

non-operational station is a part of the transaction under scrutiny, because the applicant has control over and can generally be presumed to intend to put the station on the air. Thus, if the non-operational station is one of the proposed commonly owned stations involved in the transaction, the principal community contour of the non-operational station will not be disregarded in calculating how many stations are counted as in the market or in determining the geographic area for which audience share is calculated.

28. The Commission also notes that current rules permit an AM licensee to own an existing AM station in the 535-1605 kHz band and apply for a construction permit for an AM station in the expanded band, 1605 kHz-1705 kHz, without regard to otherwise prohibited principal community contour overlap. Moreover, the national ownership restrictions are not applied when an entity with an attributable interest in an AM station in the existing band applies for an AM station in the expanded band. Note 10 to § 73.3555 specifies a five-year period during which joint ownership of existing band and expanded band AM authorizations will be acceptable; at the expiration of this five-year period, the licensee must elect to operate either the expanded band station or to operate the station on its former frequency in the existing band.

29. The Commission clarifies that if, during the five-year transition period, the licensee has not yet elected whether to move to the expanded band or retain its existing facility, the expanded band station will be disregarded for purposes of the local and national ownership rules. Thus, the principal community contour of the existing band station will be considered for purposes of determining the relevant market and for purposes of determining the number of stations in the market. Moreover, if it is necessary to determine whether the combination complies with the audience share cap, the Commission will consider only the audience share attributable in the relevant market to the existing band station.

Ordering Clauses

30. It is therefore ordered that, pursuant to the authority contained in section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. section 154(i), 303(r), part 73 of the Commission's rules, 47 CFR part 73 is amended as set forth below.

31. It is further ordered that the petitions for reconsideration filed in this proceeding are granted to the extent

indicated herein and are denied in all other respects.

32. It is further ordered that, pursuant to § 1.401(e) of the Commission's rules, 47 CFR 1.401(e), the Petition for Rule Making filed on August 23, 1993, by the National Association of Broadcasters, RM-8414, is denied.

33. It is further ordered that the Joint Motion for Rescission and Stay filed October 7, 1994, by the National Association of Black-Owned Broadcasters and the National Black Media Coalition is denied.

List of Subjects in 47 CFR Part 3

Radio broadcasting.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

Part 73 of title 47 of the U.S. Code of Federal regulations is amended to read as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334.

2. Section 73.3555 is amended by revising paragraphs (a)(3)(iii) and (e)(1)(i) to read as follows:

(a) * * *

(3) * * *

(iii) A station's "audience share" is the average number of persons age 12 or older on an average quarter-hour basis, Monday-Sunday, 6 a.m.-midnight, who listen to the station expressed as a percentage of the average number of persons listening to AM and FM stations in that radio metro market or a recognized equivalent, in which a majority of the overlap between the same service stations involved in the transaction takes place. The "combined audience share" is the total audience share of all AM or FM stations that would be under common ownership or control following a proposed acquisition. In situations where the majority of the overlap between the same service stations does not lie in a single metro market, the relevant audience share data is the data for all counties that are within the principal community contours of the mutually overlapping stations proposed for common ownership, in whole or in part, weighted based on the listening population, age 12 and older, and totalled to determine the average audience share. Audience share shall be calculated by using the most recent

published audience share data available at the time that the application is filed, unless an alternative showing is submitted pursuant to the Note following 47 CFR 73.3555(a)(1)(ii).

* * *

(e) * * *

(1) * * *

(i) more than 20 AM or more than 20 FM stations, provided, however, that minority controlled entities may acquire an additional five stations per service above the national limit, and that multiple owners that are not minority controlled may hold an attributable, but not controlling, interest in five additional stations per service above the national limit that are minority controlled or small business controlled;

* * *

[FR Doc. 94-29941 Filed 12-5-94; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 94-56; RM-8459]

Radio Broadcasting Services; Borger, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Zia Broadcasting Company, allots Channel 294A to Borger, Texas. See 59 FR 37020, July 20, 1994. Channel 294A can be allotted to Borger, Texas, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. The coordinates for Channel 294A at Borger are North Latitude 35-39-24 and West Longitude 101-23-36. With this action, this proceeding is terminated.

DATES: Effective: January 13, 1995. The window period for filing applications will open on January 13, 1995, and close on February 13, 1995.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 94-56, adopted November 21, 1994, and released November 29, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857-

3800, 2100 M Street, NW, Suite 140,
Washington, D.C. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 294A, at Borger.

Federal Communications Commission.

John A. Kareus,

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

[FR Doc. 94-29940 Filed 12-5-94; 8:45 am]

BILLING CODE 6712-01-F

47 CFR Part 76

[MM Docket Nos. 92-266 and 93-215, FCC 94-286]

Cable Television Act of 1992

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission has adopted a Sixth Order on Reconsideration and Fifth Report and Order to provide cable operators with additional incentives to expand their facilities and services in a way that both ensures that cable rates are reasonable and expands the opportunities for cable programmers to reach viewers. These incentives will: allow cable operators to offer new product tiers ("NPTs") to be priced as operators elect, provided certain limited conditions are met; permit cable operators to add new channels to existing cable programming services tiers ("CPSTs") subject to certain price caps; and create an additional option pursuant to which small cable operators may recover headend costs expended plus programming costs when they add channels to CPSTs. In addition, the Commission determined that a la carte packages are CPSTs and therefore subject to rate regulation. The Commission also confirmed that cable operators do not have to obtain the affirmative consent of subscribers before making rate adjustments so long as the changes are permitted under our rules and the fundamental nature of the affected tier is unaltered. Finally, the Commission decided not to adopt its proposal modifying restrictions on transactions between cable operators and their affiliates; instead it will retain

its existing cable affiliate transaction rule.

The Commission also has adopted a Seventh Notice of Proposed Rulemaking, which is being printed separately in the Federal Register.

EFFECTIVE DATE: January 1, 1995, with the exception of § 76.922(e) (1), (2), and (7) and § 76.987(g) which contain new reporting requirements which will be effective on that date or as soon thereafter as they may be approved by the Office of Management and Budget. At a later date, the Commission will publish a document specifying the effective date.

FOR FURTHER INFORMATION CONTACT:

Paul D'Ari or Joel Kaufman, (202) 416-0800.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Sixth Order on Reconsideration and Fifth Report and Order in MM Docket No. 92-266 and MM Docket No. 93-215, FCC 94-286, adopted November 10, 1994 and released November 18, 1994.

The complete text of this Sixth Order on Reconsideration and Fifth Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc. ("ITS, Inc.") at (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Synopsis of the Sixth Order on Reconsideration and Fifth Report and Order

A. Introduction

In this order, the Commission modifies its rules in light of comments, filed, in response to petitions for reconsideration, and on its own motion.

In this Report and Order, unless indicated otherwise, the Commission uses "CPSTs" to mean cable programming service tiers that are rate regulated under § 76.922 of its rules. Although new product tiers are CPSTs within the meaning of the Communications Act of 1934, as amended, 47 U.S.C. 543(l)(2), in this Report and Order, they are separately referred to as new product tiers or NPTs.

B. New Product Tiers

1. Background

The Cable Television Consumer Protection Act of 1992 ("1992 Cable Act"), 47 U.S.C. 543(c), requires the Commission to ensure that CPST rates are not unreasonable upon the receipt of a specific complaint. The Act requires

the Commission to establish criteria for determining whether a rate is unreasonable after considering a number of factors, such as the rates of similar systems, the rates charged by cable operators that face competition, and the operator's costs and revenues. The 1992 Cable Act also permits the Commission to consider other relevant factors for determining what constitutes unreasonable rates for CPSTs. In the Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266 ("Rate Order"), 58 FR 29736 (May 21, 1993), the Commission adopted benchmark and cost-of-service rules which reflect a reasonable balancing of the statutory factors. The Commission has also adopted rules which allow cable operators to increase rates for their Basic Service Tiers ("BSTs") and CPSTs to reflect inflation, increases in external costs, and the addition of new channels. The current formula for channel additions permits operators to collect a sliding per channel adjustment for adding new programming channels to CPSTs and to recover all programming expenses associated with adding channels, plus a 7.5% mark-up on new programming expenses. 47 CFR 76.922 (d), (e).

A number of programmers have expressed the view that the cable industry's ability to create new programming networks that can benefit consumers depends on operators' being able to offer new services in packages of programming. These programmers urge the Commission to provide increased incentives to cable operators to offer such packages of new programming services. Other commenters suggest that a marketplace system is preferable to regulation in certain programming and tiering decisions. In addition, as reflected in the record, many *ex parte* comments support the adoption of rules allowing operators to establish tiers of new services priced at market rates.

2. Discussion

The Commission is concerned, based on the comments filed by operators and programmers, that the current rules may not provide sufficient incentives for operators to expand capacity and provide new services to consumers. Accordingly, the Commission is establishing a new category of CPST—an NPT—that will provide additional incentives for operators to provide new services to consumers because operators will be permitted to price these tiers as they choose. The new rules also will help programmers by encouraging operators to add new attractive programming to NPTs in order to induce customers to subscribe to the NPTs.

NPTs are, by definition, "cable programming services" under the 1992 Cable Act, because NPTs are composed of video programming provided over cable systems that are not carried on the BST and are offered in a package rather than exclusively on a per channel or per program basis.¹ 47 U.S.C. 543(1)(2). The Commission therefore has a duty under the 1992 Cable Act to ensure that NPTs are not unreasonably priced.

The Commission finds that, so long as the conditions set forth below are met, the rates for NPTs will not be unreasonable. The conditions set forth below will ensure that subscribers may choose to subscribe to BSTs, NPTs, or CPSTs or combinations of those tiers and, that as a result, NPTs will face competition from BSTs and CPSTs.

First, operators offering NPTs are prohibited from making fundamental changes to what they offer on their BSTs and CPSTs on September 30, 1994. This requirement is necessary to ensure that cable subscribers continue to receive basically the same cable service they now receive at prices the Commission has set pursuant to its rate regulations. This requirement, however, is not intended to freeze BSTs and CPSTs. Operators remain free to move channels from the existing tier to a single channel offering or drop channels entirely, so long as the aggregation of such changes does not constitute a fundamental change of their BSTs or CPSTs.

Second, operators may not drop channels from BSTs and CPSTs and move them to NPTs (including time-shifted, slightly altered or renamed versions of channels offered on other tiers), if the channels were offered on their BSTs or CPSTs on September 30, 1994. This will protect consumers by ensuring that operators electing to provide NPTs do not dilute the BSTs and CPSTs that are currently available to consumers. This will also help ensure that BSTs and CPSTs provide a competitive option to NPTs. A channel that occupied a BST or a CPST part-time may be offered full-time on an NPT, as long as it continues to be offered on the BST or CPST under substantially the same conditions as it was offered on September 30, 1994. If a channel occupies a BST or CPST full-time, however, and is subsequently reduced to part-time on the BST and CPST, that channel may not be offered on an NPT full-time.

