

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

FCC 95-472

In the Matter of)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act) CS Docket No. 95-174
of 1992 -- Rate Regulation)
)
Uniform Rate-Setting Methodology)

NOTICE OF PROPOSED RULEMAKING

Adopted: November 28, 1995

Released: November 29, 1995

By the Commission:

Comment Date: January 12, 1996

Reply Comment Date: February 12, 1996

I. INTRODUCTION

1. Under the Commission's cable service rate regulations, a cable operator serving multiple franchise areas must establish maximum permitted service rates in each franchise area. These rates often vary from franchise area to franchise area, even if each area receives the identical package of program services. This outcome may cause needless confusion for subscribers, as well as unnecessary administrative burdens for cable companies. In addition, a cable operator's ability to market its product on a regional basis may be hindered. Therefore, in this *Notice of Proposed Rulemaking* ("NPRM"), we explore the design and implementation of an optional rate-setting methodology under which a cable operator could establish uniform rates for uniform cable service tiers offered in multiple franchise areas.

II. BACKGROUND

2. Under the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), the rates charged by a cable system are subject to

regulation unless the system faces effective competition.¹ In particular, the 1992 Cable Act directed the Commission to establish regulations designed to protect subscribers from unreasonable rates for certain types of cable services offered by such systems.² Rate-regulated services consist of the basic service tier ("BST") and the cable programming services tier ("CPST").

3. Every cable operator subject to rate regulation must offer a BST that includes all local broadcast stations that the operator carries on its system, plus all public, educational, and governmental ("PEG") access channels required by the operator's franchise agreement with its local franchising authority.³ If it so chooses, a cable operator may offer additional programming on its BST beyond these minimum requirements.⁴ Subscribers to a rate-regulated cable system must purchase the BST in order to have access to any other tier of service.⁵ CPSTs include all non-BST programming offered over the cable system, other than programming offered to subscribers on a per channel or per program basis.⁶ There is no general requirement that an operator offer a CPST, and some operators offer no CPST. Per channel and per program offerings are generally exempt from rate regulation.

4. Congress identified several specific factors that the Commission must consider in establishing regulations governing BST and CPST rates.⁷ The Commission may take other factors into account as well.⁸ In addition, the 1992 Cable Act required that the Commission "seek to reduce administrative burdens on subscribers, cable operators, franchising authorities and the Commission" in establishing its regulations.⁹

5. Under the primary method of rate regulation adopted by the

¹ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Sections 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act").

² *Id.*

³ Communications Act, § 623(b)(7)(A).

⁴ *Id.* at 623(b)(7)(B).

⁵ *Id.* at 623(b)(7)(A).

⁶ *Id.* at 623(1)(2).

⁷ *Id.* at § § 623(b)(2)(C) and (c)(2).

⁸ *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995).

⁹ Communications Act, § 623(b)(2)(A).

Commission, a regulated cable system determines the maximum permitted initial rates for cable services pursuant to a benchmark formula.¹⁰ In selecting a primary regulatory model, the Commission employed a benchmark formula instead of the cost-of-service methodology that is traditionally applied to public utilities because of the often significant administrative costs and burdens on regulators and regulated companies associated with cost-of-service regulation.¹¹ However, operators subject to regulation do have the option of setting rates in accordance with a cost-of-service methodology that the Commission has developed.

6. To set or justify its initial rates in accordance with the benchmark formula, a cable operator first must use FCC Form 1200. This form generates a maximum permitted rate as of May 15, 1994 for a particular franchise area, based upon various characteristics specific to the cable system within that franchise area.¹² These variables include channels per tier, number of regulated non-broadcast channels per tier, number of subscribers in the local franchise area, number of tier changes, the census income level for the franchise area, number of additional outlets and remote control units in the franchise area, system-wide subscribership, whether the system is part of a multiple system operation ("MSO"), and the number of systems in the MSO.¹³ A benchmark operator may, and sometimes must, adjust the rates permitted by Form 1200 to take account of changes in inflation and other costs since May 15, 1994.¹⁴ Currently, the operator must use FCC Form 1210 to calculate these adjustments.¹⁵ In addition, operators may increase rates to reflect the

¹⁰ See 47 C.F.R. § 76.922.

¹¹ See *Report and Order* 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 5631, 5731 (1992) ("*Rate Order*"); *Thirteenth Order on Reconsideration* in MM Docket No. 92-266 (Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation), 60 FR 52106, at para. 2. (Oct. 5, 1995) ("*Thirteenth Order on Reconsideration*")

¹² FCC Form 1200: Setting Maximum Initial Permitted Rates for Regulated Cable Services Pursuant to Rules Adopted February 22, 1994 (May 1994).

