TABLE A–5 OF SUBPART A—SUPPLIER CATEGORY LIST FOR § 98.2(a)(4)—Continued

(C) Exporters of CO_2 with annual bulk exports of N_2O, fluorinated GHG, and CO_2 that in combination are equivalent to 25,000 metric tons CO_2e or more.
Additional Supplier Categories Applicable [1] in 2011 and Future Years (Reserved)

[1] Suppliers are defined in each applicable subpart.

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BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 07–51; FCC 10–35]

Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

AGENCY: Federal Communications Commission.

ACTION: Final rule; policy statement.

SUMMARY: This document is the Commission's Second Report and Order concerning video services in multiple dwelling units ("MDUs"), which are apartment and condominium buildings and centrally managed residential real estate developments. The Second Report and Order resolves some issues the Commission left undecided in its First Report and Order, concerning two practices called "bulk billing" and "marketing exclusivity." The Second Report and Order concludes that bulk billing and marketing exclusivity, at present, create more benefits than harms for MDU residents. The Commission therefore allows both practices to continue.

DATES: Effective April 15, 2010.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, please contact John W. Berresford, (202) 418–1886, or Holly Saurer, (202) 418–7283, both of the Policy Division, Media Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Second Report and Order in MB Docket No. 07–51, FCC 10–35, adopted March 1, 2010, and released March 2, 2010. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (The document will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Summary of the Second Report and Order

1. The Second Report and Order is an outgrowth of the Commission's first Report and Order in the same proceeding, which was released on October 31, 2007. Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007), affirmed, National Cable & Telecommun. Ass'n v. FCC, 567 F.3d 659 (DC Cir. 2009). The first Report and Order prohibited certain multichannel video programming distributors ("MVPDs," specifically cable operators and common carriers) from engaging in so-called "building exclusivity" with MDUs—arrangements whereby only one such MVPD was allowed to provide MVPD service in an MDU. The first Report and Order ended with a Further Notice of Proposed Rulemaking that raised issues about the similar practices of bulk billing and marketing exclusivity. The Second Report and Order resolves those issues.[1]

I. Background

2. Much of the history of this proceeding, definitions of key terms, factual descriptions of MDUs and their residents, and descriptions of pertinent statutes (especially 47 U.S.C. 548(b)) are set forth in the **Federal Register** description of the first Report and Order, 73 FR 1080–01 (Jan. 7, 2008). Bulk billing is an arrangement in which one MVPD provides video service to every resident of an MDU, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Marketing exclusivity is a practice by which an MDU owner grants one MVPD certain specific marketing advantages on an exclusive basis (such as the exclusive right to have its brand on the MDU's Web page and to market its services in common areas). The issues resolved in the Second Report and Order were whether to allow any kind of MVPD to engage in bulk billing or marketing exclusivity.

3. In response to the Further Notice of Proposed Rulemaking, the Commission received filings from major cable operators, their trade association, and incumbent common carriers (also called local exchange carriers or "LECs"), the two major Direct Broadcast Satellite ("DBS") providers (DIRECTV and DISH Network), nine private cable operators ("PCOs"), PCOs' national trade association, their financiers, operators of new wire- or fiber-based systems that do not use public rights of way, approximately 20 real estate interests (MDU developers, builders, owners, and managers and their trade associations and consultants), several individual homeowners' associations and educational institutions that subscribe to PCOs' services, municipal governments, the National Governors Association, and hundreds of individual consumers.

II. Discussion

A. Bulk Billing Arrangements

1. Use of Bulk Billing Arrangements

4. In a typical bulk billing arrangement, the MDU building subscribes to the MVPD provider's service, agreeing to pay the MVPD a monthly fee. The MVPD provider then connects its service to every unit in the MDU. The MVPD typically bills its fee every month to the MDU building, which factors each unit's pro rata charge into the unit's rent, condominium fee,

[1] The Second Report and Order does not resolve another issue raised in the Further Notice of Proposed Rulemaking, which is whether the First Report and Order's ban of building exclusivity should be expanded to apply to MVPDs other than cable operators and common carriers, specifically DBS service providers and so-called "private cable operators." That issue will be resolved in a future decision.

or homeowners' association dues. The MDU building owner must pay the monthly fee to the MVPD provider.