Third, BSTs and CPSTs must continue to be cognizable services. That is, the operator must continue to market

its BSTs and CPSTs so that customers are reasonably aware of: (1) The availability of those tiers to the public; (2) the names of the channels available on those tiers; and (3) the price of the tiers. Within 30 days of the offering of an NPT, operators shall file with the Commission a copy of the new rate card that contains the following information on their BSTs, CPSTs, and NPTs: (1) The names of the programming services contained on each tier, and (2) the price of each tier. Operators also must file with the Commission copies of notifications that were sent to subscribers regarding the initial offering of NPTs. After this initial filing, cable operators must file updated rate cards and copies of customer notifications with the Commission within 30 days of rate or service changes affecting the NPT. This information will help the Commission ensure that operators are complying with our conditions for NPTs. No prior regulatory approval, however, is required to offer an NPT.

Furthermore, in accordance with the 1992 Cable Act's prohibition on negative option billing, an operator may not charge any subscriber for an NPT unless the subscriber has requested the NPT by name. Moreover, fundamental changes to an NPT must be approved by subscribers in accordance with the negative option billing rules. Channel changes involving relatively few channels generally will not change the fundamental nature of a tier and thus will not implicate the negative option billing rule.

Operators may not require the subscription to any tier, other than a BST, as a condition for subscribing to an NPT. Further, operators may not require subscription to an NPT as a condition to subscribing to a CPST. We believe that restricting the ability of operators to link the purchase of NPTs and other CPSTs will maximize subscriber choice and foster competition between NPTs and CPSTs. These buy-through restrictions will not apply, however, to cable operators that, prior to October 5, 2002, lack the capacity to offer BSTs and NPTs without also providing other intermediate tiers of service. See 47 CFR 76.921.

Apart from the foregoing limited, specific requirements, operators will have complete flexibility to offer programming services on an NPT. Thus, the Commission's NPT rules provide that operators may offer the same programming services on NPTs as are on one or more BSTs and CPSTs so long as they do not state or imply that any such channel is available only on an NPT.

Operators may add any channel to an NPT that was previously on a BST or

CPST if the channel was dropped from the BST or CPST before September 30, 1994. If a channel was offered on a system on a BST or CPST on September 30, 1994, however, the channel may not be moved to an NPT unless the operator waits at least two years from the date the channel is dropped from the BST or CPST. However, operators may offer new channels (i.e., channels first offered on a system after September 30, 1994) on CPSTs before moving them to NPTs, subject to the conditions outlined in this Report and Order. The flexibility to move new channels to NPTs will keep the prices for CPSTs from becoming unreasonable and will create additional capacity for new services on CPSTs. This capacity should help create opportunities for programmers to establish an audience for their new channels.

If after initially electing to offer an NPT, a cable operator decides that offering an NPT is no longer desirable, the cable operator is free to drop the tier upon proper notice to subscribers. An operator that drops an NPT may reestablish that tier at a later time by complying with the conditions outlined above.

The Commission's conclusion that the rates at which cable operators choose to offer NPTs will not be unreasonable reflects its consideration of the statutory factors that it must consider in establishing criteria for determining whether a rate for a CPST is unreasonable. As explained above, the Commission believes that the rates charged for NPTs will be constrained by the rates charged for BSTs and CPSTs. The rate standards for BSTs and CPSTs were set directly by analysis of the factors the 1992 Cable Act instructs the Commission to consider. The Commission believes that the rates charged for NPTs must be competitive with the rates charged for CPSTs or consumers will decline to subscribe to NPTs. Therefore, the rates charged for NPTs will reflect the Commission's analysis of the statutory factors because cable operators will have to offer NPTs at prices that are attractive in comparison to services subject to benchmark or cost-of-service regulation.

B. A La Carte Package Offerings

1. Background

Under the 1992 Cable Act, video programming offered on a per channel or per program (a la carte) basis is not subject to rate regulation. 47 U.S.C. 543(1)(2). In the April 1993 Rate Order, 58 FR 29736 (May 21, 1993), the Commission held that it would not regulate packages of otherwise exempt

¹ For purposes of the FCC Forms 1200 and 1210, however, channels that are on an operator's NPT will not be considered regulated channels.

per channel or per program services so long as: (1) The price for the combined package does not exceed the sum of the individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the package to subscribers separately. The Commission stated that the second condition would be met only when the per channel offering provides subscribers with a realistic service choice. *Id.* at 29746.

In the Second Reconsideration Order, 59 FR 17943 (April 15, 1994), in order to address concerns that some packages established by operators in response to rate regulation were not consistent with the 1992 Cable Act and Commission regulations, and the fact that other offerings raising similar concerns could be initiated in the future, the Commission provided 15 interpretive guidelines for determining whether an operator's collective offering of a la carte channels should be accorded regulated or unregulated treatment. The Commission also determined that packages of a la carte channels offered prior to April 1, 1993, (the date it adopted the Rate Order) would be accorded unregulated treatment. This limited "grandfathering" of packages available on April 1, 1993, was intended to avoid elimination of discounts that were available to consumers and clearly were not offered to evade rate regulation. *Id.* at 17951-17952.

Also, on November 17, 1993, the Commission issued 16 letters of inquiry to various cable operators, and on December 13, 1993, it issued another 35 letters of inquiry, most of which addressed the issue of removal and repackaging of channels. On February 22, 1994, the Commission issued 11 letters of inquiry to cable operators that, among other things, asked operators to justify a la carte offerings that may be inconsistent with the Commission's rate regulations.

The Commission has received numerous comments with respect to a la carte issues. Most of the commenters requested greater clarification of the Commission's a la carte rules and guidelines. Commenters also made suggestions concerning the treatment of a la carte offerings that are found not to meet Commission guidelines. Some suggest that cable operators should not be penalized for failing to satisfy the Commission's test for a la carte packages because it is unclear.

2. Discussion

The evidence obtained in response to the letters of inquiry issued to cable operators offering a la carte packages and the comments we received from

cable operators convinced the Commission that it should reconsider its approach. It seems clear that some cable operators have evaded rate regulation by purporting to offer channels a la carte, when in fact the individual offerings were not a realistic service alternative. On the other hand, there is merit to the industry's claim that neither the Commission's original two-part test nor its interpretative guidelines provides a clear answer with respect to the permissibility of some a la carte packages that have been offered. Indeed, it is perhaps inevitable that the test would not be capable of precise application in many instances because it is not clear how various factors should be weighed and applied.

The Commission's analysis leads it to conclude, contrary to its prior decisions, that a la carte packages are CPSTs within the meaning of the 1992 Cable Act. The conclusion that all packages are "cable programming services" is supported by the language of the statute, the legislative history, and practical considerations as well.

Section 3(l)(2) of the 1992 Cable Act defines CPSTs as "any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis." 47 U.S.C. 543(l)(2). A package of channels, whether or not the channels also are offered a la carte, plainly is "video programming provided over a cable system," and hence is a "cable programming service." The package is not "video programming offered on a per channel or per program basis;" the individual channels are. Accordingly, it is apparent from the statutory language that a la carte packages are cable programming services. The conclusion that a package of a la carte channels is a CPST is further supported by the legislative history, which focused on the fact that bundled offerings of cable programming would be subject to rate regulation.

A conclusion that rate regulation does not apply at all to video programming packages if the channels are offered individually would fatally undermine the rate regulations rules Congress enacted. If a package of a la carte channels is not a CPST, any cable operator may avoid rate regulation simply by announcing the offering of channels on an a la carte basis even if very few subscribers would choose the a la carte offerings rather than the package.

However, as the Commission recognized in the Rate Order, there are sound policy reasons to treat as reasonable any price offered for a package of channels that traditionally have been offered on a per-channel basis. Indeed, the Commission can not envision circumstances in which any price of a collective offering such as the commonly offered "HBO/Showtime" package would be found to be unreasonable. For the future, the new rules authorizing "new product tiers" should provide cable operators with sufficient flexibility to offer such packages at whatever price they choose. Although cable operators may not remove channels from regulated tiers and offer them on NPTs, they are free to create packages of a la carte channels under the new rules governing NPTs. Moreover, as stated above, the Commission previously "grandfathered" packages available on April 1, 1993. The difficult question concerns the treatment of a la carte packages created between April 1, 1993, and September 30, 1994. In some cases, the Commission thinks it is clear that the package at issue was not a permissible package under a fair reading of its test. In other cases, however, it is not clear how the test should be applied to the package at issue. In those cases, the Commission thinks it is fair, in light of the uncertainty created by its test, to allow cable operators to treat existing packages as NPTs even though it would not qualify under the new rules, provided that such packages involve only a small number of migrated channels.² The Commission sees little reason to require an operator to "reverse migrate" a package that was not clearly ineligible for unregulated treatment under our a la carte policy. The Commission intends to address whether specific operator packages should be treated as NPTs in rulings on individual cases in the near future.

C. Adjustments to Capped Rates for Addition, Deletion and Substitution of Channels on CPSTs

1. Background

Pursuant to Section 623 of Communications Act, 47 U.S.C. 543, the Commission adopted a comprehensive framework governing the rates for BSTs and CPSTs. Under this framework, once initial rates are set pursuant either to the benchmark or cost-of-service approaches set forth in the rules, rates are governed by a price cap designed to

² As noted above, competition between an NPT and a BST and/or CPST is the primary reason that we conclude rates for NPTs will not be unreasonable.

assure that rates for regulated cable services remain reasonable. Under the cap, operators may adjust rates annually for inflation as measured by the gross national product price index ("GNP-PI") and for certain categories of external costs. 47 CFR 76.922(b),(c),(d).

The Commission's price cap rules were amended in March, 1994 to specify a "going forward" mechanism under which capped rates are adjusted for changes in the number of channels offered on BSTs and CPSTs. Fourth Report and Order 59 FR 17943, 17955-17956 (April 15, 1994). Under these provisions, operators first remove all external costs from the tier charge and then adjust the residual component of the tier charge by a specified per channel adjustment amount when the total number of regulated channels changes. The methodology for adjusting capped rates when channels are added or deleted from a regulated tier is set forth in detail in § 76.922(e) of the Commission's rules and in FCC Form 1210.

