporting and recordkeeping requirements, Telephone, Video Dialtone.

Final Rule Changes

Part 63 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

1. The authority citation for Part 63 is revised to read as follows:

Authority: Sections 1, 4(i), 4(j), 201–205, 218, and 403 of the Communications Act of 1934, as amended, and Section 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. secs. 151, 154(i), 15(j), 201–205, 218, 403, and 533 unless otherwise noted.

2. Section 63.54 is amended by revising paragraph (d), and adding

paragraphs (e)(5), (e)(6), (f), and (g), to read as follows:

§ 63.54 Facilities for provision of video programming by a telephone common carrier in its telephone service area.

* * * * *

(d)(1) Except as provided in paragraph (d)(5) of this section, nothing in this section shall be construed to prohibit the provision of video dialtone services.

(2) Nothing in this section prohibits a telephone company from exceeding the carrier-user relationship with a video programmer or video programmers by providing services, and engaging in activities, not related to the provision of video programming directly to subscribers in its local exchange area.

(3) A telephone company may exceed the carrier-user relationship in its local exchange area with a video programmer by providing enhanced or other nonregulated services related to the provision of video programming to such video programmer, provided that a basic video platform is available to 70% of the households for which the video programmer seeks such enhanced or nonregulated services and provided that the telephone company does not:

(i) Determine how video programming is presented for sale to subscribers in its local exchange service area, including making decisions concerning the bundling or "tiering," or the price, terms, or conditions on which video programming is offered to subscribers in that area; or

(ii) Have a cognizable financial interest in, or exercise direct or indirect control over, any entity that performs any of the activities listed in paragraph (d)(3)(i) of this section within the telephone company's local exchange service area.

(4) A telephone company may exceed the carrier-user relationship with a video programmer or video programmers by providing services, and engaging in activities, related to the provision of video programming (other than enhanced or other nonregulated services), provided that the telephone company does not:

(i) Determine how video programming is presented for sale to subscribers in its local exchange service area, including making decisions concerning the bundling or "tiering," or the price, terms, or conditions on which video programming is offered to subscribers in that area;

(ii) Have a cognizable financial interest in, or exercise direct or indirect control over, any entity that performs any of the activities listed in paragraph (d)(4)(i) of this section within the telephone company's local exchange service area;

(iii) Permit any video programmer to participate in the operation or management of basic video dialtone service, except as may be authorized by the Commission; or

(iv) Exceed the carrier-user relationship with any franchised cable operator in the telephone company's local exchange service area, or affiliate of such cable operator, except to: lease cable drop wires, in accordance with paragraph (d)(5) of this section, or to provide enhanced or other nonregulated services, in accordance with paragraph (d)(3) of this section.

(5) A telephone company may not acquire cable facilities in its local exchange service area for use in providing video dialtone service, or services related to the provision of video programming directly to subscribers. Notwithstanding the above, a telephone company may acquire cable facilities in its local exchange service area for use in providing common carrier channel service, subject to Section 214 certification and compliance with the Commission's rules. A telephone company may also lease drop wires from a franchised cable operator in its local exchange service area, provided that:

(i) Such lease is for a nonrenewable term of three years or less; and

(ii) The telephone company does not obtain exclusive rights to use such drop wires, or otherwise unreasonably restrict the access of any video programmer to any of the cable operator's drop wires.

(e) * * *

(5) Interests with rights of conversion to equity, including debt instruments, warrants, convertible debentures, and options, shall not be included in the determination of cognizable ownership interests unless and until conversion is affected.

(6) Attribution of ownership interests in a video programmer that are held indirectly by any party, other than an investment company, through one or more intervening entities, will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, and application of the relevant benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. (For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of a video programmer, then X's interest in the video programmer would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in the video programmer would be 2.5% (0.1 × 0.25)). Under the 5% attribution benchmark, X's interest in video programmer would be cognizable, while A's interest would not be cognizable. Paragraph (e)(2) of this section governs stock ownership interests held by an investment company in a corporation.

(f) Nothing in this section prohibits a telephone company from providing video programming directly to subscribers outside its telephone service area or from owning video programming that an unaffiliated video programmer directly provides to subscribers in the telephone company's service area.