5. Bulk billing arrangements vary in duration and grounds for termination. They may or may not be coupled with some form of explicit exclusivity, where allowed under our rules.[2] They usually provide each MDU with the chosen MVPD's Basic or Expanded Basic video service, and sometimes also with voice, Internet access, and/or alarm service. In most bulk billing arrangements, the MDU's residents receive a significant discount from the bulk billing MVPD's standard retail rate. Residents may also purchase additional services, such as premium channels, directly from the MVPD provider at the regular retail rate. The record indicates that bulk billing arrangements occur in a significant number of MDUs, but not in most.

6. It appears that one of the factors that makes bulk billing at discounted rates practical for the bulk billing MVPD is that it authorizes uninterrupted service to every residential unit in the MDU building or suburban development. The MVPD provider is spared the significant expenses of selling to each resident, making credit checks and collecting deposits, managing bad debt and theft of service, and frequently sending personnel and vehicles to the building to place and remove boxes and turn service on and off in different units.

7. A bulk billing agreement does not prevent MDU residents from obtaining services from another MVPD, assuming that another has wired or will wire the MDU, if necessary. Some residents may also place satellite dishes on their premises, depending on the physical configuration of their units.[3] Any such residents, however, must pay for both the bulk billing MVPD and the services of the other MVPD.

8. As already noted, bulk billing does not physically or legally prevent a second MVPD from providing service to an MDU resident and does not prevent such an MVPD from wiring an MDU for its service, subject to the permission of the MDU owner. The arrangement may deter a second MVPD in some cases, however, because it limits the entrant's patronage to residents in the MDU who are willing to pay for the services of two MVPDs or who simply insist on receiving the services of the second MVPD for the characteristics of that service (e.g., high-speed broadband for a home business).

2. Benefits and Harms of Bulk Billing Arrangements

9. The chief benefits that bulk billing brings to MDU residents in most cases are lower prices, packages of programming tailored to the particular interests and needs of the MDU's residents, and avoidance of the inconvenience of establishing or disconnecting MVPD service. The chief harms that bulk billing causes to MDU residents are that it may discourage a second MVPD from entering an MDU and, even if it does not, MDU residents who want service from the second MVPD must pay for two MVPD services. After weighing these considerations carefully and examining current marketplace conditions, we conclude that the benefits of bulk billing are greater than its harms in the majority of cases. Accordingly, we will not prohibit bulk billing at this time.

10. *Benefits of Bulk Billing Arrangements.* PCOs and some new cable operators claim that bulk billing is essential to their health or survival, that bulk billing is necessary if they are to secure financing, continue to grow, and deploy broadband in MDUs. PCOs in particular state that, if their existing bulk billing arrangements were invalidated, they would be automatically in default of many loan agreements, endangering their existing businesses and making future financing for expansion very difficult. They fear that without bulk billing many of them will go out of business and the few survivors will find it difficult to expand. This harm to them, they emphasize, will harm consumers, because consumers will lose the benefits of competition, choice, and innovation (including broadband deployment) that bulk billing MVPDs can bring to MDU residents.

11. MVPDs, real estate interests, and some consumers also claim that bulk billing is satisfactory to most MDU residents and is even a major attraction to some MDU residents. They point out that bulk billing enables lower income tenants to avoid cable rate increases (if it provides for steady prices for several years); these tenants also avoid high deposits and the limitations imposed by their own imperfect credit histories. In these ways, bulk billing can make MVPD services available to some MDU residents who otherwise would not be able to afford them. Real estate interests and some others defend bulk billing, as they do building and marketing exclusivity, as a "bargaining chip" that they can give to a favored MVPD in exchange for the MVPD's paying to wire their buildings.