The March, 1994 rule amendments also permitted operators to include a mark-up of 7.5% on new programming expense related to programming added on or after May 15, 1994. Form 1210 allows the 7.5% mark-up on all programming cost increases occurring after March 31, 1994, no matter when the channel was first offered.

Parties filing petitions for reconsideration and many commenters filing in response to the Fifth Notice of Proposed Rulemaking ask the Commission to revise the existing going forward rules substantially. Many criticize the existing per channel adjustment on the grounds that it fails to provide sufficient incentives to add channels. Some cable operators, programmers, and networks state that the percentage-based approach to the programming mark-up results in disincentives for operators to add low or no-cost services to BSTs and CPSTs (noting that 7.5% of zero is zero).

Most of the alternatives on going forward issues proposed by the industry involve a flat per channel charge. Two Commenters submitted economic studies to support a flat per channel adjustment of at least 25 to 30 cents. Some propose a flat-fee mark-up subject to an annual cap.

2. Discussion

As noted, the Commission previously adopted a mechanism by which cable operators may adjust rates when adding channels to BSTs and CPSTs. The Commission is supplementing its existing going forward rules by creating an alternative channel adjustment

methodology. Cable operators adding channels to CPSTs under the new, supplemental rules may receive (1) a flat per channel mark-up, subject to a cap through December 31, 1997, and (2) recovery of programming costs, subject to a cap through December 31, 1996, and pursuant to the Commission's existing rules on permitted programming costs through December 31, 1997, modified to remove the 7.5% mark-up. In so doing, the Commission seeks to permit operators to provide new services on CPSTs, while assuring that rates for CPSTs are not unreasonable.

Operators may adjust rates for CPSTs pursuant to the new going forward rules beginning January 1, 1995, the effective date of the new rules, for channel changes, if any, made to these tiers on or after May 15, 1994, the effective date of the existing going forward rules. Operators adding channels to CPSTs on and after May 15, 1994, may use either the new rules or the existing rules for adjusting rates. Thus, the permitted charge for a CPST will consist of two elements. The first element is the permitted rate for channels offered on CPSTs on May 14, 1994, determined under current rules. The second element is the permitted rates for channels added to, or dropped from, CPSTs on or after May 15, 1994, determined under the new rules, or, if the operator so elects with respect to channel additions, the current rules as modified to remove the 7.5% mark-up on increases in programming costs under certain circumstances described below.

Operators must elect to apply either the new rules or the current rules the first time they adjust rates after December 31, 1994, to reflect a channel addition to a CPST that occurred on or after May 15, 1994, and must use the elected methodology for all rate adjustments through December 31, 1997. The Commission is allowing operators to choose to continue using the current rules because the current rules provide greater channel addition incentives than the new rules in certain limited circumstances and some operators may have relied on the current rules in deciding to add channels. While the Commission is requiring that operators use either the existing or the new going forward rules consistently for channel additions to CPSTs after December 31, 1994, an operator that chooses to use the new rules after that date may, but is not required to, adjust rates to reflect the new rules for channel additions made between May 15, 1994 and December 31, 1994. Rates for the BST will continue to be governed exclusively by the current rules, except

that where a system offered only one tier on May 14, 1994, the cable operator will be allowed to use the revised rules for channel additions to the BST, as if the tier was a CPST.

a. "Going Forward" price cap structure. Operators electing to use the new rules may adjust their rates between January 1, 1995 and December 31, 1997, by up to 20 cents, exclusive of license fees, for each new channel added to CPSTs on or after May 15, 1994, subject to the Operator's Cap and the reserve for license fees, described below. Operators are not required to raise rates, but rather are permitted to do so. Operators may add channels under the new rules at any time from May 15, 1994, to December 31, 1997. They may not, however, raise their prices as a result of channel additions by more than \$1.20 per subscriber per month between January 1, 1995, and December 31, 1996, and by more than \$1.40 between January 1, 1995, and December 31, 1997 ("Operator's Cap").

Operators may use any portion of the Operator's Cap to pay for license fees between January 1, 1995, and December 31, 1996, for channels added between May 15, 1994, and December 31, 1996. Moreover, operators may recover an additional amount of not more than 30 cents per subscriber per month for license fees (the "License Fee Reserve") between January 1, 1995, and December 31, 1996, for channels added between May 15, 1994, and December 31, 1996. After December 31, 1996, license fees may be passed through to subscribers pursuant to the existing rules, except that, as described below, operators will not be allowed the current 7.5% mark-up on programming costs for channels on or after May 15, 1994. The Operator's Cap and License Fee Reserve only apply to costs associated with new channels on CPSTs and do not affect the ability of operators to obtain rate adjustments for inflation or changes in external costs other than increases in programming costs of channel added under the new going forward rules. See 47 CFR 76.922(d)(2), (3). The new going-forward rules for channel additions should benefit consumers by increasing their viewing options on existing CPSTs, while avoiding unreasonable price increases for those tiers.

b. Per channel adjustment factor. As indicated, the Commission establishes a "per channel adjustment factor" of up to 20 cents per channel for channels added to CPSTs. Operators may increase rates by up to 20 cents, exclusive of programming costs, for each channel added to a CPST on and after May 15, 1994, subject to the Operator's Cap of \$1.20 on rate increases attributable to

channel additions through December 31, 1996, and \$1.40 through December 31, 1997. An operator may choose a lower per channel adjustment, if that would further its business plan by, for example, allowing it to devote a portion of the Operator's Cap to license fees. An operator that added a channel on or after May 15, 1994, and raised pursuant to the existing rules, may revise its rates after December 31, 1994, using the new channel addition rules. As noted, an operator must use either the existing or the revised rules consistently for all channel additions on and after January 1, 1995.

The per channel adjustment factor will compensate the operator for its costs of adding the channel plus a reasonable profit. Twenty cents falls within the historical range of 15-22 cents by which operators in a competitive environment would adjust rates for the addition of a new programming channel, exclusive of programming costs. The methodology the Commission used in deriving the 15-22 cent range is set forth in the Technical Appendix to the full text of this Report and Order.

The Commission's rules provide that any revenues received from a programmer, or shared by a programmer and an operator, must be netted against costs for purposes of calculating whether there has been an increase or decrease in external costs. 47 CFR 76.922(d)(3)(x). We extend this requirement for offsetting revenues against costs to the per channel adjustment factor for channels added to CPSTs pursuant to our revised channel adjustment rules. The revenues must be deducted from programming costs and then, to the extent revenues are remaining, from the per channel adjustment. Offsetting will apply on a channel-by-channel basis. Commissions received by an operator from programmers will be treated as revenues received from programmers.

The per channel adjustment factor permitted by this Report and Order will apply only to net increases in channels from the highest number of channels offered on all CPSTs (excluding NPTs) on May 15, 1994, or any date thereafter.³

³ An operator may receive a per channel adjustment for channel X if it substitutes channel Y for channel X and then adds channel X back to the system, so long as the addition of channel X represents the required net increase in the number of CPST channels. In contrast, an operator that had 20 channels on its CPSTs on May 15, 1994, 22 channels on its CPSTs on May 15, 1995, and 21 channels on its CPSTs on January 1, 1996, may not obtain a per channel adjustment for adding the 22nd channel back to its system on May 15, 1996.

If an operator substitutes a new channel for an existing channel, no per channel adjustment may be made under the revised channel adjustment rules. Rather, the operator should continue to charge the residual associated with the channel that was dropped. To permit an operator to receive a per channel adjustment in these situations would encourage operators to evade the purpose of the revised going forward incentives by substituting new for existing channels simply to get an additional per channel adjustment.

c. Operator's cap. For the addition of new channels to CPSTs on or after May 15, 1994, the Commission establishes a per subscriber cap on the amount by which monthly cable rates may increase between January 1, 1995, and December 31, 1997. Operators may not make rate adjustments to monthly rates totalling more than \$1.20 per subscriber over the first two years of the three-year period or more than \$1.40 over the full three-year period. Rate changes prior to January 1, 1997, resulting from programming costs of new channels must fall within the Operator's Cap unless they are covered by the License Fee Reserve. Price increases will be counted against the Operator's Cap when rates are increased as a result of channel additions, not when the addition occurs. Any rate increases pursuant to the revised rules shall be subject to the notice and prior approval requirements of the Commission's regulations. See 47 CFR 76.932, 76.933, 76.958, 76.964. In addition, operators will be required to send the Commission copies of the notices sent to subscribers. The Operator's Cap will apply only to operators using the 20 cent per channel adjustment in our new rules. It will not apply to operators that elect to use the existing rules to adjust rates for channel additions occurring on and after May 15, 1994.

The Operator's Cap on the rate increase attributable to the addition of new channels to CPSTs is based on historical increases in numbers of channels offered. It is necessary because without such a cap, the per channel mark-up could create an incentive for operators to add large numbers of channels to CPSTs so as to increase the aggregate mark-up received. This result would undermine the 17% competitive rate reduction previously ordered by the Commission and could raise overall rates toward monopoly levels that would have occurred in the absence of the 1992 Cable Act. An unreasonable CPST rate also would cause the CPST to

Rather, the 22nd channel is treated as a channel substitution.

be an unattractive choice for subscribers, thereby removing it as a viable competitor to an NPT.

In addition, the Commission adopts the Operator's Cap because there is no evidence that consumers want to pay for an unlimited number of channels in CPSTs. The cap will also provide operators with incentives to choose which new services offered on CPSTs would be most demanded by subscribers. Finally, because the per channel adjustment of up to 20 cents reflects an average based on historical data, adjusted for the lack of effective competition, it may provide some operators with a greater incentive to add channels than would exist in a competitive market.

d. License fee reserve. The Commission also establishes a License Fee Reserve of 30 cents which operators may use, between January 1, 1995, and December 31, 1996, to recover programming costs for new channels. The License Fee Reserve may be applied against the initial license fee or any increase in the license fee for channels added during the first two years that the Operator's Cap is in effect. During this period, operators also may use all or any portion of the amount permitted as a per channel adjustment under the Operator's Cap to pay for license fees in excess of the License Fee Reserve. License fees incurred in the third year the Operator's Cap is in effect may be passed through to subscribers as external costs without counting against either the License Fee Reserve or the Operator's Cap.

The 30 cents License Fee Reserve would allow 6 channels to be added at an average license fee of 5 cents per channel. The 5-cents average, per channel license fee falls within the range which the Commission observed.

