

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
	)	
Implementation of Sections of the Cable	)	MM Docket No. 92-266
Television Consumer Protection and Competition	)	MM Docket No. 93-215
Act of 1992: Rate Regulation	)	
	)	
Adoption of Uniform Accounting System for the	)	CS Docket No. 94-28
Provision of Regulated Cable Service	)	
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

**FURTHER NOTICE OF PROPOSED RULEMAKING AND REPORT AND ORDER**

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By the Commission: Chairman Pai and Commissioner O’Rielly issuing separate statements.

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## I. INTRODUCTION

1. In this Further Notice of Proposed Rulemaking (*FNPRM*) and Report and Order, we seek to update the cable television rate regulations in Part 76 of our rules and eliminate outdated regulations.<sup>1</sup> In response to a Public Notice launching the Commission's Modernization of Media Regulation Initiative,<sup>2</sup> parties have asked us to review our rate regulation rules to update them and eliminate those that are obsolete.<sup>3</sup> By suggesting ways to update and simplify these rules, we continue our efforts to modernize our regulations and reduce unnecessary requirements that no longer serve the public interest.

2. The Commission's rules governing cable rate regulation are more than 20 years old, and much has changed in the intervening years since they were adopted, including the sunset of cable programming service tier (CPST)<sup>4</sup> rate regulation, a significant increase in the competition among cable operators and other multichannel video programming distributors (MVPDs), and our adoption of a presumption that all cable operators face competition from satellite providers and therefore are exempt from rate regulation. As a consequence of these changes, very few local communities are actively regulating rates, and many of our rate regulation rules and forms appear to have become outdated. Accordingly, in the *FNPRM*, we seek comment on how to update our rules so that they reflect the current video marketplace. First, we seek comment on whether we should consider replacing our existing complex rate regulation framework with a new and simple methodology. Second, and in the alternative, we seek comment on, among other issues, whether to greatly streamline our existing initial rate-setting methodology by eliminating numerous rate forms that we believe are no longer necessary or useful, substantially reducing the amount of equipment subject to rate regulation, and ending rate regulation entirely for small cable systems owned by small operators. Finally, in the Report and Order, we eliminate or revise rules that have become obsolete or are no longer necessary due to the sunset of CPST regulation.

## II. BACKGROUND

3. Section 623 of the Communications Act of 1934, as amended (the Act),<sup>5</sup> adopted as part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act),<sup>6</sup> governs cable television rate regulation. Section 623 requires the Commission to ensure, by regulation, that "the rates for the basic service tier are reasonable" and that such regulations "shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."<sup>7</sup> Section 623 also requires the Commission to establish rate regulations for the installation and lease of equipment used to receive the basic service tier (BST) on "the basis of actual cost."<sup>8</sup> For cable systems that are not subject to effective competition,<sup>9</sup> Section 623

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<sup>1</sup> 47 CFR §§ 76.901 - 76.990.

<sup>2</sup> See *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, 32 FCC Rcd 4406 (MB 2017) (*Modernization of Media Regulation Initiative*) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary, or unduly burdensome).

<sup>3</sup> See, e.g., NCTA Comments, MB Docket No. 17-105, at 22-23; ITTA Reply, MB Docket No. 17-105, at 12-13.

<sup>4</sup> See *infra* note 15.

<sup>5</sup> 47 U.S.C. § 543.

<sup>6</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>7</sup> 47 U.S.C. § 543(b)(1).

<sup>8</sup> 47 U.S.C. § 543(b)(3).

<sup>9</sup> The term "effective competition" means that (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (B) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video

permits local franchising authorities (LFAs) to apply the Commission's rules to regulate the price for the BST<sup>10</sup> and the charges for the installation and lease of cable customer premises equipment used by subscribers to receive the BST.<sup>11</sup>

4. To implement Section 623, the Commission adopted rate regulation rules that currently serve three basic functions: (1) setting initial BST rates, (2) updating those rates, and (3) setting equipment rates.<sup>12</sup> The Commission also created a number of forms to be used by regulated cable operators to calculate reasonable rates. There are seven such rate forms still in use today: Form 1200 (used to set initial rates), Form 1205 (used to set equipment and installation rates annually), Form 1210 (used to adjust rates quarterly), Form 1220 (a cost of service alternative used to justify rates above levels calculated using Forms 1200 and 1240), Form 1230 (used to establish rates for small cable systems), Form 1235 (used to establish rate increases based on system upgrades), and Form 1240 (used to adjust rates annually).<sup>13</sup> In addition, our rules refer to rate regulation forms that are no longer in active use.<sup>14</sup>

5. Although Section 623 originally imposed rate regulation for all tiers of cable service,<sup>15</sup> Congress directed the Commission to end rate regulation for tiers other than the BST in 1999.<sup>16</sup> As a result, regulation of the CPST was sunset, and our rate regulations now apply to only the BST, which accounts for a small portion of a cable operator's overall service rates. In addition, in 2015 the Commission adopted the *Effective Competition Order*, which created a rebuttable presumption that all cable operators are subject to effective competition from competing providers.<sup>17</sup> In that decision, the Commission observed the changes in the MVPD competitive landscape since the adoption of Section 623.

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programming distributor exceeds 15 percent of the households in the franchise area; (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or (D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area. *See* 47 U.S.C. § 543(l)(1).

<sup>10</sup> The BST includes, at a minimum, the broadcast signals distributed by the cable operator (except superstations), along with any public, educational, or government access channels required by the local franchising authority. 47 U.S.C. § 543(b)(7); 47 CFR § 76.901(a).

<sup>11</sup> LFAs have jurisdiction to regulate the cable operator's rates for the installation and lease of equipment used by subscribers to receive the BST. 47 U.S.C. § 543(a)(2)(A), (b)(1), (b)(3)(A).

<sup>12</sup> 47 CFR §§ 76.901 - 76.990. The Media Bureau previously deleted rules solely pertaining to the process for filing, and adjudicating complaints concerning, the rates charged by a cable system for its CPST. *See Amendment of Parts 1, 73 And 76 of the Commission's Rules Regarding Practice and Procedure: Broadcast Applications and Proceedings; Radio Broadcast Services: Fairness Doctrine and Digital Broadcast Television Redistribution Control; Multichannel Video and Cable Television Service: Fairness Doctrine, Personal Attacks, Political Editorials and Complaints Regarding Cable Programming Service Rates*, 26 FCC Rcd 11422 (MB 2011) (“[T]he Commission's CPST complaint process rules, 47 CFR §§ 76.950, 76.951, 76.953, 76.954, 76.955, 76.956, 76.957, 76.960, 76.961, 76.1402, 76.1605 and 76.1606 are without current legal effect and are deleted as obsolete.”).

<sup>13</sup> FCC Forms may be accessed via the FCC.gov website at <https://www.fcc.gov/licensing-databases/forms>.

<sup>14</sup> As discussed below, some forms relate to CPST regulation, which has since sunset. *See infra* para. 34.

<sup>15</sup> A cable programming service tier includes video programming not carried on the basic service tier or offered on a pay-per-channel or pay-per-program basis. *See* 47 U.S.C. § 543(l)(2); 47 CFR § 76.901(b).

<sup>16</sup> The Telecommunications Act of 1996 amended Section 623 of the Communications Act of 1934 to provide that after March 31, 1999, rates for the CPST would not be subject to regulation. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 301(b)(1), 110 Stat. 115 (1996) (codified as 47 U.S.C. § 543(c)(4)).

<sup>17</sup> *See Amendment of the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, Report and Order*, 30 FCC Rcd 6574 (2015) (*Effective Competition Order*).

Specifically, the Commission observed that in 1993, incumbent cable operators had captured approximately 95 percent of MVPD subscribers, direct broadcast satellite (DBS) service had not yet entered the market, and local exchange carriers, such as Verizon and AT&T, had not yet entered the MVPD business in any significant way.<sup>18</sup> By contrast, the Commission observed in 2015 that approximately 99.7 percent of homes in the U.S. had access to multiple MVPDs, including the two major DBS providers and at least one cable operator.<sup>19</sup> Competition among MVPDs has continued to grow since that time, and there has been a continuous decline in subscribership to incumbent cable operators.<sup>20</sup>

6. As a consequence of the 2015 *Effective Competition Order* and the increasing competition among MVPDs, few LFAs are currently allowed to regulate BST rates under the Act and very few cable systems remain rate regulated today. Specifically, the *Effective Competition Order* directed franchising authorities that wished to remain certified to regulate rates to file a revised certification form rebutting the new presumption of competing provider effective competition.<sup>21</sup> The Commission only received three such forms, one of which it concluded failed to rebut the presumption.<sup>22</sup> Accordingly, only two franchising authorities filed revised certification forms that successfully rebutted the presumption of competing provider effective competition: the Hawaii Department of Commerce and Consumer Affairs, which is certified to regulate rates in two communities;<sup>23</sup> and the Massachusetts Department of Telecommunications and Cable, which is certified to regulate rates in approximately 100 communities.<sup>24</sup> Moreover, the Commission has not received any local rate appeals<sup>25</sup> in the past year, and has received only four local rate appeals in the past ten years.<sup>26</sup>

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<sup>18</sup> See *id.* at 6576, para. 3 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, 4495 (App. F) (1997) and *Implementation of Section 19 of the Cable Television Consumer Protection & Competition Act of 1992, First Report*, 9 FCC Rcd 7442 at 7474, para. 63 and 7495, paras. 103-04 (1994)).

<sup>19</sup> *Id.* (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Sixteenth Report*, 30 FCC Rcd 3253, 3267, para. 31 (2015) (citing 2013 data)).

<sup>20</sup> See generally *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 32 FCC Rcd 568, 577, 596 (MB 2017) (reporting that 99% of housing units have access to three competing MVPDs and that cable subscriptions declined by more than one percent in the most recent reported year, continuing a trend that began in 2013).

<sup>21</sup> *Effective Competition Order*, 30 FCC Rcd at 6592, para. 27. An LFA that seeks certification to regulate a system's rates must file a form that certifies that the LFA will regulate rates consistent with the Commission's rules, that it is legally authorized to regulate, that it offers interested parties reasonable opportunities to express their views, and that the system is not subject to effective competition. See 47 CFR § 76.910.

<sup>22</sup> See Letter from Steven A. Broeckert, Senior Deputy Chief, Policy Division, Media Bureau, to Jennifer Teipel, Executive Director, Campbell County Cable Board, 30 FCC Rcd 14051 (Dec. 9, 2015) (concluding that the revised form for Campbell County, Kentucky failed to provide *any* evidence rebutting the presumption of competing provider effective competition).

<sup>23</sup> See Hawaii Department of Commerce and Consumer Affairs, Form 328 (filed Dec. 4, 2015), available at <https://ecfsapi.fcc.gov/file/60001350735.pdf>.

<sup>24</sup> See Massachusetts Department of Telecommunications and Cable, Form 328 (filed Dec. 8, 2015), available at <https://ecfsapi.fcc.gov/file/60001352672.pdf>. See also Findings of Competing Provider Effective Competition Following December 8, 2015 Filing Deadline for Existing Franchise Authority Recertification, Public Notice, 30 FCC Rcd 14293, at App. A (Dec. 17, 2015) (indicating which communities listed on the Massachusetts form also were subject to other pending effective competition proceedings).

<sup>25</sup> Under Section 76.944 of our rules, any participant in an LFA's ratemaking proceeding may appeal that decision to the Commission within 30 days. See 47 CFR § 76.944.

<sup>26</sup> See *Comcast Cable Communications, LLC Orders Setting Basic Equipment Rates Appeal of Local Rate Orders And Petition For Emergency Stay*, 29 FCC Rcd 2885 (MB 2014), *New Jersey Division of Rate Counsel Appeal of Local Rate Order of the New Jersey Board of Public Utilities*, 31 FCC Rcd 4392 (MB 2016); *Time Warner Cable, Inc. Appeal of Local Rate Order of the Department of Telecommunications and Cable, Commonwealth of*

### III. DISCUSSION

7. Given the significant changes that have occurred since we last revised our rate regulations, we believe it is appropriate to revisit them as part of the media modernization proceeding. It seems unnecessary, out of step with current circumstances, and overly burdensome on the cable industry and franchising authorities to retain a complex set of rules that were written in a different era.<sup>27</sup> This is especially true given how few cable operators are actually subject to rate regulation today. The costs of complying with our current regime, including the cost of retaining experts that are familiar with it, place a great burden on the few industry members and franchising authorities that remain engaged in rate regulation. It also appears unnecessary for the Commission to administer such a complex regime for such a small number of regulatees. We therefore question whether our current regime remains necessary to fulfill the requirements of Section 623. Indeed, we believe that the marketplace and regulatory changes that have taken place in the past 20 years require us to replace, or, at a minimum, update our rate regulation rules. It also makes sense to take a fresh look at these rules because nearly all consumers across the country now have a choice of MVPD. Several commenters in the media modernization proceeding also agree that given the changes in the video programming landscape noted above, it is time to consider simplifying our cable television rate regulations.<sup>28</sup>

8. For those reasons, in this *FNPRM*, we first seek comment on whether to make fundamental changes to our existing cable rate regulatory regime based on recent developments in the competitive and regulatory landscape. Alternatively, we seek comment on ways to streamline and update our existing rules and forms to better serve cable operators and LFAs while still protecting subscribers from unreasonable prices. In this regard, we seek comment on whether to exempt from rate regulation equipment used to receive CPST service and small cable systems owned by small cable operators, and we tentatively find that “commercial cable service”<sup>29</sup> is exempt from rate regulation. We seek comment on ways to greatly simplify the process cable operators use to set their initial regulated BST rates and to justify subsequent rate increases. We seek comment on whether these changes would be consistent with Section 623 of the Act, including the statutory purpose to protect subscribers from “rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition,”<sup>30</sup> and whether they would reduce the burdens that cable operators and LFAs bear under our current rate regulation rules.

9. We note that the Commission sought comment in 2002 on many of the proposals that we seek comment on in this *FNPRM*,<sup>31</sup> but we seek to update the record on these proposals due to the passage of time and the significant changes that have since occurred in the marketplace, legal landscape, and technology. Those that commented in response to that *2002 Revised Order and NPRM* that wish to ensure their previous comments are considered in this proceeding with respect to the issues raised here should refile their comments in response to this *FNPRM*. Several issues raised in 2002 and rate related

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*Massachusetts*, 31 FCC Rcd 12661 (MB 2016); Appeal of the North Suburban Communications Commission Rate Order by Comcast Cable Communications, LLC, CSB-A-0751 (filed June 3, 2013).

<sup>27</sup> See 47 U.S.C. § 543(b)(2)(A) (in prescribing rate regulations the Commission “shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission”).

<sup>28</sup> See NCTA Comments, MB Docket No. 17-105, at 22 (stating that “the Commission should eliminate outdated cable rate regulations” and that “[t]he Commission’s cable rate regulations have largely been overtaken by events”); ITTA Reply, MB Docket No. 17-105, at 12-13 (noting that vestiges of CPST regulation “are still lodged in the CFR” and that “47 CFR § 76.922 encumbers over 14 pages of the CFR, and includes rules keyed to dates in 1994; some of these provisions clearly are no longer relevant”).

<sup>29</sup> We seek comment on how to define this term in paragraph 19.

<sup>30</sup> 47 U.S.C. § 543(b)(1).

