

2. In 180.442, by adding a new paragraph (c) to read as follows:

§ 180.442 Bifenthrin; tolerances for residues.

* * * * *

(c) A time-limited tolerance is established for residues of the combined residues of the insecticide bifenthrin [2-methyl[1,1'-biphenyl]-3-yl)methyl-3-(2-chloro-3,3,3-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate in connection with use of the pesticide

under section 18 emergency exemptions granted by EPA. These tolerances are specified in the following table. These tolerances will expire and be automatically revoked on the date specified in the table without further action by EPA.

Commodity	Parts per million	Expiration/Revocation Date
Broccoli	0.1	January 31, 1998
Cauliflower	0.05	January 31, 1998

[FR Doc. 97-3380 Filed 2-11-97; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 92-266; FCC 96-491]

Cable Television Consumer Protection and Competition Act of 1992

AGENCY: Federal Communications Commission.

ACTION: Final Rule.

SUMMARY: In this Memorandum Opinion and Order, we adopt rule changes responsive to the decision of the court in *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995). In its decision, the court considered rules adopted by the Commission to implement rate regulation and related provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). The rules were largely affirmed by the court. In five discrete areas, however, the court reversed the Commission's implementing decisions and rules. The order is intended to conform the rules to the court's decision.

DATES: The amendments to 47 CFR Sections 76.905 and 76.921 shall become effective March 14, 1997, and the amendments to 47 CFR Sections 76.922 and 76.913 will become effective upon approval by the Office of Management and Budget of the information collection requirements, but no sooner than March 14, 1997. The Commission will publish a document at a later date establishing this effective date. Written comments by the public on the modified information collections are due April 14, 1997.

ADDRESSES: A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications

Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information concerning this rulemaking contact Meryl S. Iove or Hugh Boyle, Cable Services Bureau, (202) 418-7200. For additional information concerning the information collections contained in this rulemaking contact Dorothy Conway at (202) 418-0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Memorandum Opinion and Order in MM Docket No. 96-266, FCC 96-491, adopted December 23, 1996 and released December 31, 1996. The complete text of this Order is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, N.W., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc. ("ITS Inc.") at (202) 857-3800, 2100 M Street, N.W., Suite 140, Washington, DC 20017.

PAPERWORK REDUCTION ACT: This rulemaking contains modified information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collections contained in this rulemaking, as required by the Paperwork Reduction Act of 1995. Public comments are due April 14, 1997. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the

respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060-0561

Title: Section 76.913 Assumption of jurisdiction by the Commission.

Type of Review: Revision of existing collection.

Respondents: State, local and tribal governments.

Number of Respondents: 50.

Estimated Time Per Response: 8 hours.

Total Annual Burden: 400 hours.

Estimated costs per respondent: \$500.

Postage and stationery costs are

estimated at an average of \$10 per

petition. 50 petitions \times \$10 = \$500.

Needs and Uses: 76.913 permits local franchising authorities ("LFAs") that are unable to meet certification standards to petition the Commission to regulate the rates for basic cable service and associated equipment of their respective franchisees. The Commission has amended its rules as follows: If the local franchising authority lacks the resources to administer rate regulation, its petition no longer must be accompanied by a demonstration that franchise fees are insufficient to fund any additional activities required to administer basic service rate regulation. Elimination of this requirement constitutes a modified information collection; all other requirements remain intact.

The information in the petitions is used by Commission staff to identify situations where it should exercise jurisdiction over basic service and equipment rates in place of a local franchising authority. If the information were not collected, the basic cable rates of some franchise areas not subject to effective competition would remain unregulated in contravention of the goals of the 1992 Cable Act.

OMB Approval Number: 3060-0607.

Title: Section 76.922 Rates for Basic Service Tiers and Cable Programming Tiers.

Type of Review: Revision of existing collection.

Respondents: Businesses and other for profit entities; State, local and tribal governments.

Number of Respondents: 2,200 operators filing gap period rate adjustments + 1,100 LFAs reviewing such adjustments + 25 small systems opting for the streamlined rate reduction process + 600 headend upgrade certifications = 3,925.

Estimated Time Per Response: 1–12 hours.

Total Annual Burden: 4,400 + 2,200 + 300 + 600 = 7,500 hours as explained below.