12. Bulk billing's supporters claim that it is often awarded to the "best" MVPD in the area and is sometimes coupled with enforceable standards ensuring that the bulk billing MVPD establishes prices for its services below its ordinary retail rates (and below those charged by new entrants), keeps those prices steady in contrast to major MVPDs' periodically raising rates, provides high quality service, tailors its set of channels and programs to fit the MDU residents' particular interests, and continually improves its offerings with new technology. Discounts of 30% from the bulk billing MVPD's retail rates are common, and can be as high as 75%. Century of Boca Raton Umbrella Association, for example, describes a community where bulk billed MDU residents pay $28 monthly for basic cable and the neighboring incumbent cable operator charges $48, or 70% more, for its basic service; and Camden Property Trust states that each of its bulk billed MDU residents, in addition to enjoying a significant discount from the retail rates charged by competing MVPDs, also saves up to $200 on deposits and service establishment fees. Bulk billers' low prices for video services enable them to charge low prices for the "triple play" (a combined offering of voice service, video service, and Internet access). The low prices are made possible, MVPDs and real estate interests say, by the savings in their costs that bulk billing makes possible. They argue that prices for the vast majority of MDU residents subject to bulk billing will rise if bulk billing ends.

13. In addition to lower-than-retail rates, supporters of bulk billing state that it often makes possible specialized services for MDU residents. The Independent Multifamily Communications Council lists security channels, closed circuit monitoring, community channels (that have educated residents about, among other matters, the recent conversion of broadcast television to digital-only transmission), WiFi, and free broadband access in MDUs' common areas; the National Association of Home Builders mentions free cable service provided to club houses, recreation areas, and meeting rooms in MDUs; and Verizon mentions "concierge service with a dedicated customer service representative from the video service provider."

14. Commenters defending bulk billing also state that, by sparing individual MDU residents the decision about their MVPD service provider, they avoid placing an unwanted burden on

[2] Any such building exclusivity, if executed by a cable operator or common carrier, is prohibited by the First Report and Order.

[3] The Commission's Over-the-Air Reception Devices rules, 47 CFR 1.4000, permit MDU residents to place DBS receiving antennas on their premises under some circumstances.

the residents who are satisfied with the bulk billing MVPD. These residents are spared costs and inconveniences they would incur—the time to decide among competing MVPDs, the cost of deposits, the taking of a vacation day to let the installer in, and charges for installation and the establishment and disconnection of service. These savings are particularly important to lower income households and persons who are transient and value freedom from the inconvenience of establishing and terminating service repeatedly.

15. Supporters of bulk billing also emphasize that, unlike building exclusivity, bulk billing does not prevent a second or third MVPD from entering and wiring an MDU building or an MDU resident from subscribing to that MVPD's service. One bulk billing cable operator estimates that DBS has a 30% market share in its MDU, approximately DBS's national average. They also claim that residents of MDU buildings that have bulk billing chose to live there and should not be heard to complain and seek to deprive the majority of residents who are satisfied with it.

16. Defenders of bulk billing emphasize how competitive the residential real estate market is. They characterize MVPD service as just another amenity of an MDU building that the owner can provide, such as a swimming pool, a fitness center, or valet services; with those amenities, some benefit from them, some do not, but all pay for them whether the assessment is itemized or not.

17. *Harms of Bulk Billing Arrangements.* Opponents of bulk billing claim that bulk billing arrangements reduce a second MVPD's incentive to wire a building for its services (including broadband) and frustrate the ability of residents of an MDU to receive the service of the second MVPD they want (by forcing such residents to pay for two MVPDs' services). They argue that bulk billing saddles MDU residents with a *de facto* exclusive provider with no incentive to offer or maintain pricing and programming at market levels. Some MDU residents subject to bulk billing arrangements object strongly to being forced to pay twice if they want to obtain service from an MVPD other than the bulk billing one. The need to pay twice in order to receive the preferred service falls especially heavily on persons with limited incomes.