(g) As used in this section, the term "video programmer" shall mean any entity that provides video programming either directly or indirectly through an affiliate, directly to subscribers. Any entity shall be deemed to "provide" video programming if it determines how video programming is presented for sale to subscribers, including making decisions concerning the bundling or "tiering," or the price, terms, or conditions on which video programming is offered to subscribers.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 94-30241 Filed 12-9-94; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 387, 391, 392, and 397

RIN 2125-AD39

Federal Motor Carrier Safety Regulations; Technical Amendments

AGENCY: Federal Highway Administration (FHWA), DOT

ACTION: Final rule; technical amendments.

SUMMARY: This document amends the Federal Motor Carrier Safety Regulations (FMCSR) to provide nomenclature changes that will revise and update certain regulatory references and terms. Additionally, amendments are being made to revise existing hazardous materials classifications and descriptions to conform with the United Nations' Recommendations on the Transportation of Dangerous Goods. Finally, a Schedule of Limits chart pertaining to motor carriers' financial responsibility has been removed because the information it contained

was duplicative of that in another chart elsewhere in the regulations.

EFFECTIVE DATE: This rule is effective January 11, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Brad A. Trullinger, Office of Motor Carrier Standards, (202) 366–5764, or Mr. Raymond Cuprill, Office of the Chief Counsel, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The Research and Special Programs Administration (RSPA), is the agency within the DOT that has been delegated with the responsibility of developing and promulgating regulatory requirements for the transportation of hazardous materials. The RSPA has issued regulations which identify, define, describe and classify hazardous materials. These requirements are codified, generally, in the Hazardous Materials Regulations (HMR) at 49 CFR Parts 171 through 180. The responsibility for enforcement of certain aspects of the HMR is delegated to the appropriate modal Administration, and for highways, this responsibility rests with the FHWA. The FHWA consistently incorporates hazardous materials terminology, descriptions, and classifications that are promulgated by the RSPA into the FMCSR, as appropriate, in order to maintain uniformity between the requirements of the HMR and the requirements of the FMCSR.

The RSPA published a final rule on December 21, 1990 (55 FR 52402), entitled Performance-Oriented Packaging Standards; Changes to Classification, Hazard Communication, Packaging and Handling Requirements, Based on United Nations' Standards and Agency Initiative. This rule comprehensively amended the hazardous materials communication requirements in the HMR, based upon the United Nations' Recommendations on the Transportation of Dangerous Goods, which are codified at 49 CFR Part 107 through 180. Descriptions of certain hazardous materials currently found in Parts 387, 391, 392, and 397 are incompatible with the RSPA's final rule which incorporated certain aspects of the United Nations' Recommendations on the Transportation of Dangerous Goods, into the HMR, now codified at 49 CFR Parts 171–180. Hazardous materials such as explosives, poison gases, and radioactive materials heretofore have been classified in the FMCSR using the descriptive language and regulatory requirements of Parts 171 through 177 of the HMR, that were in effect prior to the implementation of the United Nations' Recommendations. Therefore, in order to effectively carry out its responsibility for enforcement of certain parts of the HMR, the FHWA has initiated these technical amendments to the FMCSR to provide for regulatory consistency and uniformity.

Minimum Levels of Financial Responsibility for Motor Carriers, 49 CFR Part 387, was published in the **Federal Register** on June 11, 1981 (46 FR 30974–30987). This part set forth requirements for motor carriers transporting non-hazardous property, and/or hazardous materials or substances, to maintain minimum levels of financial responsibility. The levels of financial responsibility vary, depending upon whether the cargo being transported is a non-hazardous material, or a hazardous material.

Qualifications of drivers, 49 CFR Part 391, was published in the **Federal Register** on April 22, 1970 (35 FR 6460). The requirements in this part establish minimum qualification standards for drivers who drive motor vehicles as, or for a motor carrier engaged in interstate commerce. This part includes limited exceptions for drivers who are otherwise qualified and regularly employed, and were hired before July 1, 1975. A driver is not subject to the requirements of this part if the driver continues regular employment, is transporting certain material considered to be hazardous, and transports that hazardous material in *Intra*-state commerce.