76.922(d)(3)(vii) contains a one-time only information collection requirement. We estimate that the average burden for operators to supply gap period data on their next rate adjustment filing will be 2 hours per filing and that there will be approximately 2,200 such filings made in the next year (1,100 filed with the Commission, 1,100 filed with LFAs). The burden to operators to file = 2,200 filings \times 2 hours = 4,400 hours. The burden to LFAs to review this information is estimated to be an average of 2 hours per filing, therefore 1,100 filings reviewed by LFAs \times 2 hours = 2,200 hours.

76.922(b)(5) streamlined rate reduction process. We estimate that 25 systems per year use this process. The average burden for undergoing all aspects of each streamlined rate reduction process (all rate calculation, notice and reporting requirements) is estimated to be 12 hours per respondent. 25 systems \times 12 hours = 300 hours.

76.922(e)(7) headend upgrade certification process. Qualifying cable systems owned by small cable companies may certify their eligibility to use the Commission's headend upgrade incentive. The average burden to complete the certification process is estimated to be 1 hour. We estimate 600 certifications are currently filed per year. 600 certifications \times 1 hour = 600 hours.

Estimated costs per respondent: \$250 + \$3,000 = \$3,250 for all respondents as explained as follows. There are no costs incurred for gap period rate adjustments because they are made as part of regular rate adjustment filings. Postage and stationery costs are estimated at an average of \$10 per each complete streamlined rate reduction process. 25 \times \$10 = \$250. Postage and stationery costs are estimated at an average of \$5 per each headend upgrade certification. 600 \times \$5 = \$3,000.

Needs and Uses: 76.922(d)(3)(vii) has been amended to permit cable operators to adjust their current permissible rates

to reflect the rates the operators would currently be charging if they had been permitted to include increases in external costs occurring between September 30, 1992 and their initial date of regulation (this period of time is also referred to as the "gap period") reduced by inflation increases already received with respect to those costs. The increase in rates due to external cost changes that occurred during the gap period shall be reflected in the cable operator's next rate adjustment filing in accordance with the Commission's current rules. The burden imposed by reporting gap period cost data is reported under this OMB control number 3060–0607 for the following reasons: 1) to avoid confusing this requirement as being an additional filing requirement, 2) because it is a temporary one-time only information collection, and 3) because neither of the Commission's cable rate adjustment forms [FCC Form 1210 approved under OMB control number 3060–0595 and FCC Form 1240 approved under OMB control number 3060–0601] have been modified to furnish this data.

All other information collection requirements contained in 76.922 and reported under this OMB control number 3060–0607 remain intact. Those requirements are found in 76.922(b)(5) (Streamlined rate reduction process) and 76.922(e)(7) (Headend upgrades).

76.922(b)(5) provides that an eligible small system that elects to use the streamlined rate reduction process must implement the required rate reductions and provide written notice of such reductions to local subscribers, the local franchising authority ("LFA"), and the Commission.

76.922(e)(7) permits qualified small systems and small systems owned by small multiple system operators to increase rates to recover the actual cost of the headend equipment required to add up to seven channels to Cable Programming Service Tiers ("CPSTs") and single-tier systems, not to exceed \$5,000 per additional channel. These rate increases may occur between January 1, 1995 and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. In order to recover costs for headend equipment pursuant to this paragraph, systems must certify to the Commission their eligibility to use this paragraph, and the level of costs they have actually incurred for adding the headend equipment and the depreciation schedule for the equipment.

Synopsis of Order

1. In this Memorandum Opinion and Order, we adopt rule changes

responsive to the decision of the court in *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995). In its decision, the court considered rules adopted by the Commission to implement rate regulation and related provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). The rules were largely affirmed by the court. In five discrete areas, however, the court reversed the Commission's implementing decisions and rules. First, the court concluded that the Commission construed the term "effective competition" too narrowly in terms of the entities that could be counted as providing direct competition to existing cable operators. Second, the Commission erred in concluding that the requirement for a uniform rate structure applies to all systems, including those facing effective competition and not otherwise subject to rate regulation under the statute. Third, the Commission's conclusion that the statute's tier buy-through provision applies to systems subject to effective competition was found to conflict with the structure and the language of the statute. Fourth, the Commission was found to have exceeded its authority by establishing a presumption that franchising authorities seeking to cede the basic rate regulation function to the Commission could themselves fund rate regulation locally if they were collecting franchise fees. Fifth, the court vacated the Commission's rules relating to so-called gap period external costs. The following sections address each of these findings in relation to our previous decisions and rules.