¹³ *Id.*

¹⁴ 47 C.F.R. § 76.922(d).

¹⁵ As of the effective date of the Form 1240 promulgated pursuant to the recently adopted *Thirteenth Order on Reconsideration*, operators may make rate adjustments as provided by FCC Form 1240 in lieu of Form 1210. *Thirteenth Order on Reconsideration*, 60 FR at 52109. Whereas an operator can file Form 1210 as often as once per calendar quarter to adjust rates to take account of costs already incurred by the operator, Form 1240 will be filed no more than annually but will permit the operator to adjust rates based on costs to be incurred within the coming year.

addition of new programming services to regulated tiers.¹⁶

7. Enforcement of the Commission rate regulations is divided between qualified local franchising authorities and the Commission. A local franchising authority may enforce regulation of the cable operator's BST once the Commission has received and approved the local franchising authority's certification that it has the legal and practical ability to do so.¹⁷ Upon receiving notification that the franchising authority has been certified by the Commission to regulate rates, a cable operator opting for benchmark regulation must justify its existing BST rates pursuant to the benchmark formula. Once regulated, the operator also must seek local approval for future BST rate increases. The operator seeks such approvals by filing the forms described above. The operator also must justify its rates for equipment and installations associated with the BST.¹⁸ The franchising authority must then review the forms, may request additional information if reasonably necessary to complete its review, and ultimately issue an order approving or disapproving the rates proposed by the operator.¹⁹

8. The participation by local franchising authorities in the regulation of cable service is critical. Generally, the Commission establishes federal standards and procedures concerning various aspects of cable service which local franchising authorities implement. These rules include but are not limited to subscriber rates,²⁰ cable service technical standards,²¹ and customer service.²² Local franchising authorities are the first line of

¹⁶ Our rules provide two methods for adjusting rates for the addition of programming services. First, an operator can add channels to CPSTs using our original "going-forward" rules, which allow the operator to charge subscribers the cost of the additional programming plus up to an additional 7.5% markup on that cost. 47 C.F.R. § 76.922(d) and (e). Second, an operator may add programming services under the Commission's more recently adopted going-forward option, which allows an operator to charge subscribers up to \$0.20 per channel for additional channels and up to a further \$0.30 in associated licensing fees. The latter going-forward rules similarly require specific decreases in subscriber rates when an operator deletes channels from its lineup, depending on when the channel in question was added. Sixth Order on Reconsideration, Fifth Report and Order, and Seventh 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), 10 FCC Rcd 1226 (1994).

¹⁷ *Id.* at §§ 623(3)-(4).

¹⁸ 47 C.F.R. § 76.923.

¹⁹ 47 C.F.R. §§ 76.930 and 76.933.

²⁰ 47 C.F.R. §§ 76.922 - 923.

²¹ 47 C.F.R. §§ 76.601-630.

enforcement of these numerous regulations. While the Commission may be on hand, either by statute or informally, to help resolve any disputes that may arise between a cable provider and a local franchising authority, the responsibility to oversee cable service regulations falls primarily on the franchise authorities. Generally, the Commission gives significant deference to decisions by local franchising authorities. For example, where a cable operator appeals a franchising authority's rate decision, the Commission will not conduct *de novo* review of the decision; rather, the Commission will defer to the local authority's decision provided there is a rational basis for the decision.²³ This process is just one example of the Commission's significant reliance upon local franchising authorities in the regulation of basic cable service. Moreover, in all but the most rare situations, local authorities administer cable service regulation without federal assistance.

9. An operator's CPST is subject to regulation directly by the Commission.²⁴ Commission enforcement of CPST rate regulation is triggered by the filing of a complaint by a subscriber or franchising authority or other relevant state or local regulatory authority.²⁵ Upon the filing of such a complaint, the operator must file the necessary forms with the Commission, which then follows a review process analogous to that used by local franchising authorities regulating BST rates.

10. The benchmark approach described above requires operators to establish a separate rate structure in each franchise area served, since many of the variables used to generate the maximum rate are franchise specific. For example, while the data on whether the system is part of an MSO will be identical throughout all of the franchise areas served, the census income and subscribership variables are measured on a franchise area basis and necessarily will vary among franchise areas. Similarly, costs associated with PEG channels and other franchise-related costs may vary among franchise areas. A disparity in rates among franchise areas will occur even if the operator provides service to multiple franchise areas through a single, integrated cable system, since even in that case rates are set separately for each franchise area on the basis of variables specific to the franchise area.