<sup>31</sup> See *Revisions to Cable Television Rate Regulations*, 17 FCC Rcd 11550, 11566 (2002), *revised*, 17 FCC Rcd 15974 (2002) (*2002 Revised Order and NPRM*).

issues not requiring further notice and comment are resolved in the attached Report and Order. To the extent that we raised issues in the *2002 Revised Order and NPRM* that are not raised in this *FNPRM* or resolved in the Report and Order, we also seek comment on closing the *2002 Revised Order and NPRM* docket with respect to those issues,<sup>32</sup> as well as other proceedings that were consolidated in that docket.<sup>33</sup> It appears that the issues raised therein have been addressed in this *FNPRM* and Report and Order, have become obsolete or irrelevant due to regulatory updates, technology advances, or marketplace changes, or have been addressed in other Commission orders and no longer need to be resolved.<sup>34</sup>

#### A. Fundamental Changes to Existing Framework

10. We seek comment on whether to adopt fundamental changes to our rate regulation framework and what those changes could be. Our existing framework, which consists of many pages of regulations and numerous complex rate calculation forms, was implemented when the vast majority of cable operators were subject to rate regulation. As explained above, because of the statutory deregulation of the CPST and the Commission's 2015 *Effective Competition Order*, that no longer remains the case today. Rate regulation is now limited to BST and equipment rates, and very few cable operators remain subject to rate regulation for even this limited set of offerings. Moreover, as the Commission recognized in its 2015 decision, cable operators face considerably more competition today than they did when our rate regulations were put in place.<sup>35</sup> Because of these changes in the scope of rate regulation and the competitive landscape, we believe it is appropriate to seek input on new ideas that could potentially supersede our existing regulatory framework. We seek comment on whether there are simpler, more streamlined methods for determining reasonable rates that could be implemented and still satisfy our statutory obligations under Section 623 of the Act.<sup>36</sup>

11. For example, should we significantly simplify our rate regulation regime by eliminating all of our existing rate regulation forms<sup>37</sup> and directing those few LFAs that remain engaged in rate regulation to set reasonable BST rates based on the factors listed in Section 623(b)(2)(C)?<sup>38</sup> Similarly, under this approach, LFAs could set equipment rates that are based on the "actual cost" of the relevant

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<sup>32</sup> Those issues are the ones raised under the following headings in the *2002 Revised Order and NPRM*: (i) digital broadcast television rate adjustment issues, (ii) rates of interest, (iii) recovery of lost revenues for equipment and installation due to subsequently reversed rate orders, (iv) effective competition showings, and (v) procedures for Commission review of local rate decisions. *Id.*

<sup>33</sup> See Revisions to Cable Television Rate Regulations, MB Docket No. 02-144; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 and 93-215; and Adoption of Uniform Accounting System for the Provision of Regulated Cable Service, CS Docket No. 94-28.

<sup>34</sup> See, e.g., *Effective Competition Order*, 30 FCC Rcd 6574 (2015).

<sup>35</sup> *Effective Competition Order*, 30 FCC Rcd at 6579-80, para. 7.

<sup>36</sup> In 2002, the Commission sought comment on "whether there is another method for regulating BST rates that will ensure reasonable rates for basic service through a simplified regulatory process." See *2002 Revised Order and NPRM*, 17 FCC Rcd at 11566, para. 43.

<sup>37</sup> Under this proposal we would eliminate FCC Forms 1200, 1205, 1210, 1211, 1215, 1220, 1225, 1230, 1235 and 1240.

<sup>38</sup> 47 U.S.C. § 543(b)(2). The statute directs the Commission to take into account seven factors in adopting rate regulations: (1) the rates for cable systems that are subject to effective competition; (2) the direct costs of providing signals carried on the BST; (3) the joint and common costs of providing all cable signals that are allocable to the BST; (4) the advertising and other revenues a cable operator receives in connection with the BST; (5) franchise fees, taxes, or other charges imposed by a governmental entity that are allocable to the BST; (6) any amount required to support public, educational, or governmental channels; and (7) a reasonable profit, as defined by the Commission. *Id.* at § 543(b)(2)(C).

equipment, as required by Section 623(b)(3), without reliance on our existing forms.<sup>39</sup> To the extent necessary, the Commission could adjudicate any disputes that arise on a case-by-case basis. Would this approach be consistent with the Act, including the Commission's obligation under Section 623(b)(1) to ensure that BST rates are "reasonable" and "designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition?"<sup>40</sup> Would this approach be consistent with the statutory directive that the Commission "shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission?"<sup>41</sup> If the Commission adopted this approach, what new rules should we adopt? Should we retain any of our existing rules governing cable rates and, if so, which ones? What advantages or disadvantages would this type of approach have for subscribers, LFAs, and cable operators?

12. We also seek comment on the type of adjudicatory process the Commission should implement to resolve disputes if we adopt the type of rate-setting approach described above. The Act requires the Commission to prescribe "procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of [the Commission's] rate regulations."<sup>42</sup> Currently, disputes are resolved by the Commission when a cable operator appeals the decision of an LFA.<sup>43</sup> The Commission determines whether the LFA has correctly implemented Commission rules and issues an order resolving the issues in dispute.<sup>44</sup> If the Commission adopts the rate-setting approach described above, should we continue to resolve disputes between cable operators and LFAs by using the appeal process? If so, how should we determine whether the LFA's decision comports with the statutory factors? To what extent should we rely on existing rate appeal precedent for guidance? Should we adopt instead an alternative form of dispute resolution? For example, should Commission staff mediate rate disputes on an informal basis in the first instance? Alternatively, or if mediation is unsuccessful, should we consider adopting a more formal adjudicatory process and, if so, how should it work? We note that, in the program access context, the Commission has adopted merger conditions that impose baseball-style arbitration if parties cannot come to agreement.<sup>45</sup> Would a similar arbitration process work as an option for parties to elect to resolve rate disputes, with the Commission or a designated Bureau acting as the decisionmaker? Are there other adjudicatory processes that would work better in this context? If the Commission were to take this type of approach, what other issues should we consider?

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<sup>39</sup> 47 U.S.C. § 543(b)(3).

<sup>40</sup> 47 U.S.C. § 543(b)(1) (directing the Commission to adopt regulations to "ensure that the rates for the basic service tier are reasonable" and stating that the goal of rate regulation is to protect "subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.").

<sup>41</sup> 47 U.S.C. § 543(b)(5)(B).

<sup>42</sup> 47 U.S.C. § 543(b)(1)(A).

<sup>43</sup> See 47 CFR § 76.944; 47 U.S.C. § 543(b)(5)(B).

<sup>44</sup> See, e.g., *Comcast Cable Communications, LLC Orders Setting Basic Equipment Rates Appeal of Local Rate Orders and Petition For Emergency Stay*, 29 FCC Rcd 2885 (MB 2014).

<sup>45</sup> See, e.g., *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4241, 4260, 4262, 4358, 4364-70, paras. 4, 54, App. A Sections II, VII, and VIII (2011); *General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corporation, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 514, 552-555, 572-575, 631-632, paras. 87, 173-177, 220-223, Apps. B and C (2004); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corp., Assignors, to Time Warner Cable, Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8207, 8274, 8275-76, paras. 5, 156, 159-161, App. B, Sections B.2-3 (2006).

13. Alternatively, should we consider a proposal submitted by NCTA that would allow a cable operator to justify its regulated BST and equipment rates by comparison to rates for comparable offerings in communities that are subject to effective competition?<sup>46</sup> Under this framework, a cable operator would establish a national or regional rate, which NCTA refers to as an “Updated Comparative Benchmark” (UCB), that it would charge all BST subscribers.<sup>47</sup> NCTA suggests that an “[o]perator complying with the UCB could avoid all formal rate filings.”<sup>48</sup> It avers that this “[a]pproach would benefit consumers by facilitating consistent, market-driven rates across an operator’s cable systems” and “would provide a built-in incentive for operators to offer competitive prices to all subscribers, even in markets without effective competition.”<sup>49</sup> NCTA also says that, because “the vast majority of cable systems today face ‘effective competition’” and “an operator’s rate in these communities already reflects a market-based, competitive rate,” using the UCB “for regulatory purposes would fulfill the objectives and match the historical underpinnings of benchmark regulation, while also being much simpler to administer and easier to calculate.”<sup>50</sup> We seek comment on this framework.

14. Would a UCB approach be consistent with Section 623(b)? Given differences in channel lineups from system to system, how could “comparable offerings” be defined for purposes of establishing and comparing a UCB to a regulated rate? NCTA states that, under its proposal, “[o]perators would be allowed to calculate UCB rates based on reasonable system sampling”<sup>51</sup> of systems subject to effective competition. We seek comment on this idea. What type of sampling could be used to calculate the UCB? For example, should a sampling include only communities with a comparable channel lineup?<sup>52</sup> What if the cable operator has no systems that are subject to effective competition that it can use as a “comparable offering” to set its rate? If the Commission were to adopt this type of approach, to what extent should a cable operator be required to document and support its calculations? Should we adopt a presumption of reasonableness to such calculations that would be rebuttable by other interested parties? If so, what should such parties be required to demonstrate by way of rebuttal, and which party should bear the burden of persuasion? We also seek comment on the likely costs and benefits of this approach.<sup>53</sup> NCTA proffers that, if we were to permit cable operators to use the UCB, we could retain our existing rate regime as

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<sup>46</sup> See Letter from Diane Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene Dortch, Secretary, FCC, MB Docket No. 02-144 (July 3, 2018) (NCTA July 3, 2018 *Ex Parte*).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* NCTA also claims that “[w]ith respect to operator benefits, this approach would facilitate more efficient region-wide and company-wide marketing, without the need for special rate adjustments for the remaining handful of regulated communities” and that “[t]hese benefits would be achieved while simultaneously reducing the administrative burdens on federal, state, and local regulators and minimizing rate differentials based on historical anomalies.” *Id.*

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

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

<sup>52</sup> NCTA’s proposal refers to “comparable offerings” but also states that the national or regional rates would be “compared to the regulated [BST] rate without regard to the particular number of BST channels offered in either regulated or unregulated communities, provided the [national or regional] rate encompasses at least the same services that must be included in a rate regulated BST (i.e., local broadcast channels and, PEG channels, where applicable).” NCTA July 3, 2018 *Ex Parte*. Is it appropriate to base rates for a regulated area’s BST on a non-regulated area’s rate for a system that carries different channels and/or a substantially different number of channels? How would “comparable offerings” be defined if it doesn’t account for differences in the channel lineup?

<sup>53</sup> For NCTA’s qualitative assessment of the potential benefits, see *supra* note 49. To the extent possible, commenters should quantify the likely costs and benefits of this approach, provide support, and explain any uncertainties or limitations inherent in their assessment of costs and benefits.

“alternative rate support.”<sup>54</sup> Would the addition of this layer of requirements to our existing rules be consistent with the goal of simplifying and eliminating outdated rate regulations? How would this process account for LFA review?<sup>55</sup> What specific changes would we need to make to our rules if we were to adopt this framework or would retaining our existing rules as NCTA suggests be sufficient? To the extent that commenters are concerned about this framework, we also seek input on ways to revise the process to make it more acceptable to all interested parties.

15. We seek comment on any other proposals we should consider to restructure and simplify our existing rate regulation regime. Are there other processes that would reduce burdens on cable operators and local governments and achieve our statutory directive to ensure reasonable rates for subscribers? With respect to any alternative approaches we should consider, we ask commenters to explain and, if possible, quantify and provide support for their assessment of the relative costs and benefits vis-à-vis our existing regulatory framework; identify any uncertainties or limitations in their assessment of costs and benefits; and explain how their proposal would satisfy the requirements of Section 623, whether and how it would be cost effective for LFAs, cable operators, and the Commission, and how it would fit in with today’s marketplace realities.

## **B. Reform of Existing Rules and Forms**

16. In lieu of more extensive revisions to our overall rate regulation framework, we seek comment on eliminating, updating and streamlining our existing cable rate regulations.<sup>56</sup> We first seek comment on eliminating rate regulation for cable equipment that is used to receive non-BST tiers of service and exempting small cable systems owned by small cable companies from rate regulation. Next, we tentatively find that rate regulation does not apply to commercial rates.<sup>57</sup> These three areas appear to be ripe for deregulation, regardless of the regulatory framework that will apply going forward. Next, for those cable systems that remain subject to BST rate regulation, we seek comment on simplifying the process for establishing initial rates, discontinuing quarterly rate filings, and eliminating the cost of service methodology for setting rates. Collectively, these deregulatory steps would enable us to eliminate Forms 1200, 1210, 1220 and 1230.<sup>58</sup> We also seek comment on clarifying the methodology cable operators use to adjust their BST rates and on whether certain of our rules are still relevant in light of the end of CPST rate regulation.

### **1. Deregulation of Equipment, Small Systems and Commercial Rates**

17. *Equipment Regulation.* We seek comment on modifying our current rules regarding the

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

<sup>55</sup> For example, if we were to adopt a UCB approach, what formal process would a cable operator use to notify an LFA about the rate it plans to charge? What authority would the LFA have to review and approve the UCB, and what if the LFA doesn’t approve the UCB? Would an LFA have an opportunity to appeal the UCB rate as unreasonable, and if so, under what process? When would the cable operator be allowed to implement its UCB?

<sup>56</sup> The Proposed Rules in Appendix A reflect the proposals in this Section of the *FNPRM*. Specifically, in this *FNPRM*, we seek comment on possible changes to 47 CFR §§ 76.911, 76.922, 76.923, 76.924, 76.930, 76.934, 76.935, 76.937, 76.938, 76.939, 76.942, 76.944, 76.945, 76.963, 76.982, 76.990 and 76.1805 to remove references to the CPST and to reflect the changes discussed in this *FNPRM*. Additionally, in the Report and Order, we delete or modify 47 CFR §§ 76.901, 76.910, 76.922, 76.923, 76.986 and 76.987 and remove forms entitled “FCC329,” “INSTRUCTIONS FOR FCC 328” and “FCC328” located at the end of 47 CFR § 76.985. Under the proposal in the *FNPRM*, we would also eliminate FCC Forms 1200, 1210, 1211, 1215, 1220, 1225 and 1230. We close the Cable Pricing Flexibility proceeding, CS Docket No. 96-157 in the attached Report and Order.

<sup>57</sup> See *infra* para. 19.

<sup>58</sup> See *2002 Revised Order and NPRM*, 17 FCC Rcd at 11556, para. 11 (seeking comment on elimination of these forms).

regulation of equipment rates in light of the sunset of CPST regulation.<sup>59</sup> Section 76.923 of our rules provides that LFAs may regulate costs for equipment used to receive both the BST and additional tiers of service.<sup>60</sup> This rule was adopted pursuant to Section 623(b)(5) of the Act, which directs the Commission to adopt rules regulating the rates for “installation and lease of the equipment used by subscribers to receive the basic service tier.”<sup>61</sup> When promulgating this rule, the Commission reasoned that Congress in Section 623(b)(3) intended rate regulation to apply to all equipment used to receive the BST, even if the equipment was also used to receive additional tiers of service.<sup>62</sup> The Commission acknowledged at the time that this was an “expansive reading” of the underlying statutory provision that would warrant further review in the future.<sup>63</sup> While the Commission’s original interpretation of Section 623(b)(5) may have been appropriate when both the BST and CPST were rate regulated, we seek comment on whether our interpretation should be revisited and we should exempt from rate regulation equipment used by subscribers that receive additional tiers of service beyond the BST, now that CPST rate regulation has sunset. Would it be consistent with Section 623 to limit rate regulation to equipment used exclusively to receive the BST and non-tiered services?<sup>64</sup> We seek comment on this approach and on any other approaches we should consider.<sup>65</sup> Would this approach result in any complications or problems that we should consider?

18. *Small System Regulation.* We seek comment on whether to exempt from rate regulation those small cable systems, defined by our rules as cable systems serving 15,000 or fewer subscribers, that are owned by small cable companies, defined by our rules as cable television operators serving 400,000 or

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<sup>59</sup> In an *ex parte* meeting, NCTA questioned what effect the sunset of CPST regulation should have on the regulation of equipment rates. See Letter from Diane Burstein, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 02-144, MM Docket No. 92-266, MM Docket No. 93-215, CS Docket No. 94-28, CS Docket No. 96-157, at 1 (filed April 23, 2018) (“We also discussed the impact of Congress’ 1996 deregulation of the cable programming service tier on outstanding FCC rate rules, including those relating to regulation of equipment rates.”).

<sup>60</sup> 47 CFR § 76.923(a)(1). (“The equipment regulated under this section consists of all equipment in a subscriber’s home, provided and maintained by the operator, that is used to receive the basic service tier, regardless of whether such equipment is additionally used to receive other tiers of regulated programming service and/or unregulated service.”).

<sup>61</sup> 47 U.S.C. § 543(b)(3) (“The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for--(A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and (B) installation and monthly use of connections for additional television receivers.”).

<sup>62</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5802, para. 276 and 5806-07, para. 283 (1993) (*Rate Order*). See also *Rate Order* at 5800, para. 273 (“We further conclude that Congress intended these actual cost regulations to cover all installations and equipment used by subscribers to receive the basic service tier in systems not subject to effective competition, even if the installation or equipment is also used for other cable services.”).

<sup>63</sup> See *Rate Order*, 8 FCC Rcd at 5806-07, paras 282-83. Although Sections 623(b)(3) and 623(1)(2) of the Act suggest that equipment might be associated with a specific tier of service, the Commission decided to give an expansive reading to the basic tier definition so that only one rate standard (actual cost) would apply to all equipment. See 47 U.S.C. § 543(b)(3) and (1)(2). See also *Time Warner Entertainment v. FCC*, 56 F. 3rd 151 at 177 (D.C. Circuit 1995).

