

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

In the Matter of

WAIVER OF
THE COMMISSION'S
RULES REGULATING
RATES FOR CABLE SERVICES

CUID Nos. NJ0213
NJ0160

As applied to cable systems operating in
Dover Township, Ocean County, New Jersey

ORDER REQUESTING COMMENTS

Adopted: November 2, 1995; Released: November 6, 1995

Comment Date: December 13, 1995

Reply Date: December 28, 1995

By the Commission:

I. INTRODUCTION

1. Under the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"),¹ the Commission is charged with identifying criteria for determining whether rates for cable programming service tiers ("CPSTs") are unreasonable with respect to cable operators that are subject to regulation.² In carrying out this mandate, the Commission has adopted a rate setting approach for CPSTs that utilizes a competitive differential, benchmarks, and cost-of-service factors. By this Order, we seek to develop a record that would permit us to decide whether to waive, on a temporary and trial basis, certain rules governing the rates charged for CPSTs by cable operators serving subscribers in Dover Township, Ocean County, New Jersey, in light of the initiation there of the first permanent commercial video dialtone ("VDT") system.

2. We tentatively conclude that the provision of video programming by multiple independent programmers over a permanent VDT system within the franchise areas of these cable operators, along with certain other conditions

described below, will ensure that the rates the operators charge for cable programming services will not be unreasonable. If we are correct as to the substantial impact that the VDT programmers will have, then we believe that congressional intent would be furthered by a properly conditioned waiver of our rules on the initiation of commercial operation of the VDT system, to the extent those rules require that rates for CPSTs be set in accordance with our benchmark or cost-of-service methodologies. Such an approach holds the promise of reducing the administrative burdens of rate regulation and providing the cable operators greater flexibility in responding to competition and developing their systems through programming and technological innovation, while ensuring that the rates charged to subscribers for CPSTs are not unreasonable. Providing the cable operators such flexibility will also promote competition with unaffiliated VDT programmers, who will face no regulatory restrictions in the packaging and pricing of their video offerings. We adopt this Order to solicit public comment on whether we should adopt such a waiver, and if we decide to do so, the appropriate scope, duration, and conditions, of such a waiver.

3. We also seek comment on whether the local franchising authorities in Dover Township should have the option of waiving the rate regulation rules for basic service tiers ("BSTs"), based on the initiation of VDT service in their franchise areas. We do not intend by this proceeding to limit the franchising authorities' jurisdiction or discretion to regulate BST rates. Nevertheless, for the same reasons that potentially affect CPST rates, the advent of VDT may be sufficient to ensure that BST rates are reasonable as well. Therefore, it may be appropriate to allow local authorities discretion to waive BST rate rules on the same basis that we propose to waive the CPST rate rules.

II. THE DEVELOPMENT OF VIDEO DIALTONE

4. Beginning before passage of the 1992 Cable Act and continuing thereafter, the Commission has designed and refined a regulatory framework for VDT that allows local exchange carriers ("LECs") to deliver video programming on a common carrier basis, as well to provide other unregulated services.³ Programmers will be able to transmit their single channel or multiple channel offerings over the VDT basic platform to end user subscribers who will be able to select any or all of those offerings. A carrier must receive authorization from the Commission pursuant to Section 214 before constructing VDT facilities.⁴

¹ Pub. L. No. 102-385, 106 Stat. 1460 (amending the Communications Act of 1934 and codified at 47 U.S.C. § 151, *et. seq.*).

² 47 U.S.C. §§ 543(a)(2), 543(c)(1)(A).

³ See *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry*, 7 FCC Rcd 300 (1991), *recon.*, 7 FCC Rcd 5069 (1992), *aff'd*, *National Cable Television Association v. FCC*, No. 91-1649 (D.C. Cir. August 26, 1994); *Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 (1992), *appeal pending sub nom. Mankato Citizens Telephone Company v. FCC*, No. 92-1404 (filed D.C. Cir. September 9, 1992); *Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd 244 (1994); *Fourth Further Notice of Proposed Rulemaking*, 10 FCC Rcd 4617 (1995); *Third Report and Order*, FCC 95-203 (rel. May 16, 1995). The VDT framework was designed to permit

local exchange carriers ("LECs") to deliver video programming only as common carriers to comply with a cross-ownership restriction, contained in the Communications Act of 1934, as amended, and our rules, that generally prohibits LECs from providing video programming directly to subscribers within their service areas. 47 U.S.C. § 533(b); 47 C.F.R. §§ 63.54, 63.58. However, a number of courts have held the cross-ownership restriction unconstitutional under the First Amendment. *E.g., Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993); *aff'd* 42 F.3d 181 (4th Cir. 1994), *cert. granted*, No. 94-1900 (U.S. June 26, 1995); *U.S. West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *aff'd* 48 F.3d 1092 (9th Cir. 1995); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, No. 93-323-P-C (D. Me. Dec. 8, 1994).