Driving of Motor Vehicles, 49 CFR Part 392, was published in the **Federal Register** on December 25, 1968 (33 FR 19732). Among other things, this part requires drivers who drive a motor vehicle to stop at all railroad grade crossings, and to utilize, in lieu of flame producing devices, emergency reflective triangles or other such devices, when transporting certain types of hazardous materials.

Transportation of Hazardous Materials; Driving and Parking Rules, 49 CFR Part 397, was published in the **Federal Register** on March 13, 1971 (36 FR 4876). This part requires motor carriers to have in place various procedures, policies, and documents during the transportation of hazardous materials by motor vehicle. Part 397 classified hazardous materials using the descriptive language and regulatory requirements of the HMR. These classifications, in place since 1971, included explosives, flammable liquids, oxidizing materials, and gases.

The FHWA is making appropriate conforming changes to 49 CFR Parts 387, 391, 392, and 397 of the FMCSR, that reference any hazardous material classification or description, based upon the United Nations' Recommendations, the RSPA's adoption of changes to the HMR reflective of these recommendations, and the need for international uniformity of these regulations. In addition, the FHWA is appropriately making nomenclature changes in 49 CFR Part 387 of the FMCSR, to indicate that all references made to the "Bureau of Motor Carrier Safety", will now read, the "Federal Highway Administration." All text references in Part 387 referencing the "Bureau" will read the "FHWA."

The Schedule of Limits chart as it appears in section 387.9 is being amended by removing the "Note" directly beneath the chart, and replacing it with specific gross vehicle weight rating (GVWR) references within the content of the chart itself. Since first promulgated, the "Note" reference has been confusing. By inserting specific weight limits into the text of the "Type of Carriage" column, the applicability of the financial responsibility requirements is more understandable. This final rule also removes a second Schedule of Limits chart, currently in section 387.15, because the information it contains is duplicative of that in the chart found in § 387.9.

Rulemaking Analyses and Notices

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, allows agencies engaged in rulemaking to dispense with prior notice and opportunity for comment when the agency for good cause finds that such procedures are impracticable, unnecessary, or are contrary to the public interest. 5 U.S.C. 553(b)(3)(B). As previously discussed, on December 21, 1990 (55 FR 52402), the RSPA comprehensively revised the regulatory requirements of the HMR with respect to hazard communication, classification, and packaging requirements. The revisions adopted the United Nations' Recommendations on the Transportation of Dangerous Goods, and were intended to further international regulatory uniformity. This FHWA final rule changes terminology and descriptions used in the FMCSR to reflect the changes made by the RSPA to the HMR. These amendments are technical in nature, and do not alter any current requirements regarding hazardous materials. Accordingly, the FHWA has determined that prior notice

to the public on this action is unnecessary.

Moreover, prior notice and opportunity for public comment on this document are not required under the Department of Transportation's Regulatory Policies and Procedures because it is not anticipated that such action will result in the receipt of useful information. This action promotes uniformity in the regulatory terminology and descriptions contained in the HMR and the FMCSR.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a significant regulatory action under Executive Order 12866, or a significant regulation as defined under DOT regulatory policies and procedures. These amendments are being made without substantive change to the existing regulatory language of these parts, and are strictly technical in nature. Provided in the amendments is a listing of the new hazardous materials classifications and descriptions by their respective classes and divisions as they pertain to minimum levels of financial responsibility, qualifications of drivers, driving of motor vehicles, and driving and parking requirements. It is anticipated that the economic impact of this regulatory action will be minimal. Therefore, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act, 5 U.S.C. 601–612, the FHWA has evaluated the effects of this rule on small entities. Based upon the evaluation, and the fact that the changes being made to current regulatory requirements are merely technical in nature, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this action for purposes of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulation Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Parts 387, 391, 392, and 397

Hazardous materials transportation, Highways and roads, Financial responsibility, Insurance, Motor carriers.

Issued on: November 30, 1994.

Rodney E. Slater,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA is amending title 49, Code of Federal Regulations, Chapter III, Subchapter B, parts 387, 391, 392, and 397 as follows:

PART 387—[AMENDED]

1. The authority citation for part 387 continues to read as follows:

Authority: 49 U.S.C. 10927 note; 49 CFR 1.48.