11. Relatedly, we note that the acquisition and clustering of neighboring cable systems by MSOs has become fairly common. An operator seeking to establish uniform rates and services for clustered systems likely will need to add channels to the programming lineups of certain systems and delete channels from the lineups of other systems. While the Commission's "going-forward" rate regulations typically provide operators with the flexibility to establish a uniform package of programming services, the

²² 47 C.F.R. § 76.309.

²³ *Rate Order*, 8 FCC Rcd at 5731.

²⁴ *Id.* at §§ 623(c)(1).

²⁵ *Id.* at §§ 623(c)(1)(B).

operator's efforts to equalize prices will be severely constrained because the rules quite specifically dictate permitted changes in rates that must accompany changes in level of service and do not permit regional averaging of the data used to complete rates.

III. DISCUSSION

12. We tentatively conclude that permitting operators serving multiple franchise areas to establish uniform services at uniform rates in all such areas would be beneficial for subscribers, franchising authorities, and operators. For example, facilitating an operator's ability to advertise a single rate for cable service over a broad geographic region may lower marketing costs and enhance the operator's efficiency in responding to competition from alternative service providers that typically may establish and market uniform services and rates without regard to franchise area boundaries. The increased ability of operators to compete resulting from this approach may increase penetration in a particular franchise area. Such an approach could reduce consumer confusion because a subscriber moving from one part of the operator's service area to another would not experience any difference in price or service offerings. We explore below two alternatives for permitting an operator to establish uniform rates for uniform services across multiple franchise areas, while fully protecting subscribers from unreasonable rates, and solicit comment on these and any other possible approaches. Before discussing these two methodologies, we will identify several issues that will arise regardless of which methodology we ultimately adopt.

13. Cable operators currently serve multiple franchise areas using a variety of system structures; some operators serve multiple areas with a single, integrated cable system while others use multiple, distinct systems. An operator's rates are not dependent on whether single or multiple systems are used to deliver service. We propose that under a uniform rate-setting option, a cable operator be allowed to establish uniform rates for uniform service offerings in multiple franchise areas regardless of whether the operator serves the multiple franchise areas with one integrated cable system (i.e., one "headend") or with multiple separate cable systems, and seek comment on this proposal.

14. We believe that cable operators primarily will seek to establish uniform rates for systems serving multiple franchise areas that are located within some measure of proximity to each other, perhaps for purposes of regional advertising. Moreover, it is likely that the service costs and characteristics, such as the number of channels, density of subscribers, and median income level, associated with various franchise areas typically will vary as the geographic distances increase between the multiple franchise areas. This circumstance can increase the complexity of uniform rate-setting across multiple franchise areas. We note that a cable operator's obligation under the "must-carry" rules to carry local over-the-air broadcast stations,²⁶ as well as the operator's copyright fee responsibilities,²⁷ are

²⁶ 47 C.F.R. § 76.56. Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i).

determined based on the Area of Dominant Influence ("ADI") in which the system is located. Accordingly, we seek comment on whether the ADI, or some other region,²⁸ would be appropriate for the setting of uniform rates. We seek comment on additional benefits of limiting uniform rate-setting to franchise areas located within the same ADI or similar region, as well as any difficulties resulting from this limitation. We further seek comment on the benefits or detriments of limiting uniform rates to franchise areas located within the same county or state. Finally, we seek comment on the costs and benefits of permitting cable operators to select the region in which to set uniform rates under a uniform rate-setting method.

15. Below we describe two possible approaches for permitting cable operators to establish uniform rates for uniform packages of services offered to multiple franchise areas. We invite comment from interested parties as to these approaches and we seek suggestions as to any other alternatives that would further the goals discussed above.

16. The first approach would work generally as follows. A cable operator first would determine or identify BST and CPST rates established in each local franchise area pursuant to our existing rate regulations, as adjusted to reflect permitted or required rate changes resulting from the addition or deletion of channels necessary to structure uniform tiers throughout the franchise areas served. We seek comment on whether an operator would similarly follow our existing regulations concerning rates for equipment. BST rates then would be equalized by reducing all BST rates charged in the relevant region to the lowest regulated BST rate charged in any one franchise area located in the region. The new uniform BST rate would now constitute the operator's maximum permitted rate for basic cable service in all the relevant franchise areas. The operator then would add the total amount of "lost" revenue resulting from the various BST rate reductions to the total CPST revenues to which the operator is otherwise entitled, under our existing rules, for all franchise areas in the relevant region. The operator then would determine a uniform CPST rate by dividing the total of the displaced BST revenues and existing CPST revenues by all CPST

of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

²⁷ See Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477 (amending the definition of the local service area relevant to a cable operator's copyright obligations to reflect the ADI in which the cable operator's system is located).