The Commission has adopted a License Fee Reserve in response to programmers' concerns that a cap on total rate increases attributable to new channels, without a reserve for license fees, might give rate-regulated cable operators incentives to increase profits by adding only no cost or low cost channels.

e. Programming cost increase mark-up. The Commission has decided not to allow operators using the per channel adjustment under the new rules to take the 7.5% mark-up on programming cost increases, including retransmission consent fees and copyright fees incurred for coverage of broadcast signals, for channels for which the per channel mark-up of up to 20 cents was taken. The Commission's analysis indicates that the per channel adjustment of up to 20 cents for additional channels, in

addition to the License Fee Reserve, will provide full and fair compensation to operators adding channels to CPSTs. Operators who have added channels prior to the effective date of the new rules will not be harmed by this change since the operators may elect to add channels to CPSTs under the old or the new rules.

f. Deletion and substitution of channels. The new regulations also specify how operators shall adjust rates for BSTs and CPSTs when channels are dropped from, or moved between, BSTs and CPSTs. In general, when dropping a channel from a BST or CPST, operators will be required to make their rates reflect the net reduction in external costs as is required under the existing rules. See 47 CFR 76.922(d)(3) (i) and (ii). Operators also will be required to reduce the price of that tier by the "residual" associated with that channel. For channels that were on a BST or CPST on or before May 14, 1994 or channels added after that date pursuant to the current rules, the per channel residual is the charge for the tier, minus the external costs for the tier, and any per channel adjustments made after that date, divided by the number of channels on the tier. For channels added to a CPST on or after May 15, 1994, pursuant to the new channel addition rules, the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier plus any inflation adjustment since that time. The residual and programming cost shall be calculated as of the date the channel is dropped.

As noted above, when an operator substitutes a new channel for an existing channel on a CPST, no per channel adjustment may be taken. The residual for the new channel is that of the channel it replaced. Operators substituting channels will be required to adjust their rates for changes in license fees as provided by the current rules. To preserve the overall effectiveness of the Operator's Cap and the License Fee Reserve, if the license fee for the new service is greater than the license fee for the replaced service, and the operator chooses to pass that increase through to subscribers, the excess shall count against the aggregate of the Operator's Cap and the License Fee Reserve. If the license fee for the new channel is less than the license fee for the replaced channel, no credit shall be given against the cap or the reserve, so as not to create an artificial incentive to replace higher license fee channels with lower license fee channels. With respect to channels to which the 7.5% markup on new programming costs applies, the operator shall treat the mark-up as part of its

programming costs and subtract the mark-up from its external costs when a channel is dropped. When such a channel is substituted, the operator may retain in its rates the 7.5% mark-up on the license fee of the dropped channel, so long as that amount is not more than 7.5% of the license fee of the new channel.

When a channel is shifted between a BST and a CPST or between CPSTs, it shall be treated as if it was dropped from one tier and the residual and programming cost associated with the shifted channel shall be shifted to the other tier. The residuals associated with the shifted channel shall be adjusted by reference to the number of subscribers on each tier to ensure aggregate revenues remain the same.⁴ Revenue neutrality protects consumers by ensuring that the Commission's requirements do not create incentives for operators to move channels to tiers with more subscribers solely to increase revenues. And because the per channel adjustment of up to 20 cents applies only to the CPSTs, an operator may not move a channel for which it received a per channel adjustment under the new rules from a CPST to the BST.

g. Headend upgrades for small systems. The Commission decided to adopt a special streamlined cost-of-service procedure for independent small systems and small systems owned by small MSOs that upgrade their headend equipment to add new channels to CPSTs. Small systems may find it difficult to recover the fixed costs of the headend equipment required for adding channels, since the cost must be recovered over a small subscriber base. The Commission limits this relief to independent small systems and small systems owned by small MSOs because (1) systems with more than 1,000 subscribers can spread the fixed costs of headend equipment over a larger customer base and (2) small systems owned by larger operators should have adequate financial resources to add channels under our generally applicable rules. Qualified small systems that add channels to their CPSTs, therefore, have the option of either using this special procedure or using the existing or revised going forward rules applicable to all operators.

⁴ An operator may use the equivalent billing ("ERU") methodology in calculating the number of subscribers on a tier, provided it does so for both the tier from which the channel is shifted and the tier to which the channel is shifted and provided that the operator otherwise meets the conditions for using EBU methodology. See Public Notice: Question and Answer on Cable Television Rate Regulation (July 27, 1994) Question and Answer 1.

Under this streamlined cost-of-service procedure for upgrading headend equipment, independent small systems and small systems owned by small MSOs may increase rates to recover the costs associated with new headend equipment that is used to add channels to CPSTs. In order to recover costs for headend equipment, qualified small systems will be required to certify to the Commission the level of costs they have actually incurred for adding headend equipment.

The Commission also decided to limit the amount small systems may recover under this special allowance to prevent unreasonably sharp rate increases to small system subscribers. The amount a small system may recover for each channel added shall be limited to programming costs incurred plus the lesser of the actual cost of the headend equipment or \$5,000, which is consistent with comments that the addition of a satellite channel can cost between \$2,500 and \$5,000.

Headend costs that are to be recovered through increased rates must be depreciated over the useful life of the equipment. While the Commission has not prescribed depreciation rates, cable operators are required to follow reasonable depreciation practices. Depreciation and useful life of the equipment are to be submitted to the Commission with the cost certification. In addition, the rate of return the small system may earn on this investment may not exceed 11.25%.

Small systems may apply this streamlined cost-of-service procedure for channels added after May 14, 1994, but may not use this methodology to increase rates to reflect channel additions until January 1, 1995. Moreover, small systems that increase rates as a result of any channel additions pursuant to either this methodology may add a maximum of seven channels to CPSTs over the next three years. This is equal to the number of channels that a system taking the maximum 20 cent per channel adjustment may add under the Operator's Cap.

h. Systems with more than 100 channels. In the Fifth Notice of Proposed Rulemaking, the Commission noted that the Fourth Report and Order 59 FR 17943, 17955-17956 (April 15, 1994), established per channel adjustments for systems with total channels on regulated tiers of 100 channels or fewer. It did not establish per channel rates for systems that provide more than 100 channels. The Commission solicited comment on whether it should establish a method for adjusting capped rates in situations

where there are more than 100 regulated channels and, if so, what that method should be. The Commission additionally asked whether the going forward methodology should be modified to provide greater or lesser compensation to operators for adjustments to capped rates when channels are added or deleted from BSTs and CPSTs, and whether this would better meet the goals of encouraging infrastructure development and growth of programming.

The existing going forward regulations use a declining per channel adjustment as the number of channels on a system increase. In contrast, in this Report and Order the Commission has decided to allow (1) a flat per channel adjustment for the addition of new channels to CPSTs, subject to an Operator's Cap, and the License Fee Reserve, and (2) NPTs for which cable operators set the price. Because the revised regulations allow operators to set the price for an unlimited number of channels on NPTs, the Commission does not believe it is necessary to adopt any other rules that are based on a specific number of channels. Cable operators continuing to add channels under the current rules may receive a per channel incentive only for the first 100 channels on BSTs and CPSTs.

i. Term of the revised channel addition rules. A. The new rule for adjusting rates when channels are added, deleted or substituted on CPSTs will be in place through December 31, 1997, and will be reviewed prior to the end of that period to determine if there is any reason to continue to provide incentives to increase the number of channels on any CPST. The new rule will expire on that date and will be replaced by the existing rule unless the new rule is reinstated by the Commission. The special streamlined cost-of-service procedure for headend equipment costs for small systems also will expire on December 31, 1997, unless it is reinstated by the Commission.

D. Negative Option Billing

1. Background

Section 3(f) of the 1992 Cable Act, 47 U.S.C. 543(f), prohibits negative option billing, which occurs when a cable operator charges a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment may not be deemed to be an affirmative request for such service or equipment. The Rate Order, 58 FR 29736, 29748 (May 21,

1993), provided that changes in the mix of programming in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision unless they change the fundamental nature of the tier. The Commission believed that, on balance, the benefits to subscribers from giving operators the ability to diversify, improve or otherwise modify their offerings in a tier outweigh the slight reduction in subscriber choice that results from exempting such changes from the negative option billing prohibition.

In the Third Reconsideration Order, 59 FR 17961, 17969-17970 (May 21, 1993), the Commission concluded that the Commission concluded that the Commission and state and local governments have concurrent jurisdiction to regulate negative option billing. The rationale for this conclusion was that regulation of negative option billing, while discussed in the section of the 1992 Cable Act governing rate regulation, is more in the nature of a consumer protection measure than rate regulation per se. Section (8)(c)(1) of the 1992 Cable Act, codified in Section 632(c)(1) of the Communications Act, 47 U.S.C. 552(c)(1), provides that nothing in the "Consumer Protection Laws" title of the Communications Act may "be construed to prohibit any State or any franchise authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title."

Commenters request that the Commission clarify what channel additions to a tier will not require affirmative marketing under Section 3(f) of the 1992 Cable Act. They also ask the Commission to declare that local authorities may not require affirmative marketing for channel additions under state or local laws. More specifically, NCTA asks the Commission to clarify that three specific "scenarios" do not trigger the federal negative option billing rule and that state or local authorities are preempted from enacting or enforcing their own negative option billing laws.

2. Discussion

In determining whether any of the scenarios involve negative option billing, the Commission is guided by the language of the negative option billing provision, its legislative history, and our prior interpretations. In light of that guidance, the Commission reaffirms that a change in the mix of channels in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision, unless they change the fundamental nature of

the tier. With respect to NCTA's first scenario, which involved passing through external costs or inflation adjustments, the Commission holds that these types of rate changes do not in and of themselves invoke the federal negative option billing rule. As an initial matter, they do not constitute "service or equipment" within the meaning of Section 3(f). Moreover, under our rate regulations, operators are specifically permitted to pass through to subscribers increases in external costs and inflation adjustments. 47 CFR 76.922(d). These types of rate changes do not constitute a change in the fundamental nature of a tier, and, therefore, do not implicate the federal negative option billing prohibition for that reason as well.

With regard to the second and third scenarios identified in NCTA's letter, the Commission stated in the Rate Order, 58 FR 29748 (May 21, 1993), that "a change in the mix of channels in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision, unless they change the fundamental nature of the tier." Determinations as to what constitutes a change in the fundamental nature of a tier will generally depend on the individual circumstances of each case. Channel changes involving relatively few channels generally will not change the fundamental nature of that tier, and thus will not implicate the federal negative option billing rule. Consistent with this approach, additions of channels and rate adjustments within the Operator's Cap and License Fee Reserve of the revised going forward rules generally will not change the fundamental nature of a tier. Affirmative marketing also is not required when an operator moves channels pursuant to our conditions for establishment of NPTs, so long as the movements do not change the fundamental nature of the tier. Because the Commission's rules require operators to give subscribers 30-days' advance notice of any changes in rates, programming or channel positions, the Commission does not believe subscribers need the additional protection of the negative option billing provision for relatively modest changes. See 47 CFR 76.309(c)(3)(i)(B); 76.964(b).