⁴ 47 U.S.C. § 214(a). We have determined that Section 214,

5. On December 15, 1992, the Bell Atlantic Telephone Companies ("Bell Atlantic") filed a Section 214 application to provide VDT service in Dover Township, New Jersey.⁵ By Order released July 18, 1994, the Commission granted the application, subject to certain conditions, finding that the proposed system would promote the "public convenience and necessity."⁶ Pursuant to its Section 214 authorization, Bell Atlantic filed Transmittal 741 with the Common Carrier Bureau proposing revisions to F.C.C. Tariff No. 10 that would govern the rates, terms and conditions of the VDT service. On June 9, 1995 the Common Carrier Bureau released an order suspending certain terms of the tariff for one day, and other terms for a longer period, and instituted an H investigation.⁷ However, to ensure that Bell Atlantic's service will be available "without undue delay," the Common Carrier Bureau permitted the rates and terms of that service to become effective.⁸

6. Pursuant to the authorizations described above, unaffiliated video programming and information providers will have access to Bell Atlantic's broadband network for the transmission of video signals to potential end-user subscribers in Dover Township.⁹ Although the tariff will govern the rates paid by the VDT programmers for transmission of their services over the Bell Atlantic system to the end-user subscribers, the rates charged by the programmers to those subscribers are not subject to regulation.

7. The VDT system includes fiber optic transport facilities, using fiber to the curb architecture.¹⁰ Copper and coaxial cable will deliver the signals from the curb to the subscribers' premises.¹¹ The VDT system is capable of delivering up to 384 channels of video capacity at 6 megabits per second per channel.¹² Bell Atlantic expects to add a VDT capability to its Dover Township telephone network at an average rate of approximately 1,000 homes per month, reaching its planned final buildout of 38,000 homes passed within approximately three years.¹³ Bell Atlantic has predicted a penetration rate of 35% following the completion of its buildout.¹⁴

8. Our records indicate that at least two cable operators, Clear TV Cable and Cablevision of Monmouth, offer cable service within Dover Township. These operators soon will find themselves in a unique competitive environment, given that the Bell Atlantic VDT system in Dover Township will be the first such system to be operated on a non-trial basis.

III. REGULATION OF RATES FOR CABLE PROGRAMMING SERVICES

9. The question of whether to waive our CPST rate rules, on the initiation of permanent VDT service in Dover Township, must be viewed against the backdrop of our existing rules and the statute from which they emanate. The 1992 Cable Act was passed in large part to address Congress's finding that cable operators enjoyed "undue market power . . . as compared to that of consumers and video programmers."¹⁵ To protect consumers against the exercise of this market power, the 1992 Cable Act provides for regulation of the rates charged for certain programming and equipment by cable systems that are not subject to "effective competition."¹⁶ The 1992 Cable Act authorizes local franchising authorities to regulate rates for basic program service and equipment according to criteria established by the Commission to ensure that such rates are "reasonable."¹⁷ The Commission is directed to establish criteria to ensure that CPST rates are not "unreasonable."¹⁸

10. In implementing this statutory mandate, the Commission has established a "competitive differential" of 17% as the primary mechanism for ensuring lawful rates. The competitive differential measures the average amount by which the rates charged prior to rate regulation by cable systems now subject to regulation exceeded reasonable rates. A cable system may comply with the Commission's rate orders by adjusting its rates to reflect a 17% reduction from rates charged prior to enactment of the 1992 Cable Act.¹⁹ If the resulting rates fall below the "benchmark" -- which is produced by a formula that relies on certain

which generally requires Commission authorization before a carrier extends a new interstate line of communication, applies to VDT facilities. See *Second Report and Order*, supra, 7 FCC Rcd at 5783.