2. Effective Competition. The 1992 Cable Act defined three types of systems that are subject to "effective competition" and therefore exempt from rate regulation: low penetration systems, competing provider systems, and municipal systems.¹ Effective competition resulting from a competing provider exists if the franchise area is—

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers

¹ The definition of effective competition is found in 47 CFR § 543(l)(1). The Telecommunications Act of 1996 amends Section 543(l)(1) by adding a subsection (D), which contains a fourth test for effective competition. See Telecommunications Act of 1996, Section 301(b)(3). The Commission has incorporated this new test into its rules. See 47 CFR § 76.905(b)(4). See also Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking ("Cable Act Reform"), CS Docket No. 96–85, FCC 96–154 (released April 9, 1996), 11 FCC Rcd 5937 (1996), 61 FR 19013 (April 30, 1996); 47 CFR § 76.1401. All references herein to Section 543(l)(1) do not include this amendment.

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 programming distributor exceeds 15 percent of the households in the franchise area * * *.

On review, the court concluded that, although the Commission's definition of competing providers was theoretically sound, it conflicted with the plain language of the statute, and Congress did not limit the 15% threshold in Section 543(l)(1)(B)(ii) to those cable systems that satisfy the requirements of Section 543(l)(1)(B)(i).

3. In response to the court's decision we are amending the rules relating to the definition of effective competition as reflected below. With this change in place, a demonstration of "competing provider" effective competition requires only evidence that the franchise area is served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50% of the households in the franchise area and that the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15% of the households in the franchise area.

4. *Uniform Rate Structure.* Section 543(d)² provides:

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.

The Commission initially determined that the focus of this uniform rate structure provision was properly "on regulated systems in regulated markets," that is, systems that did not face effective competition as defined by the 1992 Cable Act. On reconsideration, however, the Commission decided that the uniform rate structure provision applied not only to regulated systems, but also to systems subject to effective competition and otherwise exempt from rate regulation under the 1992 Cable Act. The Commission reasoned that the harms targeted by the uniform rate provision—"charging different subscribers different rates with no economic justification and unfairly

undercutting competitors' prices"—exist equally in areas where "effective competition" exists.

5. The court concluded the latter interpretation conflicts with the language and legislative purpose of the 1992 Cable Act. Because it found that Section 543(d) regulates rates within the meaning of Section 543(a)(2), the court concluded that the Commission's uniform rate structure regulation was contrary to the statute insofar as it applied to cable operators subject to "effective competition." The court stated that, by requiring competitive systems to charge uniform rates, the Commission undermined a hallmark purpose of the 1992 Cable Act, which is to allow market forces to determine the rates charged by cable systems that are subject to "effective competition" as defined by Congress.

6. Section 310(b)(2) of the Telecommunications Act of 1996 amended Section 543(d) by adding, *inter alia*, the following language to the end of that section:

This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, * * *.

The Commission has amended its rules to reflect this statutory amendment, and in so doing has complied with the court's decision with respect to the uniform rates requirement.

7. *Tier Buy-through.* In an order, the Commission concluded that the tier buy-through provision applies not only to regulated systems, but also to systems subject to "effective competition" and thus not subject to rate regulation under the 1992 Cable Act. The court found that the Commission's interpretation of the tier buy-through provision was not permissible under the 1992 Cable Act. In response to the court's decision, we are amending our rules as reflected in below to provide that the tier buy-through requirement applies only to systems not subject to effective competition.

8. *Franchising Authorities/Franchise Fees.* The Commission, reasoning that some franchising authorities might wish to have basic rates regulated but lack the legal power or resources to do so at the local level, concluded that its general mandate to "ensure that the rates for the basic service tier are reasonable" empowered it to regulate basic rates upon the request of such franchising authorities. Rather than requiring these franchising authorities to file a certification application that was

intended to be denied in order to establish their lack of power or resources, the Commission decided to allow the authorities affirmatively to request federal regulation of basic rates. However, the Commission decided to require a showing that the franchising authority could not afford to regulate when a franchising authority that collects franchise fees claims financial incapacity. The Commission established a presumption that franchising authorities receiving franchise fees have the resources to regulate and required any franchising authority seeking to have the Commission exercise jurisdiction over basic rates to rebut this presumption with evidence showing why the proceeds of the franchise fees could not be used to cover the cost of rate regulation.

