

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
TRIAX MIDWEST ASSOCIATES, L.P. )  
 )  
 ) CSR-4638-D  
Petition for Special Relief )  
 )

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 1996

Released: September 9, 1996

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we address a petition for special relief ("Petition") filed by Triax Midwest Associates, L.P., ("Triax"). The Petition seeks a waiver of the Commission's rules to the extent necessary to permit Triax to establish regulated cable rates on behalf of its system in Lake Minnetonka, Minnesota, in accordance with the small system cost-of-service methodology adopted in the *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266 and 93-215 ("*Small System Order*").<sup>1</sup> The Petition is opposed by the City of Chanhassen, Minnesota ("Chanhassen") and by the Lake Minnetonka Cable Communications Commission (the "Cable Commission").

2. Section 623(i) of the Communications Act of 1934, as amended ("Communications Act"), requires that the Commission design rate regulations in such a way as to reduce the administrative burdens and the cost of compliance for cable systems with 1,000 or fewer subscribers.<sup>2</sup> Accordingly, in the course of establishing the standard benchmark and cost-of-service ratemaking methodologies generally available to cable operators, the Commission adopted various measures aimed specifically at easing regulatory burdens for these smaller systems.<sup>3</sup> In

<sup>1</sup> FCC 95-196, 10 FCC Rcd 7393 (1995).

<sup>2</sup> 47 U.S.C. § 543(i).

<sup>3</sup> See, e.g., Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993); Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994); Fifth Order on (continued...)

the *Small System Order*, the Commission further extended small system rate relief to certain systems that exceed the 1,000-subscriber standard.<sup>4</sup> These systems were deemed eligible for small system rate relief because they were found to face higher costs and other burdens disproportionate to their size.<sup>5</sup>

3. The *Small System Order* defines a small system as any system that serves 15,000 or fewer subscribers.<sup>6</sup> The Commission recognized that systems with no more than 15,000 subscribers were qualitatively different from larger systems with respect to a number of characteristics, including: (1) average monthly regulated revenues per channel per subscriber; (2) average number of subscribers per mile; and (3) average annual premium revenues per subscriber.<sup>7</sup> The magnitude of the differences between the two classes of systems as to these characteristics indicated that the 15,000 subscriber threshold was the appropriate point of demarcation for purposes of providing for substantive and procedural regulatory relief.<sup>8</sup>

4. However, most forms of rate relief provided under the *Small System Order* and the Commission's rules are available only to those small systems that are owned by a small cable company, which is defined as a cable operator that serves a total of 400,000 or fewer subscribers over all of its systems.<sup>9</sup> The Commission adopted this threshold because it roughly corresponds to \$100 million in annual regulated revenues, a standard the Commission has used in other

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<sup>3</sup>(...continued)

Reconsideration and Further Notice of Proposed Rulemaking in MM Docket Nos. 93-215 & 93-266, 9 FCC Rcd 5327 (1994); Eighth Order on Reconsideration in MM Docket Nos. 92-266 & 93-215, FCC 95-42, 10 FCC Rcd 5179 (1995).

<sup>4</sup> *Small System Order*, 10 FCC Rcd at 7406.

<sup>5</sup> *Id.* at 7407. More recently, Congress amended Section 623 of the Communications Act to allow greater deregulation for "small cable operators," defined as operators that "directly or through an affiliate, [serve] in the aggregate fewer than 1 percent of all subscribers in the United States and [are] not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 301(c), 110 Stat. 56, approved February 8, 1996; Communications Act, § 623(m), 47 U.S.C. § 543(m). Pursuant to this amendment, the rate regulation requirements of Sections 623(a), (b) and (c) do not apply to a small cable operator with respect to "(A) cable programming services, or (B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994," in areas where the operator serves 50,000 or fewer subscribers. *Id.*

<sup>6</sup> *Small System Order*, 10 FCC Rcd at 7406.