Section 632(c)(1) of the Communications Act makes clear that state and local authorities generally may apply statutes proscribing fraud or misleading advertising practices to cable operators. However, Section 3(a)(1) of the 1992 Cable Act makes clear that regulation of "the rates for the provision of cable service" is governed exclusively by the federal statute and Commission regulations. The scenarios NCTA

presents require the Commission to consider again the relationship between Section 632(c)(1) of the Communications Act and Section 3(a)(1) of the 1992 Cable Act.

The Commission concludes that a two-step approach is warranted. First, is the state or local negative option rule consistent with the federal rule? If it is, then the state or local rule may be enforced. If the state or local rule is inconsistent with the federal rule, then it is necessary to consider whether its enforcement "approaches, actual regulation of rates for the provision of cable service." In elaborating on that inquiry, the Commission now concludes that state or local consumer protection laws may not be enforced in a manner that conflicts with or undermines our rate regulation rules established pursuant to Section 3 of the 1992 Cable Act. If there is an actual conflict between federal and state law or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, the state law is preempted. See, e.g., *Free v. Bland*, 369 U.S. 663 (1962); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

The scenarios NCTA presents involve situations where enforcement of state and local negative option billing rules would be inconsistent with the federal rule and enforcement might undermine implementation of the cable rate rules promulgated pursuant to Congress's instruction. With respect to the first scenario, the federal negative option billing rule plainly would not require cable operators to obtain affirmative consent from subscribers before passing through external costs and inflation adjustments as permitted by the Commission's rules, as explained above. In addition, enforcement of a state or local negative option billing rule requiring affirmative consent prior to the pass-through of external costs and cost-of-service increases, as permitted by the Commission's rate rules, would undermine the federal regime governing cable rates. The Commission has issued detailed rate rules implementing Section 3 of the 1992 Cable Act. Under the Commission's rules, most cable operators must reduce their rates from pre-1992 levels, many by as much as 17%, to ensure that cable rates are reasonable. However, as the first scenario presented by NCTA recognizes, the rules also allow cable operators to increase their rates to reflect increases in the cost-of-living or other external costs, most of which are beyond cable operators' control. The 17% rate reduction and the rules authorizing the pass-through of external costs and inflation adjustments are of a piece; the

rate cut would not be fair to cable operators if they were prohibited from raising rates to reflect increased costs that are beyond their control.

The other two scenarios presented by NCTA involve the addition, deletion and replacement of channels. The negative option billing regulation makes clear that the requirement that cable operators obtain affirmative consent before charging for a new service "shall not preclude the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service, or tier of service." 47 CFR 76.981. Accordingly, the replacement of a single channel, NCTA's third scenario, would not be prohibited by the federal negative option billing provision, because that would not result in a "fundamental change" unless the tier was very small. With respect to NCTA's second scenario, involving the addition or deletion of channels, the answer would depend on how many channels were added or deleted and other factors relevant to determining whether a "fundamental change" had occurred. As stated above, however, changes that are permitted under the "Operator's Cap" generally would not constitute "fundamental changes."

If the addition, deletion, or replacement of channels did not constitute a fundamental change in a tier, so that the federal negative option billing rule was not triggered, preemption of enforcement of a stricter state or local negative option billing rule would depend on whether enforcement would conflict with or undermine the rate regulation rules established pursuant to Section 3 of the 1992 Cable Act. It is not possible to provide a blanket response to NCTA's second and third scenarios in the absence of a specific set of facts to evaluate. However, it bears emphasis that the rate rules governing the addition, deletion, and replacement of channels are designed to ensure reasonable rates without impeding the provision of new services. Indeed, the rate rules are designed to encourage the provision of new services that subscribers desire at the reasonable rates mandated by Congress. Therefore, an interpretation of state or local law that required a cable operator to obtain the affirmative consent of every subscriber before making a change that did not fundamentally alter the affected tier would, in most cases, interfere with the accomplishment of Congress's

objectives. In relatively few cases, in the Commission's view, would state or local officials be likely to seek to enforce negative option billing rules that conflict with or undermine federal rate regulation provisions. But in any event, on further consideration the Commission is convinced that, however numerous such cases are likely to be, state and local officials may not enforce negative option billing rules that obstruct the accomplishment of the objectives of Congress's cable rate provisions.

E. Affiliate Transactions

1. Background

In the Cost Order in MM Docket No. 93-215, 59 FR 17975 (April 15, 1994), the Commission promulgated a rule for valuing transactions between cable operators and affiliated companies. The Commission found that it would be inconsistent with Congressional intent to allow rates for regulated cable service to reflect the prices affiliates charge each other for transactions that occur at other than arm's length. The Commission found that allowing cable companies to pass increases in their costs through to rate payers could motivate those companies to pay excessive amounts for assets and services obtained from unregulated affiliates. The Commission therefore adopted a rule for affiliate transactions that applies to cable operators who elect cost-of-service regulation or seek to adjust benchmark/price cap rates for affiliated programming costs.

In the Cost Further Notice, 59 FR 18066, 18067-18068 (April 15, 1994), the Commission tentatively concluded that the general changes it proposed for affiliate transactions involving telephone companies should be applied to cable operators. The Commission tentatively concluded that the use of prevailing company pricing as a valuation method for transactions between cable operators and their affiliates should only be permitted where the predominant purpose of the transaction is to serve non-affiliates. To that end, the Commission proposed that any affiliate that sells less than 75 percent of its output to non-affiliates has too large a volume of affiliate transactions to be deemed to have a predominant purpose of serving non-affiliates. The Commission therefore proposed to continue to allow prevailing company pricing as a valuation method for affiliate transactions only where at least 75 percent of the cable operators output is sold to non-affiliates.

The cable industry generally opposes the proposed rule arguing that the proposal would require operators and programmers to adopt costly, inefficient and unnecessary methodologies to document the estimated fair market value of the assets or services exchanged. Some operators argue that the 75% bright-line test would impose administrative burdens that would be excessive and outweigh the speculative benefits that might result. Several other parties oppose the proposed rules on the grounds that these requirements would discourage vertical integration and would result in decreased investment in quality cable programming. Others also oppose the proposal and state that the only rationale for the rules comes from an incorrect premise that the application of such rules in the telephone context necessitates similar rules in the cable industry.

2. Discussion

The Commission declines to adopt the proposal to prevent cable operators from valuing assets or services at the operators' prevailing company prices unless the providing affiliates sell more than 75% of their output to non-affiliates. The Commission finds that this proposal would prevent, in many cases, cable operators from establishing a prevailing company price for programming services that have achieved wide distribution among cable operators. In addition, the Commission is concerned that by preventing cable operators from valuing programming at the prevailing company price, it may discourage major MSOs with substantial resources from investing in cable programming and related services that could benefit subscribers.

The Commission will, therefore, retain the existing cable affiliate transaction rule which provides that a cable operator may value an asset or service at the prevailing company price if the provider has sold the same kind of service or asset to a substantial number of third parties at a generally available price. For cable affiliate transactions, the sale of an asset to a substantial number of third parties will ensure that cable operators will not have an incentive to pay excessive prices when they obtain services and assets from affiliates because in such cases the primary purpose of the transaction would not be to provide services and assets to the affiliated programmer. However, the Commission will continue to examine our test for the establishment of a prevailing company price in MM Docket No. 93-215 and as the Commission gains experience with our current cable affiliate transaction

rule, it may seek further comment in order to refine the rule.

Finally, the Cost Further Notice sought comment on (1) the proposal to require cable operators that do not meet the prevailing company price test to value services at the higher of cost and fair market value when the cable operator is the seller and the lower of cost and fair market value when the cable operator is the buyer; (2) whether the current definition of an affiliate should be retained; (3) whether the interim cable affiliate transaction rules should be adopted as our final rules; and (4) whether our final cable affiliate transaction rule should be included in the uniform system of accounts that we adopted for cable operators. The Commission will address these issues in conjunction with our general consideration of final cost rules in MM Docket No. 93-215 at a later time.

Administrative Matters

Regulatory Flexibility Act Analysis

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-12, the Commission's final analysis with respect to the Sixth Order on Reconsideration and Fifth Report and Order is as follows:

Need and purpose of this action. The Commission, in compliance with section 3(i) of the Cable Television Consumer Protection and Competition Act of 1992 pertaining to rate regulation, adopts rules and procedures intended to ensure cable subscribers reasonable rates for cable services with minimum regulatory and administrative burden on cable entities.

Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the Rate Order. The SBA also filed reply comments in response to the Fifth Notice.

Significant alternatives considered and rejected. Petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. In the course of this proceeding, the Commission has attempted to accommodate the concerns expressed by these parties. For example, the revised going forward mechanisms are designed to enhance incentives to add new channels to regulated tiers

without creating new regulatory burdens and to provide additional options tailored to the concerns of small systems. In addition, the New Products Tier is designed to ensure that regulated cable service rates are reasonable while reducing administrative burdens.

Paperwork Reduction Act

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

Ordering Clauses

Accordingly, *it is ordered*, That, pursuant to Sections 4(i), 4(j), 303(r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), 532, 542(c) and 543, the rules, requirements and policies discussed in this Sixth Order on Reconsideration and Fifth Report and Order, are adopted and Part 76 of the Commission's rules, 47 CFR Part 76, is amended as set forth in below.

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

It is further ordered, That the requirements and regulations established in this decision shall become effective January 1, 1995,⁵ with the exception of new reporting requirements which will become effective on that date or as soon thereafter as they may be approved by the Office of Management and Budget.

List of Subjects in 47 CFR Part 76

Cable television.

⁵ Good cause exists to make these requirements effective on less than 30 days notice in the Federal Register. See 5 U.S.C. section 553(d)(3). Good cause exists to make the requirements effective January 1, 1995 because this Order provides additional opportunities and incentives to cable operators and many of the Commission's rate regulations apply on a calendar quarter system.

Federal Communications Commission.

LaVera F. Marshall,
Acting Secretary.

Amendatory Text

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

PART 76—CABLE TELEVISION SERVICE

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

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat. as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.901 is amended by adding paragraph (d) to read as follows:

§ 76.901 Definitions

(d) **New Product Tier.** A new product tier ("NPT") is a cable programming service tier meeting the conditions set forth in § 76.987.

3. Section 76.922 is amended by revising paragraphs (d)(3)(x), (d)(3)(xi) and (e) to read as follows:

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

(d) ***
(3) ***

(x) Adjustments to permitted charges on account of increase in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer. Such adjustments shall apply on a channel-by-channel basis.

