

for (i), (ii), (iii), and (iv) each place they appear.

3. In § 68.306, paragraph (a)(5) is amended by removing the designations for (i), (ii), and (iii) each place they appear.

Federal Communications Commission.

William F. Caton,

*Acting Secretary.*

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#### 47 CFR Part 76

[MM Docket Nos. 92-266, 93-215, FCC 95-343]

#### Rates for Cable Programming Service Tiers; External Costs

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This Twelfth Order on Reconsideration ("The Order") amends the Commission's rules to eliminate the requirement that cable operators, when adding home shopping channels to cable programming service tiers, offset the per channel mark up with revenues received as sales commissions from such home shopping channels.

**EFFECTIVE DATE:** February 23, 1996.

**FOR FURTHER INFORMATION CONTACT:** Paul Glenchur, Cable Services Bureau, (202) 416-1150.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Twelfth Order on Reconsideration in MM Docket Nos. 92-266 and 93-215, FCC 95-343, adopted August 7, 1995 and released August 8, 1995. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M St. NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Service (ITS) at 2100 M St. NW., Washington, DC 20037, (202) 857-3800.

#### I. Introduction

1. In the Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Going Forward Order"), 59 FR 62614 (December 6, 1994), the Commission adopted rules providing incentives for cable operators to add new channels to their cable programming service tiers. Those rules allow operators a per channel mark up of up to 20 cents. With respect to home shopping channels, however, operators are required to offset this mark up with sales commission revenues received

from such channels. Several programming entities, including Home Shopping Network, Inc. ("HSN") and QVC, Inc. ("QVC"), filed petitions for reconsideration of the sales commission offset requirement. In this Twelfth Order on Reconsideration, the Commission grants these petitions for reconsideration and eliminates the home shopping offset requirement.

#### II. Elimination of Offsets

##### A. Background

2. Generally, an operator will pay a licensing fee to a programmer for the right to carry that programmer's service. This licensing fee, or program cost, is part of the overall cost that a programmer can recover as an "external cost" when rates are adjusted to account for the addition of a program service to an operator's channel lineup. In an effort to ensure that an operator's program cost reflects the actual cost of carrying a program service, the Commission, in the Report and Order and Further Notice of Proposed Rulemaking, 58 FR 29736 (May 21, 1993), required that revenues received from a programmer, or shared by a programmer with an operator, be netted against programming costs when calculating net programming costs that can be recovered through regulated rates.

3. In the Going Forward Order, the Commission established new rules governing the amount by which an operator can mark up its rates in addition to license fees to account for the addition of new channels to its CPST. These rules establish a mark up per channel of up to 20 cents subject to an overall cap of \$1.20 for the first two years. Moreover, in that Order, the Commission applied the revenue offsetting requirement to the per channel mark up for channels added to Cable Programming Service Tiers ("CPSTs"). Specifically, the Going Forward Order provided that revenues received from programmers must be deducted from programming costs and, to the extent revenues remain, from the operator's mark up. Offsetting applies on a channel-by-channel basis. In addition, the Going Forward Order reaffirmed that commissions received by an operator from programmers will be treated as revenues received from programmers. Thus, commissions received by operators must first be netted against programming costs. Remaining commission revenues must be deducted from the per channel adjustment.

##### B. Petitions for Reconsideration

4. A number of parties filed petitions for reconsideration in response to the Going Forward Order. Home shopping entities such as QVC, Inc. and Home Shopping Network, Inc. contend that requiring operators to offset the operator's mark up with sales commissions discriminates against home shopping services. They argue that other programming networks offer advertising availabilities to operators and the value represented by such advertising availabilities is not offset against programming costs or the channel adjustment. In their view, this establishes a regulatory disincentive to add home shopping while encouraging the addition of traditional programming. Moreover, QVC contends that mark ups for channels added to the CPST reflect "network costs" which, unlike programming costs, are not as susceptible to manipulation or artificial inflation. Consequently, QVC argues, a primary purpose for restricting external cost recovery to net operator cost is absent in the case of network cost recovery embodied in the operator's mark up. HSN and Jones Infomercial Network further contend that the regulatory complexity and burdens associated with the accounting and offset of commission revenues discourage operators from adding home shopping channels. Furthermore, Petitioner Black Entertainment Television ("BET") argues that the elimination of the offset for sales commission revenues could benefit subscribers by allowing sales commission revenues to cover some of its channel's operating costs. In turn, BET asserts, operators would be less inclined to raise subscriber rates for the service. BET also contends that the offset rule discourages operators from carrying niche programming that may contain both a traditional programming component and a shopping service.