2. Section 387.3 is amended by revising paragraph (c) to read as follows:

§ 387.3 Applicability.

* * * * *

(c) *Exception.* (1) The rules in this part do not apply to a motor vehicle that has a gross vehicle weight rating (GVWR) of less than 10,000 pounds. This exception does not apply if the vehicle is used to transport any quantity of a Division 1.1, 1.2, or 1.3 material, any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A, or to a highway route controlled quantity of a Class 7 material as it is defined in 49 CFR 173.403, in interstate or foreign commerce.

(2) The rules in this part do not apply to the transportation of non-bulk oil, non-bulk hazardous materials, substances, or wastes in intrastate commerce, except that the rules in this part do apply to the transportation of a highway route controlled quantity of a Class 7 material as defined in 49 CFR 173.403, in intrastate commerce.

3. In § 387.5, the definition of In bulk is revised, the definitions of In bulk (Class A and B explosives) and In bulk (poison gas) are removed, and the definitions of In bulk (Division 1.1, 1.2, and 1.3 explosives) and In bulk (Division 2.3, Hazard Zone A or Division 6.1, Packing Group I, Hazard Zone A materials) are added in alphabetical order to read as follows:

§ 387.5 Definitions.

* * * * *

In bulk—the transportation, as cargo, of property, except Division 1.1, 1.2, or 1.3 materials, and Division 2.3, Hazard Zone A gases, in containment systems with capacities in excess of 3500 water gallons.

In bulk (Division 1.1, 1.2, and 1.3 explosives)—the transportation, as cargo, of any Division 1.1, 1.2, or 1.3 materials in any quantity.

In bulk (Division 2.3, Hazard Zone A or Division 6.1, Packing Group I, Hazard Zone A materials)—the transportation, as cargo, of any Division 2.3, Hazard Zone A, or Division 6.1, packing Group I, Hazard Zone A material, in any quantity.

* * * * *

4. Paragraph (d)(3) of § 387.7 is revised to read as follows:

§ 387.7 Financial responsibility required.

* * * * *

(d) * * *

(3) A written decision, order, or authorization of the Interstate Commerce Commission authorizing a motor carrier to self-insure under § 1043.5 of this title, provided the motor carrier maintains a satisfactory safety rating as determined by the Federal Highway Administration under part 385 of this title.

* * * * *

5. Section 387.9 is revised to read as follows:

§ 387.9 Financial responsibility, minimum levels.

The minimum levels of financial responsibility referred to in § 387.7 of this subpart are hereby prescribed as follows:

SCHEDULE OF LIMITS—PUBLIC LIABILITY

Type of carriage	Commodity transported	Jan. 1, 1985
(1) For-hire (In interstate or foreign commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Property (nonhazardous)	$750,000
(2) For-hire and Private (In interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2, and 1.3 materials, Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 CFR 173.403.	5,000,000
(3) For-hire and Private (In interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,000 or more pounds).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below.	1,000,000
(4) For-hire and Private (In interstate or foreign commerce, with a gross vehicle weight rating of less than 10,000 pounds).	Any quantity of Division 1.1, 1.2, or 1.3 material; any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in 49 CFR 173.403.	5,000,000

6. In § 387.15, Illustration I, the second full paragraph under the heading "Authorized Company Representative" and the first paragraph following the definition of "Public Liability" are revised. The paragraph beginning "The Motor Carrier Act of 1980 * * *", and the paragraph beginning "THE SCHEDULE OF LIMITS SHOWN * * *", as well as the Schedule chart itself are removed. In Illustration II, paragraph (2) under the heading "Governing Provisions" and the fifth paragraph under the heading "Conditions" are revised to read as follows:

§ 387.15 Forms.

* * * * *

Illustration I

* * * * *

Authorized Company Representative

* * * * *

Whenever required by the FHWA or the ICC the company agrees to furnish the FHWA or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date. The telephone number to call is: _____

* * * * *

Definitions as Used in This Endorsement

* * * * *

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration and the Interstate Commerce Commission (ICC).

* * * * *

Illustration II

* * * * *

Governing Provisions

* * * * *

(2) Rules and regulations of the Federal Highway Administration.