⁵ W-P-C 6840, FCC Public Notice Rept. No. D-675-A, December 23, 1992, as amended September 2, 1993 ("Application").

⁶ *New Jersey Bell Telephone Company, Order and Authorization*, File No. W-P-C 6840 ("Order and Authorization"), 9 FCC Rcd 3677, 3677 (1994), quoting 47 U.S.C. 214(a). The *Order and Authorization* is the subject of a pending petition for reconsideration. See *Bell Atlantic-New Jersey Petition for Limited Reconsideration* (filed August 17, 1994).

⁷ *Bell Atlantic Telephone Companies, Transmittal No. 741, Order* (June 9, 1995) ("Tariff Order") ¶¶ at 2-4. More recently, the Common Carrier Bureau has designated the specific issues that are the subject of investigation. *Bell Atlantic Telephone Companies, Transmittal No. 741, Order Designating Issues for Investigation* (Sept. 8, 1995)

⁸ *Tariff Order* at ¶ 3.

⁹ *Tariff Order* at ¶ 9. Bell Atlantic's petition for limited reconsideration of the *Order and Authorization* seeks authority to also act as a customer-programmer of its VDT system -- i.e., to provide video programming directly to subscribers.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Application*, as amended, at 7.

¹⁴ *Order and Authorization*, 9 FCC Rcd at 3678.

¹⁵ 1992 Cable Act, § 2(a)(2), 106 Stat. 1460.

¹⁶ 47 U.S.C. § 543(a)(2). A cable system is subject to "effective competition," and consequently exempt from rate regulation, if it meets any one of the following three tests:

(A) Fewer than 30 percent of the households in the cable system's franchise area subscribe to its service;

(B) The franchise area is (1) served by at least two unaffiliated MVPDs [multichannel video programming distributors] each of which offers comparable video programming to at least 50 percent of the households in the franchise area, and (2) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area; or

(C) An MVPD operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

¹⁷ 47 U.S.C. § 543(l)(1).

¹⁸ 47 U.S.C. § 543(a)(2)(A) & (b)(1).

¹⁹ 47 U.S.C. § 543(a)(2)(B) & (c)(1)(A).

¹⁹ See *Second Order on Reconsideration, Fourth Report and*

specified characteristics of the cable system in question -- then the cable operator is not required to reduce its rates below the benchmark.²⁰ As an alternative to the benchmark/competitive differential mechanism, a cable operator may elect to set its rates on the basis of a cost-of-service showing.²¹ To govern rates on a "going forward" basis, the Commission adopted a price cap system that allows operators to adjust their lawfully established rates for inflation and other factors.²² The Commission also has adopted rules that provide incentives for cable operators to add channels to their systems.²³

11. The language and structure of the 1992 Cable Act, and sound policy considerations, suggest that we continually monitor the impact and appropriateness of our rules as the market for multichannel video programming evolves, and that in crafting and applying our rules we keep pace with and encourage the development of competition. Congress expressly declared its desire for competition as opposed to regulation, when feasible.²⁴ Of course, we must remain cognizant of our paramount duty to ensure that CPST rates are not unreasonable. We believe that the initiation of services by VDT programmers whose offerings and rates will not be subject to regulation, when considered in conjunction with other factors, may sufficiently restrain the CPST rates of the Dover Township cable operators such that they can be presumed not unreasonable. We believe such a conclusion is in accord with Congress' express policy under the 1992 Cable Act to "rely on the marketplace, to the maximum extent feasible," to promote "the availability to the public of a diversity of views and information through cable television and other video distribution media."²⁵

12. The statutory definition of effective competition remains the dividing line between systems that are subject to rate regulation and those that are not. However, nothing in the 1992 Cable Act prohibits the Commission from adopting different regulatory rules for different categories of operators or from waiving its rules for certain operators or

categories of operators.²⁶ For the reasons set forth below, we tentatively conclude that the launch of VDT service in Dover Township is potentially so significant and unique as to justify, on a two-year trial basis, a separate regulatory treatment for the cable operators providing service there. Accordingly, we tentatively conclude that for the cable systems operating within Dover Township, a two-year experimental waiver of our CPST rate rules, subject to certain conditions to ensure that rates remain not unreasonable, is in the public interest.