<sup>7</sup> *Id.* at 7408.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* A small system is deemed owned by a larger cable company if the company "holds more than a 20 percent equity interest (active or passive) in the system or exercises de jure control (such as through a general partnership or majority voting shareholder interest)." *Id.* at 7412-13, n.88.

contexts to identify smaller entities deserving of relaxed regulatory treatment.<sup>10</sup> The Commission found that cable companies exceeding this threshold would find it easier than smaller companies to attract the financing and investment necessary to maintain and improve service.<sup>11</sup> In addition, the Commission determined that cable companies that exceeded the small cable company definition "are better able to absorb the costs and burdens of regulation due to their expanded administrative and technical resources."<sup>12</sup>

5. In addition to adopting the new categories of small systems and small cable companies, the *Small System Order* introduced a form of rate regulation known as the small system cost-of-service methodology.<sup>13</sup> This approach, which is available only to small systems owned by small cable companies, is more streamlined than the standard cost-of-service methodology available to cable operators generally. In addition, the small system rules include substantive differences from the standard cost-of-service rules to take account of the proportionately higher costs of providing service faced by small systems. Eligible systems establish their rates under this methodology by completing and filing FCC Form 1230. In order to qualify for the small system cost-of-service methodology, systems and companies must meet the new size standards as of either the effective date of the *Small System Order*, or on the date thereafter when they file the documents necessary to elect the relief they seek.<sup>14</sup>

6. Cable systems that fail to meet the numerical definition of a small system, or whose operators do not qualify as small cable companies, may submit petitions for special relief requesting that the Commission grant a waiver of its rules to enable the petitioning systems to utilize the various forms of rate relief available to small systems owned by small cable companies.<sup>15</sup> The Commission stated that petitioners should demonstrate that they "share relevant characteristics with qualifying systems."<sup>16</sup> Other potentially pertinent factors include "the degree by which the system fails to satisfy either or both definitions, whether the system recently has been the subject of an acquisition or other transaction that substantially reduced its size or that of its operator, and evidence of increased costs (e.g., lack of programming or equipment discounts) faced by the operator."<sup>17</sup> If the system fails to qualify for relief based on its affiliation

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<sup>10</sup> *Id.* at 7409-11.

<sup>11</sup> *Id.* at 7411.

<sup>12</sup> *Id.* at 7409.

<sup>13</sup> *Id.* at 7418-28.

<sup>14</sup> *Id.* at 7413. The effective date of the *Small System Order* was August 21, 1995.

<sup>15</sup> *Id.* at 7412-13.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

with a larger cable company, the Commission will consider "the degree to which that affiliation exceeds our affiliation standards, and whether other attributes of the system warrant that it be treated as a small system notwithstanding the percentage ownership of the affiliate."<sup>18</sup> The Commission specifically stated that this list of relevant factors was not exclusive and invited petitioners to support their petitions with any other information and arguments they deemed relevant.<sup>19</sup>

### THE PETITION AND RESPONSES

7. Triax seeks to establish rates for its cable system serving Lake Minnetonka in accordance with the small system cost-of-service methodology. Triax claims that while the Lake Minnetonka system is owned by a small cable company, the system has over 15,000 subscribers in the 20 communities it serves, thus necessitating special relief in order for it to use the small system rate rules.

8. The Petition states that Triax is a privately owned limited partnership.<sup>20</sup> The Petition does not identify the partners of the partnership, except to say that it is "controlled by" Triax Communications Corporation ("TCC").<sup>21</sup> Through Triax and other affiliated entities, TCC operates approximately 450 cable systems that in the aggregate serve fewer than 400,000 subscribers, according to the Petition.<sup>22</sup> In an attachment, Triax reports a total subscriber count for TCC of 398,131 as of May 31, 1995.<sup>23</sup> The same exhibit indicates that this figure declined to 386,334 by November 30, 1995 as the result of the sale of some systems.<sup>24</sup> A trade publication submitted by Triax states that TCC served 389,000 subscribers as of August 31, 1995.<sup>25</sup> The total subscriber count remained below 400,000 at the time Triax filed the Petition, according to a supporting declaration.<sup>26</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Petition at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2-3.

<sup>23</sup> *Id.*, Exhibit B. Except as noted, the factual assertions set forth in the Petition are supported by the accompanying declaration of Daniel P. Callahan, Director of Business Administration of TCC ("Callahan Declaration").

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, Exhibit C (*Cable TV Investor*, Paul Kagan Associates (Nov. 22, 1995)).

<sup>26</sup> Callahan Declaration at ¶ 3.

