

pleadings submitted in this proceeding that non-cable exclusive contracts of the type involved here are either harmful to the development of competition, "unfair" or "deceptive," or have negative effects on consumers. The record does not demonstrate that such contracts will hinder the development of DBS as an effective competitor to cable; that USSB's contracts with Viacom and Time Warner have impeded the entry either of DirectTV or NRTC into the DBS marketplace; or that the contracts generally have harmed the entry of DBS service into the multichannel video programming marketplace. Indeed, the evidence presented suggests that a DBS distributor's exclusive contract for programming covering one orbital location may foster DBS as a significant competitor to cable. Such contracts may allow a distributor to distinguish its service from that of another, avoid duplication of programming, and eventually lead to more diversity in programming for the consumer. To the extent such contracts allow a greater number of DBS distributors to establish distinctive competing services, we believe they further congressional policy to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming."¹⁶ In contrast to cable exclusivity in areas unserved by cable, which would foreclose services from non-cable multichannel video programming distributors, consumers will be able to receive all DBS programming from one DBS provider or another by being able to select specific programming services without having to purchase entire programming packages. We agree with Opponents that prohibiting a DBS distributor's exclusive contract for programming covering one orbital location may in fact create unnecessary inefficiencies because the same programming could then occupy multiple transponders on the same satellite and decrease the diverse mix of programming available. Without prejudging any future complaints, we currently believe that the record before us provides no basis to conclude that the market power abuses, about which Congress was concerned, are present in the exclusive contracts at issue here.

14. Our reaffirmation of our interpretation of section 628(c)(2)(C) does not foreclose all remedies to an MVPD who claims to be aggrieved by an exclusive contract between a non-cable MVPD and a vertically integrated

satellite cable programming vendor. In the *First R&O*, we previously determined that while section 628(b) does not specify types of "unfair" practices that are prohibited, it "is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."¹⁷ The Commission did not sanction exclusive contracts between non-cable MVPDs and vertically integrated cable programming vendors, thus leaving open the possibility that such contracts could be challenged on the basis that they involve non-price discrimination or "unfair practices." Section 628(b) of the 1992 Cable Act and the Commission's implementing rule, § 76.1001, provide a broad prohibition against "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."¹⁸ Also in the *First R&O*, the Commission stated that section 628(b) does not prescribe specific practices (in contrast to section 628(c)), but does require a showing of anti-competitive harm, i.e., that the purpose or effect of the complained of conduct is to "hinder significantly or to prevent an MVPD from providing programming to subscribers or customers."¹⁹ The Commission has stated that the objectives of the "unfair practices" provision are to provide a mechanism for addressing conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming fields, that inhibits the development of multichannel video programming distribution competition.²⁰ Therefore, where future contracts cause a restriction in the availability of programming to alternative distributors and their subscribers, an aggrieved MVPD could seek redress by filing an "unfair practices" complaint under § 76.1001 of the Commission's rules.

15. Finally, we believe that using § 76.1001 as an avenue to address non-cable exclusive contracts, such as those at issue here, will afford the Commission the opportunity to consider

all the ramifications of such contracts, including the effect on competition, based upon the particular facts of each case. This case-by-case review will avoid amending a Commission rule to create an overly broad per se prohibition appears to be contrary to Congress' intent.

16. For the reasons discussed above, we reaffirm our interpretation of section 628(c)(2)(C) as reflected in our implementing rule. We believe that this is the most reasonable interpretation based on the fact that Congress specifically directed the Commission to prohibit exclusive contracts between cable operators and vertically integrated programming vendors in unserved areas, but did not specifically address the inclusion of exclusive contracts between non-cable MVPDs and vertically integrated programming vendors within section 628(c)(2)(C)'s prohibition. We believe that any complaints regarding exclusive agreements are more appropriately addressed through other provisions of the statute. Thus, the Commission denies NRTC's request.

IV. Ordering Clause

17. Accordingly, it is ordered, that the Petition for Reconsideration of the National Rural Telecommunications Cooperative is denied.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 651

[Docket No. 950109008-5008-01; I.D. 122894A]

Northeast Multispecies Fishery; Amendment to an Emergency Interim Rule

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Emergency interim rule; amendment.

SUMMARY: NMFS issues this emergency interim rule to amend an existing emergency interim rule concerning the Northeast Multispecies Fishery. This

¹⁷Id. at 3374.

¹⁸47 U.S.C. 548(b); 47 CFR 76.1001.

¹⁹First R&O, 8 FCC Rcd at 3377.

²⁰Id. at 3373.