18. Individual commenters have brought to our attention instances—suburban real estate developments of owned homes, not rentals—in which they allege that bulk billing arrangements have been entered into not by MDU residents or their elected representatives (*e.g.,* homeowners associations or "HOAs"), but by builders and developers of the developments. These commenters claim that developers make bulk billing arrangements with MVPDs in which they have financial interests or from which they receive a stream of revenue. There are allegations that some of these "sweetheart" arrangements last long periods, up to 75 years in one case; that the arrangements were entered into before any association of actual homeowners came into existence and cannot be nullified by the actual homeowners; and that the bulk billing MVPD is held to no performance standards, installs inferior facilities, charges high prices, and fails to innovate by deploying the triple play. One City government in Florida (Weston) states that most of their residents are subject to some of these practices.

3. Conclusion

19. The Commission concludes that the benefits of bulk billing outweigh its harms. A key consideration is that bulk billing, unlike building exclusivity, does not hinder significantly the entry into an MDU by a second MVPD and does not prevent consumers from choosing the new entrant. Indeed, many commenters indicate that second MVPD providers wire MDUs for video service even in the presence of bulk billing arrangements and that many consumers choose to subscribe to those second video services. Especially significant is that that Verizon, which more than any other commenter in the earlier proceedings argued that building exclusivity clauses deterred competition and other pro-consumer effects, makes no claim in its filings herein that bulk billing hinders significantly or, as a practical matter, prevents it from introducing its service into MDUs. Bulk billing, accordingly, does not have nearly the harmful entry-barring or -hindering effect on consumers that exists in the case of building exclusivity.

20. The incidents of consumers being subjected either to prices that they believed were not discounted or to inferior service under certain bulk billing deals are troublesome. Based on a review of the record, however, they appear to be few, isolated, and atypical of bulk billing as a whole. And even in some of these cases, a second video provider is present in the MDU and large numbers of residents subscribe to its video service. Also, nearly all of these cases involve owner premises such as condominiums or suburban developments rather than rental properties. A significant number of states have statutes that, if certain requirements are satisfied, may provide some relief to such homeowners by allowing them, once they have taken control of an HOA from the developer, to void contracts that the developer has entered into. Two of these states are Florida and Virginia, in which reside most of the MDU residents who have filed comments in this proceeding objecting to bulk billing. We note that legal action is not the only possible relief for MDU residents subject to bulk billed service that they find unsatisfactory. Most of the consumers' complaints in this proceeding came from a particular MDU where the video service provider being complained of was effectively replaced by another cable operator.

21. Finally, it would be a disservice to the public interest if, in order to benefit a few residents, the Commission prohibited bulk billing, because so doing would result in higher MVPD service charges for the vast majority of MDU residents who are content with such arrangements. Based on the evidence in the record before us, we choose not to take action that would raise prices for most MDU residents who are subject to bulk billing. Accordingly, we will allow bulk billing by all MVPDs to continue because, under current marketplace conditions, it is clear that it has significant pro-consumer effects.[4] The Commission may re-examine the issue if marketplace conditions change.

B. Exclusive Marketing Arrangements

1. Use of Exclusive Marketing Arrangements

22. We define an exclusive marketing arrangement as an arrangement between an MDU owner and an MVPD, in a written agreement or in practice, that gives the MVPD, usually in exchange for some consideration, the exclusive right to certain means of marketing its service to residents in the MDU. Typically, this includes advertising in the MDU's common areas, placement of the MVPD's brand on the MDU building's web page, placement of the MVPD's brochures in "welcome packs" for new

[4] We also decline to create a system in which we would adjudicate specific bulk billing arrangements. As the Commission stated in the first Report and Order about such proposals for MDU exclusivity clauses, such adjudications—each potentially involving individual measurements of prices, quality and quantity of channels, competition, the MDU's characteristics, and other matters—are essentially local issues that would be difficult to deal with on a Commission level.

residents, sponsoring events on the premises of the MDU, and slipping brochures under residents' doors.