9. The court concluded, however, that the Commission erred in establishing this presumption because the presumption implies that the franchising authority must use any available franchise fees for purposes of rate regulation. In response to the court's decision, we will no longer establish a relationship between the franchising authority's ability to regulate and its franchise fee collection. The Commission will continue, however, to exercise authority over the basic tier in response to a franchising authority's request only when justified by a franchising authority's financial or legal inability to proceed on its own. We are amending our rules as reflected below to incorporate the court's decision regarding franchising authorities requests for Commission assumption of jurisdiction.

10. *External Costs Treatment.* The court held that the Commission's decision to preclude a rate adjustment designed to recover changes in external costs increases resulting from the period between September 30, 1992 and an operator's initial date of regulation was arbitrary and capricious. In response to the court's decision, we are amending our rules to permit operators to adjust their current permissible rates to reflect the rates the operators would currently be charging if they had been permitted to include increases in external costs occurring between September 30, 1992 and their initial date of regulation reduced by inflation increases already received with respect to those costs.

11. The operator will calculate an adjustment which will be incorporated into a Form 1210 or Form 1240, and which will be added to the operator's rate. To calculate the adjustment, the operator will use information from a previously filed Form 1200. A more detailed explanation of how to make the

² Section 301(b)(2) of the Telecommunications Act of 1996 amends Section 543(d). All references herein to Section 543(d) do not include this amendment.

adjustment is provided below. The general methodology is as follows: the operator should calculate and subtract (a) the "average monthly external cost per subscriber per tier as of September 30, 1992, as adjusted for inflation through the initial date of regulation" from (b) the "average monthly external cost per subscriber per tier as of the initial date of regulation." To determine (a), the operator would increase the average monthly external cost per subscriber per tier as of September 30, 1992 by the same inflation factor as was applied in the calculation of initial maximum permitted rates. The difference between (a) and (b) is the allowed adjustment. When using Form 1210 or Form 1240 to reflect these adjustments, the operator shall disclose that the adjustment has been included in rates and shall provide its calculations.

Final Regulatory Flexibility Act Analysis.

12. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in MM Docket 92-266 and in several further notices of proposed rulemaking. The Commission therein sought written public comments on the proposals, including comments on the IRFAs, and addressed these comments in previous orders. See, e.g., 8 FCC Rcd 5631, 5978 (1993), 58 FR 29736 (May 21, 1993); 9 FCC Rcd 1164, 1253 (1993), 58 FR 46718 (September 2, 1993); 9 FCC Rcd 4119, 4249 (1994), 59 FR 17943 (April 15, 1994). This FRFA thus addresses the impact of regulations on small entities only as adopted or modified in the action and not as adopted or modified in earlier stages of this rulemaking proceeding. The Commission's Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Public Law No. 104-121, 110 Stat. 847.

13. Need and Purpose for Action: This action is taken to conform the Commission's rules to the court's decision in *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

14. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: This order is adopted in direct response to a judicial remand and has been adopted without a further notice and comment cycle.

15. Description and Estimate of the Number of Small Entities Impacted: Cable Systems: SBA has developed a

definition of small entities for cable and other pay television services, which includes all such companies generating less than \$11 million in revenue annually. This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than \$11 million in revenue that were in operation for at least one year at the end of 1992. The Commission has developed its own definition of a small cable system 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. Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995. 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 entity cable system operators that may be affected by the decisions and rules adopted in this *Memorandum Opinion and Order*. The Communications Act also contains a definition of a small cable system operator, 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." The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 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. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

16. Municipalities: The term "small governmental jurisdiction" is defined as "governments of * * * districts, with a population of less than fifty thousand." There are 85,006 governmental entities in the United States. This number includes such entities as states, counties, cities, utility districts and school districts. We note that any official actions with respect to cable systems will typically be undertaken by LFAs, which primarily consist of counties, cities and towns. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states, which typically are not LFAs. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000. Thus, approximately 37,500 "small governmental jurisdictions" may be affected by the rules adopted in this *Memorandum Opinion and Order*.