¹⁶First R&O, 8 FCC Rcd at 3369 (citing 1992 Cable Act section (2)(b)(2)).

rule specifies among other things, that allowable bycatch species have been added to the exempted fisheries as defined in the existing emergency interim rule, that a bycatch fishery for longhorn sculpin will be allowed in the Northern Shrimp Exemption Area, and that transiting through closed areas established by the existing emergency interim rule will be allowed for vessels seeking safe haven.

EFFECTIVE DATE: January 10, 1995, through March 12, 1995.

FOR FURTHER INFORMATION CONTACT: Susan A. Murphy, NMFS, Fishery Policy Analyst, 508-281-9252 or Bridgette S. Davidson, NMFS, Fishery Management Specialist, 508-281-9347.

SUPPLEMENTARY INFORMATION: The New England Fishery Management Council (Council) submitted Amendment 5 to the Northeast Multispecies Fishery Management Plan on September 27, 1993. Amendment 5, with some exceptions, was approved on January 3, 1994. The final rule for Amendment 5 was published, and effective for the most part, on March 1, 1994 (59 FR 9872). On December 12, 1994, an emergency interim rule was published (59 FR 63926), and became effective. This action makes several modifications or clarifications to the December 12 emergency interim rule.

Section 651.20(a)(8) and (9) are revised to clarify that transit is allowed through the Stellwagen Bank/Jeffreys Ledge (SB/JL) juvenile protection area, if nets that are not of proper configuration for trawling in this area are properly stowed. Net stowage requirements at § 651.20(c)(7) are revised to incorporate the SB/JL juvenile protection area transit provision.

Provisions at § 651.21(d)(1)(ii) and (d)(3)(ii) are modified to include, in Closed Area I and the Nantucket Lightship Closed Area, entry of vessels seeking safe haven from storm conditions. These sections are modified due to safety concerns.

Section 651.21(d)(2)(ii) is revised to include a reference to § 651.21(d)(1)(iii), which will define the stowage provision for scallop dredge gear. This definition of a stowed scallop dredge is added due to the inability of scallop dredge gear to be stowed in compliance with the net stowage requirements specified under § 651.21(c)(7).

Sections 651.20(a)(7)(i) and (iii) are revised to clarify that in the Northern Shrimp Exemption Area, a vessel fishing for northern shrimp may direct its fishing effort on northern shrimp only and may not possess or retain any other species with the exception of an allowable bycatch of longhorn sculpin.

Sections 651.20(c)(6)(ii) and (d)(5)(ii) are revised to specify additional bycatch species allowed to be retained in the exempted fisheries as defined by the December 12 emergency interim rule. The bycatch species allowed under this amendment meet the same criteria as those bycatch species allowed under the December 12 emergency interim rule. These species were not raised as potential bycatch species in time to be considered for the December 12 emergency interim rule. Specifically, these species are caught incidentally to the exempted fisheries as defined by the December 12 emergency interim rule. It is unlikely that there would be an incentive to direct on these bycatch species, or if a vessel did direct on them, it is unlikely that they would catch regulated multispecies. This addition preserves the original intent of the requirement without overly burdening the industry or creating unnecessary discards.

This action also adds scientific names for the other allowable bycatch to help in species identification.

All exempted small-mesh fisheries and species which are caught incidentally to them, are subject to any applicable fishery management plans and their implementing regulations contained within Title 50, CFR.

Classification

This emergency interim rule amends an existing emergency interim rule, for the remainder of its short duration, for safety considerations and to clarify an exemption to the existing emergency interim rule. Given the limited time of these rules' applicability and that these modifications serve to refine and broaden an existing exemption, prior notice and opportunity for public comment would be impracticable and unnecessary. As such, good cause exists to waive these requirements pursuant to authority at 5 U.S.C. section 553(b)(B). Further, because this emergency interim rule relieves a regulatory restriction and amends an existing rule for safety concerns there is good cause under 5 U.S.C. sections 553(d)(1) and (3) to waive the 30-day delay in effective date.

This action has been determined to be "not significant" for the purposes of E.O. 12866.

List of Subjects in 50 CFR Part 651

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: January 10, 1995.

Charles Karnella,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 651 is amended as follows:

PART 651—NORTHEAST MULTISPECIES FISHERY

1. The authority citation for part 651 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 651.9, paragraph (e)(36), which was temporarily added at 59 FR 63929, December 12, 1994, effective December 12, 1994, through March 12, 1995, is temporarily revised, effective January 10, 1995, through March 12, 1995, to read as follows. On March 12, 1995, § 651.9(e)(36) will expire.

§ 651.9 Prohibitions.