23. The comments indicate that marketing exclusivity arrangements occur in a significant number of MDUs, but not in most of them. It appears that all types of MVPDs use marketing exclusivity; one industry association states that such arrangements are more common in real estate developments than multi-tenant structures. The typical marketing exclusivity arrangement lasts for a few years. Some MVPDs and real estate interests make widespread use of marketing exclusivity. No MVPD, however, claims that marketing exclusivity is necessary for its entry into an MDU or its financial survival, or that any MVPD has failed to enter an MDU or gone out of business because another MVPD had a marketing exclusivity arrangement.

2. Benefits and Harms of Exclusive Marketing Arrangements

24. The record clearly shows that marketing exclusivity arrangements have some modest beneficial effects for consumers and no significantly harmful ones. The balance of these considerations favors allowing the continued use of marketing exclusivity arrangements.

25. *Benefits of Exclusive Marketing Arrangements.* Proponents of marketing exclusivity arrangements state that the arrangements provide readily accessible information to MDU residents about an MVPD provider and allow their residents to make more informed decisions. In exchange for receiving marketing exclusivity, an MVPD provider may afford the MDU and its residents lower rates and other benefits. The added revenue stream that can result from marketing exclusivity may also help the MDU owner or MVPD provider obtain financing to fund the expensive wiring of an MDU building. Marketing exclusivity does not explicitly or in practical effect bar, or significantly hinder, other MVPD providers from wiring an MDU or prevent any residents from choosing another MVPD if they do not want service from the provider that has the exclusive marketing arrangement. Real estate interests, in defense of marketing exclusivity arrangements, make the same "bargaining chip" point they made in favor of building exclusivity and bulk billing, namely that marketing exclusivity is something they can give to an MVPD in exchange for which the MVPD may pay a greater share of the wiring costs or may agree to provide better service, thus benefiting MDU residents.

26. Finally, one PCO that concentrates on smaller markets in which it is a new entrant, states that exclusive marketing arrangements are an especially valuable means of advertising for small new entrants who cannot afford high-priced mass media advertising that large incumbent cable operators and LECs regularly use. In the same vein, Verizon states that such one-building-at-a-time arrangements help a new entrant to overcome the greater name recognition of the entrenched incumbent cable operator.

27. *Harms of Exclusive Marketing Arrangements.* Lafayette Utilities System, Marco Island Cable, and the City of Reedsburg, Wisconsin, claim that marketing exclusivity arrangements make it difficult or costly for competitors other than the one with marketing exclusivity to communicate with MDU residents and hurt MDU residents by making it more difficult for them to find out about the other competitors. None of these commenters cites any instance where marketing exclusivity has, in practical effect, excluded or hindered a competitor from entering an MDU. Residents may still subscribe to the other MVPDs' services, and MVPDs are still able to reach residents through many other channels such as television, mail, newspapers, billboards, and sponsorship of public events.

3. Conclusion

28. The record does not support prohibiting or regulating exclusive marketing arrangements in order to protect competition or consumers. Although marketing exclusivity confers an advantage on the MVPD in whose favor the arrangement runs, it appears to be a slight one and there is no indication that it prevents or significantly hinders other MVPDs from providing video services in MDUs with such arrangements. Neither does marketing exclusivity prevent or significantly hinder other MVPDs from reaching MDU residents via television, radio, and other media; deter MDU residents from subscribing to other MVPDs' services; slow the evolution of competing wireless technologies; raise prices to consumers; or, by unfair methods, acts, or practices, have the purpose or effect of hindering significantly or preventing other MVPDs from providing programming to consumers, especially programming ordinarily found on broadcast and cable video systems.