13. In sum, Congress gave the Commission considerable discretion in developing criteria for determining when CPST rates are unreasonable in particular instances, which we believe includes the discretion to relax or to waive certain rules as competition increases, even for systems that do not yet face effective competition as defined in the 1992 Cable Act. We tentatively conclude that such a waiver would be justified for cable systems operating in Dover Township.

IV. THE SIGNIFICANCE OF VIDEO DIALTONE AND OTHER MVPDS

14. For a number of reasons, we believe that the availability of VDT service in Dover Township may have a profound effect on competition there. These reasons are grounded in what we believe to be well established economic principles relating to competition. In particular, we are guided by an accepted competitive analysis that seeks first to define the relevant product market and next to examine market power within that market. We have used this two-step relevant market analysis in classifying certain common carriers as non-dominant,²⁷ in reporting on the status of cable competition,²⁸ in reconsidering the radio ownership rules,²⁹ and in seeking comment on revising our broadcast television ownership rules.³⁰ A similar framework

Order, and Fifth Notice of Proposed Rulemaking in MM Docket No. 92-266 (Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation), 9 FCC Rcd 4119, 4141-90 (1994) ("*Second Recon. Order*").

²⁰ *Id.*

²¹ See *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 93-215 & CS Docket No. 94-28 (Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service), 9 FCC Rcd 4527 (1994).

²² See *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266 (Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation), 8 FCC Rcd 5611, 5757 (1993) ("*Rate Order*") ; *Second Recon. Order*, 9 FCC Rcd at 4235-47.

²³ See *id.*; *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking* in MM Docket Nos. 92-266 & 93-215, 10 FCC Rcd 1226 (1994) ("*Sixth Recon. Order*").

²⁴ See Section 2(b)(2) of the 1992 Cable Act, 106 Stat. 1463.

²⁵ Sections 2(b)(1) & (2) of the 1992 Cable Act, 106 Stat. 1463.

²⁶ Indeed, we have provided several alternative regulatory schemes for smaller cable operators. See, e.g., *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, MM Docket Nos. 92-266,

93-215, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5921 (1993); *Memorandum Opinion and Order*, 8 FCC Rcd 5585 (1993); *Second Order on Reconsideration Fourth Report and Order and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994); *Sixth Report and Order and Eleventh Order on Reconsideration*, FCC 95-196 (released June 5, 1995).

²⁷ See *Further Notice of Proposed Rulemaking* in CC Docket No. 79-252 (Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor), 84 FCC 2d 445, 498-500 (1981).

²⁸ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report*, 9 FCC Rcd 7442, 7462 (1994) ("*Competition Report*"); *Report (Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services)*, 5 FCC Rcd 4962, 4994 (1990) ("*1990 Cable Competition Report*") (using relevant market concept in report on cable competition under 1984 Cable Act).

²⁹ *Second Memorandum Opinion and Order*, MM Docket No. 91-140 (Revision of Radio Rules and Policies), 9 FCC Rcd 7183, 7184 (1994).

³⁰ *Further Notice of Proposed Rule Making* in MM Docket Nos. 91-221 & 87-8 (Review of the Commission's Regulations Governing Television Broadcasting/Television Satellite Stations Review of Policy and Rules), 10 FCC Rcd 3524, 3532 (1995).

is also used in antitrust analysis.³¹ As explained more fully below, application of this well accepted framework for competitive analysis suggests that the availability of video services from a number of programmers by way of the VDT system, in addition to other market forces, may constrain the CPST rates of the Dover Township cable operators, thus justifying a waiver of our CPST rate rules.

A. The Relevant Market

15. We tentatively conclude that the offerings to be delivered over the Dover VDT system will fall within the same product market as the cable operators' CPSTs and therefore constitute a potentially competitive alternative. We understand that seven programmers have reserved space on Bell Atlantic's system.³² End user subscribers will be able to select offerings from these programmers, individually or in combination. One of the VDT programmers, Rainbow Holdings, a CableVision affiliate, will offer 192 channels.³³ Another programmer, FutureVision, has reserved 96 channels.³⁴ In contrast to other alternative MVPDs currently providing service in the Dover Township area, both programmers appear capable of providing a full range of both broadcast and cablecast services comparable to those offered by the two local incumbent cable operators. By way of comparison, according to the *Warren Publishing 1995 Cable TV Factbook* one of the cable operators, Clear TV Cable, currently offers 18 basic service tier channels, 17 CPST channels, and seven premium channels, and the other, CableVision of Monmouth, currently offers 21 basic service tier channels, 15 CPST channels, and six premium channels. In addition to being in a position to compete with respect to these program offerings, the VDT system will be equipped to provide interactive services and other features not currently available from existing providers. Thus, there is evidence to suggest that the VDT programmers will be potent competitors to cable and will greatly enhance consumer choice, thus restraining the cable operators' ability to raise CPST rates. To confirm our tentative conclusions, we solicit information concerning the specific programming that will be available to VDT

subscribers in Dover Township and appropriate comparisons of the specific VDT offerings to those of the cable operators.³⁵