<sup>64</sup> Equipment used to receive only the BST plus any non-tiered programming such as programming offered on a per channel or per program basis would remain subject to our rate regulation rules as the Act requires. 47 U.S.C. § 543(b)(3), (8).

<sup>65</sup> See *2002 Revised Order and NPRM*, 17 FCC Rcd at 11566, paras. 44-48 (seeking comment on appropriate scope of equipment regulation).

fewer subscribers.<sup>66</sup> If we find that rate regulation is no longer necessary for such small systems owned by small cable companies, we propose to eliminate the rules establishing alternate methodologies for small systems as well as the Form 1230.<sup>67</sup> Based on our review of Form 328 data, information contained in pending applications for review of an effective competition decision, and information from our COALS database, it does not appear that any such small cable systems currently are subject to rate regulation. Would an exemption for small systems be consistent with the Act, including Section 623(i), which requires the Commission to “reduce the administrative burdens and costs of compliance” for cable systems that have “1000 or fewer” subscribers,<sup>68</sup> and Section 623(m), which exempts certain small cable operators from regulation of the BST?<sup>69</sup> Are there any small systems serving 15,000 or fewer subscribers that are owned by small cable companies of 400,000 or fewer subscribers that are currently rate regulated? To the extent any such systems exist, would there be any benefit to retaining rate regulation for these cable systems? For example, should we retain our regulations on the premise that additional cable systems may become subject to regulation in the future? Should we create a different exemption for small entities or provide another form of relief short of a blanket exemption? What are the costs, if any, of retaining regulations for this class of providers, particularly where it appears no such providers are currently regulated? To the extent possible, commenters should quantify anticipated costs and benefits of this proposal or any proposed alternatives, provide support, and describe any uncertainties or limitations inherent in their analysis. We also seek comment on whether a cable operator that loses its deregulated status as a small system, small cable company or small cable operator because it gains subscribers and surpasses the maximum subscriber threshold for such an exemption should be required to notify its LFA that it no longer qualifies for the exemption.

19. *Commercial Service Regulation.* We tentatively conclude that cable services offered to commercial subscribers, such as bars and restaurants, are not subject to the Commission’s rate regulations. Since the onset of cable rate regulation, the Commission has never applied its rate regulations to cable service provided to commercial subscribers.<sup>70</sup> Section 623(b)(1) refers to the Commission’s obligations to “subscribers,” including to “ensure that the rates for the basic service tier are

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<sup>66</sup> See 47 CFR § 76.901(c) (“small system” defined), *id.* § 76.901(e) (“small cable company” defined). The Commission has previously provided relief to operators of small cable systems based on various criteria. For a summary of this relief, see *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Fourteenth Reconsideration Order*, 12 FCC Rcd 15554, 15554-8, paras. 2-9 (1997).

<sup>67</sup> In addition to the option of filing a Form 1230 (abbreviated cost of service), small systems owned by small cable operators are permitted to use a 14 percent reduction streamlined methodology for setting their initial rates. This option allows an eligible operator to reduce its March 31, 1994 rates by 14 percent in lieu of setting initial regulated rates using another methodology. See 47 CFR § 76.922(b)(5).

<sup>68</sup> 47 U.S.C. § 543(i). The Commission determined in the *Small Systems Order* that extending additional regulatory relief to small systems is consistent with the 1992 Cable Act, and in particular with the Statement of Policy in § 2(b)(1-3), which states its intention to promote diversity, rely on the marketplace when feasible and ensure the ability of cable operators to expand. *Small Systems Order*, 10 FCC Rcd 7393, 7407, para. 26. Once a small cable system owned by small cable company exceeds 15,000 subscribers or is no longer owned by a small company, then its eligibility for small system relief would terminate. *Compare Small System Order*, 10 FCC Rcd at 7413, para. 38 and 7427, para. 73.

<sup>69</sup> 47 U.S.C. § 543(m).

<sup>70</sup> In the *Second Reconsideration Order*, the Commission sought comment on issues relating to commercial rates. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4248-49, para. 257 (1994) (*Second Reconsideration Order*). (“[W]e solicit comment on whether we should establish regulations governing rates for regulated cable service provided to commercial establishments.”) See also *2002 Revised Order and NPRM*, 17 FCC Rcd at 11562, paras. 29-30. Parties that previously filed comments on this issue should resubmit any comments they believe are still relevant.

reasonable.”<sup>71</sup> The term “subscriber” is not defined in Section 623. Although Section 623 of the Act does not specify that cable services offered to commercial subscribers are exempt from rate regulation, Section 623(a)(2) specifies that rate regulation shall not be imposed on a cable system that is subject to effective competition, and it defines “effective competition” based on the percentage of “households” subscribing to cable or the percentage of households to which competing service is available.<sup>72</sup> In applying the test for effective competition, the Commission has concluded that the term “household” means “occupied” housing units.<sup>73</sup> Given the use of the term “households” in Section 623 and the Commission’s prior definition of that term in connection with the test for effective competition, we tentatively find that Congress did not intend to include cable service offered to commercial subscribers within the scope of rate regulation. We seek comment on this interpretation and, if we were to adopt it, on how we should define cable service offered to commercial subscribers for purposes of our rate regulation rules. One alternative would be to define it as a “cable service offered to locations that do not consist of households that are temporary or permanent, single housing units or multi-dwelling units.”<sup>74</sup> We seek comment on this definition and any alternatives we should consider.

## 2. Setting Initial Regulated Rates (Forms 1200 and 1220)

20. We seek comment on replacing our initial rate setting methodology, which requires using data from as far back as 1992, with one based on current, actual BST rates.<sup>75</sup> This simplified practice would apply to cable operators that become regulated for the first time or that become re-regulated<sup>76</sup> and would eliminate the need for Forms 1200 and 1220.

21. *Form 1200.* Under our current rules, a newly regulated cable operator choosing our benchmark methodology must use Form 1200 to calculate its initial regulated rates. The Form 1200 requires newly regulated cable operators to use financial data from the early 1990s to establish an initial rate, which is then brought up to the current date.<sup>77</sup> This process has become increasingly time-

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<sup>71</sup> 47 U.S.C. § 543(b)(1).

<sup>72</sup> 47 U.S.C. § 543(a) and (l).

<sup>73</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy Through Prohibition*, MM Docket Nos. 92-266 & 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4324, para. 17 (1994) (*Third Reconsideration Order*) (“[T]he operator should measure its penetration rate of full-time subscribers as a percentage of full-time households, i.e., by excluding housing units used for seasonal, occasional, or recreational use.”). See also *Americable International Arizona, Inc.*, 11 FCC Rcd 11588, para. 6 (1996); *American Cable Systems, et al.*, 23 FCC Rcd 638 (2008).

<sup>74</sup> Both “household” and “multi-dwelling unit” are terms we have defined in Commission precedent regarding cable operators. “Household” is an occupied housing unit. *Third Reconsideration Order*, 9 FCC Rcd at 4324, para. 17. “Multi-dwelling unit” is a building or buildings with two or more residences, including apartment buildings, condominiums, hotels, hospitals, universities, and trailer parks. *Rate Order*, 8 FCC Rcd at 5897 and *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 18 FCC Rcd 1342, 1343 (2003).

<sup>75</sup> See *2002 Revised Order and NPRM*, 17 FCC Rcd at 11561-62, paras. 27-28 (seeking comment on initial rate setting).

<sup>76</sup> For simplicity, we refer to first time or re-regulated cable operators as newly regulated cable operators throughout this document. Newly regulated cable operators may include those that are regulated for the first time, operators in communities where an LFA successfully rebuts the presumption of effective competition, or operators that lose their exemption from rate regulation because their status under our rules has changed. For all newly regulated operators, the initial or effective date of regulation would be the date that an LFA notifies the cable operator that the LFA is certified to regulate rates and that the basic service tier is subject to regulation under the generally applicable rate rules.

<sup>77</sup> Under the benchmark approach, existing rates for cable service are compared to a benchmark that reflects the rates charged by cable systems with similar characteristics but that were subject to effective competition. The initial regulated rate is calculated using rate and subscriber data from 1992 and 1994 and external costs data from 1994.

consuming, burdensome and impractical. We seek comment on whether to streamline this process by accepting an operator's current, actual BST rate at the time it becomes subject to rate regulation in lieu of the benchmark rate calculated using the Form 1200.<sup>78</sup> We seek comment on whether this approach will ensure that BST rates are kept within a reasonable range while creating a less burdensome process for cable operators and LFAs.<sup>79</sup>

22. Is it reasonable to presume under this proposal that the operator's rates in effect prior to becoming subject to regulation are reasonable? Does Section 623, which prohibits rate regulation for communities that are subject to effective competition, support this presumption, at least with respect to cable operators that become newly regulated but were previously subject to effective competition?<sup>80</sup> Is this presumption also reasonable in cases where an LFA decides to exercise its authority and has successfully rebutted the presumption of effective competition? In cases where an LFA previously had the authority to rate regulate, but chose not to do so, can we assume that the rates in effect before the LFA became certified to regulate were reasonable? Are there other approaches we should consider that would enable us to update and simplify our existing process for setting initial regulated cable rates?

23. If we adopt this approach, we also seek comment on whether we should impose any restrictions on a cable operator's ability to use its actual current BST rate as its initial regulated rate. For example, should we restrict a cable operator's ability to use its actual BST rate as a starting point if there is a substantial spike in its BST rate shortly before the initial date of regulation? This approach would be consistent with our precedent and would limit an operator's incentive to substantially raise its BST rates in anticipation of becoming newly regulated.<sup>81</sup> It could also account for a large rate increase during the time period between when an operator is no longer subject to effective competition and the initial date of regulation. If we adopt such a restriction, how much of a rate increase should be considered as the threshold and what would be an appropriate period of time before rate regulation commences for us to restrict substantial increases?<sup>82</sup> If a cable system is not permitted to use its existing rate in certain cases,

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The initial rate is updated by a price cap mechanism that permits periodic adjustments for inflation, changes in the number of regulated channels, and changes in external costs. For a summary of the history of rate regulation, *see 2002 Revised Order and NPRM*, 17 FCC Rcd at 11553, n.8.

<sup>78</sup> Under this approach, the BST rate would include the entire amount charged for the BST on the effective date of regulation, whether or not an operator had identified individual components of the rate on its subscribers' bills. It would not include promotional or discount rates nor include charges for equipment used to receive the BST. To the extent that any equipment or installation costs were included in the BST service charge, they would be removed using an off-form attachment. The initial or effective date of regulation would be the date that an LFA notifies the cable operator that the basic service tier is subject to regulation under the generally applicable rate rules.

<sup>79</sup> *See 2002 Revised Order and NPRM*, 17 FCC Rcd at 11561-62, para. 28.

<sup>80</sup> *See* 47 U.S.C. §§ 543(a)(2) ("If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this Section."); 543(b)(2)(C)(i) (noting a "preference for competition" over rate regulation, and directing the Commission to adopt regulations that consider "the rates for cable systems . . . that are subject to effective competition").

<sup>81</sup> At the onset of rate regulation, the Commission imposed a three-month freeze on rate increases. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, Order, 8 FCC Rcd 2921 (1993). The rate freeze afforded local franchising authorities an opportunity to become certified to regulate the basic service tier. *Id.* at 2921-22, paras. 3-4 and 12. *See C-Tec Cable Systems, et al., Letters of Inquiry*, 10 FCC Rcd 3358 (CSB 1995); *TCI of Southeast Mississippi, Appeal of Local Rate Order*, 10 FCC Rcd 8728 (CSB 1995).

<sup>82</sup> In the interest of uniformity and consistency, should we conform the three-month period that applies to small cable operators who lose their deregulatory status as small cable operators to any newly proposed rule? *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5334-35, paras. 88-89 (1999). (Commission regulations should not "act as an incentive for an operator to raise rates

how should its initial rate be determined? For example, in such cases, should we allow LFAs to review the cable operator's most recent rate increase for compliance with our rules by using the last previous rate as the initial rate? Are there other approaches we should consider?

24. We tentatively conclude that we would no longer need to retain our methodology for determining historical permitted charges using the Form 1200 if we use an operator's actual rate for the initial regulated rate. Consequently, if we adopt this approach, we propose to amend our rules to delete references to Form 1200 and its predecessor, Form 393, and to delete rules that relate solely to this methodology.<sup>83</sup> If we adopt this proposal, should we also modify and streamline our refund liability rule in Section 76.942 to reflect the reduction in possible refund scenarios that could occur under our streamlined methodology for setting initial rates?<sup>84</sup> Should we simplify the refund rule so that a cable operator's liability for refunds runs from the date of initial regulation until it reduces its rate in compliance with an LFA order?<sup>85</sup> Are there any other rules we should delete or modify if we adopt this approach?

25. *Form 1220.* We seek comment on eliminating the labor-intensive Form 1220 cost of service methodology as an alternative means of setting initial regulated rates and on terminating pending rulemaking proceedings related to this methodology.<sup>86</sup> The cost of service methodology was adopted as a safety valve for high cost systems that might not receive an adequate rate of return using the benchmark system methodology (via Form 1200) to establish initial rates. With the demise of CPST regulation and the revised methodology for setting initial rates discussed above, the Form 1220 cost of service alternative may no longer be necessary to ensure that an operator receives an adequate return on its investment. First, only a small portion of a cable operator's service rates are subject to regulation so cable operators now have considerable flexibility in how they can recover costs and realize an adequate rate of return.<sup>87</sup> In addition, if we adopt a revised methodology for setting initial rates for a regulated BST, operators will set initial BST rates using their current actual rate as the starting point for future rate increases. We presume these current, unregulated rates would have been set by the cable operator to recover all necessary costs

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dramatically as a means of protecting those rates from regulatory review, when it becomes apparent that the operator is about to lose its deregulatory status.") *Id.* at 5335, para 89. *See also* 47 U.S.C. § 543(m); 47 CFR § 76.990.

<sup>83</sup> For example, Section 76.944(f)(4) addresses adjustments for increases in external costs incurred during the period between September 1992 and the initial date of regulation. 47 CFR § 76.944(f)(4). *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Memorandum Opinion and Order*, 11 FCC Rcd 20206 (1996); *Time Warner Entertainment Co., LP v. FCC*, 144 F.3d 75 (D.C. Cir. 1998). This rule may no longer be necessary if we eliminate the Form 1200. *See, e.g., Falcon Cablevision*, 17 FCC Rcd 3560 (CSB 2002) (unregulated operators filing FCC Form 1240s not entitled to section 76.922(f)(4) adjustment).

<sup>84</sup> *See* 47 CFR § 76.942. Section 76.942 of the Commission's rules addresses refunds of overcharges to subscribers, including the LFA's authority to order refunds, the refund period, and how refunds may be implemented.

<sup>85</sup> *Id.* *See also* 47 CFR § 76.911(b)(3).

<sup>86</sup> The Commission adopted interim cost rules in 1994, which were finalized in 1996. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 11 FCC Rcd 2220 (1996) (*Final Cost Order*). *See also* 47 CFR §§ 76.922(i), 76.924. A Further Notice of Proposed Rulemaking in the *Final Cost Order*, along with petitions for reconsideration of the *Final Cost Order*, remain pending. An appeal of the rules, *Comcast Cable Communications, Inc. v. FCC* (D.C. Cir. Case No. 96-1148), was dismissed by voluntary stipulation of the parties in November 2010. If we eliminate the Form 1220 and cost of service methodology, issues raised on appeal of the *Final Cost Order*, as well as the Commission's *Further Notice of Proposed Rulemaking* appended to the *Final Cost Order*, will be rendered moot. Therefore, if we eliminate the Form 1220, we also propose to withdraw our 1996 *Further Notice of Proposed Rulemaking* contained in the *Final Cost Order* and to dismiss the various pending petitions for reconsideration of the *Final Cost Order*. *See also 2002 Revised Order and NPRM*, 17 FCC Rcd at 11563-64, paras. 34-35.

<sup>87</sup> Because most cable services are not rate regulated, cable operators can choose to locate most services on non-regulated tiers, setting rates for those services at levels sufficient to provide an adequate aggregate rate of return.

plus an adequate return on investment. Would these factors eliminate the need for the Form 1220 cost of service safety valve?<sup>88</sup> Is there any compelling need for the Commission to retain Form 1220 or a cost of service methodology as an alternative way to set initial regulated rates? To what extent, if any, do cable operators use this process today? Would eliminating this alternative from our rules create any problems that we should consider?<sup>89</sup> What costs and benefits would result from eliminating the cost of service option for setting rates?<sup>90</sup>

### 3. Calculating Rate Increases (Forms 1210, 1240 and 1235)

26. Under our current rules, once a regulated operator sets an initial BST rate, it justifies rate increases based on changes in external costs, changes in the number of channels on the BST, and inflation.<sup>91</sup> In this section, we seek comment on ways to simplify the process for calculating these rate increases. We seek comment on the costs and benefits of these proposals or any alternatives that commenters may identify. Commenters should quantify costs and benefits to the extent possible, provide supporting information, and identify any limitations or uncertainties in their assessments.