* * * * *

Conditions

* * * * *

The surety agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the surety bond is in force as of a particular date. The telephone number is: _____

* * * * *

7. Section 387.17 is revised to read as follows:

§ 387.17 Violation and penalty.

Any person (except an employee who acts without knowledge) who knowingly violates the rules of this subpart shall be liable to the United States for civil penalty of no more than $10,000 for each violation, and if any such violation is a continuing one, each day of violation will constitute a separate offense. The amount of any such penalty shall be assessed by the FHWA's Associate Administrator for the Office of Motor Carriers, by written notice. In determining the amount of such penalty, the Associate Administrator, or his/her authorized delegate shall take into account the nature, circumstances, extent, the gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

PART 391—[AMENDED]

8. The authority for Part 391 continues to read as follows:

Authority: 49 U.S.C. App. 2505; 49 U.S.C. 504 and 3102; 49 CFR 1.48.

9. The section heading and paragraphs (a)(1) and (b)(3) of § 391.71 are revised to read as follows:

§ 391.71 Intrastate drivers of vehicles transporting Class 3 combustible liquids.

(a) * * *

(1) Is transporting Class 3 combustible liquids (as defined in § 173.120 of this title), and

* * * * *

(b) * * *

(3) Is transporting a Class 3 combustible liquid (as defined in § 173.120 of this title), and

* * * * *

PART 392—[AMENDED]

10. The authority for Part 392 is revised to read as follows:

Authority: 49 U.S.C. 31136, 31502; 49 U.S.C. 1.48.

10a. In § 392.10, paragraphs (a)(2) through (a)(5), and paragraph (b)(1) are revised to read as follows:

§ 392.10 Railroad grade crossings; stopping required.

(a) * * *

(2) Every motor vehicle transporting any quantity of a Division 2.3 chlorine.

(3) Every motor vehicle which, in accordance with the regulations of the Department of Transportation, is required to be marked or placarded with one of the following classifications:

(i) Division 1.1

(ii) Division 1.2, or Division 1.3

(iii) Division 2.3 Poison gas

(iv) Division 4.3
(v) Class 7
(vi) Class 3 Flammable
(vii) Division 5.1
(viii) Division 2.2
(ix) Division 2.3 Chlorine
(x) Division 6.1 Poison
(xi) Division 2.2 Oxygen
(xii) Division 2.1
(xiii) Class 3 Combustible liquid
(xiv) Division 4.1
(xv) Division 5.1
(xvi) Division 5.2
(xvii) Class 8
(xviii) Division 1.4

(4) Every cargo tank motor vehicle, whether loaded or empty, used for the transportation of any hazardous material as defined in the Hazardous Materials Regulations of the Department of Transportation, Parts 107 through 180 of this title.

(5) Every cargo tank motor vehicle transporting a commodity which at the time of loading has a temperature above its flashpoint as determined by § 173.120 of this title.

* * * * *

(b) * * *

(1) A streetcar crossing, or railroad tracks used exclusively for industrial switching purposes, within a business district, as defined in § 390.5 of this chapter.

* * * * *

11. Section 392.25 is revised to read as follows:

§ 392.25 Emergency signals; dangerous cargoes.

No driver shall use or permit the use of any flame-producing emergency signal for protecting any motor vehicle transporting Division 1.1, Division 1.2, or Division 1.3 explosives; any cargo tank motor vehicle used for the transportation of any Class 3 or Division 2 1, whether loaded or empty; or any motor vehicle using compressed gas as a motor fuel. In lieu thereof, emergency reflective triangles, red electric lanterns, or red emergency reflectors shall be used, the placement of which shall be in the same manner as prescribed in § 392.22(b).

PART 397—[AMENDED]

12. The authority citation for part 397 is revised to read as follows:

Authority: 49 U.S.C. 5101 *et seq.*, 49 CFR 1.48.

13. Section 397.5 is revised to read as follows:

§ 397.5 Attendance and surveillance of motor vehicles.

(a) Except as provided in paragraph (b) of this section, a motor vehicle which contains a Division 1.1, 1.2, or 1.3 (explosive) material must be attended at all times by its driver or a qualified representative of the motor carrier that operates it.