9. Although these figures indicate that TCC qualifies as a small cable company, the Petition states that its Lake Minnetonka system serves 15,467 subscribers and therefore is not a small system.<sup>27</sup> The Petition asserts that the Lake Minnetonka system exceeded the 15,000-subscriber limit in August, 1995.<sup>28</sup> Shortly thereafter, apparently believing that the system still served fewer than 15,000 subscribers, Triax completed and filed FCC Form 1230, the form used to establish rates under the small system rules.<sup>29</sup> Triax states that after reviewing updated data, it determined that the system had crossed the 15,000-subscriber threshold and thus was not eligible to set rates in accordance with the small system cost-of-service methodology, thus leading to its filing the Petition.<sup>30</sup> Triax characterizes as "de minimis" the amount by which it exceeds the subscriber threshold and notes that the Bureau has extended waiver relief to systems larger than the Lake Minnetonka system.<sup>31</sup>

10. Triax asserts that the Lake Minnetonka system has a number of the defining characteristics of small systems that the Commission found relevant in establishing the small system definition. For example, the Lake Minnetonka systems serves approximately 29 subscribers per mile, according to the Petition.<sup>32</sup> Thus, according to Triax, the system has a subscriber density below the average for small systems of 35.3 subscribers per mile and well below the average of 68.7 subscribers per mile for larger systems.<sup>33</sup> The Petition notes that the Commission has recognized that lower subscriber density leads to increased costs, and argues that the subscriber density of the system in question is "substantially below the average" of systems that automatically qualify for small system relief.<sup>34</sup>

11. Triax does not receive the bulk price discounts often offered to larger multiple system operators ("MSOs") by programming and equipment vendors, according to the Petition.<sup>35</sup> Further, the Petition states that "because it does not have the economies of scale that a large MSO

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<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 3, n. 7.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 3-4, citing *In The Matter of Insight Communications Company, L.P.*, Memorandum Opinion and Order, CSR No. 4559-D, DA 95-2334, ¶ 22 (Cable Services Bur. rel. Nov. 13, 1995).

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 6-7.

<sup>35</sup> *Id.* at 7.

does, Triax incurs higher costs on a per subscriber basis for managing and operating its systems."<sup>36</sup>

12. Granting the Petition is in the public interest, Triax claims, because it will allow the operators and the twenty communities it serves "to avoid the substantial administrative burdens" associated with the Commission's standard rules used to set cable rates.<sup>37</sup> The relief also will be "critical" to Triax's ability to "enhance the cable television services delivered to" its Lake Minnetonka subscribers.<sup>38</sup> Finally, the Petition contends that denying the Petition "would create a perverse incentive for operators near the 15,000 subscriber cap to avoid taking any action (such as consolidating systems or improving services and program offerings) that might have the effect of increasing subscriber growth."<sup>39</sup>

13. In opposing the Petition, the Cable Commission initially questions whether TCC is a small cable company.<sup>40</sup> The Cable Commission claims that it has requested verification of the nature of Triax's relationship with TCC and other cable affiliates and an explanation of how Triax arrived at its subscriber counts, but that Triax has refused to provide a direct response.<sup>41</sup> The Cable Commission initially requested this information, it states, in response to the Form 1230 that Triax submitted before filing the Petition.<sup>42</sup> In addition to Triax's failure to respond to this request, the Cable Commission cites other factors that it believes render Triax's subscriber count suspect. These other factors include Triax's initial miscalculation of the number of subscribers served by the Lake Minnetonka system and TCC's "very close proximity to the relevant subscriber threshold."<sup>43</sup> The Cable Commission also questions the timing of a recent sale by TCC of one of its affiliated cable entities, arguing that "TCC should not be allowed to artificially maintain lower subscriber totals through divestiture and corporate shell games to take advantage of the small system cost-of-service methodology."<sup>44</sup> The Cable Commission requests that we investigate TCC's claimed status as a small cable company.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Cable Commission Opposition to Petition for Special Relief ("Cable Commission Opposition") at 6-7.

<sup>41</sup> *Id.* at 2, 6-7.

<sup>42</sup> *Id.* at 2.

<sup>43</sup> *Id.* at 7.

<sup>44</sup> *Id.*

14. The Cable Commission is similarly skeptical of Triax's calculation of the subscriber count for the Lake Minnetonka system.<sup>45</sup> Its Opposition cites evidence that the system's subscriber base is growing at a steady rate.<sup>46</sup>

15. Further, the Cable Commission urges us to discount the Lake Minnetonka system's below average subscriber density on the grounds that, in establishing the relevance of that factor, the Commission observed "that a 'smaller system serving a large rural area' has higher operating and maintenance costs."<sup>47</sup> The Cable Commission argues that the Lake Minnetonka system's service area consists of "affluent, suburban Minneapolis metro communities."<sup>48</sup> Low subscriber density in such a non-rural area should not be significant in this context, according to the Cable Commission.<sup>49</sup>