²⁸ We note that Arbitron, the company that establishes the boundaries for ADIs, has ceased updating its ADI market list. Commission staff is currently exploring the designation of a replacement measure.

subscribers in the region.²⁹ Thereafter, the operator would apply our going-forward policies and annual rate adjustment regulations on a regional basis.

17. In some instances, cable systems may be regulated in certain franchise areas within the region and unregulated in others. We propose that operators be free to establish uniform rates under the uniform rate-setting approach in unregulated as well as regulated franchise areas for purposes of uniformity. We believe that in such situations, an operator may elect to base uniform rates in part on data from unregulated areas only if such uniform rates also are charged in the unregulated areas. We believe that this optional approach further enhances operators' flexibility in establishing uniform rates. Moreover, uniform rates calculated pursuant to the method ultimately adopted in this proceeding, and charged in unregulated areas, should increase an operator's regulatory certainty with respect to whether the subscriber rates charged in the unregulated areas are reasonable under our rules should the operator later become subject to rate regulation in one of those areas.³⁰ We seek comment on this approach. We also seek comment on how an operator's regulated rates for equipment may affect the setting of uniform rates.

18. An operator's rates would remain subject to the dual jurisdictions of the affected local franchising authorities and the Commission. Upon the initial application of this approach, BST rates would be unchanged in at least one franchise area and would be reduced in each franchise area with higher rates. Thus, this proposal may benefit many subscribers who receive only basic cable service, and should be cost-neutral to the remaining basic-only subscribers in the franchise area(s) with the lowest current BST rates. Certified local franchising authorities would retain jurisdiction to ensure that the operator's BST rates are in compliance with our rules. The operator would recoup the costs of reduced BST rates through the averaged CPST rates over which the Commission would retain jurisdiction. We seek comment on this proposed approach, including comment on: (1) the costs and benefits of requiring operators to reduce BST rates to the lowest common rate under this option, (2) the impact of an operator's redistribution of BST rate reductions among CPST rates charged in neighboring franchise areas, and (3) the application of our going-forward policies and annual rate adjustment on a regional basis. We note that our rules allow franchising authorities to review and approve operators' proposed BST rates and increases to those rates. Under this option, however, pre-approval of uniform BST rates by franchising authorities generally will be unnecessary given that subscriber rates typically will decrease or remain unchanged. We seek comment on the benefits and costs of this approach for local franchising authorities, and whether this approach will protect subscribers from unreasonable rates.

²⁹ A numerical example of this option can be found in Appendix A.

³⁰ An operator later becoming subject to regulation would follow our existing procedures for establishing regulated rates, including determining an initial rate pursuant to our benchmark formula or cost-of-service rules, and seeking the approval of rates from the local franchising authority.

19. Under the second possible approach for establishing uniform rates for uniform services, a cable operator would determine or identify BST and CPST rates charged in each of the relevant franchise areas pursuant to our existing rate regulations, as adjusted for rate changes resulting from the addition or deletion of channels necessary to structure uniform service tiers. We seek comment on whether an operator similarly would follow our existing regulations concerning rates for equipment. After aggregating the BST rates and revenues for all the franchise areas in the region, and then the CPST rates and revenues for all franchise areas, the operator would determine a single "blended" rate for BSTs, and a single blended rate for CPSTs, to be charged in all franchise areas in the region pursuant to a formula designed by the Commission. The blended rates for BSTs and CPSTs would be determined by averaging the operator's total BST and CPST rates, respectively, on a per subscriber basis for all subscribers in the region, in order to ensure that the establishment of uniform rates is revenue-neutral to the cable operator.³¹ The operator would be required to justify its blended rates to each local franchising authority certified to regulate rates. The operator would be free, of course, to establish this rate in uncertified franchise areas, for purposes of uniformity across a wide region. As noted for the other proposed approach, we propose that an operator may elect to base uniform rates in part on data from unregulated areas only if such uniform rates also are charged in the unregulated areas, and believe that similar benefits for operators and subscribers will result from this requirement under both possible approaches. We seek comment on this tentative conclusion, as well as comment on other benefits and detriments of the cable operator basing the blended rate in part on data from such unregulated areas. We also seek comment on how an operator's establishment of uniform rates in uncertified areas may impact on the operator's ability to later implement required refunds or prospective rate reductions in certified areas.

20. After setting initial uniform rates, the operator would apply our going-forward policies and the recently adopted annual adjustment method on a regional basis to adjust future rates. Again, the dual jurisdictional boundaries of franchising authorities and the Commission would remain intact. We seek comment on this approach generally, including comment on: (1) any associated burdens for regulated cable companies and regulators, (2) whether this approach would protect cable subscribers from unreasonable rates in accordance with the 1992 Cable Act, (3) the proposed calculation of the blended rate, and (4) the application of our going-forward policies and annual adjustment method on a regional basis. We note that under this approach subscribers' BST rates may increase in certain jurisdictions (and decrease in others) as BST rates are adjusted to establish uniformity. We seek comment on the benefits and costs of adopting this formula given that certain BST subscribers may experience rate increases.