16. Although a typical analysis of competition requires identification of a relevant geographic market, our proposed waiver effectively defines the geographic market, for purposes of this proceeding, as being the franchise areas of the two cable operators. However, the degree of proposed overlap between the VDT service area and each of the cable franchise areas is important. If, for example, Bell Atlantic intends its VDT system to pass only 2% of the homes located in a franchise area, the cable operator presumably will offer less of a competitive response than if Bell Atlantic intends to pass 75% of the homes. Thus, our inclination to relax CPST rate regulation may depend upon the degree of overlap between the VDT and cable systems. Interested parties should comment on the appropriate extent of the anticipated overlap.³⁶

B. Market Power

17. The presence of possible substitutes for the cable operators' CPSTs does not necessarily impose competitive pressure on the cable operators or restrain the rates those operators will charge for their services. Rather, we must determine whether the cable operators continue to wield market power, despite the presence of would be competitors. Market power is generally defined as the ability to generate excess profits by raising and maintaining prices or by adversely affecting product quality for a significant period of time.³⁷ The market power of a cable operator can be diluted by two categories of entities: those currently offering comparable programming and those that could commence offering comparable programming within a relatively short period of time.³⁸ Once such entities are identified, further analysis is necessary to ensure that they indeed impose competitive pressure on the cable operator.

18. With respect to market power, any waiver would be premised on the availability in Dover Township of products that cable subscribers view as sufficiently reasonable substitutes for cable programming service.³⁹ A standard method of determining whether a firm can exercise market power with respect to a particular product is to answer the

³¹ See, e.g., *U.S. Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines*, 4 Trade Reg. Rep. (CCH) [¶ 13,104] ("DOJ/FTC Merger Guidelines").

³² *FCC Clears Prices for Bell Atlantic Test of Shore Phone-TV*, The (Newark) Star Ledger, Steven A. Rosenbush, June 11, 1995.

³³ *Communications Daily*, June 30, 1995.

³⁴ *Id.*

³⁵ By statute, the market for comparable programming also includes multichannel multipoint distribution service ("MMDS"), direct broadcast satellite ("DBS"), and television receive-only ("TVRO") satellite programming service. 47 U.S.C. § 522(12). Similarly, in the *Competition Report* we identified a number of multichannel video programming distributors ("MVPDs"), in addition to VDT providers, that offer services that seemed "reasonably interchangeable" with a typical cable operator's services, including DBS, TVRO, MMDS, and satellite master antenna television ("SMATV") systems. *Competition Report*, 9 FCC Rcd at 7642, 7473-7492. The competitive significance of these providers will depend upon the pricing and structuring of their video offerings and their market share. Thus, in our discussion of market power below, we invite comparisons between the offerings of these providers and the composition and pricing of the CPSTs of the cable operators located in Dover Township.

³⁶ Commenters should keep in mind that, to the extent the requirement of a uniform rate structure applies, an operator that decides to lower its CPST rates in the portion of its franchise area passed by the VDT system will have to make the same rate adjustment in the portions of its franchise area not served by Bell Atlantic. 47 C.F.R. § 76.984; see *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 190-92 (D.C. Cir. 1995).

³⁷ See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956).

³⁸ The possibility that the Dover Township cable operators already have taken competitive responses is consistent with the notion that even the potential for competition can have a constraining effect on the conduct of incumbents. See, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623-25 (1974) (discussing the "potential competition" doctrine and the "wings effect," which recognizes that a firm poised to enter the relevant market may prompt competitive responses from existing firms).