* * * * *

(e) * * *

(36) Fish with or possess within the areas described in

§ 651.20(a)(1) nets of mesh smaller than the minimum size specified in § 651.20(a)(6), unless the vessel is exempted under § 651.20(a)(7), (a)(9), (e) or (f), or unless the vessel qualifies for the exception specified in paragraph (e)(1)(ii) of this section.

* * * * *

3. In § 651.20, paragraphs (a)(7)(i), (a)(7)(iii), (a)(8) introductory text, (a)(9), (c)(6)(ii), (c)(7) introductory text, and (d)(5)(ii), which were temporarily added at 59 FR 63929, December 12, 1994, effective December 12, 1994, through March 12, 1995, are temporarily revised, effective January 10, 1995, through March 12, 1995, to read as follows. On March 12, 1995, § 651.20(a)(7)(i), (a)(7)(iii), (a)(8) introductory text, (a)(9), (c)(6)(ii), (c)(7) introductory text and (d)(5) will expire.

§ 651.20 Regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(a) * * *

(7) * * *

(i) *Possession limit.* A vessel fishing under this exemption may not fish for, possess on board or land any species of fish other than shrimp. However, vessels may retain longhorn sculpin (*Myoxocephalus octodecimspinosus*) as an allowable bycatch species in the Northern Shrimp Exemption Area as described in this section.

* * * * *

(iii) A vessel may only fish for or harvest northern shrimp, with the exception that a vessel may retain longhorn sculpin as an allowable bycatch species, during the northern

shrimp season, as established by the Atlantic States Marine Fisheries Commission (ASMFC). The northern shrimp season is December 1 through May 30, or as modified by the ASMFC.

(8) *Stellwagen Bank/Jeffreys Ledge (SB/JL) juvenile protection area.* Except as provided in paragraphs (a)(7), (a)(9), (e) and (f) of this section, the minimum mesh size for any trawl net or Scottish seine in use, or available for use as described under paragraph (c)(7) of this section, by a vessel fishing in the following area shall be 6 inches (15.24 cm) square mesh in the last 50 bars of the codend and extension piece for vessels 45 ft (13.7 m) and less, and in the last 100 bars of the codend and extension piece for vessels greater than 45 ft (13.7 m).

* * * * *

(9) *Transitting.* (i) Vessels subject to the mesh requirements specified in paragraph (a)(6) of this section may transit through the Northern Shrimp Exemption Area defined in paragraph (a)(7) of this section with nets on board with mesh smaller than the minimum size specified in paragraph (a)(6) of this section, provided that the nets are stowed in accordance with the provisions of paragraph (c)(7) of this section, and provided the vessel has no fish on board; and

(ii) Vessels subject to the mesh requirements specified in paragraph (a)(6) of this section may transit through the SB/JL juvenile protection area defined in paragraph (a)(8) of this section with nets on board that do not conform to the requirements specified in paragraphs (a)(6) or (a)(8) of this section, provided that the nets are stowed in accordance with the provisions of paragraph (c)(7) of this section.

* * * * *

(c) * * *
(6) * * *

(ii) *Possession and net stowage requirements.* Vessels may possess regulated species while in possession of nets with mesh less than the minimum size specified in paragraph (c)(5) of this section, provided that the nets are stowed and are not available for immediate use in accordance with paragraph (c)(7) of this section, and provided that regulated species were not harvested by nets of mesh size smaller than the minimum mesh size specified in paragraph (c)(5) of this section. Vessels may only fish for, or retain, butterfish, dogfish, herring, mackerel, ocean pout, scup, shrimp, *Loligo* squid, *Illex* squid, summer flounder, whiting and/or weakfish, while fishing with nets of mesh smaller than the minimum size

specified in paragraph (c)(5) of this section. Vessels fishing for these species under the exemption provided herein may also possess and retain the following species as incidental take to these exempted fisheries: Conger eels (*Conger oceanicus*); searobins (species in the family Triglidae); black sea bass (*Centropristis striata*); red hake; tautog (blackfish) (*Tautoga onitis*); blowfish (puffer) (species in the family Tetraodontidae); cunner (*Tautogolabrus adspersus*); John Dory (*Zenopsis conchifera*); mullet (species in the family Mugilidae); bluefish (*Pomatomus saltatrix*); tilefish (*Lopholatilus chamaeleonticeps*); longhorn sculpin (*Myoxocephalus octodecimspinosus*); fourspot flounder (*Paralichthys oblongus*); alewife (*Alosa pseudoharengus*); hickory shad (*Alosa mediocris*); American shad (*Alosa sapidissima*); blueback herring (*Alosa aestivalis*); sea ravens (*Hemirhamphus americanus*); Atlantic croaker (*Micropogonias undulatus*); spot (*Leiostomus xanthurus*); and swordfish (*Xiphias gladius*).