21. Both proposed uniform rate setting methodologies will result in increases in CPST rates for some subscribers. In light of the cost savings to cable operators likely to be created by implementation of uniform rates, we seek comment on whether it is

³¹ A numerical example of this option can be found in Appendix A.

appropriate to either limit the amount of increase a CPST subscriber must pay in a given year as a result of the institution of uniform rates or to phase-in significant increases over a two-year period. Comments should also address what administrative burdens such a limitation or phased-in increase would create for operators.

22. Several potential timing circumstances may affect the implementation of a uniform rate-setting approach. For example, where an operator has submitted justifications, the operator may be subject to multiple local tolling orders of varying durations which can complicate implementation of uniform BST rates.³² We seek suggestions of procedures that would permit a cable operator in this situation to establish uniform rates as expeditiously as possible. We solicit comment on allowing proposed uniform rates to take effect automatically after some period of time, subject to ultimate resolution in a later "truing-up" process, in which rate discrepancies could be reflected in rates for the following year.

23. In proposing to give cable operators flexibility to charge uniform rates for uniform services, we in no way seek to circumscribe the authority of local franchising authorities to negotiate franchise-specific terms in their agreements with cable operators. For example, we note that local franchising authorities typically establish requirements in a franchise agreement with respect to the designation or use of the franchised cable operator's channel capacity for PEG services.³³ This could result in a cable system having a non-uniform channel line-up within franchise areas where it seeks to establish uniform rates. We seek comment on whether our uniform rate proposals require any modification or adjustment to accommodate such non-uniform offerings.

24. A further problem may arise because PEG requirements and other franchise obligations will vary between franchise areas, such that the operator's "franchise related costs," one of the variables used to establish and adjust rates,³⁴ also will vary among franchise areas. We seek to provide cable operators with uniform rate alternatives while allowing franchising authorities flexibility to negotiate franchise terms and conditions that respond to particular community needs. We also seek to ensure that the uniform rate proposal does not allow franchise-specific costs to be shifted from one community to another. One alternative for resolving this issue would be to permit the cable operator simply to itemize and charge for franchise-related costs outside the uniform rate-setting formula. We seek comment on this approach. We also seek suggestions of other methods that could compensate operators for legitimately incurred expenses while protecting subscribers from unreasonable rates. Finally, we seek comment on additional potential obstacles to the

³² After the initial 30 day notice period that must precede any rate adjustment, franchising authorities can toll the effective date of a proposed rate for an additional 90 days in benchmark cases or 150 days in cost of service cases. 47 C.F.R. § 76.922(b)(1)-(2).

³³ Communications Act, § 611(a).

³⁴ 47 C.F.R. § 76.922(d)(3)(iv)(B)-(C).

establishment of uniform rates and service offerings, and possible resolutions to such obstacles.

IV. Initial Regulatory Flexibility Act Analysis

25. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis ("IRFA") of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *NPRM*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *NPRM*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

26. *Reason for Action.* The Commission has perceived that our cable service rate regulations may impede a cable operator's ability to establish uniform rates for uniform services offered in multiple clustered franchise areas. We believe that allowing operators to set such uniform rates may facilitate operators' regional marketing of services, reduce administrative burdens on both regulators and cable companies, and reduce consumer confusion resulting from disparate rates. The *NPRM* proposes two possible alternatives for setting uniform rates, and solicits comments on further approaches.

27. *Objectives.* To explore a method under which a cable operator could establish uniform rates for uniform services offered in multiple franchise areas.

28. *Legal Basis.* Action as proposed for this rulemaking is contained in Section 623 of the Communications Act of 1934, as amended, 47 U.S.C. § 543.

29. *Description, Potential Impact and Number of Small Entities Affected.* The proposals, if adopted, will not have a significant effect on a substantial number of small entities.

30. *Reporting, Recordkeeping and Other Compliance Requirements.* None.

31. *Federal Rules which Overlap, Duplicate or Conflict with these Rules.* None.

32. *Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives.* None.

V. PAPERWORK REDUCTION ACT

33. This *NPRM* contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this *NPRM*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *NPRM*; OMB comments are due 60 days from date of publication of this *NPRM* in the Federal Register. 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.

VI. PROCEDURAL PROVISIONS

34. *Ex parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

35. 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. Comments are due by January 12, 1996, and reply comments are due by February 12, 1996. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, 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.