16. The Cable Commission also points to Triax's failure to include in the Petition information concerning the regulated revenues or the premium revenues of the Lake Minnetonka system, noting that these were two factors found by the Commission to be significant in distinguishing small systems from other systems for purposes of rate regulation.<sup>50</sup> The Petition's omission of evidence concerning the factors "must be received as an admission that the Lake Minnetonka system is dissimilar from qualifying systems in these respects," according to the Cable Commission.<sup>51</sup> As for Triax's claim that it faces increased operating costs similar to other small cable companies, the Cable Commission argues that Triax has failed to provide any evidence to back up this claim. Thus, the Cable Commission argues that Triax has failed to meet its burden of proving the issue.<sup>52</sup>

17. Finally, the Cable Commission expresses concern about the potential extent of rate increases that could result if Triax were permitted to establish rates for its Lake Minnetonka system in accordance with the small system cost-of-service rules.<sup>53</sup> The Cable Commission asserts that according to the Form 1230 previously filed by Triax, the maximum permitted rates

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<sup>45</sup> *Id.* at 11.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, citing *Small System Order*, 10 FCC Rcd at 7401-02.

<sup>48</sup> *Id.* at 9; Declaration of James W. Daniels at ¶¶ 4-5.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 12.

<sup>53</sup> *Id.* at 13-14.

would increase from approximately \$0.50 per channel to over \$1.00 per channel.<sup>54</sup> Such a rate increase would not serve the public interest, according to the Cable Commission.<sup>55</sup> In particular, the Cable Commission contends that the increased revenues likely would not be used to upgrade the system, given that Triax has recently completed a substantial system upgrade and thus presumably would not institute a new upgrade in the foreseeable future.<sup>56</sup>

18. In a separate opposition to the Petition, Chanhassen estimates that cable rates in its franchise area would increase by approximately 120% if Triax were permitted to use the small system cost-of-service methodology.<sup>57</sup> Chanhassen states that such a rate increase would not serve the public interest and that Triax has not shown why the Lake Minnetonka system should be exempted from the rules applicable to other systems of its size.<sup>58</sup>

19. In its Reply, Triax denies that its initial miscalculation of the subscriber base of the Lake Minnetonka system calls into question its claim that TCC serves fewer than 400,000 subscribers.<sup>59</sup> Triax contends that it filed its Form 1230 claiming small system status for the system in question on the basis of preliminary data.<sup>60</sup> When those data proved to be imprecise, Triax states, it reported that fact and filed its Petition.<sup>61</sup> According to Triax: "This is hardly grounds for challenging either Triax's accuracy or its veracity in providing the best available count of its parent company's total subscribership."<sup>62</sup> Further, Triax denies that TCC's recent sale of a cable affiliate was a "corporate shell game" intended to maintain TCC's status as a small cable company, as alleged by the Cable Commission. Triax notes that TCC had entered into negotiations with the eventual buyer several months before the Commission adopted the *Small System Order* in which it established the definition of a small cable company.<sup>63</sup>

20. Triax next disputes the Cable Commission's claim that the Petition fails to show that the Lake Minnetonka system shares relevant characteristics with small systems generally.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 13.

<sup>56</sup> *Id.*

<sup>57</sup> Chanhassen Response In Opposition To Petition For Special Relief at 2.

<sup>58</sup> *Id.* at 2-3.

<sup>59</sup> Reply at 5.

<sup>60</sup> *Id.* at 2.

<sup>61</sup> *Id.* at 5.

<sup>62</sup> *Id.* These assertions are supported by a second declaration of Daniel P. Callahan.

<sup>63</sup> *Id.* at 7.



Triax points to evidence in the Petition of the system's subscribership that barely exceeds the small system cutoff, its below-average subscriber density, and its ineligibility for programming and equipment discounts typically available to systems owned by larger MSOs.<sup>64</sup> Triax argues that a system should not be required to share all of the other distinguishing characteristics of small systems as cited by the Commission in the *Small System Order*.<sup>65</sup> Triax notes that the Commission itself referred to those factors as non-exclusive and has granted small system status to systems that do not share all such factors.<sup>66</sup>