³⁹ See *supra* at ¶ 14; see also *E.I. du Pont de Nemours & Co.*, 351 U.S. at 394; see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962). The substitutability of products is sometimes referred to as their "cross-elasticity." See William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 945-48 (1981).

question: if this firm raised the price of the product, to what degree would consumers continue to purchase that product or turn to the products of other firms, and what are these other products and other firms?⁴⁰

19. Our analysis of this issue is significantly affected by what we understand to be the anticipated offerings of the VDT system. As described above, it appears that the VDT programmers will be able to provide programming fully comparable to that currently provided by the Dover Township cable operators.⁴¹ Moreover, the cable operators can expect aggressive competition from the VDT programmers with respect to pricing strategies, according to press reports.⁴² We tentatively conclude that the combination of a fully comparable product and aggressive pricing, if and when made available to consumers via VDT, may produce an effective restraint on cable rates, particularly given that the VDT programmers will be able to implement packaging and pricing strategies free of regulatory restraints.⁴³ We seek comment as to the factual and analytical validity of this tentative conclusion. We seek similar data and comparisons with respect to all other MVPDs offering programming comparable to that of the cable operators in Dover Township.

20. We presume that any competitive pressure felt by the Dover Township cable operators as a result of the initiations of VDT service will increase over time as Bell Atlantic continues construction of its system and as consumers become more familiar with the service and the offerings of the VDT programmers. Although the penetration rate of VDT programmers will not reach a mature level immediately, in the present instance there are several reasons to suggest that the commencement of VDT service may restrain prices and prompt other competitive responses from the cable operators such that application of our CPST rate rules will be unnecessary.

21. Initially, we note that the remaining barriers to the initiation of service by Bell Atlantic are relatively minor. Bell Atlantic has received the required Section 214 authorization from the Commission.⁴⁴ In addition, Bell Atlantic's VDT tariff has become effective, subject to investigation.⁴⁵ Bell Atlantic now has substantial control over the rollout of its new service and has every incentive to expedite that process. Once VDT service is initiated, Bell Atlantic faces a similar lack of barriers with respect to the continued buildout of the system. Thus, the availability of service may represent a logical point at which to make any waiver effective. We seek comment on whether Bell Atlantic's entry plan alone is sufficient to exert a present restraint on cable prices and cable operator conduct in Dover Township.

22. We further note that a current cable subscriber apparently will be able to switch from his or her current video provider to one or more of the VDT programmers without sacrificing broadcast channels or channel capacity. This distinguishes VDT from DBS service, which generally

does not include local broadcast stations, and from MMDS, which has a lower overall channel capacity. Moreover, both DBS and MMDS require the installation of receiving antennae and other equipment. Competition from VDT may pose a greater competitive threat to cable operators than competition from other providers that have more limited channel line-ups or require significant initial expenditures by the consumer. We do not mean to understate, and we welcome comments concerning, the significance of DBS and other MVPDs that may be offering service in Dover Township. We believe, however, that the addition of permanent VDT service to the competitive mix is independently significant. We seek comment on the validity of these comparisons, including data concerning the initial installation costs of VDT for its end users.

23. Dover Township is a laboratory in which these theories can be tested. In view of the novelty and potential consequences of this situation, we are considering waiving our rules that require these cable operators to establish and maintain rates for their CPSTs in accordance with our benchmark or cost-of-service methodologies, as adjusted for changes in inflation, external costs, and for channel additions and deletions.⁴⁶ We believe that such a waiver may well be justified in light of the rate restraining impact that the VDT plus other competitive offerings may have on the cable operators' CPSTs. Additionally, such a trial waiver may yield information that will prove useful in the future as we continue to adapt our regulations to the ever-changing MVPD marketplace.

24. To the extent that the particular circumstances of the Dover Township MVPD marketplace will ensure that the cable operators refrain from charging unreasonable rates for their CPSTs, we tentatively conclude that a waiver would be consistent with congressional policy favoring competition over regulation.⁴⁷ We invite comment on this tentative conclusion.

V. WAIVER ANALYSIS

25. The Commission may waive rules only for "good cause shown."⁴⁸ Waiver orders must show that special circumstances warrant a deviation from the general rule and that the deviation will serve the public interest.⁴⁹ In this Order, we indicate why we believe there may be good cause to waive our CPST rate rules for the Dover Township cable operators upon the initiation of VDT service, and we seek comment thereon. In particular, we believe that the availability to cable subscribers of video services offered by multiple VDT programmers may exert competitive pressure on CPST rates, and thus may constitute special circumstances justifying waiver of our CPST benchmark rules. Such waiver may serve the public interest by encouraging operator innovation and programming diversity, establishing some measure of regulatory parity between the cable operators and the VDT programmers,

⁴⁰ See *DOJ/FTC Merger Guidelines* § 1.11.