17. Reporting, Recordkeeping, and Other Compliance Requirements: The rules do not establish any filing requirements. However, an operator choosing to adjust its rates to account for changes in its external costs as permitted by the rule adopted here will have to make additional calculations in conjunction with the filing of its form. The franchising authority will review these calculations in conjunction with its review of the form. The rule will not require any additional special skills beyond any which are already needed in the cable rate regulatory context.

18. Steps Taken to Minimize the Economic Impact on Small Entities and Significant Alternatives Rejected: The rule changes adopted in this Order are required by the court's decision, and, if anything, they result in decreasing the regulatory burdens on cable operators. If the revised interpretation of the statutory definition of effective competition results in a system being subject to effective competition, then the system will not be subject to rate regulation. The amendment to the tier buy-through rule provides more flexibility for cable systems subject to effective competition. The requirement that the Commission not establish a relationship between the franchising authority's ability to regulate and its franchise fee collection may simplify the franchising authority's request that the Commission assume jurisdiction. The cable operator may choose whether or not to adjust its rate to account for changes in external costs as permitted by the rule. If a system is regulated and it chooses to adjust its rate, it can do so the next time it is scheduled to file a form.

19. Report to Congress: The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Memorandum Opinion and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

20. Accordingly, it is ordered that, pursuant to the authority contained in Section 4(i) and (j) and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Public Law No. 102-385, Part 76 of the Commission Rules, 47 CFR Part 76, IS AMENDED as set forth below.

21. *It is further ordered* that the amendments to 47 CFR Sections 76.905 and 76.921 shall become effective March 14, 1997, and the amendments to 47 CFR Sections 76.922 and 76.913 will become effective upon approval by the Office of Management and Budget of the information collection requirements, but no sooner than March 14, 1997.

List of Subjects in 47 CFR Part 76

Cable television.

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

Rule Changes

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

PART 76—CABLE TELEVISION SERVICE

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

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.905 is amended by revising paragraph (f) to read as follows:

§ 76.905 Standards for identification of cable systems subject to effective competition.

* * * * *

(f) For purposes of determining the number of households subscribing to the services of a multichannel video programming distributor other than the largest multichannel video programming distributor, under paragraph (b)(2)(ii) of this section, the number of subscribers of all multichannel video programming

distributors that offer service in the franchise area will be aggregated.

* * * * *

3. Section 76.913 is amended by revising paragraph (b)(1) to read as follows:

§ 76.913 Assumption of jurisdiction by the Commission.

* * * * *

(b) * * *

(1) The franchising authority lacks the resources to administer rate regulation.

* * * * *

4. Section 76.921 is revised to read as follows:

§ 76.921 Buy-through of other tiers prohibited.

(a) No cable system operator, other than an operator subject to effective competition, may require the subscription to any tier other than the basic service tier as a condition of subscription to video programming offered on a per channel or per program charge basis. A cable operator may, however, require the subscription to one or more tiers of cable programming services as a condition of access to one or more tiers of cable programming services.

(b) A cable operator not subject to effective competition may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per-channel or per-program charge basis.

(c) With respect to cable systems not subject to effective competition, prior to October 5, 2002, the provisions of paragraph (a) of this section shall not apply to any cable system that lacks the capacity to offer basic service and all programming distributed on a per channel or per program basis without also providing other intermediate tiers of service:

(1) By controlling subscriber access to nonbasic channels of service through addressable equipment electronically controlled from a central control point; or

(2) Through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided.

(d) With respect to cable systems not subject to effective competition, any retiering of channels or services that is not undertaken in order to accomplish legitimate regulatory, technical, or customer service objectives and that is intended to frustrate or has the effect of frustrating compliance with paragraphs

(a) through (c) of this section is prohibited.