5. Several parties, in response to petitions for reconsideration, have urged the Commission to retain the offset requirement for home shopping revenues. The Arts and Entertainment Network favors retention of the offset requirement. It argues that direct cash payments to operators in the form of commissions encourage operators to base programming choices on financial incentives offered by home shopping services rather than on the quality of a channel's programming. Lifetime TV argues that the offset requirement is needed to enable non-shopping networks to compete for limited channel space on cable systems. According to Lifetime, traditional program networks

cannot match the economic incentives of home shopping channels if carriage of such channels allows recovery of both a channel adjustment mark up and unrestricted revenue from sales commissions. With respect to advertising availabilities, a number of respondents challenge the petitioners' view that the absence of an offset for advertising availabilities discriminates against home shopping channels. Respondents argue that local advertising availabilities differ from commissions because they do not involve direct cash compensation and require operators to incur costs to produce advertisements and to acquire equipment necessary to air them. In addition, ESPN claims that home shopping channels are not disadvantaged in comparison to traditional programmers because home shopping channels can also provide advertising availabilities to local operators. Finally, the City of St. Joseph and Benton Charter Township (West Michigan Communities), in a petition for reconsideration, urge application of the revenue offset as a tier-based adjustment rather than an adjustment on a channel-by-channel basis. In response to the West Michigan Communities Petition, QVC and Time Warner argue that governing statutes do not require tier-based offsets and that Commission rules properly apply the offsets on a channel-by-channel basis.

### C. Discussion

6. Based on the petitions for reconsideration and other comments in the record, we have determined that requiring operators to offset the mark up with home shopping sales commissions creates a disincentive for operators to carry home shopping services. Accordingly, in this Order, we eliminate this requirement.

7. We agree with petitioners that requiring operators to offset the per channel mark up with home shopping sales commissions creates a disincentive for operators to add home shopping services. As we explained in the Going Forward Order, the twenty-cent per channel operator mark up falls within the historical range of rate increases imposed by operators who add new channels and adjust their rates accordingly in competitive environments. The allowance of this mark up is independent of the type of programming or the program licensing fee associated with adding the channel. Requiring operators to offset this mark up with revenues derived from sales commissions effectively eliminates the mark up in any case where commission revenues exceed program costs to the operator (usually zero in the case of

home shopping channels) and the otherwise allowable mark up. Although we presume that cash payments to the operator in the form of commissions represent significant value to the operator, the partial or complete elimination of the mark up for adding a home shopping channel is a disincentive for an operator to add such a service. At the same time, we recognize that other programming networks may offer local advertising availabilities to operators for carriage of their services without putting the mark up at risk. By reducing or eliminating the operator mark up when home shopping channels raise sales commission revenue for operators, the offset requirement effectively penalizes the operator, and home shopping channels indirectly, by taking away the mark up simply because many customers in the operator's territory purchase products from the home shopping service. Consequently, the offset requirement has the effect of disfavoring carriage of home shopping services while favoring the carriage of traditional programming services that can provide incentives to operators in the form of advertising availabilities not subject to the revenue offset rule.

8. As indicated above, some commenters argue that the Commission does not have to treat offsets against sales commission revenues and advertising availabilities in the same way to promote neutral incentives to add channels. For example, it has been argued that availabilities are different because operators may incur production and equipment costs when utilizing the availabilities. Although advertising availabilities may entail some production costs, as suggested by ESPN and Lifetime Television, we believe that operators, as a general matter, limit their utilization of availabilities to instances where the net gain from such use exceeds the associated costs. Therefore, we do not think commissions are so different from availabilities to warrant granting different offset treatment. Finally, we are unpersuaded by suggestions that, because home shopping services theoretically could offer advertising availabilities, exempting the value of advertising availabilities from the offset requirement does not provide a comparative advantage to traditional networks. Generally, home shopping channels, unlike traditional program networks, are not developed or designed to attract commercial advertisers to air advertising time as is traditionally the case with other programmers. Consequently, advertising availabilities

do not appear to be a viable alternative for home shopping channels. Exempting the revenue offset requirement for advertising availabilities creates an inherent disparity between home shopping services and channels that have been developed with the objective of becoming attractive advertising vehicles.

9. The offset requirement for home shopping sales commissions also creates administrative and practical difficulties. Although the channel adjustment factor remains available to the operator if revenues from an added shopping service fail to match the 20-cent markup, the operator is still obligated to incur accounting costs and burdens, and some degree of regulatory scrutiny, to ensure compliance with the revenue offset rule. This burden may be sufficient to discourage an operator from adding to the CPST an innovative shopping service or a hybrid channel containing both additional programming and shopping services. As a regulatory matter, the revenues derived from sales commissions can vary with each reporting period which renders difficult the incorporation of these fluctuations into the ratemaking process. Indeed, the Commission has not applied the offset requirement to advertising availabilities in part because of similar administrative burdens. Recently, the Court of Appeals upheld as reasonable the Commission's decision to forgo an offset requirement for advertising revenues.