⁴¹ See *supra* at ¶ 14.

⁴² *Communications Daily*, June 30, 1995.

⁴³ Indeed, while being able to make these crucial marketing decisions free of regulatory concerns, VDT programmers benefit from regulation of Bell Atlantic's rates for the common carrier VDT service.

⁴⁴ *Order and Authorization*, 9 FCC Rcd at 3677.

⁴⁵ *Id.*; *Tariff Order* at ¶¶ 2-4.

⁴⁶ See 47 C.F.R. § 76.922.

⁴⁷ 1992 Cable Act, § 2(b)(2), 106 Stat. 1460, 1463.

⁴⁸ 47 C.F.R. § 1.3.

⁴⁹ See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

and reducing the regulatory burdens faced by the cable operators, while still satisfying the underlying goal of ensuring that CPST rates are not unreasonable.

26. We note that in establishing our rate regulation rules, we considered the six statutory factors identified by Congress as potentially relevant.⁵⁰ In the context of waiving those rules, we believe it is appropriate to consider as many of those factors as are relevant. For example, the 1992 Cable Act directs us to consider "the rates for cable systems, if any, that are subject to effective competition . . ."⁵¹ Consideration of this factor is consistent with Congress' direction that the marketplace be the sole arbiter of the reasonableness of an operator's rates once the operator is subject to effective competition.⁵² Equally consistent with the reasoning underlying this statutory factor is the notion that as a cable operator nears the effective competition standard, the market should play more of a role, and our regulations less of a role, in setting rates. We seek comment on our tentative conclusion that consideration of this factor weighs in favor of waiving CPST rate rules upon the initiation of VDT service.

27. Other relevant factors set forth in the 1992 Cable Act include the capital and operating costs of the cable system⁵³ and the system's advertising revenues.⁵⁴ The presence of competition from programmers on the VDT platform suggests that a cable operator's costs may increase due to, for example, the need to finance marketing efforts to compete with the VDT programmers' offerings. Meanwhile, VDT programmers may draw advertising revenues away from the cable operators. Therefore, under certain circumstances, both of these statutory factors might support a waiver of our CPST rules that generally are applicable to operators that do not face such increases in operating costs on the one hand and decreases in advertising revenues on the other. While the result of these conditions might be higher CPST rates, we cannot conclude automatically that such higher rates are unreasonable, particularly if they are the product of a competitive environment.

28. As the D.C. Circuit recently held, it may be appropriate to consider a particular factor, but ultimately attach little weight to it in devising a regulatory scheme.⁵⁵ Commenters should respond to this consideration as well. We note in particular that all of the statutory factors specifically identified by Congress in the 1992 Cable Act relate either to the rates, costs, and revenues of the regulated cable operator itself or to the rates of other cable operators that can be used for purposes of comparison. None of the statutory factors calls for specific consideration of the presence of a competing MVPD in the cable operator's franchise area. This suggests that Congress may have intended the specific statutory factors to be of particular relevance when no such competition existed, as was more likely to be the case when Congress enacted the legislation, but that as the marketplace changed, the Commission was given the

discretion to place more reliance on the "other factors,"⁵⁶ not specifically identified in the statute, that the Commission is permitted to identify and take into account in ensuring that CPST rates are not unreasonable. We already have identified one such factor -- the provision of video services over a VDT platform by programmers who will face no regulatory restraints on their ability to design and price their programming packages. We request comment on the potential relevance of the statutory factors to our waiver analysis and our tentative views that the statutory factors may support a waiver.

VI. SCOPE AND CONDITIONS OF WAIVER

29. Because our proposed waiver assumes the absence of effective competition as defined by the 1992 Cable Act, we are statutorily obligated to ensure that the cable operators' CPST rates will not be unreasonable.⁵⁷ Accordingly, complaints against unreasonable rates may continue to be filed under 47 U.S.C. § 543(c). But rather than being adjudicated against the benchmark, any complaints would be resolved on a case-by-case basis, subject to a presumption of the reasonableness of the rates.