5. Section 76.922 is amended by revising paragraph (f)(4) to read as follows:

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

* * * * *

(f) * * *

(4) The starting date for adjustments on account of external costs for a tier of regulated programming service shall be the earlier of the initial date of regulation for any basic or cable service tier or February 28, 1994. Except, for regulated FCC Form 1200 rates set on the basis of rates at September 30, 1992 (using either March 31, 1994 rates initially determined from FCC Form 393 Worksheet 2 or using Form 1200 Full Reduction Rates from Line J6), the starting date shall be September 30, 1992. Operators in this latter group may make adjustment for changes in external costs for the period between September 30, 1992, and the initial date of regulation or February 28, 1994, whichever is applicable, based either on changes in the GNP-PI over that period or on the actual change in the external costs over that period. Thereafter, adjustment for external costs may be made on the basis of actual changes in external costs only.

* * * * *

This attachment will not be published in the Code of Federal Regulations.

Attachment

This adjustment may be made only to rates set under the benchmark methodology on the basis of rates in effect at September 30, 1992 (using either March 31, 1994 rates initially determined from FCC Form 393 Worksheet 2 or using Form 1200 Full Reduction Rates from Line J6). This is a one-time adjustment to rates and may be made on a FCC Form 1210 or FCC Form 1240. To adjust such rates to include fully the change in external costs occurring between September 30, 1992 and the initial date of regulation or February 28, 1994, whichever is earlier, the operator will make the adjustments pursuant to the procedure outlined below.

Step 1. Identify the average external cost per subscriber per tier as of the initial date of regulation or February 28, 1994, as applicable.

This information is found on Line B7 of Form 1200.

Step 2. Identify the average monthly external cost per subscriber per tier as of September 30, 1992.

This should be calculated using the same methodology used to determine the external cost per subscriber per tier on the initial date of regulation, and the operator shall therefore follow the instructions for Lines B2 through B7 on FCC Form 1200. In such case "Beginning Date" shall be considered to be September 30, 1992 for purposes of following these instructions.

Step 3. Determine the inflation factor applied in the calculation of initial maximum permitted rates to adjust for inflation for the period from September 30, 1992 to the initial date of regulation or February 28, 1994, as applicable.

If the rates being adjusted were determined on FCC Form 1200 based on rates in effect on September 30, 1992 under the FCC Form 1200 Full Reduction Methodology (i.e., the rates on both Line I18 and Line J6 of FCC Form 1200), the inflation factor applied is 3%. In determining Full Reduction Rates on FCC Form 1200, the September 30, 1992 rates were adjusted to September 30, 1993 (on Line G10) using 3%.

If the rates being adjusted were determined on FCC Form 1200 based on rates current at March 31, 1994 but initially determined on FCC Form 393 from September 30, 1992 rates (under the Worksheet 2 methodology), the inflation factor applied from September 30, 1992 to the initial date of regulation is the factor found on Line 401 of FCC Form 393.

This is the factor used by the operator initially to set rates using FCC Form 393, unless a corrected factor was ordered by a regulatory authority. If the factor was corrected, the regulator-ordered factor for Line 401 shall be used.

Step 4. Adjust the amount from Step 2 by the factor identified in Step 3.

Step 5. Subtract the amount calculated in Step 4 from the amount determined in Step 1, i.e., from the average monthly external cost per subscriber per tier as of the initial date of regulation. The resultant amount is the permanent adjustment—a one-time average monthly per subscriber per tier adjustment to the operator's maximum permitted rate.

Step 6. Complete FCC Form 1210 or FCC Form 1240 in accordance with Commission rules and procedures for the applicable form, but include the adjustment calculated in Step 5.

If a FCC Form 1210 is used, the resultant adjustment amount from Step 5 should be added to the amount on Line J8 (Aggregate

Full Reduction Rate) or, if transition rates are being adjusted, the adjustment should be added to the amounts on Lines I8 (Updated Transition Rate per Tier) and J8.

If a FCC Form 1240 is used, the resultant adjustment amount from Step 5 should be added to Line H9 (Maximum Permitted Rate for Projected Period).

Along with the FCC Form 1210 or FCC Form 1240 adjusted, the operator shall disclose that the adjustment has been included in rates and shall provide its calculations of the adjustment amount.

The operator shall provide the level of external cost adjustment disclosure shown in Module B, Line B2 through B14 of FCC Form 1200, except that it shall also disclose the adjustment for inflation applied to the average monthly external cost per subscriber per tier as of September 30, 1992.

[FR Doc. 97-3454 Filed 2-11-97; 8:45 am]

BILLING CODE 6712-01-P