(xi) In calculating programming expense, operators may add a mark-up of 7.5% for increases in programming costs occurring after March 31, 1994, except that operators may not file for or take the 7.5% mark-up on programming costs for new channels added on or after May 15, 1994 for which the operator has used the methodology set forth in paragraph (e)(3) of this section for adjusting rates for channels added to cable programming service tiers. Operators shall reduce rates by decreases in programming expense plus an additional 7.5% for decreases occurring after May 15, 1994 except with respect to programming cost decreases on channels added after May 15, 1994 for which the rate adjustment methodology in paragraph (e)(3) of this section was used.

(e) **Changes in the number of channels on regulated tiers—(1) Generally.** A system may adjust the residual component of its permitted rate for a tier

to reflect changes in the number of channels offered on the tier on a quarterly basis. Cable systems shall use FCC Form 1210 (or FCC Form 1211, where applicable) to justify rate changes made on account on changes in the number of channels on a basic service tier ("BST") or a cable programming service tier ("CPST"). Such rate adjustments shall be based on any changes in the number of regulated channels that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). However, when a system deletes channels in a calendar quarter, the system must adjust the residual component of the tier charge in the next calendar quarter to reflect that deletion. Operators must elect between the channel addition rules in paragraphs (e)(2) and (e)(3) of this section the first time they adjust rates after December 31, 1994, to reflect a channel addition to a CPST that occurred on or after May 15, 1994, and must use the elected methodology for all rate adjustments through December 31, 1997. A system that adjusted rates after May 15, 1994, but before January 1, 1995 on account of a change in the number of channels on a CPST that occurred after May 15, 1994, may elect to revise its rates to charge the rates permitted by paragraph (e)(3) of this section on or after January 1, 1995, but is not required to do so as a condition for using the methodology in paragraph (e)(3) of this section for rate adjustments after January 1, 1995. Rates for the BST will be governed exclusively by paragraph (e)(2) of this section, except that where a system offered only one tier on May 14, 1994, the cable operator will be allowed to elect between paragraphs (e)(2) and (e)(3) of this section as if the tier was a CPST.

(2) **Adjusting Rates for increases in the number of channels offered between May 15, 1994, and December 31, 1997, on a basic service tier and at the election of the operator on a cable programming service tier.** The following table shall be used to adjust permitted rates for increases in the number of channels offered between May 15, 1994, and December 31, 1997, on a basic service tier and subject to the conditions in paragraph (e)(1) of this section at the election of the operator on a CPST. The entries in the table provide the cents per channel per subscriber per month by which cable operators will adjust the residual component using FCC Form

1210 (or FCC Form 1211, where applicable).

Average No. of regulated channels	Per-channel adjustment factor	Average No. of regulated channels	Per-channel adjustment factor
7	\$0.52	14	0.14
7.5	0.45	14.5	0.13
8	0.40	15–15.5	0.12
8.5	0.36	16	0.11
9	0.33	16.5–17	0.10
9.5	0.29	17.5–18	0.09
10	0.27	18.5–19	0.08
10.5	0.24	19.5–21.5 ..	0.07
11	0.22	22–23.5	0.06
11.5	0.20	24–26	0.05
12	0.19	26.5–29.5 ..	0.04
12.5	0.17	30–35.5	0.03
13	0.16	34–46	0.02
13.5	0.15	46.5–99.5 ..	0.01

In order to adjust the residual component of the tier charge when there is an increase in the number of channels on a tier, the operator shall perform the following calculations:

(i) Take the sum of the old total number of channels on tiers subject to regulation (i.e., tiers that are, or could be, regulated but excluding New Product Tiers) and the new total number of channels and divide the resulting number by two;

(ii) Consult the above table to find the applicable per channel adjustment factor for the number of channels produced by the calculations in paragraph (e)(2)(i) of this section. For each tier for which there has been an increase in the number of channels, multiply the per-channel adjustment factor times the change in the number of channels on that tier. The result is the total adjustment for that tier.

(3) **Alternative methodology for adjusting rates for changes in the number of channels offered on a cable programming service tier or a single tier system between May 15, 1994, and December 31, 1997.** This paragraph at the Operator's discretion as set forth in paragraph (e)(1) of this section shall be used to adjust permitted rates for a CPST after December 31, 1994, for changes in the number of channels offered on a CPST between May 15, 1994, and December 31, 1997. For purposes of this paragraph (e)(3) of this section, a single tier system may be treated as if it were a CPST.

(i) **Operators cap attributable to new channels on all CPSTs through December 31, 1997.** Operators electing to use the methodology set forth in this paragraph may increase their rates between January 1, 1995, and December 31, 1997, by up to 20 cents per channel, exclusive of programming costs, for new

channels added to CPSTs on or after May 15, 1994, except that they may not make rate adjustments totalling more than \$1.20 per month, per subscriber through December 31, 1996, and by more than \$1.40 per month, per subscriber through December 31, 1997 (the "Operator's Cap"). Except to the extent that the programming costs of such channels are covered by the License Fee Reserve provided for in paragraph (e)(3)(iii) of this section, programming costs associated with channels for which a rate adjustment is made pursuant to this paragraph (e)(3) of this section must fall within the Operator's Cap if the programming costs (including any increases therein) are reflected in rates before January 1, 1997. Inflation adjustments pursuant to § 76.922(d)(2) are not counted against the Operator's Cap.

(ii) *Per channel adjustment.* Operators may increase rates by a per channel adjustment of up to 20 cents per subscriber per month, exclusive of programming costs, for each channel added to a CPST between May 15, 1994, and December 31, 1997, except that an operator may take the per channel adjustment only for channel additions that result in an increase in the highest number of channels offered on all CPSTs as compared to May 14, 1994, and each date thereafter. Any revenues received from a programmer, or shared by a programmer and an operator in connection with the addition of a channel to a CPST shall first be deducted from programming costs for that channel pursuant to paragraph (d)(3)(x) of this section and then, to the extent revenues received from the programmer are greater than the programming costs, shall be deducted from the per channel adjustment. This deduction will apply on a channel by channel basis.

(iii) *License fee reserve.* In addition to the rate adjustments permitted in paragraphs (e)(3)(i) and (e)(3)(ii) of this section operators that make channel additions on or after May 15, 1994 may increase their rates by a total of 30 cents per month, per subscriber between January 1, 1995, and December 31, 1996, for license fees associated with such channels (the "License Fee Reserve"). The License Fee Reserve may be applied against the initial license fee and any increase in the license fee for such channels during this period. An operator may pass-through to subscribers more than the 30 cents between January 1, 1995, and December 31, 1996, for license fees associated with channels added after May 15, 1994, provided that the total amount recovered from subscribers for such

channels, including the License Fee Reserve, does not exceed \$1.50 per subscriber, per month. After December 31, 1996, license fees may be passed through to subscribers pursuant to paragraph (d) of this section, except that license fees associated with channels added pursuant to this paragraph (d)(3) of this section will not be eligible for the 7.5% mark-up on increases in programming costs.

(iv) *Timing.* For purposes of determining whether a rate increase counts against the maximum rate increases specified in paragraphs (e)(3)(i) through (e)(3)(iii) of this section, the relevant date shall be when rates are increased as a result of channel additions, not when the addition occurs.

(4) *Deletion of Channels.* When dropping a channel from a BST or CPST, operators shall reflect the net reduction in external costs in their rates pursuant to paragraphs (d)(3)(i) and (ii) of this section. With respect to channels to which the 7.5% mark-up on programming costs applied pursuant to paragraph (d)(3)(xi) of this section, the operator shall treat the mark-up as part of its programming costs and subtract the mark-up from its external costs. Operators shall also reduce the price of that tier by the "residual" associated with that channel. For channels that were on a BST or CPST on May 14, 1994, or channels added after that date pursuant to paragraph (e)(2) of this section, the per channel residual is the charge for the tier, minus the external costs for the tier, and any per channel adjustments made after that date, divided by the total number of channels on the tier minus the number of channels on the tier that received the per channel adjustment specified in paragraph (e)(3) of this section. For channels added to a CPST after May 14, 1994, pursuant to paragraph (e)(3) of this section, the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier.

(5) *Movement of channels between tiers.* When a channel is moved from a CPST or a BST to another CPST or BST, the price of the tier from which the channel is dropped shall be reduced to reflect the decrease in programming costs and residual as described in paragraph (e)(4) of this section. The residual associated with the shifted channel shall then be converted from per subscriber to aggregate numbers to ensure aggregate revenues from the channel remain the same when the channel is moved. The aggregate residual associated with the shifted channel may be shifted to the tier to which the channel is being moved. The

residual shall then be converted to per subscriber figures on the new tier, plus any subsequent inflation adjustment. The price of the tier to which the channel is shifted may then be increased to reflect this amount. The price of that tier may also be increased to reflect any increase in programming cost. An operator may not shift a channel for which it received a per channel adjustment pursuant to paragraph (e)(3) of this section from a CPST to a BST.

(6) *Substitution of channels on a BST or CPST.* If an operator substitutes a new channel for an existing channel on a CPST or a BST, no per channel adjustment may be made. Operators substituting channels on a CPST or a BST shall be required to reflect any reduction in programming costs in their rates and may reflect any increase in programming costs pursuant to paragraphs (d)(3)(i) and (d)(3)(ii) of this section. If the programming cost for the new channel is greater than the programming cost for the replaced channel, and the operator chooses to pass that increase through to subscribers, the excess shall count against the License Fee Reserve or the Operator Cap when the increased cost is passed through to subscribers. Where an operator substitutes a new channel for a channel on which a 7.5% mark-up on programming costs was taken pursuant to paragraph (d)(3)(xi) of this section, the operator may retain the 7.5% mark-up on the license fee of the dropped channel to the extent that it is no greater than 7.5% of programming cost of the new service.

(7) *Headend upgrades for small systems.* When adding channels to CPSTs, independent small systems, as defined in § 76.901(c), and small systems owned by small multiple system operators, as defined in § 76.922(b)(5), may choose among the methodologies set forth in this paragraph and in paragraphs (e)(2) and (e)(3) of this section. Operators choosing the methodology of this paragraph may increase rates to recover the actual cost of the headend equipment required to add up to seven channels to CPSTs, not to exceed \$5,000 per additional channel, plus any applicable programming costs. Rate increases pursuant to this paragraph may occur between January 1, 1995, and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. Headend costs shall be depreciated over the useful life of the headend equipment. The rate of return on this investment shall not exceed 11.25 percent. In order to recover costs for headend equipment pursuant to this paragraph, small

systems must certify to the Commission their eligibility to use this paragraph, the level of costs they have actually incurred for adding the headend equipment and the depreciation schedule for the equipment.