10. We recognize respondents' concerns that allowing operators the ability to recover the 20-cent mark up regardless of the success of an added shopping service enhances the economic attractiveness of adding such channels. We reaffirm our belief, however, that Commission regulations should not influence the operator's decision for or against such services by making standard cost recovery available for carriage of one type of program service but not another. The decision to add a shopping service or a traditional programming service should be left to the operator's business judgment. Similarly, we will not discourage "traditional" services from adding a shopping component or providing advertising availabilities, with concomitant revenue incentives for operators, to their program offerings. By eliminating the revenue offset requirement as it applies to the operator's mark up, we neutralize availability of the mark up as a factor in the operator's decision to determine what kinds of program services should be added to the CPST.

11. This Order does not affect our requirement that revenue from shopping

commissions must be applied as an offset against program costs. We remain concerned that a programmer's definition of program cost can be manipulated to raise such costs artificially. Accordingly, we limit the scope of this Order to the revenue offset requirement for home shopping sales commissions as it applies to the per channel mark up only.

III. Regulatory Flexibility Act Analysis

12. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-12, the Commission's final analysis with respect to the Twelfth Order on Reconsideration is as follows:

13. *Need for and purpose of this action.* The Commission, in compliance with section 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. 543 (1992), pertaining to rate regulation, adopts revised rules intended to ensure that cable services are offered at reasonable rates with minimum regulatory and administrative burdens on cable entities.

14. *Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis.* Comments were filed in response to the Initial Regulatory Flexibility Analysis. HSN and Jones Informercial Network explain that operators face significantly less complexity when deciding to carry traditional advertiser-supported channels rather than home shopping services. They argue that advertising availabilities represent value to operators and that such value, unlike shopping commission revenue, need not be offset against the channel adjustment mark up, rendering less burdensome the addition of non-shopping channels.

15. *Significant alternatives considered and rejected.* In the course of this proceeding, home shopping channels and other programming entities submitted requests to delete shopping commission revenue from the offset rule. This was the only proposal advanced by petitioners and the only alternative to current rules considered in connection with this specific action. In this Order, the Commission is providing relief to certain programmers seeking the elimination of regulatory burdens associated with the carriage of their channels.

IV. Paperwork Reduction Act

16. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and have been found to impose new or modified information collection requirements on the public. Implementation of any new or modified

requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. Ordering Clauses

17. Accordingly, *it is ordered* that, pursuant to sections 4(i), 4(j), 303(r), 612 and 623 of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 154(j), 303(r), 532, 542(c) and 543, the rules, requirements and policies discussed in this Order are adopted and part 76 of the Commission's rules, 47 CFR part 76, is amended as set forth below.

18. *It is further ordered* that the petitions for reconsideration filed by QVC, Inc. and Home Shopping Network, Inc. are granted consistent with this Order. The Petition for Reconsideration filed by the West Michigan Communities is denied.

19. *It is further ordered* that the regulations established in this Order shall become effective February 23, 1996.

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

Amendatory Text

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

**PART 76—CABLE TELEVISION SERVICE**

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

Authority: 47 U.S.C. 543(c).

2. Section 76.922 is amended by revising paragraph (e)(3)(ii) to read as follows:

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

\* \* \* \* \*

(e) \* \* \*

(3) \* \* \*

(ii) *Per Channel Adjustment.*

Operators may increase rates by a per channel adjustment of up to 20 cents per subscriber per month, exclusive of programming costs, for each channel added to a CPST between May 15, 1994, and December 31, 1997, except that an operator may take the per channel adjustment only for channel additions that result in an increase in the highest number of channels offered on all CPSTs as compared to May 14, 1994, and each date thereafter. Any revenues received from a programmer, or shared by a programmer and an operator in connection with the addition of a channel to a CPST shall first be deducted from programming costs for that channel pursuant to paragraph

(d)(3)(x) of this section and then, to the extent revenues received from the programmer are greater than the programming costs, shall be deducted from the per channel adjustment. This deduction will apply on a channel by channel basis. With respect to the per channel adjustment only, this deduction shall not apply to revenues received by an operator from a programmer as commissions on sales of products or services offered through home shopping services.

\* \* \* \* \*

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 11, 12, and 52**

[FAC 90-32 Correction]

**Federal Acquisition Regulation; Corrections**

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Corrections.

**SUMMARY:** The Federal Acquisition Regulatory Council is issuing corrections to Federal Acquisition Circular 90-32, FAR Case 94-790, Acquisition of Commercial Items, published at 60 FR 48206, September 18, 1995.

**DATES:** Effective Date: October 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite correction to FAC 90-32.

Corrections

**PART 11—DESCRIBING AGENCY NEEDS**

1. On page 48238, in the center column, following the table of contents, the authority citation for Part 11 should read as follows:

Authority: 40 U.S.C. 486 (c); 10 U.S.C. Chapter 137; 42 U.S.C. 2473 (c).

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

**12.303 [Corrected]**

2. In 12.303 on page 48244, in the third column, in paragraphs (b)(2)