21. In reply to the assertion that there is no evidence supporting Triax's claim that it faces operating costs higher than those of larger companies, Triax suggests that affirmative evidence is unnecessary because operators with fewer than 400,000 subscribers are presumed to have such higher costs.<sup>67</sup> Further, in a declaration, Triax's chief financial officer states that his review of publicly available information indicates TCC pays interest rates approximately 1% to 1.5% higher than larger MSOs.<sup>68</sup> Triax also notes that the Commission has found that low subscriber density, such as that faced by the Lake Minnetonka system, generally results in higher operating costs.<sup>69</sup> Triax disputes the Cable Commission's claim that the nexus between low density and higher costs should not be presumed when the cable system serves an affluent, suburban area.<sup>70</sup> Triax argues that low subscriber density leads to increased operating costs because of the amount of facilities that must be acquired, installed and maintained over a disproportionately large service area, "regardless of the proximity of the system to an urban or suburban area or the average income of the area."<sup>71</sup>

22. As for the impact on cable rates if the Petition is granted, Triax notes that we previously have said that the small system rules specifically allow qualifying systems to raise their rates if justified under the small system cost-of-service methodology.<sup>72</sup> With respect to the alleged unlikelihood of any system upgrades in the foreseeable future, Triax responds that the small system rules are needed to recover the costs of recent upgrades that already are benefitting

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<sup>64</sup> *Id.* at 9.

<sup>65</sup> *Id.* at 9-10.

<sup>66</sup> *Id.* at 9-10.

<sup>67</sup> *Id.* at 12.

<sup>68</sup> *Id.*, Declaration of Christopher O'Toole at ¶ 1.

<sup>69</sup> Reply at 11.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 14.

subscribers.<sup>73</sup> While acknowledging that such costs could be recovered through the standard cost-of-service rules available to all cable operators, Triax states that the impact on rates would likely be the same.<sup>74</sup> Thus, according to Triax, there is no reason to force it to incur the costs and other burdens of the standard cost-of-service procedures when the small system rules are available.<sup>75</sup>

23. Following the close of the comment period, the Cable Commission filed a Supplemental Opposition to Petition For Special Relief ("Supplemental Opposition"), citing Section 76.7 of our rules,<sup>76</sup> which requires parties to ensure the continuing accuracy of pleadings filed in a special relief proceeding. In the supplemental pleading, the Cable Commission reports that on or about April 15, 1996, it received a completed FCC Form 394 and supporting documentation announcing a proposed merger between Triax and D.D. Cable Holdings, Inc ("DDC").<sup>77</sup> According to the Cable Commission, the Form 394 indicates that the merger will be consummated by the end of August, 1996, following which Triax "will serve 487,135 subscribers in 17 states, making it one of the nation's 25 largest MSOs."<sup>78</sup> Noting that Triax will no longer fall under the 400,000 subscriber cap for small cable companies, the Cable Commission urges us to deny the Petition.

24. In its Reply to Supplemental Opposition ("Supplemental Reply"), Triax contends that the proposed merger with DDC "in no way undermines the sound reasons for granting the relief requested by Triax."<sup>79</sup> In particular, Triax states: "If transactions that have been announced but not yet consummated are to provide a basis for reopening and supplementing the record, then obviously *all* such planned transactions -- including divestitures as well as acquisitions -- are equally relevant."<sup>80</sup> Triax states that its parent company, TCC, has contracted to sell one affiliate that serves approximately 50,000 subscribers. In addition, according to Triax, TCC intends to sell other affiliated cable operators that serve a total of about 200,000 subscribers. The net effect of all of these transactions, including the merger with D.D. Cable Holdings, Inc., will be to reduce the TCC subscriber total by almost 150,000 subscribers, according to Triax. Triax concludes that "to the extent that Triax's and TCC's announced and intended acquisitions and

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<sup>73</sup> *Id.* at 15.

<sup>74</sup> *Id.* at 15.

<sup>75</sup> *Id.*

<sup>76</sup> 47 C.F.R. § 76.7.

<sup>77</sup> Supplemental Opposition at 3. FCC Form 394 is the form used by a cable operator when seeking the local franchising authority's consent to the assignment or transfer of control of a cable franchise.

<sup>78</sup> *Id.*

<sup>79</sup> Supplemental Reply at 2.