30. We stress that we intend the proposed waiver to apply only to Section 76.922 to the extent it prescribes rates for CPSTs and Section 76.956 to the extent it places the burden upon the operator to justify a CPST rate that is the subject of a complaint. We do not propose to extend the waiver to include the other rules applicable to regulated cable operators such as, but not limited to, those concerning a uniform rate structure, negative option billing, subscriber notices, and tier buy throughs, to the extent they apply.⁵⁸ While recognizing the possible need to give the Dover Township cable operators some additional flexibility in light of the unique competitive circumstances in which they soon may find themselves, we deem it prudent to move cautiously in experimenting with waivers of our generally applicable rules.

31. For the same reasons we propose to waive our CPST rate regulations, we believe it may be appropriate to give the relevant local franchising authorities in Dover Township the option of waiving rate regulation rules applicable to BSTs and associated equipment. Ordinarily, if a local franchising authority has been certified to regulate basic rates and seeks to retain that certification, it cannot forgo from regulating in accordance with the Commission's rules. With the advent of VDT, however, we tentatively conclude that the Dover Township franchising authorities should have greater discretion to determine how to regulate basic service. Therefore we seek comment on whether local authorities should have the option of waiving the BST rate rules on the same basis and to the same extent that we propose to waive the CPST rate rules.

⁵⁰ The six factors specified in the statute are: (1) the rates of similarly situated cable systems; (2) the rates of systems that face effective competition; (3) the history of rates for the system; (4) the system's rates for cable programming, equipment and services; (5) the system's capital and operating costs; and (6) the system's advertising revenues. 47 U.S.C. § 543(c)(2).

⁵¹ 47 U.S.C. § 543(c)(2)(B).

⁵² 47 U.S.C. § 543(a)(2).

⁵³ 47 U.S.C. § 543(c)(2)(E).

⁵⁴ 47 U.S.C. § 543(c)(2)(F).

⁵⁵ See *Time Warner*, 56 F.3d at 175.

⁵⁶ 47 U.S.C. § 543(c)(2).

⁵⁷ 47 U.S.C. § 543(c)(1). No waiver would be required if effective competition existed, because rates are not subject to regulation in such circumstances. 47 U.S.C. § 543(a)(2).

⁵⁸ Indeed, the Commission lacks authority to waive the statutory obligations upon which some of these rules are based.

32. Finally, our tentative view is that the waiver will take effect as of the date VDT service is actually available in the relevant franchise areas. Thus, if initially VDT service is available in only one of Dover Township's two franchise areas, the proposed waiver would apply only to the cable operator serving the franchise area in which consumers have access to VDT service. The second operator would become subject to the waiver upon providing notice to this Commission and its local franchising authority that VDT service has been initiated in its franchise area. We propose to re-examine any waiver of CPST regulation for the Dover Township two years from the date the waiver goes into effect. We are concerned that a shorter period would not give the operators sufficient incentive or flexibility to respond freely to the changes in the competitive landscape. In fact, that landscape will continue to evolve throughout the entirety of that two year period, according to Bell Atlantic's projections with respect to passings and penetration. In two years, we will revisit the issue and take steps consistent with the market environment that exists and is developing at that time.

VII. CONCLUSION

33. In analyzing these issues, the Commission is guided by the goal of reducing unnecessary burdens on cable operators and providing the cable operators incentives to innovate and promote program diversity in response to competition. At the same time, we must be confident that a waiver will not lead to unreasonable rates for the CPSTs offered by the Dover Township operators. We will look to the record in this proceeding to provide us the necessary assurance that the proposed approach will satisfy this statutory mandate. We consequently urge commenters to support their positions with empirical and other data, and to frame their arguments in terms of the economic concepts outlined above or other relevant economic analysis. As noted, comments also should take into account the factors that the Commission is required by statute to consider in establishing criteria for determining when CPS rates are unreasonable and other factors that commenters believe to be relevant.⁵⁹

VIII. PROCEDURAL PROVISIONS

34. Pursuant to its discretion under 47 C.F.R. § 1.1200, the Commission is treating this as a non-restricted proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally*, 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206.

35. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before December 13, 1995 and reply comments on or before December 28, 1995. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washing-

ton, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

IX. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED that comments on these issues must be filed on or before December 13, 1995 and reply comments on or before December 28, 1995.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

⁵⁹ See 47 U.S.C. § 543(c)(2)(A)-(F).