(b) The rules in paragraph (a) of this section do not apply to a motor vehicle which contains Division 1.1, 1.2, or 1.3 material if all the following conditions exist—

(1) The vehicle is located on the property of a motor carrier, on the property of a shipper or consignee of the explosives, in a safe haven, or, in the case of a vehicle containing 50 pounds or less of a Division 1.1, 1.2, or 1.3 material, on a construction or survey site; and

(2) The lawful bailee of the explosives is aware of the nature of the explosives the vehicle contains and has been instructed in the procedures which must be followed in emergencies; and

(3) The vehicle is within the bailee's unobstructed field of view or is located in a safe haven.

(c) A motor vehicle which contains hazardous materials other than Division 1.1, 1.2, or 1.3, materials, and which is located on a public street or highway, or the shoulder of a public highway, must be attended by its driver. However, the vehicle need not be attended while its driver is performing duties which are incident and necessary to the driver's duties as the operator of the vehicle.

(d) For purposes of this section—

(1) A motor vehicle is attended when the person in charge of the vehicle is on the vehicle, awake, and not in a sleeper berth, or is within 100 feet of the vehicle and has it within his/her unobstructed field of view.

(2) A qualified representative of a motor carrier is a person who—

(i) Has been designated by the carrier to attend the vehicle;

(ii) Is aware of the nature of the hazardous materials contained in the vehicle he/she attends;

(iii) Has been instructed in the procedures he/she must follow in emergencies; and

(iv) Is authorized to move the vehicle and has the means and ability to do so.

(3) A safe haven in an area specifically approved in writing by local, State, or Federal governmental authorities for the parking of unattended vehicles containing Division 1.1, 1.2, or 1.3 materials.

(e) The rules in this section do not relieve the driver from any obligation imposed by law relating to the placing of warning devices when a motor vehicle is stopped on a public street or highway.

14. Section 397.7 is revised to read as follows:

§ 397.7 Parking.

(a) A motor vehicle which contains Division 1.1, 1.2, or 1.3 materials must not be parked under any of the following circumstances—

(1) On or within 5 feet of the traveled portion of a public street or highway;

(2) On private property (including premises of fueling or eating facility) without the knowledge and consent of the person who is in charge of the property and who is aware of the nature of the hazardous materials the vehicle contains; or

(3) Within 300 feet of a bridge, tunnel, dwelling, or place where people work, congregate, or assemble, except for brief periods when the necessities of operation require the vehicle to be parked and make it impracticable to park the vehicle in any other place.

(b) A motor vehicle which contains hazardous materials other than Division 1.1, 1.2, or 1.3 materials must not be parked on or within five feet of the traveled portion of public street or highway except for brief periods when the necessities of operation require the vehicle to be parked and make it impracticable to park the vehicle in any other place.

15. Section 397.13 is revised to read as follows:

§ 397.13 Smoking.

No person may smoke or carry a lighted cigarette, cigar, or pipe on or within 25 feet of—

(a) A motor vehicle which contains Class 1 materials, Class 5 materials, or flammable materials classified as Division 2.1, Class 3, Divisions 4.1 and 4.2; or

(b) An empty tank motor vehicle which has been used to transport Class 3, flammable materials, or Division 2.1 flammable gases, which when so used, was required to be marked or placarded in accordance with the rules in § 177.823 of this title.

16. Section 397.19 is revised to read as follows:

§ 397.19 Instructions and documents.

(a) A motor carrier that transports Division 1.1, 1.2, or 1.3 (explosive) materials must furnish the driver of each motor vehicle in which the explosives are transported with the following documents:

(1) A copy of the rules in this part;

(2) [Reserved]

(3) A document containing instructions on procedures to be followed in the event of accident or delay. The documents must include the names and telephone numbers of persons (including representatives of carriers or shippers) to be contracted,

the nature of the explosives being transported, and the precautions to be taken in emergencies such as fires, accidents, or leakages.

(b) A driver who receives documents in accordance with paragraph (a) of this section must sign a receipt for them. The carrier shall retain the receipt in its files for 1 year at its principal place of business.