36. In addition to filing comments with the Secretary, 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, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

37. For additional information concerning the information collections contained in this *NPRM* contact Dorothy Conway at 202-418-0217, or via the Internet at dconway@fcc.gov.

VII. ORDERING CLAUSES

38. IT IS ORDERED that, pursuant to Sections 623 of the Communications Act of 1934, as amended, 47 U.S.C. § 543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this *NPRM*, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

39. IT IS FURTHER ORDERED that the Secretary shall send a copy of this *NPRM*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A: Examples of Proposed Methods

<u>Current Rates</u> <u>Franchise C</u>	<u>Franchise A</u>	<u>Franchise B</u>	
BST	\$10	\$11	\$11
CPST	\$21	\$21	\$20
Total	\$31	\$32	\$31

* Each franchise area has 11,000 BST subscribers and 10,000 CPST subscribers.

First Proposed Method:

- Step 1: BST rates reduced to lowest in region: BST rates in franchise areas "B" and "C" reduced to \$10.
- Step 2: "Lost" BST revenue is totalled: \$1/subscriber in franchise areas "B" and "C" = $(\$1 \times 11,000) + (\$1 \times 11,000) = \$22,000$.
- Step 3: Current CPST revenue is totalled: $(\$21 \times 10,000) + (\$21 \times 10,000) + (\$20 \times 10,000) = \$620,000$.
- Step 4: Current CPST revenue is added to Lost BST revenue to create new CPST revenue requirement: $\$620,000 + \$22,000 = \$642,000$.
- Step 5: New CPST revenue requirement is divided evenly by all CPST subscribers in the region to calculate new uniform CPST rate: $\$642,000/30,000 = \21.40 .

<u>New Rates</u>	<u>Franchise A</u>	<u>Franchise B</u>	<u>Franchise C</u>
BST	\$10	\$10	\$10
CPST	\$21.40	\$21.40	\$21.40
Total	\$31.40	\$31.40	\$31.40

Franchise A: no change in BST rates; increase in CPST and overall rates.

Franchise B: decrease in BST rates; increase in CPST rates; decrease in overall rates.

Franchise C: decrease in BST rates; increase in CPST rates; increase in overall rates.

Second Proposed Method:

Step 1: Average current BST rates on a per BST subscriber basis to calculate average, uniform BST rate:

$$\$10(11,000) + \$11(11,000) + \$11(11,000) = \$10.67/\text{BST subscriber.}$$

Step 2: Average current CPST rates on a per CPST subscriber basis to calculate average, uniform CPST rate:

$$\$21(10,000) + \$21(10,000) + \$20(10,000) = \$20.67/\text{CPST subscriber.}$$

Total: \$31.34/subscriber.

<u>New Rates</u>	<u>Franchise A</u>	<u>Franchise B</u>	<u>Franchise C</u>
BST	\$10.67	\$10.67	\$10.67
CPST	\$20.67	\$20.67	\$20.67
Total	\$31.34	\$31.34	\$31.34

Franchise A: increase in BST rates; decrease in CPST; increase in overall rates.

Franchise B: decrease in BST rates; decrease in CPST rates; decrease in overall rates.

Franchise C: decrease in BST rates; increase in CPST rates; increase in overall rates.

The results under each proposed method will vary widely depending on the current rates and the numbers of subscribers in each franchise area. In addition, these examples do not account for the impact of channel changes that may be necessary to achieve uniform packages of services.

telecommunications equipment. The procedures allow interested industry parties to participate in setting industry-wide standards or generic requirements and require the organization and such parties to attempt to develop a dispute resolution process in the event of disputes on technical issues. 47 U.S.C. § 273(d)(4). Section 273(d)(5) requires the Commission to prescribe within 90 days of enactment a dispute resolution process to be used in the event all parties cannot agree to a dispute resolution process. 47 U.S.C. § 273(d)(5). Thus, the Commission's dispute resolution process is triggered only if the parties fail to agree to a process for resolving technical issues on their own. Section 273(d)(5) also requires the Commission to "establish penalties to be assessed for delays caused by referral of frivolous disputes to the dispute resolution process." Id.

2. The purpose of this proceeding is to establish dispute resolution procedures as provided for in section 273(d)(5). In section II(A) below, members of the public are requested to comment on the proposal set forth here and are also encouraged to submit alternative dispute resolution proposals that they believe would better implement this statutory section. Comment is also sought on methods for selecting an arbitrator or neutral and on the issue of whether the Commission should make its employees available for that purpose. In section II(B), we solicit proposals or recommendations concerning the types of penalties that should be assessed for referral of frivolous disputes.