<sup>80</sup> *Id.* at 3.

divestitures are relevant to the consideration of its petition for special relief, those announced plans should reassure the Commission that TCC will remain the sort of 'small company' for which small system relief is intended and warranted."<sup>81</sup>

## DISCUSSION

25. The Supplemental Opposition establishes that Triax has definite plans to merge with DDC, thereby substantially exceeding the 400,000-subscriber level that defines a small cable company. If taken into account, this merger substantially alters the merits of the Petition since Triax no longer automatically qualifies as a small cable company. To grant special relief, we would have to find not only that the Lake Minnetonka system shares the relevant characteristics of a small system, but also that its operator, Triax, bears sufficient similarities to a small cable company, despite exceeding the 400,000 subscriber cutoff. Rather than asking us to make the latter finding, however, Triax instead urges us to consider the DDC merger in the context of other planned transactions that, if accomplished, will reduce Triax's subscriber count back down to below 400,000.

26. In a separate order we adopt today, we deny a similar petition for special relief filed by DDC, the cable operator that is merging with Triax.<sup>82</sup> According to DDC's petition, which does not account for the merger with Triax, DDC operates only small systems and serves fewer than 400,000 subscribers. DDC's small systems do not qualify automatically for small system relief because DDC is affiliated with at least one other cable operator that brings the aggregate subscriber count to well over 400,000, even excluding any subscribers that may be attributable as a result of the Triax merger. DDC urged us to evaluate its waiver petition without regard to its planned merger with Triax, even though the merger was announced several days before DDC filed its petition. Alternatively, DDC made essentially the same argument that Triax makes in the instant proceeding with respect to TCC's plans to divest itself of approximately 200,000 subscribers. Our reasoning in that case applies with equal force here:

Absent special relief, a small system may set rates in accordance with the small system cost-of-service methodology if it is owned by a small cable operator, not simply because it expects to be owned by such an operator at some time in the future. As described by DDC, the transactions that allegedly will reduce Triax's subscriber base below 400,000 are far too indefinite and speculative to be considered here. For example, DDC simply states that Triax has contracted to sell systems serving a total of 50,000 subscribers. The Petition lacks relevant details such as when, or whether, this transaction is scheduled to close. In addition, there is no description of any conditions under which the agreement would be voided

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<sup>81</sup> Supplemental Reply at 3.

<sup>82</sup> *In the Matter of D.D. Cable Holdings, Inc.*, Memorandum Opinion and Order, CSR No. 4725-D, DA 96- (Cable Services Bur. rel. Sept. 12, 1996) ("*D.D. Cable*").

or the likelihood of such conditions occurring. Even were this transaction to be consummated, Triax-DDC would still serve in excess of 400,000 subscribers. To fall below this level and thus become eligible for small system relief, Triax would have to consummate additional system sales for which it has "plans" but which are not now even under contract. In contrast to the speculativeness of these transactions, we note that the Triax-DDC merger, that will result in Triax serving almost 490,000 subscribers, was scheduled to close as of a date certain and was conditioned only on the approval of the appropriate local franchising authorities. We cannot grant regulatory relief based on a cable operator's indefinite, and perhaps unattainable, "plans" to meet the conditions necessary to justify that relief.<sup>83</sup>

27. For all relevant purposes, this proceeding and the *D.D. Cable* proceeding are essentially the same case since the petitioners in the two cases have merged, creating a single operator with approximately 490,000 subscribers. In neither case do the pleadings assert, or offer a factual basis on which we could conclude, that Triax differs in some relevant way from other cable operators of more than 400,000 subscribers. As we stated in *D.D. Cable*:

Since the record reveals no relevant distinctions between Triax and other large cable companies, there is no justification for exempting Triax from the general rule that precludes large cable companies from availing themselves of the small system cost-of-service methodology. Therefore, we must deny the Petition.<sup>84</sup>

28. As with the systems at issue in *D.D. Cable*, the systems that are the subject of the present case may become eligible for the small system cost-of-service methodology, either automatically or by meeting our waiver criteria, upon the consummation of all of the planned transactions. For Triax to await the consummation of those transactions before again seeking small system relief is consistent with our prior observation that "the waiver process is better suited for a petitioner that has a fixed ownership and affiliation status, as opposed to a petitioner that is contemplating adjustments to its ownership or affiliation status."<sup>85</sup>

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<sup>83</sup> *D.D. Cable* at ¶ 31 (footnote omitted).

<sup>84</sup> *D.D. Cable* at ¶ 32.

<sup>85</sup> *D.D. Cable* at ¶ 26, n. 92.

**ORDERING CLAUSES**

29. Accordingly, **IT IS ORDERED** that the Petition for Special Relief filed by Triax Midwest Associates, L.P. **IS DENIED**.

30. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules.<sup>86</sup>

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones  
Chief, Cable Services Bureau

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<sup>86</sup> 47 C.F.R. § 0.321.