(7) *Net stowage requirements.* Any person on a fishing vessel or any fishing vessel subject to the net stowage or transitting requirements of this section may not have available for immediate use any net not meeting the regulated mesh requirements as specified in paragraphs (a)(7), (a)(8), (c)(5), and (d)(4) of this section and, as applicable, in the areas and for the times specified in § 651.32(c). A net that conforms to one of the following specifications and that can be shown not to have been in recent use is considered to be not "available for immediate use:"

* * * * *

(d) * * *
(5) * * *

(ii) *Possession and net stowage requirements.* Vessels may possess regulated species while in possession of nets with mesh less than the minimum size specified in paragraph (d)(4) of this section, provided that the nets are stowed and are not available for immediate use in accordance with paragraph (c)(7) of this section, and provided that regulated species were not harvested by nets of mesh size smaller than the minimum mesh size specified in paragraph (d)(4) of this section. Vessels may only fish for, or retain, butterfish, dogfish, herring, mackerel, ocean pout, scup, shrimp, *Loligo* squid, *Illex* squid, summer flounder, whiting weakfish, and/or scallops while fishing with nets of mesh smaller than the minimum size specified in paragraph (d)(4) of this section. Vessels fishing for these species under the exemption

provided herein may also possess and retain the following species as incidental take to these exempted fisheries: Conger eels (*Conger oceanicus*); searobins (species in the family Triglidae); black sea bass (*Centropristis striata*); red hake; tautog (blackfish) (*Tautoga onitis*); blowfish (puffer) (species in the family Tetraodontidae); cunner (*Tautogolabrus adspersus*); John Dory (*Zenopsis conchifera*); mullet (species in the family Mugilidae); bluefish (*Pomatomus saltatrix*); tilefish (*Lopholatilus chamaeleonticeps*); longhorn sculpin (*Myoxocephalus octodecimspinosus*); fourspot flounder (*Paralichthys oblongus*); alewife (*Alosa pseudoharengus*); hickory shad (*Alosa mediocris*); American shad (*Alosa sapidissima*); blueback herring (*Alosa aestivalis*); sea ravens (*Hemirhamphus americanus*); Atlantic croaker (*Micropogonias undulatus*); spot (*Leiostomus xanthurus*); swordfish (*Xiphias gladius*); and skate (species in the family Rajidae).

* * * * *

4. In § 651.21, paragraphs (d)(1)(ii) and (d)(2)(ii)(B), which were temporarily added at 59 FR 63932, December 12, 1994, effective December 12, 1994, through March 12, 1995, are temporarily revised, and paragraphs (d)(1)(iii) and (d)(3)(ii)(C) are temporarily added, effective January 10, 1995, through March 12, 1995, to read as follows. On March 12, 1995, § 651.21(d)(1)(ii), (d)(1)(iii), (d)(2)(ii)(B) and (d)(3)(ii)(C) will expire.

§ 651.21 Closed areas.

* * * * *

(d) * * *
(1) * * *

(ii) Paragraph (d)(1)(i) of this section does not apply to persons on fishing vessels or fishing vessels:

(A) Fishing with or using pot gear designed and used to take lobsters, and which have no other gear on board capable of catching multispecies finfish;

(B) Seeking safe haven from storm conditions. Such fishing vessels may transit through the closed area providing that:

(1) Gale, storm, or hurricane conditions are posted for the area by the National Weather Service;

(2) Such vessels do not fish in the area;

(3) Fishing net gear is stowed in accordance with

§ 651.20(c)(7) and scallop dredge gear is stowed in accordance with paragraph (d)(1)(iii) of this section; and

(4) The vessel provides notice to a patrolling U.S. Coast Guard aircraft or

vessel in the vicinity of Georges Bank by high frequency radio (2.182 kHz) of its intention of transiting the closed area, the time and position when the vessel enters the area and the time and position when the vessel exits the closed area.

(iii) Scallop dredge vessels transiting the closed areas as specified under paragraphs (d)(1), (2), and (3) of this section may not have fishing gear

available for immediate use and must detach the towing wire from the scallop dredge, reel the wire up onto the winch, and secure and cover the dredge so that it is rendered unusable for fishing.

(2) * * *

(ii) * * *

(B) Seeking safe haven from storm conditions in waters adjacent to the western edge of the closed area. Such fishing vessels may transit through the

closed area in accordance with paragraph (d)(1)(ii)(B) of this section.

(3) * * *

(ii) * * *

(C) Seeking safe haven from storm conditions. Such fishing vessels may transit through the closed area in accordance with paragraph (d)(1)(ii)(B) of this section.

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