29. On the other hand, marketing exclusivity appears to have the efficiencies listed above, the benefits of which appear to flow through to MDU residents. The balance of consumer harms and benefits for marketing exclusivity is thus significantly pro-consumer. Accordingly, we find that the record does not support a prohibition or any limitation on marketing exclusivity arrangements in MDUs.

C. Petition of Shenandoah Telecommunications Company

30. An affiliate of Shenandoah Telecommunications Company ("Shentel") is a common carrier in some areas and, in other areas, is a PCO (through an affiliate named Shentel Converged). Shentel petitioned for clarification or reconsideration of the first Report and Order, seeking a ruling that that decision's prohibition of MDU building exclusivity clauses does not apply to the PCO operations of Shentel Converged. The Commission denies the petition on the grounds that the express language of Section 628(j) of the Communications Act, 47 U.S.C. 548(j), requires that the prohibition apply to all common carriers and their affiliates that provide video service, including the PCO operations of Shentel Converged.

31. Shentel also asked the Commission to forbear, under Section 10 of the Act, 47 U.S.C. 160, from applying the prohibition of MDU building exclusivity to Shentel Converged. The Commission declines that forbearance on the grounds that Shentel has not satisfied the requirements for forbearance set forth in Section 10. Shentel may submit another, fully supported, request for forbearance in the future.

D. Miscellaneous

32. The Second Report and Order also denies other requests that amounted to unsupported petitions for reconsideration of the first Report and Order and to petitions to address extraneous matters.

III. Procedural Matters

A. Paperwork Reduction Act Analysis

33. The Second Report and Order does not contain new or modified information collection requirements subject to the paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burdens for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

B. Regulatory Flexibility Act

34. Because the Second Report and Order neither promulgates nor adopts

any new or revised rules or regulations that affect small businesses, it is not necessary to write a Final Regulatory Flexibility Analysis for it.

C. Congressional Review Act

35. The Commission will not send a copy of this Second Report and Order pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A), because the Second Report and Order adopts no rules of any kind.

D. Additional Information

36. For additional information on this proceeding, please contact John W. Berresford, (202) 418–1886, or Holly Saurer, (202) 418–7283, both of the Policy Division, Media Bureau.

IV. Ordering Clauses

37. Accordingly, *it is ordered* that, pursuant to the authority contained in Sections 1, 2 (a), 4(i) 157 nt., 201(b), 303(r),307–10, 335(a), 601(4, 6), and 628(b, c) of the Communications Act of 1934, as amended; 47 U.S.C. 151, 152(a), 154(i), 157 nt., 201(b), 303(r), 307–10, 335(a), 521(4, 6), and 548(b, c), this Second Report and Order *is adopted.*

38. *It is further ordered* that, pursuant to the authority contained in Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. 160, the Petition for Clarification, or, in the Alternative, Reconsideration filed by Shenandoah Telecommunications Company concerning 47 CFR 76.2000 *is denied without prejudice* to its submission of a petition for forbearance pursuant to 47 U.S.C. 160.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–5718 Filed 3–15–10; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 080521698–9067–02]

RIN 0648–XU84

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Removal of Gear Restriction for the U.S./Canada Management Area

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

ACTION: Temporary rule; removal of gear restrictions.

SUMMARY: This action removes temporary gear restrictions in both the Eastern and Western U.S./Canada Areas for limited access Northeast (NE) multispecies vessels fishing on a NE multispecies Category A day-at-sea (DAS) for the remainder of the 2009 fishing year (FY) (i.e., through April 30, 2010). This action is authorized by the regulations implementing Amendment 13 to the NE Multispecies Fishery Management Plan (FMP) to optimize the harvest of transboundary stocks of Georges Bank (GB) yellowtail flounder, haddock, and cod under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Removal of the temporary gear restriction in the Western U.S./Canada Area is effective March 11, 2010, through April 30, 2010.