(8) *Sunset provision.* Paragraph (e) of this section shall cease to be effective on January 1, 1998 unless renewed by the Commission.

* * *

4. Section 76.964 is amended by revising the section heading to read as follows:

§ 76.964 Written notification of changes in rates and services.

* * *

5. Section 76.981 is revised to read as follows:

§ 76.981 Negative option billing.

(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

(b) The requirements of paragraph (a) of this section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to § 76.922, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraph (a) or (b) of this section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C. 543.

6. Section 76.986 is revised to read as follows:

§ 76.986 "A la carte" offerings.

(a) Collective offerings of unregulated per-channel or per-program ("a la carte") video programming shall be regulated as CPSTs pursuant to § 76.922. For purposes of this section, "multiplexed" channels shall be treated as one channel.

(b) A discounted package price offered by a cable system is not unreasonable with respect to any collective offering of channels if the component channels' collective offering also have been continuously available on the system on a per channel basis since April 1, 1993.

(c) A collective offering of per channel offerings may be treated as New Product Tier if:

(1) The collective offering meets the conditions set forth in § 76.987; or

(2) The operator had reasonable grounds to believe the collective offering involving only a small number of migrated channels complied with the Commission's requirements as of the date it was first offered.

(d) In reviewing a basic service rate filing, local franchising authorities may make an initial decision addressing whether a collective offering of "a la carte" channels will be treated as a cable programming service tier that is an NPT under § 76.987 or a CPST that is regulated under § 76.922. The franchising authority must make this initial decision within the 30 day period established for review of basic cable rates and equipment costs in § 76.933(a), or within the first 60 days of an extended 120 day period (if the franchise authority has requested an additional 90 days) pursuant to § 76.933(b). The franchising authority shall provide notice of its decision to the cable system and shall provide public notice of its initial decision within seven days pursuant to local procedural rules for public notice. Operators or consumers may make an interlocutory appeal of the initial decision to the Commission within 14 days of the initial decision. Operators shall provide notice to franchise authorities of their decision whether or not to appeal to the Commission within this period. Consumers shall provide notice to franchise authorities of their decision to appeal to the Commission within this period.

(e) A limited initial decision under paragraph (b) of this section shall toll the time periods under § 76.933 within which local authorities must decide local rate cases. The time period shall resume running seven days after the Commission decides the interlocutory appeal, or seven days following the expiration of the period in which an interlocutory appeal pursuant to paragraph (b) of this section may be filed.

(f) A local franchising authority alternatively may decide whether a collective offering of "a la carte" channels will be treated as an NPT as a part of its final decision setting rates for

the basic service tier. That decision may then be appealed to the Commission as provided for under § 76.945.

7. Section 76.987 is added to read as follows:

§ 76.987 New product tiers.

(a) Operators may establish a category of CPSTs, referred to as "new product tiers" ("NPTs"), and offer these tiers to subscribers at prices they elect.

(b) In order to be eligible to offer NPTs, cable operators must meet the following conditions:

(1) Operators offering NPTs are prohibited from making fundamental changes to what they offer on their BSTs and CPSTs offerings on September 30, 1994. Operators may drop channels or move channels between BSTs and/or CPSTs or to an a la carte offering so long as the aggregation of such changes do not constitute a fundamental change in their BST or CPSTs.

(2) Operators may not drop channels that were offered on their BSTs or CPSTs on September 30, 1994 and move them to NPTs unless they wait at least two years from the date the channels were dropped from the BSTs or CPSTs. Time shifted versions, slightly altered versions or renamed versions of channels offered on BSTs and CPSTs on September 30, 1994 shall not be exempt from this restriction.

(3) Operators must market their BSTs and CPSTs so that customers should be reasonably aware that:

(i) Those tiers are being offered to the public;

(ii) The names of the channels available on those tiers; and

(iii) The price of the tiers. A subscriber may not be charged for an NPT unless the cable operator has obtained the subscriber's affirmative consent. Changes to the fundamental nature of an NPT must be approved by subscribers in accordance with § 76.981.

(4) Operators may not require the subscription to any tier, other than a BST, as a condition for subscribing to an NPT and operators may not require subscription to an NPT as a condition for subscribing to a CPST. These restrictions will not apply to cable operators prior to October 5, 2002, if such operators lack the capacity to offer BSTs and NPTs without also providing other intermediate tiers of service as provided in § 76.900(c).

(c) Operators may offer the same service on NPTs as are on one or more BSTs or CPSTs. A channel that occupied a CPST or BST part-time on September 30, 1994 also may be offered full-time on an NPT as long as it continues to be offered at least part-time on CPST or BST, under substantially the

same conditions as before it was offered on the NPT. If a channel occupies a BST or CPST (regulated pursuant to § 76.922) full-time on September 30, 1994, and is subsequently reduced to part-time on the BST or CPST, that channel may not be offered on an NPT full-time.

Operators that offer a channel both on an NPT and a BST or CPST will have a continuing obligation to ensure that subscribers are aware that the channels are available on the CPST or BST.

(d) Operators may temporarily place new channels on CPSTs for marketing purposes and then move them to NPTs. In order for an operator to move a channel from a CPST to an NPT pursuant to this paragraph, the channel must not have been offered on a BST or CPST prior to October 1, 1994.

(e) After initially electing to offer an NPT, a cable operator may cease to provide the NPT, upon proper notice to subscribers pursuant to § 76.964. If an operator drops an NPT and subsequently determines to reestablish that tier, at the time of the reestablishment it must comply with the conditions for offering NPTs set forth in paragraph (b) of this section.

(f) If the Commission receives a complaint about an NPT, the operator need not file the rate justification provided in § 76.956, but shall within the time period provided by that rule file documentation that the NPT meets all the conditions set forth in this section.

(g) Within 30 days of the offering of an NPT, operators shall file with the Commission, a copy of the new rate card that contains the following information on their BSTs, CPSTs and NPTs:

- (1) The names of the programming services contained on each tier; and
- (2) The price of each tier. Operators also must file with the Commission, copies of notifications that were sent to subscribers regarding the initial offering of NPTs. After this initial filing, cable operators must file updated rate cards and copies of customer notifications with the Commission within 30 days of rate or service changes affecting the NPT.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 663

[Docket No. 931249-3349; I.D. 112594B]

Pacific Coast Groundfish Fishery

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

ACTION: Closure; fishing restrictions; request for comments.

SUMMARY: NMFS announces the closure of the commercial fishery for sablefish and a reduction in the trip limits for Dover sole and thornyheads north of 36°00' N. lat., and a reduction in the coastwide trip limit for widow rockfish in the groundfish fishery off Washington, Oregon, and California. This action is authorized by the regulations implementing the Pacific Coast Groundfish Fishery Management Plan (FMP). The closure and trip limits are designed to keep landings as close as possible to the 1994 harvest guidelines for these species while extending the fisheries as long as possible during the year.

DATES: Effective from 0001 hours (local time) December 1, 1994, until the effective date of the 1995 annual specifications and management measures, as published in the *Federal Register*. Comments will be accepted through December 21, 1994.

ADDRESSES: Submit comments to William L. Robinson, Jr., Regional Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE., BIN-C15700, Seattle, WA 98115-0070; or Hilda Diaz-Soltero, Regional Director, Southwest Region, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213.

FOR FURTHER INFORMATION CONTACT: William L. Robinson at 206-526-6140; or Rodney McInnis at 310-980-4040.

SUPPLEMENTARY INFORMATION: The FMP and its implementing regulations (50 CFR part 663) provide for rapid changes to specific management measures that have been designated "routine." Trip landing and frequency limits (hereafter referred to as trip limits) for Dover sole, thornyheads, sablefish, and widow rockfish are among those management measures that have been designated as routine at 50 CFR 663.23(c). Implementation and further adjustment of those measures may occur after consideration at a single Pacific Fishery Management Council (Council) meeting.

A trip limit is defined at 50 CFR 663.2 as the total allowable amount of a groundfish species or species complex by weight, or by percentage of weight of fish on board, that may be taken and retained, possessed, or landed from a single fishing trip. Trip limits may limit the amount of fish that a vessel may legally land per fishing trip or cumulatively per unit of time, or the number of landings that may be made by a vessel in a given period of time. A daily trip limit is the maximum amount that may be taken and retained, possessed or landed per vessel in 24 consecutive hours, starting at 0001 hours local time. Only one landing of groundfish may be made in that 24-hour period. A cumulative trip limit is the maximum amount that may be taken and retained, possessed, or landed per vessel in a specified period of time, without a limit on the number of landings or trips. Cumulative trip limits for 1994 apply to calendar months.

Background

Sablefish: The 1994 sablefish harvest guideline of 7,000 metric tons (mt) north of 36°00' N. lat. is divided among several fishing groups (59 FR 685; January 6, 1994). After subtracting 300 mt for the Washington coastal treaty Indian tribes, the remaining 6,700 mt is allocated 6,070 mt for the limited entry fishery and 630 mt for the open access fishery. The limited entry allocation is further subdivided 3,520 mt (58 percent) for the trawl fishery and 2,550 mt (42 percent) for the nontrawl fishery. At the Council's October 1994 meeting, review of the best available information on sablefish catches indicated that, at current catch rates, the limited entry allocation for the trawl fishery would be reached by November 4, and if not curtailed, would be exceeded by about 529 mt, or 15 percent, by the end of 1994. By October 8, 1994, the nontrawl limited entry fishery had already exceeded its allocation by 681 mt, or 27 percent. The open access sablefish fishery has not reached its allocation, 630 mt, and is not likely to before the end of 1994. Nevertheless, the overall harvest guideline north of 36°00' N. lat. has already been reached and is projected to be exceeded by about 9 percent in 1994 if landings are not curtailed. To keep landings from further exceeding the harvest guideline in 1994, the Council recommended closure of the commercial sablefish fishery north of 36°00' N. lat. for the remainder of the year, beginning December 1, 1994. NMFS agrees with the Council's recommendation, and is implementing a closure by setting the trip limit for sablefish at zero for all commercial gear.

types north of 36°00' N. lat. Although closure of the entire sablefish fishery results in closure of the open access fishery for sablefish as well, it was considered necessary to prevent the transfer of effort from the limited entry fishery, which could result in the open access allocation quickly being reached and the harvest guideline being further exceeded. Even with the closure in December, the 1994 harvest guideline for sablefish will be exceeded by an estimated 4.7 percent. Since the 1994 sablefish harvest guideline does not apply to the area south of 36°00' N. lat., that area remains open to sablefish fishing under existing trip limits. Those are 350 lb (159 kg) daily for limited entry nontrawl and open access fisheries, and for the limited entry trawl fishery, 6,000 lb (2,722 kg) cumulative per month, with a per-trip limit of no more than 1,000 lb (454 kg) or 33.333 percent of the legal thornyheads and Dover sole, whichever is greater.