27. *Eliminating Form 1210 Quarterly Update of Maximum Permitted Rates.* Currently, cable operators are permitted to justify changes to their rates either on a quarterly basis using Form 1210 or an annual basis using Form 1240. We seek comment on whether there is any benefit to retaining the Form 1210 quarterly adjustment option. The main difference between the two methods is that the Form 1210 calculates rates based on costs already incurred, whereas the Form 1240 calculates rates based on projected future costs, avoiding a delay in cost recovery.<sup>92</sup> Another benefit of the Form 1240 is that it allows cable operators to accumulate costs to pass through to subscribers at an indefinite later date.<sup>93</sup> We understand that cable operators often use Form 1240 and rarely, if ever, use the Form 1210. We therefore seek input on whether the quarterly methodology should be removed from our rules.<sup>94</sup> Is there any

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<sup>88</sup> Our proposed elimination of the Form 1220 and cost of service methodology would not affect cost rules, methodologies and policies that are applicable to the cost calculations on Form 1205 (equipment form), Form 1235 (significant upgrade form) and Form 1240 (annual rate adjustment form) as these forms are still necessary to fulfill the purposes of Section 623 and our relevant rules. For example, our cost rules are used in determining equipment and installation rates pursuant to Section 76.923 of the Commission's rules and Form 1205 and to determine rate increases for network upgrade surcharges pursuant to Section 76.922(j) and Form 1235. Both of these methodologies incorporate cost of service components and utilize Section 76.924 cost allocation categories. See 47 CFR § 76.924.

<sup>89</sup> If we eliminate the Forms 1200 and 1220, should we eliminate references to the initial Form 1200 and cost of service methodologies in Section 76.933, which addresses the process for filing these forms and their franchising authority review? Under the Act, LFAs review cable operators' BST and equipment rates for conformance with the Commission's rules. 47 U.S.C. § 543(b). If the cable operator has improperly calculated its rates, the LFA can order the cable operator to adjust the rates and order refunds. 47 CFR § 76.937(d); *Falcon Classic Cable*, 15 FCC Rcd 5717, 5720, para. 10 (2000); *Western Reserve Cablevision, Inc.*, 14 FCC Rcd 13391, 13398 (1999). Similarly, should we modify Section 76.942 to delete references to those forms and the processes they use?

<sup>90</sup> Commenters should quantify and support their estimates of costs and benefits, to the extent possible, and identify any uncertainties or limitations in their approach.

<sup>91</sup> See *supra* note 77.

<sup>92</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 413-414, paras. 55-58 (1995) (*Thirteenth Reconsideration Order*).

<sup>93</sup> *Id.* at 415, para. 62.

<sup>94</sup> We note that the language in the inflation adjustment rule set forth in Section 76.922(e)(2)(i) refers to the quarterly calculation rather than the annual calculation. Compare 47 CFR 76.922(e)(2)(i) with *Instructions for FCC Form 1240* at pp. 13, 24 (or electronic version at <https://transition.fcc.gov/Forms/Form1240/1240inst.pdf> at pp. 9, 17). We propose to conform Section 76.922(e)(2)(i) to the annual methodology adopted in Form 1240, as consistently applied since 1996. See, e.g., *Public Notice, Inflation Adjustment Figures for Cable Operators Using*

compelling reason for the Commission to retain the quarterly rate form? To what extent, if at all, do cable operators continue to use the Form 1210 and will eliminating it create any problems or disadvantages that we should consider?<sup>95</sup>

28. *Modifying Form 1240 Annual Update of Maximum Permitted Rates, Channel Movement Calculation.* We seek comment on modifications to our Form 1240 instructions for adjusting rates when channels are added to or deleted from the BST.<sup>96</sup> Our existing channel movement rules were adopted when both the BST and CPST were subject to rate regulation and were intended to provide a rate adjustment mechanism for channel movement between BST and CPST regulated tiers.<sup>97</sup> With the sunset of CPST regulation, we seek comment on whether we should eliminate two components of channel movement rate adjustment calculations: the “residual” component<sup>98</sup> and the “channel number” component.<sup>99</sup>

29. Under our current rules, when a channel is removed from the CPST or BST, a per channel “residual” amount is removed as well and moves with the channel to its new tier location.<sup>100</sup> Now that the CPST is no longer regulated, there is no longer a regulated residual calculation available to move with a channel that is added to the BST from a CPST.<sup>101</sup> However, when a channel is removed

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*FCC Forms 1210 and 1240 Now Available*, 32 FCC Rcd 7337 (2017); *see also* Appendix A at 76.922(c)(2)(i). We seek comment on this proposal.

<sup>95</sup> If we eliminate the Form 1210, should we eliminate references to this quarterly process in Sections 76.933 and 76.942, as discussed above? *See supra* note 89.

<sup>96</sup> Our current process for adding or deleting channels to or from the BST is set forth in Section 76.922(g) of our rules, as modified by order in 2002. *See* 47 CFR § 76.922(g)(2), *2002 Revised Order and NPRM*, 17 FCC Rcd at 11569-11570, para. 55 (2002); *revised*, 17 FCC Rcd 15974, 15974-6, para. 2 (2002) (stating that although 47 CFR 76.922(g)(8) sunset paragraph (g), LFAs should continue to accept rate adjustments based on the markup table in 76.922(g)(2)). Operators may also recover the full amount of programming cost increases due to added channels, plus a markup on new programming expenses of 7.5 percent. *Second Reconsideration Order*, 9 FCC Rcd 4119, 4139-40, para. 40 (1994).

<sup>97</sup> The Commission’s rate regulations were designed to be “tier-neutral,” so the same methodology was used to set rates for the BST and CPST. Channels could be moved between tiers on a revenue neutral basis. *Rate Order*, 8 FCC Rcd at 5746, 5759-60, 5881-82, paras. 171, 197, 396; *reconsideration denied on this issue, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1182-85, paras. 31-36 (1993) (*First Reconsideration Order*). The Commission previously adopted interim instructions to deal with the end of CPST regulation and the sunset provision in 47 CFR § 76.922(g)(8). *See 2002 Revised Order and NPRM*, 17 FCC Rcd at 11569-11570, para. 55 and *Revised 2002 Order*, 17 FCC Rcd at 15974-6, para. 2.

<sup>98</sup> The term “residual component” refers to the portion of a permitted charge that remains after subtracting external costs and any other per channel adjustments. The total tier residual is divided by the number of channels on the tier to determine a per channel residual amount. *See* 47 CFR § 76.922; Form 1240 Instructions at p. 3 and Worksheets 4 and 5.

<sup>99</sup> The term “channel number component” refers to a per channel amount that accounts for changes in the total number of regulated channels on the system when channels are added or deleted. *See Second Reconsideration Order*, 9 FCC Rcd at 4243-4244, 4303-4307, paras. 247-48 and Technical Appendix; 47 CFR § 76.922(g)(2).

<sup>100</sup> This amount is calculated by subtracting external costs and any other per channel adjustments from a permitted charge for the CPST and then dividing the remainder by the number of CPST channels.

<sup>101</sup> *See 2002 Revised Order and NPRM*, 17 FCC Rcd at 11569-11570, para. 55 and *Revised 2002 Order*, 17 FCC Rcd at 15974-6, para. 2 (“Because of our concern about determining the CPST residual from unregulated rates, we will not find franchising authority orders unreasonable for disallowing the movement of an unregulated residual

from the BST, our current rules continue to require the removal of the per channel share of the residual portion of the BST permitted charge. Without a regulated CPST, this sets up an unbalanced relationship between the tiers because, as discussed above, a regulated per channel residual can no longer move from the CPST to the BST.<sup>102</sup> We seek comment on simplifying our rule so that (1) no per channel residual is moved to the BST along with a CPST channel and (2) no per channel residual is removed from the BST when a channel is removed from the BST unless the total number of channels on the BST falls below the total number of channels included in the initial regulated BST rate. This proposal will ensure that unregulated CPST residual amounts are not added to the BST and that excessive amounts of residual are not removed from the BST. We seek comment on eliminating from our rules the movement of CPST residual to the BST and on restricting the removal of BST residual and whether there are alternative mechanisms we should consider.

30. With regard to the channel number component, our rules currently allow for a rate adjustment based on changes in the total number of channels on all regulated tiers. This “per channel adjustment factor” is calculated using a “markup table,” which is premised on having a regulated CPST and a system with fewer than 100 channels.<sup>103</sup> Neither of those factors are valid today, so we seek comment on eliminating this adjustment and the accompanying table.<sup>104</sup> Will this approach result in reasonable rate changes based on changes in the number of channels, and if not, what other methodologies should we consider?

31. *Form 1240 True-Up Adjustment Clarification to Disallow the Accrual of Interest on Interest.* As noted above, the Form 1240 allows an operator to calculate a maximum permitted rate using projected costs. The operator is then required to “true up” its rate by comparing the projected costs with actual costs once they are known. The operator is not required to pass through all of its costs to subscribers in its actual rate and may accrue costs to pass through at a later date. The Commission has stated that interest should not continue to accrue on these unrecovered costs, but subsequent decisions have created confusion in this area.<sup>105</sup> When interest continues to accrue on these costs, it can result in excessive maximum permitted rates calculated on the Form 1240. We tentatively conclude that we should clarify our Form 1240 instructions to prevent cable operators from using the form to accrue

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amount for channels moved from the CPST to the BST after the sunset of CPST rate regulation.”). *See also Going Forward Order*, 10 FCC Rcd at 1256, para. 84.

<sup>102</sup> For example, an exchange of channels between the tiers would result in a residual portion of the BST rate being removed but no residual portion of the CPST rate added to the BST.

<sup>103</sup> The markup table calculates a per channel amount that cable operators may use to adjust their rates when they add or delete a channel to or from the BST; the amount is dependent on the total number of regulated channels on both tiers of service. *See Second Reconsideration Order*, 9 FCC Rcd at 4243-4244, paras. 247-48; Technical Appendix at 4303-4307 (per channel adjustment factors based on benchmark equation). *See also* 47 CFR §76.922(g)(2). This methodology was originally scheduled to sunset after December 31, 1997 if not replaced or updated.

<sup>104</sup> *See Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MB Docket No. 92-266, Report on Cable Industry Prices, 33 FCC Rcd 1268, 1281, Table 5 (MB 2018) (reporting that, on average, cable systems carry more than 400 channels).

<sup>105</sup> *Thirteenth Reconsideration Order*, 11 FCC Rcd at 421, para 80 (1995). *See also Comcast Cablevision of Dallas, et al, Order Setting Basic Equipment and Installation Rates*, 19 FCC Rcd 10628, 10640, para. 30 (MB 2005) (“The import of the decisions . . . , at least for the present case, is that a cable operator is not entitled to earn interest on rate increases that it chose voluntarily not to take.”). The Commission seemed to throw doubt on this policy in *CoxCom, Inc. d/b/a Cox Communications New England*, 17 FCC Rcd 7931 (MB 2002), *application for review denied*, 18 FCC Rcd 6941 (2003) and *AT&T Broadband, et al.*, 18 FCC Rcd 11279 (MB 2003). However, subsequent decisions affirm the original policy. *See Comcast Cablevision of Dallas, et al, Order Setting Basic Equipment and Installation Rates*, 19 FCC Rcd 10628, 10640, para. 30 (MB 2004).

interest on costs not passed through to subscribers when they are first entitled to recover those costs.<sup>106</sup> We seek comment on our tentative conclusion.

32. *Form 1235 Updates to Reflect Changes in Channel and/or Subscriber Counts.* We seek comment on modifications to the Form 1235 instructions for calculating significant network upgrade costs to account for substantial changes in a system's channel count or number of subscribers.<sup>107</sup> Through the Form 1235, cable operators are permitted to allocate a portion of their network upgrade costs to the BST based on the system channel capacity devoted to the BST.<sup>108</sup> The cable operator then determines a per subscriber surcharge based on the number of subscribers to the BST.<sup>109</sup> Under our current instructions, the Form 1235 is filed only once and, if there is a subsequent substantial change in the number of subscribers or the number of channels allocated to the BST, the surcharge remains the same. This fails to account for system changes over time and could result in either over-inflated or under-inflated surcharges. Accordingly, we seek comment on whether to allow an LFA to require the cable operator to refile an updated Form 1235 using the new channel ratio or subscriber count, when the change is substantial. If so, we seek comment on how we should define "substantial" or otherwise establish a threshold upon which an LFA could require the operator to file a Form 1235 update.

33. *Form 1235 Adjustment to Prevent Double Depreciation Recovery.* We also seek comment on modifying the Form 1235 instructions to prevent the double recovery of depreciation expense.<sup>110</sup> Currently, Form 1235 calculates a rate of return on the initial net investment rather than calculating a return based on the average net investment, which would include a reduction for depreciation expense. At the same time, operators fully recover the upgrade investment over time as depreciation expense. As a result, operators have been able to recover a return on investment that has also been recovered through depreciation expense. Would a modification to the Form 1235 instructions, requiring operators to use the average net upgrade investment over the life of the upgrade rather than the

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<sup>106</sup> We believe this proposal is consistent with our prior conclusion that if an operator elects not to recover its accrued costs with interest on the date the operator is entitled to make its annual rate adjustment, the interest will cease to accrue. See *Thirteenth Reconsideration Order*, 11 FCC Rcd at 421, para. 80 ("This policy will give operators the flexibility to delay rate increases without losing the opportunity to recover interest on costs that accrued due to circumstances beyond their control. At the same time, this policy ensures that where an operator makes a business decision to delay recovery of its costs, subscribers are not required to pay for the cost of the delay."). See also Letter from JoAnn Lucanick, Chief, Policy and Rules Division, Cable Services Bureau, to Richard D. Treich, Vice President, Franchising and Regulatory Affairs, TCI Communications, Inc, 12 FCC Rcd 10340 (CSB 1997). We emphasize that we do not propose to take away an operator's ability to recover these costs and allowable accrued interest at a later date. Costs and accrued interest will continue to be carried in Module H of the Form 1240 and available to be passed through in subsequent rate increases.

<sup>107</sup> Cable operators may recover significant network upgrade costs through a surcharge on regulated rates, by filing a Form 1235 with LFAs. See 47 CFR § 76.922(j). Only those costs properly allocable to the BST may be recovered through BST rates and the Form 1235 requires that the cost allocation methodology be disclosed. See FCC Form 1235 Instructions at 3, 8-9, and Worksheet A. See also 47 CFR § 76.924(f), *Final Cost Order*, 11 FCC Rcd at 2268-70, paras. 119-24. See also *Cox Communications San Diego, Inc.*, 13 FCC Rcd 17653, 17656, para. 10 (CSB 1998).

<sup>108</sup> See Form 1235, Worksheets A, B (cost assignments and allocations; allocation key); Form 1235, Instructions for Completion of Abbreviated Cost of Service Filing for Cable Network Upgrades ("Form 1235 Instructions"), at 8-12 (Instructions for Worksheets A, B);

<sup>109</sup> The per-subscriber Monthly Network Upgrade Add-on is computed on Form 1235, Part III, by dividing the upgrade revenue requirement by the number of subscribers at the time of filing or, in the case of a pre-approval filing, the estimated number of subscribers upon completion of the upgrade, and by the 12 months of the year. Form 1235, Part III; Form 1235 Instructions at 8. If the rate computed on Part III is unchanged but the number of subscribers increases, the cable operator will recover more than the annual revenue requirement. See Form 1235, Instructions for Completion of Abbreviated Cost of Service Filing for Cable Network Services at 2 (Feb. 1996).

<sup>110</sup> See *2002 Revised Order and NPRM*, 17 FCC Rcd at 11564-65, para. 37 (seeking comment on modifications to Form 1235).

initial net investment, prevent this double recovery?<sup>111</sup> Would it allow the cable operator to earn a return on its investment and recover its network upgrade costs, while preventing subscribers from overpaying for network upgrade costs? If not, what other alternatives should be considered to address this issue?