Removal of the temporary gear restriction in the Eastern U.S./Canada Area is effective April 13, 2010, through April 30, 2010.

FOR FURTHER INFORMATION CONTACT: Douglas Potts, Fishery Policy Analyst, (978) 281–6341, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: Regulations governing fishing activity in the U.S./Canada Management Area are found at § 648.85. These regulations authorize vessels issued a valid limited access NE multispecies permit and fishing under a NE multispecies DAS to fish in the Eastern U.S./Canada Area under specific conditions. The Eastern U.S./Canada Area GB cod TAC for FY 2009 was specified at 527 mt, and the TAC for the entire U.S./Canada Management Area for GB yellowtail flounder was specified at 1,617 mt, by the 2009 interim final rule (72 FR 25709). The regulations at § 648.85(a)(3)(iv) authorize the Administrator, Northeast Region, NMFS (Regional Administrator) to modify gear requirements, modify or close access to the area, modify trip limits, or modify the total number of trips into the U.S./Canada Management Area, to prevent over-harvesting or to facilitate achieving the U.S./Canada Management Area TACs.

Pursuant to § 648.85(a)(3)(iv)(E), once the available TAC for GB yellowtail flounder is projected to be caught, the Regional Administrator is required to close the Eastern U.S./Canada Area to all NE multispecies DAS vessels and prohibit retention of yellowtail flounder in the Western U.S./Canada Area for the remainder of the fishing year.

Based upon Vessel Monitoring System (VMS) reports and other available information, the catch of GB yellowtail flounder was at 81 percent of the FY 2009 TAC as of March 5, 2010, and was projected to not be fully harvested by April 30, 2010, potentially resulting in the under-harvest of the available TAC for GB yellowtail flounder during FY 2009. Based on this information, the Regional Administrator is removing the current temporary prohibition on the use of trawl gear, other than the haddock separator trawl and the Ruhle trawl, as specified at § 648.85(a)(3)(ix) and § 648.85 (b)(10)(iv)(J)(*3*), respectively, by any limited access NE multispecies vessel fishing in the Western U.S./Canada Area south of 41° 40′ N. lat. Therefore, effective March 11, 2010, through April 30, 2010, unless modified by a subsequent action, a NE multispecies vessel fishing under a Category A DAS may fish with any legal trawl gear throughout the Western U.S./Canada Area.

In addition, as of March 5, 2010, the catch of Eastern GB cod was 72 percent of the FY 2009 TAC and was projected to not be fully harvested by April 30, 2010. Projected catch rates indicate that lifting the current prohibition on the use of flounder trawl gear in the Eastern U.S./Canada Area on April 13, 2010, will allow vessels to harvest the Eastern GB cod TAC without exceeding it. Based on this information, the Regional Administrator is removing the temporary prohibition on the use of flounder trawl gear in the Eastern U.S./Canada Area effective April 13, 2010. Therefore, effective April 13, 2010, through April 30, 2010, unless modified by a subsequent action, a NE multispecies vessel fishing with trawl gear under a Category A DAS in the Eastern U.S./Canada Area may fish with any one of the gears specified for this area at § 648.85(a)(3)(ix), i.e., a flounder trawl, haddock separator trawl, or a Ruhle trawl.

Classification

This action is authorized by 50 CFR part 648 and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), there is good cause to waive prior notice and opportunity for public comment, as well as the delayed effectiveness for this action, because notice, comment, and a delayed effectiveness would be impracticable and contrary to the public interest. The regulations under § 648.85(a)(3)(iv) grant the Regional Administrator the authority to modify gear requirements to prevent over-harvesting or under-harvesting the TAC allocation. Because of the time necessary to provide for prior notice and opportunity for public comment, NMFS would be prevented from taking immediate action to remove