(c) A driver of a motor vehicle which contains Division 1.1, 1.2, or 1.3 materials must be in possession of, be familiar with, and be in compliance with

(1) The documents specified in paragraph (a) of this section;

(2) The documents specified in § 177.817 of this title; and

(3) The written route plan specified in § 397.67.

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INTERSTATE COMMERCE COMMISSION

49 CFR Part 1039

[Ex Parte No. 346 (Sub-No. 31)]

Rail General Exemption Authority—Exemption of Grease or Inedible Tallow

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: The Commission is exempting from regulation the transportation by rail of grease or inedible tallow, etc. (STCC No. 20–143). These commodities are added to the list of exempt commodities in 49 CFR part 1039, as set forth below. This exemption does not embrace exemptions from regulation of car hire and car service.

On October 21, 1993, at 58 FR 54320, we requested comments on a proposal by the Association of American Railroads (AAR) to exempt from regulation the railroad transportation of grease or inedible tallow. The comments have been received and analyzed. We are approving AAR's proposal.

EFFECTIVE DATE: January 11, 1995.

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

SUPPLEMENTARY INFORMATION: 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, 1201 Constitution Avenue, N.W., Washington, DC 20423. Telephone (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services: (202) 927–5721.]

We reaffirm our initial finding that the exemption will not significantly affect either the quality of the human environment or the conservation of energy resources.

We also reaffirm our initial finding that the exemption will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 49 CFR Part 1039

Agricultural commodities, Intermodal transportation, Manufactured commodities, Railroads.

Decided: November 16, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, and Commissioners Simmons, Morgan, and Owen. Vice Chairman Phillips recused herself in this proceeding. Commissioner Owen did not participate in the disposition of this proceeding.

Vernon A. Williams,

Secretary.

For the reasons set forth in the preamble, title 49, chapter X, part 1039 of the Code of Federal Regulations is amended as follows:

PART 1039—EXEMPTIONS

1. The authority citation for part 1039 continues to read as follows:

Authority: 49 U.S.C. 10321 and 10505; and 5 U.S.C. 553.

2. In § 1039.11, the table in paragraph (a) is amended by adding the following new entry in the correct numerical order to STCC tariff 6001–V:

§ 1039.11 Miscellaneous commodities exemptions.

(a) * * *

STCC No.	STCC tariff 6001–V eff. 1–1–94	Commodity
*	* *	* *
20–143 ...	.....do	Grease or Inedible Tallow.
*	* *	* *

* * * * *

[FR Doc. 94–30470 Filed 12–9–94; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 651

[Docket No. 941236–4336; I.D. 111594A]

RIN 0648–AH46

Northeast Multispecies Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Emergency interim rule.

SUMMARY: NMFS, by emergency interim rule, amends the regulations implementing the Northeast Multispecies Fishery Management Plan (FMP). This emergency rule implements a simultaneous closure of redefined Closed Area I, the Nantucket Lightship Closed Area, and Closed Area II; a prohibition on scallop vessels in the closed areas; a disallowance of any fishery utilizing mesh smaller than the minimum mesh size allowed for regulated species, with the exception of fisheries that have been determined to have a catch of less than 5 percent by weight of regulated species; a prohibition on the possession of regulated species while fishing with small mesh; a requirement that all mobile gear vessels fishing in the Stellwagen Bank and Jeffreys Ledge areas, with the exception of mid-water trawl vessels, use 6-inch (15.24-cm) square mesh codends; and an increase in the minimum mesh size in the Southern New England and Nantucket Lightship Regulated Mesh Areas to 6-inch (15.24-cm) diamond or square mesh.

EFFECTIVE DATES: December 12, 1994, through March 12, 1995.

ADDRESSES: Copies of the Environmental Assessment (EA) supporting this action may be obtained from Jon C. Rittgers, Acting Regional Director, National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Susan A. Murphy or E. Martin Jaffe, NMFS, Fishery Policy Analysts, at 508–281–9252 or 508–281–9272.

SUPPLEMENTARY INFORMATION: The New England Fishery Management Council (Council) submitted Amendment 5 to the FMP to NMFS on September 27, 1993. The Amendment contained provisions that the Council believed would eliminate the overfished condition of cod, yellowtail flounder, and haddock. Amendment 5 was