#### 4. Elimination of Additional Forms

34. We seek comment on whether to eliminate a number of inactive or obsolete rate forms and delete references to them in our rules.<sup>112</sup> These include: (1) Form 1211 (small system alternative to FCC Form 1210), which would be obsolete if we eliminate the Form 1210; (2) Form 1215 (a la carte channel offerings), which is a vestige of CPST regulation and is therefore no longer relevant; (3) Form 1225 (small systems cost of service form), which was superseded by the Form 1230; and (4) Form 329, an obsolete CPST complaint form.<sup>113</sup> We seek comment on whether there is any reason to retain any of these forms.

#### C. CPST Sunset Issues

35. In this Section, we seek comment on issues related to the sunset of CPST regulation. Commenters in the media modernization proceeding question whether specific rules have been rendered moot by the sunset of CPST regulation or by the passage of time.<sup>114</sup> These rules include, among others addressed in the Order below, Section 76.980 (charges for customer changes in service tiers) and Section 76.984 (requiring a geographically uniform rate structure).<sup>115</sup> In addition, we seek comment on whether there is any reason to retain Section 76.922(e)(2)(iii)(C) (mid-year rate adjustments) and Section 76.963 (forfeiture exceptions) in light of CPST deregulation. Additionally, we seek comment on the continued relevance of Section 76.982 (continuation of certain types of rate agreements).<sup>116</sup> We seek comment on how these rules might be affected by the sunset of CPST regulation and whether the rules continue to serve the public interest.

36. *Section 76.922(e)(2)(iii)(C)*. We seek comment on eliminating our rule that allows cable operators using the annual rate adjustment methodology to make an additional rate adjustment to their CPST to reflect mid-year channel additions.<sup>117</sup> The rule also allows operators with only a single regulated tier, i.e., an operator offering only a BST, to make an additional rate adjustment to reflect mid-year channel additions which otherwise is not permitted with respect to BST rates and therefore functions as an exception to our rules for annual BST rate adjustments.<sup>118</sup> Since the Commission adopted Section

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<sup>111</sup> Under this approach, on the Form 1235, cable operators would reduce the total net upgrade rate base claimed by 50 percent to reflect a reduction for upgrade related depreciation expense over the life of the upgrade assets. By reducing the net upgrade investment to 50 percent of its value, the operator is realizing a return on the average net value of the upgrade over the recovery period, allowing an annual return on investment that, over the life of the upgrade, would fully compensate the operator for its upgrade investment. Without this adjustment, an operator would need to re-file the Form 1235 annually in order to capture a return only on the annual net upgrade investment reflecting the subtraction of accumulated depreciation, as the Form 1235 allows the recovery of an annual depreciation expense.

<sup>112</sup> See 47 CFR §§ 76.922 and 76.934. Our rules no longer refer to the Form 329, but a hard copy is included at the end of Section 76.985 of our rules. We delete that reference copy in the attached Report and Order.

<sup>113</sup> See Form 1211, Form 1215, Instructions for FCC Form 1215: A La Carte Channel Offerings (May 1994); Form 1225, Cost of Service Filing for Regulated Cable Services for Small Systems (Apr. 1994).

<sup>114</sup> See NCTA Comments, MB Docket No. 17-105, at 22-23; ITTA Reply, MB Docket No. 17-105, at 12-13.

<sup>115</sup> See NCTA Comments, MB Docket No. 17-105, at 23, n. 72; ITTA Reply, MB Docket No. 17-105, at 13. See also 47 CFR §§ 76.922(e)(2)(iii)(C), 76.980, 76.984.

<sup>116</sup> See 47 CFR § 76.982.

<sup>117</sup> The Commission proposed deleting this rule in *2002 Revised Order and NPRM*, 17 FCC Rcd at 11556, para. 9.

<sup>118</sup> 47 CFR § 76.922(e)(2)(iii)(C) (“An operator may make one additional rate adjustment during the year to reflect channel additions to the cable programming services tiers or, where the operator offers only one regulated tier,

76.922(e)(2)(iii)(C), both the CPST and most single tier systems have been deregulated.<sup>119</sup> We seek comment on whether the rule including the single tier aspect of the rule, became meaningless after CPST deregulation because (1) there is no longer a need for a rule governing CPST rate adjustments and (2) in effect, all regulated systems now have only a single regulated tier, so the single-tier exception (as written) would seem to be applicable to all regulated operators, undermining the policy of limiting BST rate adjustments to an annual event. We seek comment on whether there are any single tier systems still operating. Although we recognize that subscriber and market demand for channel line-ups may change during the course of a year, operators under the annual system can either project these changes to the BST at the time of their annual filing or accrue these costs and reflect them in their next annual filing.

37. *Section 76.980.* Section 623(b)(5)(C) of the Act requires that Commission regulations include “standards and procedures to prevent unreasonable charges for changes in the subscriber’s selection of services or equipment subject to regulation under this section . . .”<sup>120</sup> Section 76.980, which limits charges cable operators may impose for changes in service tiers, was adopted pursuant to this statutory directive.<sup>121</sup> This rule protects subscribers from paying excessive service charges just for dropping or adding tiers of service. NCTA argues that Section 76.980 is a rule that “should be eliminated as a matter of regulatory clean-up.”<sup>122</sup> We seek comment on NCTA’s claim. Did Congress provide for a sunset of the statutory requirement when it sunset CPST rate regulation, as NCTA suggests, or does the sunset apply only to regulations adopted under subsection (c) of Section 623?<sup>123</sup> Even if Congress did not sunset the statutory authority for Section 76.980, we seek comment on whether the rule is still necessary to implement Section 623(b)(5)(C) of the Act. If not, should we eliminate or narrow the rule, or are there policy reasons to retain it?

38. *Section 76.982.* Section 76.982 implements Section 623(j) of the Act, which allows franchise agreements entered into before July 1, 1990 to supersede Section 623 of the Act and our implementing rules.<sup>124</sup> Section 76.982 requires a cable operator to notify the Commission of its intent to continue regulating basic cable rates in accordance with this exemption to our rules. Any such franchise agreements would be more than 28 years old and thus this notice requirement has very limited, if any, relevance today. In the unlikely event that this issue arises, Section 623(j) of the Act would still allow the regulatory exemption. Accordingly, we seek comment on whether we should eliminate Section 76.982.

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the basic service tier.”). *See also* 47 CFR § 76.922(e)(1) (Except as provided for in paragraph (e)(2)(iii)(C) operators that elect the annual rate adjustment method may not adjust their rates more than annually.)

<sup>119</sup> *See* 47 U.S.C. § 543(m) (deregulating small cable operators with single tier systems as of December 31, 1994, in a franchise area in which the cable operator serves 50,000 or fewer subscribers).

<sup>120</sup> 47 U.S.C. § 543(b)(5)(C) (the standards “shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system’s configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method. . .”).

<sup>121</sup> *See* 47 CFR § 76.980. This rule requires that charges for customer changes in service tiers effected solely by coded entry on a computer terminal or by other similarly simple methods shall be a nominal amount, not exceeding actual costs, 47 CFR § 76.980(b); that charges that involve more than coded entry shall be based on actual cost, 47 CFR § 76.980(c); and that for 30 days after notice of retiering or rate increases, a customer may obtain changes in service tiers at no additional charge, 47 CFR § 76.980(f).

<sup>122</sup> *See* NCTA Comments, MB Docket No. 17-105, at 23, n.72.

<sup>123</sup> *See* 47 U.S.C. § 543(c)(4) (“*This subsection shall not apply to cable programming services provided after March 31, 1999.*”) (emphasis added). As stated above, Section 76.980 of our rules implements a subsection of Section 623(b), not Section 623(c).

<sup>124</sup> *See* 47 CFR § 76.982; *See also* 47 U.S.C. § 543(j). ITTA argues that Section 76.982 should be eliminated because a search of the Commission’s website yields only 5 references to the rule, the last one in 2003. ITTA surmises that the referenced agreements would be over 27 years old. ITTA Reply, MB Docket No. 17-105, at 13.

39. *Section 76.984.* Section 76.984 was adopted to carry out the mandate of Section 623(d) of the Act, which prohibits cable operators from selling the same cable service at different prices in different parts of a given franchise area unless the franchise area as a whole faces effective competition.<sup>125</sup> Although commenters claim that Section 76.984 should no longer be in effect, we tentatively disagree and believe that this provision continues to prevent anti-competitive behavior and promote competition.<sup>126</sup> As discussed above, the 1996 Act<sup>127</sup> amended Section 623(c) to provide for the sunset of CPST rate regulation, but the requirement for uniform rates is found in Section 623(d).<sup>128</sup> Accordingly, we do not believe Section 76.984 is subject to the sunset provision, and we seek comment on this issue as well as on whether the rule continues to serve the public interest.<sup>129</sup>

40. *Section 76.963.* Section 76.963 was adopted to limit the Commission's existing forfeiture authority from being applied to Commission orders resolving complaints regarding CPST service and equipment rates.<sup>130</sup> In implementing this rule, the Commission stated that it "will not impose forfeitures on a cable operator simply because a rate for cable programming service is found to be unreasonable."<sup>131</sup> It appears that this rule is no longer needed due to the sunset of CPST regulation.<sup>132</sup> Eliminating this rule does not affect the Commission's general authority to impose forfeitures for violations of specific rules or statutory provisions.<sup>133</sup> We seek comment on eliminating this rule.

#### IV. REPORT AND ORDER

41. In this Report and Order, we eliminate or revise rules that have become obsolete due to the sunset of CPST regulation, are unnecessary given changes in industry practices, or to implement established Commission policy.<sup>134</sup> For the reasons stated below, we find good cause to modify Section 76.923(i) without notice and comment because the modification in question merely codifies an existing uncodified rule.<sup>135</sup> We also eliminate the hard copies of Forms 328 and 329 located at the end of Section 76.985 of our rules. We are not changing the text of Section 76.985 by deleting these hard copies, and they are unnecessary because Form 329 is no longer in use and Form 328 is available electronically.

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<sup>125</sup> 47 CFR § 76.984; *see* 47 U.S.C. § 543(d) ("A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."). There is no question that the uniform rate requirement does not apply to cable systems about which the Commission has made a finding of effective competition. The statute contains two express limitations: first, it does not apply to services "in an area that are subject to effective competition;" and second, it does not apply to services "offered on a per channel or per program basis." 47 U.S.C. § 543(d)(1), (2).

<sup>126</sup> NCTA believes this rule "should be eliminated as a matter of regulatory clean-up." NCTA Comments, MB Docket No. 17-105, at 23, n.72; *see also* ITTA Reply, MB Docket No. 17-105, at 13, n. 51.

<sup>127</sup> Pub. L. No. 104-104 § 301(b)(1).

<sup>128</sup> 47 U.S.C. § 543(c)(4). ("SUNSET OF UPPER TIER RATE REGULATION. This subsection shall not apply to cable programming services provided after March 31, 1999.")

<sup>129</sup> 47 U.S.C. § 543(d).

<sup>130</sup> *See* 47 CFR §76.963 ("A cable operator shall not be subject to forfeiture because its rate for cable programming service or equipment is determined to be unreasonable.")

<sup>131</sup> *See Rate Order*, 8 FCC Rcd 5631, 5869-70, para. 380, *See also* House Report at 88 ("A finding that rates are unreasonable is not deemed a violation of law subject to the penalties and forfeitures of the Communications Act.")

<sup>132</sup> The Commission proposed changes to this rule in *2002 Revised Order and NPRM*, 17 FCC Rcd at 11556, para. 9 and received no comments in response.

<sup>133</sup> *See* 47 U.S.C. § 503(b).

<sup>134</sup> Commenters in the *Modernization of Media Regulation Initiative* docket identified several of these rule sections. *See* NCTA Comments, MB Docket No. 17-105, at 23, n. 72; ITTA Reply, MB Docket No. 17-105, at 13.

<sup>135</sup> 5 U.S.C. §553(b) (exempting the notice and comment requirement when an agency "for good cause finds . . . that notice and public procedure thereon are . . . unnecessary").

Finally, we eliminate Sections 76.986, 76.987, 76.922(g)(7) and 76.922(n) of the rules and close proceedings related to uniform regional rate structures, which are moot due to the sunset of CPST regulation.

42. *A la Carte Packages and New Product Tiers.* We eliminate Sections 76.986 and 76.987 because they are vestiges of CPST regulation.<sup>136</sup> These rule sections address “a la carte” packages and “new product tiers,” both of which are types of CPSTs.<sup>137</sup> Therefore, because of the sunset of CPST regulation we remove these two sections from our rules.<sup>138</sup>

43. *Equipment Leasing.* We modify Section 76.923(i) to codify our previously adopted uncodified rule that, where an operator offers its equipment for sale as well as for lease, the sales price is unregulated.<sup>139</sup> The lease price offers the safety of a cost-based regulated rate to subscribers and the operator’s sales price for the same equipment is regulated by the market.<sup>140</sup>

44. *Single Tier Small System Headend Upgrades.* We remove subsection 76.922(g)(7) to reflect the sunset of the opportunity for single tier small systems to make headend upgrade adjustments.<sup>141</sup> The time period for taking this rate increase, January 1, 1995 to December 31, 1997, has expired, and we see no continued need for this rule section.<sup>142</sup>

45. *Uniform Regional Rate Structures.* The *Notice of Proposed Rulemaking in the Cable Pricing Flexibility Order*<sup>143</sup> and our interpretation in the *Uniform Rate Order* of Section 76.922(n) of our rules are both moot due to the deregulation of the CPST.<sup>144</sup> In the *Cable Pricing Flexibility Order*, we

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<sup>136</sup> NCTA agrees these rules “should be eliminated as a matter of regulatory clean-up.” NCTA Comments, MB Docket No. 17-105, at 23, n.72; *see also* ITTA Reply, MB Docket No. 17-105, at 13, n. 51.

<sup>137</sup> 47 CFR §§ 76.986, 76.987. “A la carte” refers to video programming offered on a per channel or per program basis; “new product tier” refers to a package of new channels. *See Going Forward Order*, 10 FCC Rcd at 1229-30, paras. 4 and 7. Although the Commission proposed the elimination of these two rules in the *2002 Revised Order and NPRM*, 17 FCC Rcd at 11556, para. 9, we received no comments on these specific rules.

<sup>138</sup> Section 76.987 requires cable operators, in order to be eligible to offer new product tiers, to market their BSTs so that customers are reasonably aware that the BST is being offered to the public, what channels are available on the BST, and the price of the BST. *See* 47 CFR § 76.987. We note that all cable operators are required to provide this same information to subscribers via notice pursuant to Section 76.1618 of the Commission’s rules. *See* 47 CFR § 76.1618 (“A cable operator shall provide written notification to subscribers of the availability of basic tier service to new subscribers at the time of installation. This notification shall include the following information: (a) That basic tier service is available; (b) The cost per month for basic tier service; (c) A list of all services included in the basic service tier.”) We also remove the definition of new product tier in 47 CFR § 76.901(d) and reformat the notes to part (f) to conform to the requirements of the Office of the Federal Register.

<sup>139</sup> In the *First Reconsideration Order*, the Commission found that when a cable operator offers the same equipment for lease and for sale, the lease price is subject to rate regulation and the sale price is not. *First Reconsideration Order*, 9 FCC Rcd at 1192, n.80.

<sup>140</sup> *See First Reconsideration Order*, 9 FCC Rcd at 1190, para. 51.

<sup>141</sup> 47 CFR § 76.922(g)(7). (“Rate increases pursuant to this paragraph may occur between January 1, 1995, and December 31, 1997.”)

<sup>142</sup> In the *2002 Revised Order and NPRM*, 17 FCC Rcd at 11562, para. 24, the Commission sought comment on this issue, but received no comments in opposition.

<sup>143</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 11 FCC Rcd 9517, 9523, para. 12 (1996) (*Cable Pricing Flexibility Order*).

<sup>144</sup> *See* 47 CFR § 76.922(n) (“A cable operator that has established rates in accordance with this section may then be permitted to establish a uniform rate for uniform services offered in multiple franchise areas. This rate shall be determined in accordance with the Commission’s procedures and requirements set forth in CS Docket No. 95-174.”) *See also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, Report and Order*, CS Docket No. 95-174, 12 FCC Rcd 3425, para. 1 (1997) (*Uniform Rate Order*)

proposed exceptions to the CPST rate rules to allow operators to reduce BST prices and offset those reductions with increased CPST rates.<sup>145</sup> Section 76.922(n) permits similar offsets for CPST rates in order to permit cable operators to establish uniform rates across multiple franchise areas. Now that CPST rates are no longer regulated, an operator may increase CPST rates without Commission approval so the exceptions to the CPST rate rules are no longer needed. Accordingly, we terminate CS Docket No. 96-157 and remove Section 76.922(n) from our rules.<sup>146</sup>

46. *Forms 328 and 329.* Two hard copy FCC forms are located at the end of Section 76.985 of our rules in the Code of Federal Regulations.<sup>147</sup> Form 329 is an obsolete CPST complaint form. Form 328 is now available electronically.<sup>148</sup> We delete these hard copy forms, including instructions, from Section 76.985 and modify Section 76.910 to direct interested parties to the electronic Form 328 and instructions.<sup>149</sup>

## V. PROCEDURAL MATTERS

47. *Initial Regulatory Flexibility Act Analysis.*—As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>150</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to this *FNPRM*. The IRFA is set forth in Appendix B.

48. *Paperwork Reduction Act.*—The *FNPRM* may result in new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501 through 3520). If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the *Federal Register* inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

49. In this present *FNPRM*, we have assessed the effects of the proposed changes to the Commission’s rate regulations, including the modification of channel addition and deletion rules, the adoption of a streamlined process for establishing initial regulated rates, the sunset of a separate streamlined process for small systems, the sunset of the unabbreviated cost of service methodology, the modification of the Form 1235 methodology, and the clarification and or elimination of obsolete rules and forms and find that the policy changes are either neutral or reduce the burden on businesses with fewer than 25 employees.

50. *The Report and Order* eliminates, and thus does not contain new or revised, information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C.

(Continued from previous page) \_\_\_\_\_  
 (“Under any uniform rates approach permitted by the Commission, rates for regulated basic service tiers (“BSTs”) may not exceed the BST rates that would be established under our existing regulations; thus, BST rates will either decrease or remain the same under a uniform rates mechanism.”).

<sup>145</sup> *Cable Pricing Flexibility Order*, 11 FCC Rcd 9517, 9523, para. 12 (1996).

<sup>146</sup> In the *2002 Revised Order and NPRM*, 17 FCC Rcd at 11562, para. 29, the Commission sought comment on whether the open issues in CS Docket No. 96-157 were bypassed by the sunset of CPST tier rate regulation, but received no comments on that question.

<sup>147</sup> *See* 47 CFR § 76.985.

<sup>148</sup> Form 328 is entitled, “*Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition*”.

<sup>149</sup> *See* 47 CFR § 76.910 (c).

<sup>150</sup> *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

§§ 3501-3520). In addition, therefore, it does not contain any new or modified “information burden for small business concerns with fewer than 25 employees” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. § 3506(c)(4).

51. *Ex Parte Rules.—Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. Memoranda must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Section 1.1206(b) of the rules. In proceedings governed by Section 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

52. *Filing Requirements.—Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

53. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.

54. Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

55. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

56. All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> Street, SW, TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

57. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

58. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington, DC 20554.

59. *People with Disabilities.* To request materials in accessible formats for people with

disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

60. *Availability of Documents.* Comments and reply comments will be publicly available online via ECFS.<sup>151</sup> These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC Headquarters, 445 12<sup>th</sup> Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

61. *Additional Information.* For additional information on this proceeding, contact Katie Costello of the Policy Division, Media Bureau at [Katie.Costello@fcc.gov](mailto:Katie.Costello@fcc.gov) or (202) 418-2333.

## VI. ORDERING CLAUSES

62. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 2(a), 3, 4(i), 4(j), 303(r), 601(3), 602, and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153, 154(i), 154(j), 303(r), 521, 522, 543, this Further Notice of Proposed Rulemaking and Report and Order **ARE ADOPTED**.

63. **IT IS FURTHER ORDERED** that, pursuant to the authority found in sections 1, 2(a), 3, 4(i), 4(j), 303(r), 601(3), 602, and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153, 154(i), 154(j), 303(r), 521, 522, 543, the Commission's rules **ARE AMENDED** as set forth in Appendix B. These amendments shall become effective 30 days after publication in the Federal Register.

64. **IT IS FURTHER ORDERED** that CS Docket No. 96-157 IS TERMINATED.

65. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice of Proposed Rulemaking and Report and Order, including the Initial and Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

66. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Notice of Proposed Rulemaking and Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>151</sup> Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

## APPENDIX A

## PROPOSED RULES

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

## Part 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Amend § 76.911 to revise paragraph (b)(3) to read as follows:

**§76.911 Petition for reconsideration of certification.**

\* \* \* \* \*

(b) \* \* \*

(3) In any case in which a stay of rate regulation has been granted, if the petition for reconsideration is denied, the cable operator may be required to refund any rates or portion of rates above the permitted tier charge or permitted equipment charge in accordance with § 76.942.

\* \* \* \* \*

3. Revise § 76.922 to read as follows:

**§ 76.922 Rates for the basic service tier.**

(a) *Basic service tier rates.* Basic service tier rates shall be subject to regulation by the Commission and by state and local authorities, as is appropriate, in order to assure that they are in compliance with the requirements of 47 U.S.C. 543. Rates that are demonstrated, in accordance with this part, not to exceed the permitted charge as described in this section, plus a charge for franchise fees, will be accepted as in compliance. The maximum monthly charges for regulated programming services shall not include any charges for equipment or installations. Charges for equipment and installations are to be calculated separately pursuant to §76.923. Equipment and installation rates that are demonstrated not to exceed the maximum permitted rates as specified in §76.923, will be accepted as in compliance. The initial rate-setting methodology used to set basic service tier rates shall continue to provide the basis for subsequent permitted charges.

(b) *Permitted charge.* (1) The permitted charge for a tier of regulated program service shall be the maximum permitted rate calculated using FCC Forms 1240 and 1235. Permitted charges established prior to the effective date of this rule will be reviewed for conformance with the rules in effect at the time the permitted charges were established.

(2) *Establishment of newly regulated rates.* (i) Cable systems shall use FCC Form 1240 to establish initial regulated rates.

(ii) For newly regulated cable systems, including cable systems that are re-regulated following a change in regulatory status, the initial date of regulation for the basic service tier shall be the date on which notice is given by the local franchising authority that the basic service tier is subject to regulation under the generally applicable rate rules.

(iii) For purposes of this section, rates in effect on the initial date of regulation shall be the rates charged to subscribers for service received on that date.

(c) *Annual rate adjustment method -- (1) Generally.* Except as provided for in paragraph (c)(2)(iii)(B) of this section and Section 76.923(o), operators using the annual rate adjustment method may not adjust their rates more than annually to reflect inflation, changes in external costs, changes in the number of regulated channels, and changes in equipment costs. Operators must file on the same date a Form 1240 for the purpose of making rate adjustments to reflect inflation, changes in external costs and changes in the number of regulated channels and a Form 1205 for the purpose of adjusting rates for regulated equipment and installation. Operators may choose the annual filing date, but they must notify the franchising authority of their proposed filing date prior to their filing. Franchising authorities or their designees may reject the annual filing date chosen by the operator for good cause. If the franchising authority finds good cause to reject the proposed filing date, the franchising authority and the operator should work together in an effort to reach a mutually acceptable date. If no agreement can be reached, the franchising authority may set the filing date up to 60 days later than the date chosen by the operator. An operator may change its filing date from year to year, except, as described in paragraphs (c)(2)(iii)(B) of this section, at least twelve months must pass before the operator can implement its next annual adjustment.

(2) *Projecting inflation, changes in external costs, and changes in number of regulated channels.* An operator using the annual rate adjustment method may adjust its rates to reflect inflation, changes in external costs and changes in the number of regulated channels that are projected for the 12 months following the date the operator is scheduled to make its rate adjustment pursuant to Section 76.933.

(i) *Inflation adjustments.* The residual component of a system's permitted charge may be adjusted annually to project for the 12 months following the date the operator is scheduled to make a rate adjustment. The annual inflation adjustment shall be based on inflation that occurred in the most recently completed quarter, converted to an annual factor. Adjustments shall be based on changes in the Gross National Product Price Index as published by the Bureau of Economic Analysis of the United States Department of Commerce.

(ii) *External costs.* (A) Permitted charges for a tier may be adjusted annually to reflect actual changes in external costs experienced but not yet accounted for by the cable system, as well as for projections in these external costs for the 12-month period on which the filing is based. In order that rates be adjusted for projections in external costs, the operator must demonstrate that such projections are reasonably certain and reasonably quantifiable. Projections involving copyright fees, retransmission consent fees, other programming costs, Commission regulatory fees, and cable specific taxes are presumed to be reasonably certain and reasonably quantifiable. Operators may project for increases in franchise related costs to the extent that they are reasonably certain and reasonably quantifiable, but such changes are not presumed reasonably certain and reasonably quantifiable. Operators may pass through increases in franchise fees pursuant to Section 76.933.

(B) In all events, a system must adjust its rates every twelve months to reflect any net decreases in external costs that have not previously been accounted for in the system's rates.

(C) Any rate increase made to reflect increases or projected increases in external costs must also fully account for all other changes and projected changes in external costs, inflation and the number of channels on regulated tiers that occurred or will occur during the same period. Rate adjustments made to

reflect changes in external costs shall be based on any changes, plus projections, in those external costs that occurred or will occur in the relevant time periods since the periods used in the operator's most recent previous FCC Form 1240.

(iii) *Channel adjustments.* (A) Permitted charges for a tier may be adjusted annually to reflect changes not yet accounted for in the number of regulated channels provided by the cable system, as well as for projected changes in the number of regulated channels for the 12-month period on which the filing is based. In order that rates be adjusted for projected changes to the number of regulated channels, the operator must demonstrate that such projections are reasonably certain and reasonably quantifiable.

(B) An operator may make rate adjustments for the addition of required channels to the basic service tier that are required under federal or local law at any time such additions occur, subject to the filing requirements of Section 76.933(c)(5), regardless of whether such additions occur outside of the annual filing cycle. Required channels may include must-carry, local origination, public, educational and governmental access and leased access channels. Should the operator elect not to pass through the costs immediately, it may accrue the costs of the additional channels plus interest, as described in paragraph (c)(3) of this section.

(3) *True-up and accrual of charges not projected.* As part of the annual rate adjustment, an operator must “true up” its previously projected inflation, changes in external costs and changes in the number of regulated channels and adjust its rates for these actual cost changes. The operator must decrease its rates for overestimation of its projected cost changes, and may increase its rates to adjust for underestimation of its projected cost changes.

(i) Where an operator has underestimated costs, future rates may be increased to permit recovery of the accrued costs plus 11.25% interest between the date the costs are incurred and the date the operator is entitled to make its rate adjustment.

(ii) If an operator has underestimated its cost changes and elects not to recover these accrued costs with interest on the date the operator is entitled to make its annual rate adjustment, the interest will cease to accrue as of the date the operator is entitled to make the annual rate adjustment, but the operator will not lose its ability to recover such costs and interest. An operator may recover accrued costs between the date such costs are incurred and the date the operator actually implements its rate adjustment.

(d) *External costs.* (1) External costs shall consist of costs in the following categories:

(i) State and local taxes applicable to the provision of cable television service;

(ii) Franchise fees;

(iii) Costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority;

(iv) Retransmission consent fees and copyright fees incurred for the carriage of broadcast signals;

(v) Other programming costs;

(vi) Commission cable television system regulatory fees imposed pursuant to 47 U.S.C. §159 and

(vii) Headend equipment costs necessary for the carriage of digital broadcast signals.

(2) The permitted charge for a regulated tier shall be adjusted on account of programming costs, copyright fees and retransmission consent fees only for the program channels or broadcast signals offered on that tier.

(3) Adjustments for external costs in the true-up portion of the FCC Form 1240 may be made on the basis of actual changes in external costs only. The starting date for adjustments to external costs for newly regulated or re-regulated systems shall be the implementation date of the actual rate in effect as of the initial date of regulation or re-regulation.

(4) Changes in franchise fees shall not result in an adjustment to permitted charges, but rather shall be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming service.

(5) Adjustments to permitted charges to reflect changes in the costs of programming purchased from affiliated programmers, as defined in §76.901, shall be permitted as long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming.

(i) For purposes of this section, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities.

(ii) Attributable interest shall be defined by reference to the criteria set forth in Notes 1 through 5 to §76.501 provided, however, that:

(A) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and

(B) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(6) Adjustments to permitted charges on account of increases 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.

(7) In calculating programming expense, operators may add a mark-up of 7.5% for increases in programming costs. Operators shall reduce rates to reflect decreases in programming costs and remove the 7.5% mark-up, if any, taken on the removed costs.

(e) *Changes in the number of channels on the regulated basic service tier.* (1) *Generally.* A system must adjust annually the residual component of its permitted rate for the basic service tier (“BST”) to reflect any decreases in the number of channels that were on the BST as of the initial date of regulation or May 14, 1994, whichever is later. Cable systems shall use FCC Form 1240 to justify rate changes made on account of changes in the number of channels on the BST.

(2) *Deletion of channels.* (i) When dropping a channel from a BST, operators shall reflect the net reduction in external costs in their rates. With respect to channels to which the 7.5% markup on programming costs was applied, the operator shall treat the markup as part of its programming costs and subtract the markup from its external costs.

(ii) For channels added to the BST after the initial date of regulation or May 14, 1994, whichever is later, operators shall remove the actual per channel adjustment taken for that channel when it was added to the BST.

(iii) When removing channels results in a total BST channel count that is less than the number of channels that were on the BST as of the initial date of regulation or May 14, 1994, whichever is later, operators shall also reduce the price of the BST by any “residual” associated with the channel removal. For purposes of this calculation, the per channel residual is the permitted charge for the BST, minus the external costs and any per channel adjustments included in the permitted charge, divided by the total number of channels on the BST as of the initial date of regulation or May 14, 1994, whichever is later.

(3) *Movement of channels to the BST.* When a channel is moved from another tier of service to the BST, the moved channel shall be treated as a new channel.

(4) *Substitution of channels on a BST.* An operator may substitute a new channel for an existing channel on a BST to prevent a reduction in the total BST channel count to less than the number of channels that were on the BST as of the initial date of regulation or May 14, 1994, whichever is later. The substituted channel will carry the same residual as the original channel for which it was substituted. Operators substituting channels on a BST shall be required to reflect any reduction in programming costs in their rates and may reflect any increase in programming costs, including the 7.5% markup.

(f) Permitted charges for a tier shall be determined in accordance with forms and associated instructions established by the Commission.

(g) *Network upgrade rate increase.* (1) Cable operators that undertake significant network upgrades requiring added capital investment may justify an increase in rates for regulated services on FCC Form 1235 by demonstrating that the capital investment will benefit subscribers, including providing television broadcast programming in a digital format.

(2) A rate increase on account of upgrades shall not be assessed on customers until the upgrade is complete and providing benefits to customers of regulated services.

(3) Cable operators seeking an upgrade rate increase have the burden of demonstrating the amount of the net increase in costs, taking into account current depreciation expense, likely changes in maintenance and other costs, changes in regulated revenues and expected economies of scale.

(4) Cable operators seeking a rate increase for network upgrades shall allocate net cost increases in conformance with the cost allocation rules as set forth in §76.924.

(5) Cable operators that undertake significant upgrades shall be permitted to increase rates by adding the benchmark/price cap rate to the rate increment necessary to recover the net increase in cost attributable to the upgrade.

(h) *Hardship rate relief.* A cable operator may adjust charges by an amount specified by the Commission or the franchising authority for the basic service tier if it is determined that:

(1) Total revenues from cable operations, measured at the highest level of the cable operator's cable service organization, will not be sufficient to enable the operator to attract capital or maintain credit necessary to enable the operator to continue to provide cable service;

(2) The cable operator has prudent and efficient management; and

(3) Adjusted charges on account of hardship will not result in total charges for regulated cable services that are excessive in comparison to charges of similarly situated systems.

4. Amend § 76.923 to revise paragraphs (a) (1) and (n) to read as follows:

**§76.923 Rates for equipment and installation used to receive the basic service tier.**

(a) \* \* \*

(1) The equipment regulated under this section consists of all equipment in a subscriber's home, provided and maintained by the operator, that is used to receive the basic service tier and video programming offered on a per channel or per program basis, if any, except if such equipment is additionally used to receive other tiers of programming service. Such equipment shall include, but is not limited to:

(i) Converter boxes;

(ii) Remote control units; and

(iii) Inside wiring.

\* \* \* \* \*

(n) *Timing of filings.* An operator shall file FCC Form 1205 in order to establish its maximum permitted rates at the following times:

(1) When the operator sets its initial regulated equipment rates;

(2) On the same date it files its FCC Form 1240. If an operator elects not to file an FCC Form 1240 for a particular year, the operator must file a Form 1205 on the anniversary date of its last Form 1205 filing; and

(3) When seeking to adjust its rates to reflect the offering of new types of customer equipment other than in conjunction with an annual filing of Form 1205, 60 days before it seeks to adjust its rates to reflect the offering of new types of customer equipment.

5. Amend § 76.924 to revise paragraphs (a), (c), and the first sentence of paragraph (d), remove paragraph (d) (2), and revise paragraph (e) to read as follows:

**§76.924 Allocation to service cost categories.**

(a) *Applicability.* The requirements of this section are applicable to cable operators for which the basic service tier is regulated by local franchising authorities or the Commission. The requirements of this section are applicable for purposes of rate adjustments on account of external costs and for cost of service showings such as the FCC Form 1235.

\* \* \* \* \*

(c) *Accounts level.* Cable operators making cost of service showings or seeking adjustments due to changes in external costs shall identify investments, expenses and revenues at the franchise, system, regional, and/or company level(s) in a manner consistent with the accounting practices of the operator on

its initial date of regulation or re-regulation. However, in all events, cable operators shall identify at the franchise level their costs of franchise requirements, franchise fees, local taxes and local programming.

(d) *Summary accounts.* Cable operators making cost of service showings shall report all investments, expenses, and revenue and income adjustments accounted for at the franchise, system, regional and/or company level(s) to the summary accounts listed below.

\* \* \*

(e) *Allocation to service cost categories.* (1) For cable operators making cost of service showings, investments, expenses, and revenues contained in the summary accounts identified in paragraph (d) of this section shall be allocated among the Equipment Basket, as specified in §76.923, and the following service cost categories:

(i) *Basic service cost category.* The basic service category, shall include the cost of providing basic service as defined by §76.901(a). The basic service cost category may only include allowable costs as defined by §76.922.

(ii) *Cable programming services cost category.* The cable programming services category shall include the cost of providing cable programming services as defined by §76.901(b). The cable programming service cost category may include only allowable costs as defined in §76.922.

(iii) *All other services cost category.* The all other services cost category shall include the costs of providing all other services that are not included in the basic service or cable programming services cost categories as defined in paragraphs (e)(1)(i) and (ii) of this section.

(2) Cable operators seeking an adjustment due to changes in external costs identified in FCC Form 1240 shall allocate such costs among the equipment basket, as specified in §76.923, and the following service cost categories:

(i) The basic service category as defined by paragraph (e)(1)(i) of this section;

(ii) The cable programming services category as defined by paragraph (e)(1)(ii) of this section;

(iii) The all other services cost category as defined by paragraph (e)(1)(iii) of this section.

\* \* \* \* \*

6. Revise § 76.930 to read as follows:

**§76.930 Initiation of review of basic cable service and equipment rates.**

A cable operator shall file its rate justifications for the basic service tier and associated equipment with a franchising authority within 30 days of receiving written notification from the franchising authority that the franchising authority has been certified by the Commission to regulate rates for the basic service tier, or within 30 days from the date the franchising authority notifies the operator that the operator will be subject to the generally applicable rate rules because the operator's regulatory status has changed. Basic service and equipment rate filings for existing rates or proposed rate increases (including increases that result from reductions in the number of channels on a tier) must use the appropriate official FCC form, a copy thereof, or a copy generated by FCC software. Failure to file on the official FCC form, a copy thereof, or a copy generated by FCC software, may result in the imposition of sanctions specified in §76.937(d). A cable operator shall include rate cards and channel line-ups with its filing and include an

explanation of any discrepancy in the figures provided in these documents and its rate filing.

7. Revise § 76.933 to read as follows:

**§76.933 Franchising authority review of basic cable rates and equipment costs.**

(a) A cable operator that submits for review its existing rates for the basic service tier and associated equipment costs may continue the existing rates in effect pending franchising authority review and subject to the refund liability provisions of §76.942.

(b) A cable operator that submits for review a proposed change in its existing rates for the basic service tier and associated equipment costs, including a rate increase resulting from a network upgrade pursuant to §76.922(g), shall do so no later than 90 days prior to the effective date of the proposed rates.

(c) (1) The franchising authority will have 90 days from the date of the rate filing to review it. However, if the franchising authority or its designee concludes that the operator has submitted a facially incomplete filing, the franchising authority's deadline for issuing a decision, the date on which a rate increase may go into effect if no decision is issued, and the period for which refunds are payable will be tolled while the franchising authority is waiting for this information, provided that, in order to toll these effective dates, the franchising authority or its designee must notify the operator of the incomplete filing within 45 days of the date the filing is made.

(2) If there is a material change in an operator's circumstances during the 90 day review period and the change affects the operator's rate filing, the operator may file an amendment to its rate filing prior to the end of the 90 day review period. If the operator files such an amendment, the franchising authority will have at least 30 days to review the filing. Therefore, if the amendment is filed more than 60 days after the operator made its initial filing, the operator's proposed rate change may not go into effect any earlier than 30 days after the filing of its amendment. However, if the operator files its amended application on or prior to the sixtieth day of the 90 day review period, the operator may implement its proposed rate adjustment, as modified by the amendment, 90 days after its initial filing.

(3) If a franchising authority has taken no action within the 90 day review period, then the existing rates may continue in effect or the proposed rates may go into effect at the end of the review period, subject to a prospective rate reduction and refund if the franchising authority subsequently issues a written decision disapproving any portion of such rates, provided, however, that in order to order a prospective rate reduction and refund, if an operator inquires as to whether the franchising authority intends to issue a rate order after the 90 day review period, the franchising authority or its designee must notify the operator of its intent in this regard within 15 days of the operator's inquiry. If the franchising authority has not issued its rate order by the end of the 90 day review period, the franchising authority will have 12 months from the date the operator filed for the rate adjustment to issue its rate order. In the event that the franchising authority does not act within the 12-month period, it may not at a later date order a refund or a prospective rate reduction with respect to the rate filing.

(4) At the time an operator files its rate justifications with the franchising authority, the operator may give customers notice of the proposed rate changes. Such notice should state that the proposed rate change is subject to approval by the franchising authority. If the operator is only permitted a smaller increase than was provided for in the notice, the operator must provide an explanation to subscribers on the bill in which the rate adjustment is implemented. If the operator is not permitted to implement any of the rate increase that was provided for in the notice, the operator must provide an explanation to subscribers within 60 days of the date of the franchising authority's decision. Additional advance notice is required if

the rate to be implemented exceeds the previously noticed rate.

(5) If an operator files for a rate adjustment for the addition of channels to the basic service tier that the operator is required by federal or local law to carry, the franchising authority has 60 days to review the requested rate. The proposed rate shall take effect at the end of this 60 day period unless the franchising authority rejects the proposed rate as unreasonable. The franchising authority shall be subject to the requirements described in paragraph (c)(1)-(3) of this section for ordering refunds and prospective rate reductions, except that the initial review period is 60 rather than 90 days.

(6) When the franchising authority is regulating basic service tier rates, a cable operator may increase its rates for basic service to reflect the imposition of, or increase in, franchise fees or cable television system regulatory fees imposed pursuant to 47 U.S.C. 159. The increased rate attributable to Commission cable television system regulatory fees or franchise fees shall be subject to subsequent review and refund if the franchising authority determines that the increase in basic tier rates exceeds the increase in regulatory fees or in franchise fees allocable to the basic tier. This determination shall be appealable to the Commission pursuant to §76.944. When the Commission is regulating basic service tier rates pursuant to §76.945, an increase in those rates resulting from franchise fees or Commission regulatory fees shall be reviewed by the Commission pursuant to the mechanisms set forth in §76.945.

(d) If an operator files an FCC Form 1205 for the purpose of setting the rate for a new type of equipment under Section 76.923(o), the franchising authority has 60 days to review the requested rate. The proposed rate shall take effect at the end of this 60 day period unless the franchising authority rejects the proposed rate as unreasonable. The franchising authority shall be subject to the requirements described in paragraph (c)(1)-(3) of this section for ordering refunds and prospective rate reductions, except that the initial review period is 60 rather than 90 days.

8. Amend § 76.934 to read as follows:

**§76.934 Small systems and small cable companies.**

(a) For purposes of rules governing the regulatory status of small systems, the size of a system or company shall be determined by reference to its size as of the date the system files with its franchising authority or the Commission the documentation necessary to qualify for the relief sought. Where relief is dependent upon the size of both the system and the company, the operator must measure the size of both the system and the company as of the same date. A small system shall be considered affiliated with a cable company if the company holds a 20 percent or greater equity interest in the system or exercises *de jure* control over the system.

(b) A franchising authority that has been certified, pursuant to §76.910, to regulate rates for basic service and associated equipment may permit a small system as defined in §76.901 to certify that the small system's rates for basic service and associated equipment comply with §76.922, the Commission's substantive rate regulations.

(c) *Regulation of small systems.* A small system, as defined by §76.901(c), that receives a notice of regulation from its local franchising authority must respond within the time periods prescribed in §76.930.

(d) *Petitions for extension of time.* Small systems may obtain an extension of time to establish compliance with rate regulations provided they can demonstrate that timely compliance would result in severe economic hardship. Requests for extension of time should be addressed to the local franchising authority. The filing of a request for an extension of time to comply with the rate regulations will not toll the effective date of rate regulation for small systems or alter refund liability for rates that exceed permitted

levels.

(e) *Small Systems Owned by Small Cable Companies.* Small systems owned by small cable companies are not subject to rate regulation as long as they meet the definitions of small system and small cable company. When a system no longer qualifies for deregulatory status, the system must give the franchising authority notice of its change in status. The system may maintain the actual rates it charged prior to its loss of small system status, but future rate adjustments will be subject to generally applicable rate regulations. After receiving notice of regulation from the franchising authority, the system shall file its schedule of rates consistent with §76.930 of this subpart.

(f) For rules governing small cable operators, see §76.990 of this subpart.

9. Revise § 76.935 to read as follows:

**§76.935 Participation of interested parties.**

In order to regulate basic tier rates or associated equipment costs, a franchising authority must have procedural laws or regulations applicable to rate regulation proceedings that provide a reasonable opportunity for consideration of the views of interested parties. Such rules must take into account the time periods that franchising authorities have to review rates under §76.933.

10. Amend § 76.937 to remove paragraph (c), redesignate paragraphs (d) and (e) as paragraphs (c) and (d) and revise new paragraph (d) to read as follows:

**§76.937 Burden of proof.**

\* \* \* \* \*

(d) A franchising authority or the Commission may order a cable operator that has filed a facially incomplete form to file supplemental information, and the franchising authority's deadline to rule on the reasonableness of the proposed rates will be tolled pending the receipt of such information. A franchising authority may set reasonable deadlines for the filing of such information, and may find the cable operator in default and mandate appropriate relief, pursuant to paragraph (c) of this section, for the cable operator's failure to comply with the deadline or otherwise provide complete information in good faith.

11. Revise § 76.938 to read as follows:

**§76.938 Proprietary information.**

A franchising authority may require the production of proprietary information to make a rate determination in those cases where cable operators have submitted initial rates for review, or have proposed rate increases. The franchising authority shall state a justification for each item of information requested and, where related to an FCC form filing, indicate the question or section of the form to which the request specifically relates. Upon request to the franchising authority, the parties to a rate proceeding shall have access to such information, subject to the franchising authority's procedures governing non-disclosure by the parties. Public access to such proprietary information shall be governed by applicable state or local law.

12. Revise § 76.939 to read as follows:

**§76.939 Truthful written statements and responses to requests of franchising authority.**

Cable operators shall comply with franchising authorities' and the Commission's requests for information, orders, and decisions. Any information submitted to a franchising authority or the

Commission in making a rate determination pursuant to an FCC form filing is subject to the provisions of §1.17 of this chapter.

13. Revise § 76.942 to read as follows:

**§76.942 Refunds.**

(a) A franchising authority (or the Commission, pursuant to §76.945) may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment. Before ordering a cable operator to refund previously paid rates to subscribers, a franchising authority (or the Commission) must give the operator notice and opportunity to comment.

(b) The refund period shall run as follows:

(1) From the date the operator implements the rate under review until it reduces the rate in compliance with a valid rate order or justifies that rate or a higher rate in its next rate filing, whichever is sooner, however, the refund period shall not begin before the initial date of regulation.

(2) For rates in effect and justified on rate forms filed before the effective date of this rule, as amended, the refund period shall be determined by the rules in effect at the time of filing.

(3) Refund liability shall be calculated on the reasonableness of the rates as determined by the rules in effect during the period under review by the franchising authority or the Commission.

(c) The cable operator, in its discretion, may implement a refund in the following manner:

(1) By returning overcharges to those subscribers who actually paid the overcharges, either through direct payment or as a specifically identified credit to those subscribers' bills; or

(2) By means of a prospective percentage reduction in the rates for the basic service tier or associated equipment to cover the cumulative overcharge. The refund shall be reflected as a specifically identified, one-time credit on prospective bills to the class of subscribers that currently subscribe to the cable system.

(d) Refunds shall include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments.

(e) Once an operator has implemented a rate refund to subscribers in accordance with a refund order by the franchising authority (or the Commission pursuant to paragraph (a) of this section), the franchising authority must return to the cable operator an amount equal to that portion of the franchise fee that was paid on the total amount of the refund to subscribers. The franchising authority must promptly return the franchise fee overcharge either in an immediate lump sum payment, or the cable operator may deduct it from the cable system's future franchise fee payments. The franchising authority has the discretion to determine a reasonable repayment period, but interest shall accrue on any outstanding portion of the franchise fee starting on the date the operator has completed implementation of the refund order. In determining the amount of the refund, the franchise fee overcharge should be offset against franchise fees the operator holds on behalf of the franchising authority for lump sum payment. The interest rate on any refund owed to the operator presumptively shall be 11.25%.

14. Amend § 76.944 to revise paragraph (c) as follows:

**§76.944 Commission review of franchising authority decisions on rates for the basic service tier and associated equipment.**

\* \* \* \* \*

(c) An operator that uses the annual rate adjustment method under §76.922(c) may include in its next true up under §76.922(c)(3) any amounts to which the operator would have been entitled but for a franchising authority decision that is not upheld on appeal.

15. Revise § 76.945 to read as follows:

**§76.945 Procedures for Commission review of basic service rates.**

(a) Upon assumption of rate regulation authority, the Commission will notify the cable operator and require the cable operator to file its basic rate schedule with the Commission within 30 days, with a copy to the local franchising authority.

(b) Basic service and equipment rate schedule filings for existing rates or proposed rate increases or adjustments (including increases that result from reductions in the number of channels in a tier) must use the official FCC form, a copy thereof, or a copy generated by FCC software. Failure to file on the official FCC form or a copy may result in the imposition of sanctions specified in §76.937(c).

(c) Filings for existing rates or proposed rate increases or adjustments must be made 90 days prior to the proposed effective date and can become effective on the proposed effective date unless the Commission issues an order deferring the effective date or denying the rate proposal. Petitions opposing such filings must be filed within 15 days of public notice of the filing by the cable operator and be accompanied by a certificate that service was made on the cable operator and the local franchising authority. The cable operator may file an opposition within five days of the filing of the petition, certifying to service on both the petitioner and the local franchising authority.

16. Remove §76.963.

**§76.963 [Removed]**

17. Remove §76.982.

**§76.982 [Removed]**

18. Amend §76.990 to remove paragraph (b) (3) and revise paragraphs (a), (b) (2) and (c) to read as follows:

**§76.990 Small cable operators.**

(a) A small cable operator is exempt from rate regulation on its basic service tier if that tier was the only service tier subject to rate regulation as of December 31, 1994, in any franchise area in which that operator services 50,000 or fewer subscribers.

(b) \* \* \*

(2) Once the operator has certified its eligibility for deregulation on the basic service tier, the local franchising authority shall not prohibit the operator from taking a rate increase and shall not order the operator to make any refunds unless and until the local franchising authority has rejected the certification in a final order that is no longer subject to appeal or that the Commission has affirmed. The operator shall be liable for refunds for revenues gained (beyond revenues that could be gained under regulation) as a result of any rate increase taken during the period in which it erroneously claimed to be deregulated, plus interest, in the event the operator is later found not to be deregulated. The limits on refund liability will not be applicable during that period to ensure that the filing of an invalid small operator certification does not reduce any refund liability that the operator would otherwise incur.

(c) *Transition from small cable operator status.* If a small cable operator subsequently becomes ineligible for small operator status, the operator will become subject to regulation but may maintain the rates it charged prior to losing small cable operator status if such rates were in effect for three months preceding the initial date of regulation. Upon regulation, actual rates and subsequent rate increases will be subject to generally applicable regulations governing rates and rate increases. A cable operator must give its franchising authority notice of its change in status. The system shall file its rate justifications consistent with §76.930 of this subpart. For rules governing small cable systems and small cable companies, see §76.934.