II. PROPOSED REGULATIONS

A. Binding Arbitration Proposal

3. As explained above, section 273(d)(5) directs the Commission to prescribe a dispute resolution process to be used by non-accredited standards development organizations in situations where the parties involved cannot agree on the dispute resolution process to be used. 47 U.S.C. § 273(d)(5). Specifically, section 273(d)(5) provides:

funded by or performed on behalf of local exchange carriers for use in providing wireline telephone exchange service whose combined total of deployed access lines in the United States constitutes at least 30 percent of all access lines deployed by telecommunications carriers in the United States as of the date of the enactment of the Telecommunications Act of 1996.

47 U.S.C. § 273(d)(8)(C).

-- [w]ithin 90 days after the date of enactment of the Telecommunications Act of 1996, the Commission shall prescribe a dispute resolution process to be utilized in the event that a dispute resolution process is not agreed upon by all the parties when establishing and publishing any industry-wide standard or industry-wide generic requirement for telecommunications equipment or customer premises equipment, pursuant to paragraph (4) (A) (v). The Commission shall not establish itself as a party to the dispute resolution process. Such dispute resolution process shall permit any funding party to resolve a dispute with the entity conducting the activity that significantly affects such funding party's interests, in an open, nondiscriminatory, and unbiased fashion, within 30 days after the filing of such dispute. Such disputes may be filed within 15 days after the date the funding party receives a response to its comments from the entity conducting the activity. The Commission shall establish penalties to be assessed for delays caused by referral of frivolous disputes to the dispute resolution process.

47 U.S.C. § 273(d) (5). According to the Conference Report, the intended purpose of the Commission's dispute resolution process is to "enable all interested parties to influence the final resolution of the dispute without significantly impairing the efficiency, timeliness, and technical quality of the activity."⁴

4. We propose here to require binding arbitration as the dispute resolution process. Binding arbitration involves the submission of the dispute to a third party or arbiter who renders a decision after hearing arguments and reviewing evidence. The parties to the dispute are bound by this final decision. Because it is less formal and complex than a formal hearing (i.e., procedural and evidentiary rules may be relaxed), arbitration is often less costly and time consuming than other dispute resolution mechanisms. Given the short 30-day period for completing the dispute resolution process, we believe binding arbitration presents the most feasible dispute resolution approach. We also seek comment on whether additional procedures are necessary in the event that the dispute resolution process is not resolved within the allotted 30-day time period.

⁴ H.R. Conf. Rep. No. 230, 104th Cong., 2d Sess. 39 (1996).

5. Although binding arbitration appears to be the only dispute resolution method that could be accomplished within the short statutory period for completion of the dispute resolution process, we also seek comments on other approaches that might be used. For example, other methods of alternative dispute resolution include mediation, conciliation, neutral evaluation, settlement judges, mini-trial, or hybrids of these methods, such as "med-arb" (first, the neutral third party serves as a mediator and then as an arbitrator empowered to decide any issues not resolved through mediation). Although the Administrative Dispute Resolution Act, Pub. L. No. 101-552 (Nov. 15, 1990), contained a sunset date of October 1, 1995, we also invite parties to review its provisions in making recommendations to us.

6. In addition, we seek comment on what types of procedures are needed to govern the selection of an arbitrator or neutral fact-finder. For example, should the arbitrator or neutral be selected by agreement of the involved parties? If so, what procedures should apply in the event parties are unable to reach agreement on the arbitrator? We ask commenters to address these issues. Commenters may also wish to address whether Commission staff who have expertise in the area of dispute resolution should be available to serve as neutrals/arbitrators. We note, however, that any such proposal to use Commission staff could raise issues concerning the staff's delegated authority and the procedures for application for review to the full Commission in section 5(c)(4) of the Act, 47 U.S.C. § 155(c)(4).

B. Complaints of Frivolous Disputes

7. Section 273(d)(5) directs the Commission to establish penalties for delays caused by the referral of frivolous disputes to the dispute resolution process. We request commenters to assist us in defining what constitutes a "frivolous dispute." For example, section 1.52 of the Commission's rules requires that any document filed with the Commission be signed by the party or his counsel and that such signatures certify that the party or attorney has read the document, that "to the best of his knowledge, information and belief there is good ground to support it" and that "it is not interposed for delay." 47 CFR § 1.52.⁵ This appears to be a useful definition in this context as well. We expect that findings concerning possible frivolous disputes and recommendations for an appropriate penalty could be made in the first instance by the resolver of the dispute, e.g., the arbitrator. We encourage commenters to present specific

⁵ See generally, FCC Public Notice, "Commission Taking Tough Measures Against Frivolous Pleadings," FCC 96-42, released February 9, 1996.

proposals concerning procedures for the referral of complaints of frivolous disputes to the Commission.