Limited Entry Trawl Fishery—Dover Sole and Thornyhead Trip Limits

In the limited entry trawl fishery, Dover sole, thornyheads, and sablefish are managed collectively as the "DTS complex," because they are unavoidably caught together. If the trawl trip limits for Dover sole and thornyheads are not reduced to minimal levels, substantial amounts of sablefish are likely to be caught and discarded. In order to minimize the incidental catch and wastage of sablefish in the trawl fishery for Dover sole and thornyheads after the retention of sablefish is prohibited, the Council also recommended reductions in the trip limits for these species. NMFS agrees with this recommendation. The Dover sole cumulative monthly trip limit is reduced from 30,000 lb (13,608 kg) to 6,000 lb (2,722 kg) and the cumulative monthly trip limit for thornyheads is reduced from 8,000 lb (3,629 kg) to 1,500 lb (680 kg) beginning December 1, 1994. Because sablefish cannot be landed, the cumulative limit for the DTS complex, which was designed primarily to protect sablefish, is no longer needed and will no longer apply north of 36°00' N. lat. At the Council's October 1994 meeting, the best available data suggested that, at then-current rates, 58 percent of the coastwide harvest guideline for Dover sole (16,900 mt) would be utilized (9,854 mt), and the harvest guideline for thornyheads (7,000 mt) would be reached near December 15, 1994, with about a 2 percent overage by the end of the year. These trip limit reductions will exacerbate the failure to achieve the harvest guideline for Dover

sole, but may keep landings within the harvest guideline for thornyheads.

Operating north and south of 36°00' N. lat.: This action results in different trip limits south and north of 36°00' N. lat.; the trip limits for thornyheads and Dover sole south of 36°00' N. lat. are less restrictive. It also closes all commercial fishing for sablefish north of 36°00' N. lat.; and current trip limits for trawl and nontrawl gear are unchanged south of 36°00' N. lat. This raises questions about the application of trip limits and the sablefish closure for vessels that operate both north and south of 36°00' N. lat. during December 1994.

The trip limits and sablefish closure will be applied in much the same way as the trip limits for bocaccio and the *Sebastes* complex are applied north and south of Cape Mendocino, CA (59 FR 46002, September 6, 1994). In the limited entry fishery, a vessel that fishes for any species north of 36°00' N. lat. during the month is subject to, for the entire month, the closure for trawl-caught sablefish and the trip limits for Dover sole and thornyheads caught north of 36°00' N. lat., no matter where the fish are possessed or landed. Similarly, if a vessel fishes for Dover sole and thornyheads south of 36°00' N. lat. and possesses or lands them north of 36°00' N. lat., the northern limits apply to that vessel for the entire month. No vessel may possess or land sablefish north of 36°00' N. lat. during December, no matter where the fish are harvested. In the limited entry nontrawl and open access fisheries for sablefish, the daily trip limit and closure would be applied the same way, except on a daily rather than a monthly basis.

Widow Rockfish: The 1994 harvest guideline for widow rockfish is 6,500 mt, which is further allocated between the limited entry (6,260 mt) and the open access fisheries (240 mt). On January 1, 1994, the cumulative trip limit for widow rockfish was set at 30,000 lb (13,608 kg) per month (59 FR 685, January 6, 1994).

At the Council's October 1994 meeting, a continuing review of the best information available indicated that, through early October, 80 percent (5,207 mt) of the 1994 harvest guideline for widow rockfish had been landed and the harvest guideline would be reached by November 25, 1994. Therefore, the Council recommended that the cumulative trip limit for widow rockfish be reduced from 30,000 lb (13,608 kg) per month to 3,000 lb (1,361 kg) per trip. NMFS agrees. Even by reducing the trip limit to 3,000 lb (1,361 kg) on December 1, the harvest guideline may still be exceeded by about 3 percent for the year.

Secretarial Action

NMFS hereby announces, pursuant to 50 CFR 663.23 (b)(2), (c)(1), and (c)(2), changes to the following management measures for the limited entry and open access fisheries as announced at 59 FR 685, January 6, 1994, and subsequently modified at 59 FR 23638, May 6, 1994; 59 FR 29736, June 9, 1994; 59 FR 33700, June 30, 1994; and 59 FR 46002, September 6, 1994. In addition, paragraphs E.(3)(b) through (e) on sablefish and the DTS complex are redesignated as E.(3)(c) through (f). All other current provisions remain unchanged.

1. Widow Rockfish

B(1) Limited-entry Fishery. No more than 3,000 lb (1,361 kg) of widow rockfish may be taken and retained, possessed, or landed per vessel per trip. (Widow rockfish are also called brownies.)

B(2) Open-access Fishery. Within the rockfish open access trip limits (see section G., 59 FR 23638, May 6, 1994), no more than 3,000 lb (1,361 kg) per trip may be widow rockfish.

2. Sablefish

All Gear, All Fisheries North of 36°00' N. Lat.:

E.(3)(b) Sablefish Closure—Limited Entry and Open Access Fisheries. The trip limit for all commercial gear north of 36°00' N. lat. is zero. It is unlawful to take and retain, possess, or land sablefish north of 36°00' N. lat. in the limited entry and open access fisheries. For vessels that operate both north and south of 36°00' N. lat. during December 1994 (see paragraph E.(5)).

3. Dover sole, Thornyheads and Trawl-Caught Sablefish—Limited Entry Fishery

E.(3)(c)(ii) Trip Limits.

(1) North of 36°00' N. lat., no more than 6,000 lb (2,722 kg) cumulative of Dover sole and no more than 1,500 lb (680 kg) cumulative of thornyheads may be taken and retained, possessed, or landed per vessel in a calendar month. (2) South of 36°00' N. lat., no more than 30,000 lb (13,608 kg) cumulative of the DTS complex may be taken and retained, possessed, or landed per vessel in a calendar month, of which no more than 8,000 lb (3,629 kg) cumulative of thornyheads and 6,000 lb (2,722 kg) cumulative of trawl-caught sablefish may be taken and retained, possessed, or landed per vessel in a calendar month. (3) In any trip south of 36°00' N. lat., no more than 1,000 lb (454 kg) or 33.333 percent of the legal thornyheads and Dover sole, whichever is greater, may be trawl-caught sablefish; and no

more than 5,000 lb (2,268 kg) may be trawl-caught sablefish smaller than 22 inches (56 cm) (total length). (4) For vessels that operate both north and south of 36°00 N. lat. during December 1994 (see paragraph E.(5)).

4. Sablefish—Nontrawl Limited Entry Fishery South of 36°00 N. Lat.

E.(3)(d)(iii)(2) The daily trip limit for sablefish caught with nontrawl gear by a vessel in the limited entry fishery south of 36°00 N. lat. remains at 350 lb (159 kg). This trip limit applies to sablefish of any size. For vessels that operate both north and south of 36°00 N. lat. during December 1994 (see paragraph E.(5)).

5. Sablefish—Open Access Fishery South of 36°00 N. Lat.

E.(4) Open-access Fishery. The daily trip limit for sablefish south of 36°00 N. lat. is 350 lb (159 kg). For vessels that operate both north and south of 36°00 N. lat. during December 1994 (see paragraph E.(5)).

6. Sablefish/Dover Sole/Thornyheads—All Gear, All Fisheries

E.(5) Operating North and South of 36°00 N. Lat.

(a) *Dover Sole, Thornyheads, and Trawl-caught Sablefish.* If a vessel is used to fish for any species north of 36°00 N. lat. during the month, then that vessel is subject to, for the entire month, the sablefish closure and the trip limits for Dover sole and thornyheads north of 36°00 N. lat., no matter where the fish are possessed or landed. Similarly, if a

vessel is used to take and retain Dover sole or thornyheads south of 36°00 N. lat. and possesses or lands Dover sole or thornyheads north of 36°00 N. lat., that vessel is subject to the northern trip limit for these species. No vessel may possess or land sablefish north of 36°00 N. lat. during December 1994, no matter where the fish are harvested.

(b) *Nontrawl Sablefish.* If a vessel is used to fish for any species north of 36°00 N. lat. during a day, then that vessel may not take and retain sablefish during that day, no matter where the fish are taken and retained, possessed or landed. No vessel may possess or land sablefish north of 36°00 N. lat., no matter where the fish are harvested.

7. Sablefish—Open Access Fishery South of 36°00 N. Lat.—Set Net, Hook-and-Line, Pot, and Other Exempt Gear Except Exempted Trawl Gear

G.(1)(b) *Sablefish.* The daily trip limit for sablefish south of 36°00 N. lat. is 350 lb (159 kg). For vessels that operate both north and south of 36°00 N. lat. during December 1994 (see paragraph E.(5)).

8. Shrimp and Spot and Ridgeback Prawn Open Access Fisheries

G.(2)(c) Within these limits, a vessel may not take and retain, possess, or land more widow rockfish, Pacific ocean perch, thornyheads, sablefish, DTS complex, *Sebastes* complex, yellowtail rockfish, bocaccio, Dover sole, or Pacific whiting than authorized in the limited-entry fishery. Therefore it is unlawful to take and retain, possess, or land sablefish taken with shrimp, spot

prawn, or ridgeback prawn trawl gear north of 36°00 N. lat. (see paragraphs B.(1), C.(2), D.(1), E.(3), and F.(1)).

9. California Halibut or Sea Cucumber Open Access Fisheries [South of Point Arena, CA (38°57'30" N. lat.)]

G.(3)(c) No groundfish landing by California halibut or sea cucumber trawl may be in excess of the limited-entry trip limit for trawl gear. Therefore, it is unlawful to take and retain, possess, or land sablefish taken with California halibut or sea cucumber trawl gear north of 36°00 N. lat. (see paragraphs B.(1), C.(2), D.(1), E.(3), and F.(1)).

Classification

The determination to take these actions is based on the most recent data available. The aggregate data upon which the determinations are based are available for public inspection at the Office of the Regional Director, Northwest Region, (see ADDRESSES) during business hours. There was an opportunity for public comment at the Council's October 1994 meeting in San Francisco, CA.

This action is taken under the authority of 50 CFR 663.23(c) and is not subject to review under E.O. 12866.

Dated: November 30, 1994.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

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