\* \* \* \* \*

19. Remove § 76.1805.

**§76.1805 [Removed]**

## APPENDIX B

## FINAL RULES

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

## Part 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.901 to remove paragraph (d), renumber paragraphs (e) and (f) as (d) and (e) and reformat the newly designated paragraph (e) to read as follows:

(e) *Small cable operator.* A small cable operator is an operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000. For purposes of this definition, an operator shall be deemed affiliated with another entity if that entity holds a 20 percent or greater equity interest (not including truly passive investment) in the operator or exercises de jure or de facto control over the operator.

(1) Using the most reliable sources publicly available, the Commission periodically will determine and give public notice of the subscriber count that will serve as the 1 percent threshold until a new number is calculated.

(2) For a discussion of passive interests with respect to small cable operators, see Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order in CS Docket No. 96–85, FCC 99–57 (released March 29, 1999).

(3) If two or more entities unaffiliated with each other each hold an equity interest in the small cable operator, the equity interests of the unaffiliated entities will not be aggregated with each other for the purpose of determining whether an entity meets or passes the 20 percent affiliation threshold.

3. Amend § 76.910 to revise the first sentence of paragraph (c) and add a second sentence to paragraph (c) to read as follows:

**§76.910 Franchising authority certification.**

(c) The written certification described in paragraph (b) of this section shall be made by completing and filing FCC Form 328. FCC Form 328 can be obtained from the Internet at <http://www.fcc.gov/Forms/Form328/328.pdf> or by calling the FCC Forms Distribution Center at 1-800-418-3676. \* \* \*

\* \* \* \* \*

4. Amend § 76.922 to remove and reserve paragraph (g)(7), and remove paragraph (n).

5. Amend § 76.923 to revise paragraphs (i) to add a final sentence as follows:

\* \* \* \* \*

(i) *Charges for equipment sold.* \* \* \* Equipment sales by an operator will be unregulated where the operator offers subscribers the same equipment under regulated leased rates.

\* \* \* \* \*

6. In §76.985, remove forms entitled “FCC329”, “INSTRUCTIONS FOR FCC 328” and “FCC328”.  
**§76.985 [Amended]**

7. Remove §76.986.  
**§76.986 [Removed]**

8. Remove §76.987.  
**§76.987 [Removed]**

## APPENDIX C

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (FNPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. This FNPRM addresses ways to modernize, update and streamline the cable rate regulations in Part 76 of the Federal Communications Commission's rules governing multichannel video and cable television service. The FNPRM seeks comment on whether to replace the existing rate regulation framework and seeks proposals for that. Alternatively, if the Commission keeps the existing rate regulation framework in place, the FNPRM seeks comment on a number of proposals to update and simplify it. The FNPRM proposes to simplify the cable rate regulatory scheme by streamlining the initial rate-setting methodology, clarify how cable operators may adjust their rates every year, and eliminate rate regulation of some equipment used to receive cable signals and small systems owned by small cable companies. This would enable the Commission to eliminate several rate forms that would no longer be necessary. These changes would relieve regulatory burdens, modernize and streamline cable rate regulations, and update regulations to account for the deregulation of cable programming service tier rates.

**B. Legal Basis**

3. The proposed action is authorized pursuant to sections 1, 2(a), 3, 4(i), 4(j), 303(r), 601(3), 602, and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153, 154(i), 154(j), 303(r), 521, 522, 543.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>4</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>5</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>6</sup> A small business

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.* § 603(b)(3).

<sup>5</sup> *Id.* § 601(6).

<sup>6</sup> *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes

concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>7</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Cable Companies and Systems (Rate Regulation Standard)*. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.<sup>8</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but 11 are small under this size standard.<sup>9</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>10</sup> Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.<sup>11</sup> Thus, under this second size standard, the Commission believes that most cable systems are small.

6. *Cable System Operators*. The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>12</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>13</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but 10 are small under this size standard.<sup>14</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>15</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

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one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

<sup>7</sup> 15 U.S.C. § 632.

<sup>8</sup> 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>9</sup> These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

<sup>10</sup> 47 CFR § 76.901(c).

<sup>11</sup> Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

<sup>12</sup> 47 U.S.C. § 543(m)(2); *see also* 47 CFR § 76.901(f) & nn.1-3.

<sup>13</sup> 47 CFR § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>14</sup> These data are derived from R.R. BOWKER, *BROADCASTING & CABLE YEARBOOK 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, *TELEVISION & CABLE FACTBOOK 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

<sup>15</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

7. *Small Governmental Jurisdictions.* The small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>16</sup> U.S. Census Bureau data from the 2012 Census of Governments<sup>17</sup> indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>18</sup> Of this number there were 37,132 General purpose governments (county,<sup>19</sup> municipal and town or township<sup>20</sup>) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts<sup>21</sup> and special districts<sup>22</sup>) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000.<sup>23</sup> Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”<sup>24</sup> As discussed in the FNPRM, however, local governments are certified to rate regulate in only about 100 jurisdictions, and that includes governmental jurisdictions that are not small. Therefore, we expect the number of small governmental jurisdictions to which these rule changes would apply is likely under 100.

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<sup>16</sup> 5 U.S.C. § 601(5).

<sup>17</sup> See 13 U.S.C. § 161. The Census of Government is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Program Description Census of Government <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#>

<sup>18</sup> See U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-States. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

<sup>19</sup> See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. There were 2,114 county governments with populations less than 50,000.

<sup>20</sup> See U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States – States. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

<sup>21</sup> See U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. There were 12,184 independent school districts with enrollment populations less than 50,000.

<sup>22</sup> See U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. The U.S. Census Bureau data did not provide a population breakout for special district governments.

<sup>23</sup> See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States - <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States-States - <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

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

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

8. As indicated above, this FNPRM addresses ways to modernize, update and streamline the cable rate regulations in Part 76 of the Federal Communications Commission's rules governing multichannel video and cable television service. The FNPRM proposes to modify channel addition and deletion rules, streamline the process for establishing initial regulated rates, sunset a separate streamlined process for small systems and further deregulate small entities, sunset the single tier system headend surcharge methodology, sunset the unabbreviated cost of service methodology, modify the FCC Form 1235 methodology, clarify Commission jurisdiction over basic service tier rates, and the clarify and or eliminate obsolete rules and forms. These changes are necessary to relieve regulatory burdens, modernize and streamline cable rate regulations, and update regulations to account for the deregulation of cable programming service tier rates.

9. All of the proposed rule changes are either neutral or reduce existing reporting, recordkeeping or other compliance requirements. Specifically, changes to the initial rate calculation methodology remove requirements that cable operators go back to 1992 records to justify their rate and systems serving 15,000 or fewer subscribers that are owned by small cable companies of 400,000 or fewer subscribers are relieved from all rate regulation.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

10. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."<sup>25</sup>

11. The Commission expects to more fully consider the economic impact on small entities following its review of comments filed in response to the FNPRM and this IRFA. Generally, the FNPRM seeks comment on: ways to modernize, update and streamline the cable rate regulations in Part 76 of the Federal Communications Commission's rules governing multichannel video and cable television service. The FNPRM proposes to modify channel addition and deletion rules, streamline the process for establishing initial regulated rates, sunset of a separate streamlined process for small systems and further deregulate small entities, sunset the single tier system headend surcharge methodology, sunset the unabbreviated cost of service methodology, modify the FCC Form 1235 methodology, clarify Commission jurisdiction over basic service tier rates, and the clarify and or eliminate obsolete rules and forms. These changes are necessary to relieve regulatory burdens, modernize and streamline cable rate regulations, and update regulations to account for the deregulation of cable programming service tier rates. All of the proposed rule changes are either neutral or reduce existing reporting, recordkeeping or other compliance requirements. Specifically, changes to the initial rate calculation methodology remove requirements that cable operators go back to 1992 records to justify their rate and systems serving 15,000 or fewer subscribers that are owned by small cable companies of 400,000 or fewer subscribers are relieved from all rate regulation.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

12. None.

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<sup>25</sup> 5 U.S.C. § 603(c)(1-4).

## APPENDIX D

## FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),<sup>1</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking and Order, Revisions to Cable Television Rate Regulations ("NPRM")*.<sup>2</sup> The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. No comments on the IRFA were received. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.<sup>3</sup>

**G. Need for, and Objectives of, the Revised Rules**

2. In the past, the Commission developed rules and forms for the regulation of cable television rates when both the basic service tier ("BST") and the cable programming service tiers ("CPST") were subject to rate regulation. In this *Report and Order*, the Commission updates some of these regulations. Updating is needed so that the rules and rate forms will reflect the March 1999 sunset of cable programming services tier ("CPST") rate regulation pursuant to the Telecommunications Act of 1996.<sup>4</sup> Finally, updating is required to address issues which have arisen over time.

3. This *Report and Order* makes changes to remove rule sections that are obsolete due to the sunset of upper tier regulation. For cable systems in general, including small cable systems, in this Report and Order the Commission deletes or modifies rules relating solely to CPST regulation and modifies a rule to codify existing policy. All of these changes have the effect of eliminating or reducing regulatory burdens.

**H. Legal Basis**

4. The authority for this action is contained in sections 1, 2(a), 3, 4(i), 4(j), 303(r), 601(3), 602, and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153, 154(i), 154(j), 303(r), 521, 522, and 543.

**I. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the modified rules.<sup>5</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>6</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>7</sup> A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *Notice of Proposed Rulemaking and Order, Revisions to Cable Television Rate Regulations*, 17 FCC Rcd 11550, 11570 (2002), revised, 17 FCC Rcd 15974 (2002).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> This is codified as Communications Act §623(c) (4), 47 U.S.C. § 543(c) (4).

<sup>5</sup> 5 U.S.C. § 603(a) (3).

<sup>6</sup> *Id.* § 601(6).

<sup>7</sup> *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register"

additional criteria established by the SBA.<sup>8</sup>

6. The SBA has developed a small business size standard for Cable and Other Program Distribution, which consists of all such firms having \$12.5 million or less in annual receipts.<sup>9</sup> This category includes, among others, cable operators, closed circuit television services, direct broadcast satellite services, multipoint distribution services, open video systems, satellite master antenna television systems, and subscription television services. According to Census Bureau data for 1997, in this category, there was a total of 1,311 firms that operated for the entire year, of which 1180 have less than \$10 million in revenue and an additional 52 firms had revenue of \$10 million or more but less than \$25 million.<sup>10</sup> Thus, under this size standard, the majority of firms can be considered small. In this category, only cable system operators are affected by this *Report and Order* and we address them below to provide a more precise estimate of the affected small entities.

7. *Cable Systems.* The Commission has developed its own small business size standard for a small cable operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>11</sup> Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.<sup>12</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small cable companies that may be affected by the proposed rules. A "small system" under the Commission's rules, is one serving "15,000 or fewer subscribers. The service area of a small system shall be determined by the number of subscribers that are served by the system's principal headend, including any other headends or microwave receive sites that are technically integrated to the principal headend."<sup>13</sup>

8. The Communications Act of 1934, as amended, also contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>14</sup> The Commission has determined that there are 67,700,000 cable subscribers in the United States.<sup>15</sup> Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>16</sup> Based on this available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.<sup>17</sup> We do not request or collect information on whether

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<sup>8</sup> 15 U.S.C. § 632.

<sup>9</sup> 13 CFR § 121.201, North American Industry Classification System ("NAICS") code 517510.

<sup>10</sup> See U.S. Census Bureau, 1997 Economic Census, Subject Series –Establishment and Firm Size, Table 4 (October 2000). No category for \$12.5 million existed. Thus, the number is as accurate as is possible to calculate based on available information.

<sup>11</sup> 47 CFR § 76.901(e). The Commission developed this definition based on its determinations that a small cable company is one with annual revenues of \$100 million or less. See *Small System Order*, 10 FCC Rcd at 7408-7409 ¶¶ 28-30.

<sup>12</sup> Paul Kagan Assocs., Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>13</sup> 47 CFR § 76.901(c).

<sup>14</sup> 47 U.S.C. § 543(m) (2).

<sup>15</sup> See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, 16 FCC Rcd 2225 (2001).

<sup>16</sup> 47 CFR § 76.1403(b).

<sup>17</sup> See 16 FCC Rcd 2225.

cable operators are affiliated with entities whose gross annual revenues exceed \$250,000,000,<sup>18</sup> and therefore are unable to estimate accurately the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

**J. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements for Small Entities**

9. No increase in the regulatory burden on small systems or small governmental entities is expected to result from this proceeding.

**K. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered**

10. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."<sup>19</sup> In general, this item does not impose any new regulatory burdens on large or small entities. Rather, it serves to streamline and update rules, thereby relieving burdens in general.

11. Although the Commission requested comment on any changes in the rate rules that might address continuing difficulties faced by operators of small systems, such as the problems associated with the simultaneous growth in competition and the need for additional investment to upgrade facilities, no comments were received. The changes do not increase the regulatory burden small systems face as a result of rate regulation and may lessen it by reducing the amount of information required to be reported.

**L. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Rules**

12. None.

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<sup>18</sup> We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. See 47 CFR § 76.990(b).

<sup>19</sup> 5 U.S.C. § 603(c) (1) – (c) (4).

**STATEMENT OF  
CHAIRMAN AJIT PAI**

Re: *Modernization of Media Regulation Initiative*, MB Docket No. 17-105; *Revisions to Cable Television Rate Regulations*, MB Docket No. 02-144; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket Nos. 92-266 and 93-215; *Adoption of Uniform Accounting System for the Provision of Regulated Cable Service*, CS Docket No. 94-28; *Cable Pricing Flexibility*, CS Docket No. 96-157.

Because of changes in the video marketplace, cable rates are only regulated in some communities in two states, Hawaii and Massachusetts. And even in those communities, only rates for one tier of service—the basic service tier—are regulated. Yet the FCC’s cable rate regulations are mind-numbingly complex, filling up 52 pages in the Code of Federal Regulations. They are also outdated. For example, some rules refer to forms that are no longer in active use.

The time has come for a wholesale review of our complicated web of cable rate regulations and forms. Our aim is to dramatically simplify these regulations and bring them up to date. This effort reflects one of the baseline principles of this Commission: Today’s regulations should reflect today’s marketplace.

My thanks to the staff who did excellent work on this important item: Michelle Carey, Katie Costello, Martha Heller, Tom Horan, Nancy Murphy, Brendan Murray, Holly Saurer, and Sarah Whitesell from the Media Bureau, and Susan Aaron and Dave Konczal from the Office of General Counsel.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Modernization of Media Regulation Initiative*, MB Docket No. 17-105; *Revisions to Cable Television Rate Regulations*, MB Docket No. 02-144; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket Nos. 92-266 and 93-215; *Adoption of Uniform Accounting System for the Provision of Regulated Cable Service*, CS Docket No. 94-28; *Cable Pricing Flexibility*, CS Docket No. 96-157.

I really appreciate the Chairman's efforts in this Notice to update the framework for calculating basic cable service rates, to the extent any local franchise authority (LFA) has the desire and requisite facts to pursue a case. In particular, I applaud the proposal to exempt small cable systems from rate regulation.

Thankfully, the universe of situations in which this proposed structure would apply is fairly narrow, as very few LFAs currently regulate basic cable rates and few are unlikely to do so going forward. Because of the development of competition in the offering of video services, which is a far better arbitrator and protector of consumers than bureaucratic calculations, the need and value for such regulation is limited. Moreover, the Commission's work on the presumptive burden and closing old rate petitions has made most of this discussion moot – but still important.

On that note, I appreciate my colleagues' willingness to clarify the draft to ensure our presumptive burden on local franchise authorities was not affected by this item. Having made the right decision and survived a court challenge, I have no intention of allowing that rule to be reversed.

From a larger perspective, we need to acknowledge and substantially deregulate “cable operators” to reflect the current state of the video marketplace, which includes well-funded and highly successful over-the-top providers that are rightfully not governed by archaic rules designed to implement woefully outdated statutory provisions. Here are just a few reforms the Commission should consider: (1) limit the shenanigans of LFAs during franchise transfers and renewals; (2) prevent mandated new broadband network builds for use by LFAs; (3) state that GAAP accounting is appropriate when determining franchise fees; (4) allow cable operators to modify their franchises so that they can better respond to market conditions; and (5) allow cable operators to offer “skinny bundles” to respond to market demands. This list is far from exclusive but would go a long way towards removing added burdens placed on cable operators at the expense of consumers.