8. In addition, we seek public comment on the penalties that should be assessed against delaying parties. Specifically, we ask commenters to address whether the Commission should rely solely on its forfeiture authority contained in section 503(b) of the Communications Act, or in the alternative or in addition, whether it should, or could, impose other penalties such as barring the party from further participation in the standards and requirements development processes or the imposition of costs on the complainant if its complaint is found to be frivolous. In addressing these issues, commenters should consider what procedural protections might be necessary to protect the party subject to such a complaint. Further, in addressing the potential use of forfeitures, commenters should consider the impact of section 503(b)(5), requiring that, for certain persons, there be a citation and subsequent misconduct before a forfeiture can be assessed. 47 U.S.C. § 503(b)(5).

III. CONCLUSION

9. As discussed above, we have proposed a dispute resolution process, binding arbitration, that may be used in the event that disputes arise over technical issues when setting standards pursuant to section 273(d)(5) of the Act. To assist us in our efforts, we invite public comment on this proposal and any other possible rules and procedures that would enable us to fulfill the congressional directive.

IV. PROCEDURAL MATTERS

10. Pursuant to the applicable procedures set forth in section 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415 and 1.419, interested parties may file comments on or before **(20 days from date of publication in the Federal Register)** and reply comments on or before **(30 days from date of publication in the Federal Register)**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must submit an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, (Room 239), of the Federal Communications Commission.

11. This Notice of Proposed Rulemaking is a non-restricted notice and comment proceeding. Ex parte presentations are

permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

12. As required by section 603 of the Regulatory Flexibility Act of 1980, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals in this document. The IRFA is set forth in the paragraph below. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. P.L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601, et seq. (1980).

13. **Initial Regulatory Flexibility Analysis**

Reason for Action: The Telecommunications Act of 1996 permits a Bell Operating Company, through a separate subsidiary, to engage in the manufacture of telecommunications equipment and customer premises equipment after the Commission authorizes the company to provide in-region interLATA services. As one of the safeguards for the manufacturing process, the Telecommunications Act of 1996 amended the Communications Act by creating a new section 273, which sets forth procedures for a "non-accredited standards development organization," such as Bell Communications Research, Inc., to set industry standards for manufacturing such equipment. The statutory procedures allow outside parties to participate in setting the organization's standards and require the organization and the parties to attempt to develop a process for resolving any technical disputes. Section 273(d)(5) requires the Commission "to prescribe a dispute resolution process" to be used in the event that all parties cannot agree to a mutually satisfactory dispute resolution process. 47 U.S.C. § 273(d)(5). This rulemaking proceeding was initiated to secure comment on our proposal to rely on binding arbitration as this dispute resolution process. The proposals advanced in this Notice are also designed to implement Congress' goal of establishing procedures "to enable all interested parties to influence the final resolution of the dispute without significantly impairing the efficiency, timeliness and technical quality of the activity." H.R. Conf. Rep. No. 230, 104th Cong., 2d Sess. 39 (1996).

Objectives: The Commission proposes a dispute resolution process that requires parties to rely on binding arbitration which appears to be the most feasible option given the 30 day period for completing the dispute resolution process. It also

seeks to adopt rules that conform to specific statutory parameters. Section 273(d)(5) directs that the Commission "shall not establish itself as a party to the dispute resolution process," that the process shall permit resolution "in an open, non-discriminatory and unbiased fashion within 30 days after the filing of such dispute" and that the Commission will "establish penalties to be assessed for delays caused by referral of frivolous disputes to the dispute resolution process." 47 U.S.C. § 273(d)(5).

Legal Basis: The proposed action is authorized under the Communications Act, sections 4(i), 4(j), 273(d)(5), 303(r) and 403 of the Communications Act, 47 U.S.C. §§ 154(i) and (j), 273(d)(5), 303(r), and 403.

Reporting, Recordkeeping, and Other Compliance Requirements: The dispute resolution requirement contained in this Notice, if adopted, will require parties to use binding arbitration in the event that all parties cannot agree to a dispute resolution process. No reporting or recordkeeping requirements are proposed in this Notice.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: This Notice solicits comments on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

IRFA Comments: We request written comments on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines set forth in this Notice.

14. Authority to conduct this inquiry is given in sections 4(i), 4(j), 273(d)(5), 303(r) and 403 of the Communications Act, 47 U.S.C. §§ 154(i) and (j), 273(d)(5), 303(r) and 403.

15. Further information on this proceeding may be obtained by contacting Sharon B. Kelley, Office of the General Counsel, 202/418-1720.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary