

intervals no greater than every 20 minutes while the VMES is transmitting. The VMES operator will make this data available upon request to a coordinator, fixed-satellite system operator, NTIA, or the Commission within 24 hours of the request.

(ii) VMES operators shall control all VMESs by a Hub earth station located in the United States.

(11) Operations of VMESs in the 14.0–14.2 GHz (Earth-to-space) frequency band within 125 km of the NASA TDRSS facilities on Guam (latitude 13°36'55" N, longitude 144°51'22" E) or White Sands, New Mexico (latitude 32°20'59" N, longitude 106°36'31" W and latitude 32°32'40" N, longitude 106°36'48" W) are subject to coordination with NASA. When NASA seeks to provide similar protection to future TDRSS sites that have been coordinated through the National Telecommunications and Information Administration (NTIA) Interdepartment Radio Advisory Committee (IRAC) Frequency Assignment Subcommittee process, NTIA will notify the Commission that the site is nearing operational status. Upon public notice from the Commission, all Ku-band VMES operators must cease operations in the 14.0–14.2 GHz band within 125 km of the new TDRSS site until they have coordinated with the new site. After coordination, VMES operations will then again be permitted to operate in the 14.0–14.2 GHz band within 125 km of the new TDRSS site, subject to any operational constraints developed in the coordination process.

(12) Operations of VMESs in the 14.47–14.5 GHz (Earth-to-space) frequency band within: 45 km of the radio observatory on St. Croix, Virgin Islands (latitude 17°46' N, longitude 64°35' W); 125 km of the radio observatory on Mauna Kea, Hawaii (latitude 19°48' N, longitude 155°28' W); 90 km of the Arecibo Observatory on Puerto Rico (latitude 18°20'46" N, longitude 66°45'11" W); and 160 km of the radio observatories listed in US203 as observing in the 14.47–14.5 GHz band are subject to coordination with the National Science Foundation (NSF).

(13) In the 10.95–11.2 GHz (space-to-Earth) and 11.45–11.7 GHz (space-to-Earth) frequency bands a VMES shall not claim protection from interference from any authorized terrestrial stations to which frequencies are either already assigned, or may be assigned in the future.

(14) VMES antennas licensed for reception of radio transmissions from space stations in the fixed-satellite service in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth)

and 11.7–12.2 GHz (space-to-Earth) bands for which they have equal status with respect to other fixed-satellite service applications are protected from harmful interference caused by other space stations only to the degree to which an earth station employing an antenna conforming to the referenced patterns defined in § 25.209(a) and (b) of the rules is protected from radio interference.

(b) Applications for VMES operation in the 14.0–14.5 GHz (Earth-to-space) to geostationary satellites in the fixed-satellite service must include, in addition to the particulars of operation identified on Form 312 and associated Schedule B, the following data for each earth station antenna type:

(1)(i) A series of EIRP density charts or tables at the maximum EIRP density listed in Schedule B, calculated for a production earth station antenna, based on measurements taken on a calibrated antenna range at 14.25 GHz, with the off-axis EIRP envelope set forth in paragraphs (a)(1) through (a)(4) of this section, as follows:

(A) Showing off-axis co-polarized EIRP spectral density in the azimuth plane, at off-axis angles from minus 10° to plus 10° and from minus 180° to plus 180°.

(B) Showing off-axis co-polarized EIRP spectral density in the elevation plane, at off-axis angles from 0° to plus 30°.

(C) Showing off-axis cross-polarized EIRP spectral density in the azimuth plane, at off-axis angles from minus 10° to plus 10°.

(D) Showing off-axis cross-polarized EIRP spectral density in the elevation plane, at off-axis angles from minus 10° to plus 10°; or

(ii) A certification, in Schedule B, that the VMES antenna conforms to the gain pattern criteria of § 25.209(a) and (b), that, combined with the maximum input power density calculated from the EIRP density less the antenna gain, which is entered in Schedule B, demonstrates that the off-axis EIRP spectral density envelope set forth in paragraphs (a)(1) through (a)(4) of this section will be met.

(2) The Multiple Access technique being employed and the value of N.

(3) A certification from the antenna manufacturer countersigned by the applicant that the antenna complies with the requirements in paragraphs (a)(6) and (a)(7) of this section.

(4) The contact information pursuant to paragraph (a)(8) of this section.

(5) The mitigation plan pursuant to paragraph (a)(9) of this section.

(6) Indication of whether the VMES will operate in the regions indicated in

paragraph (a)(11) or (a)(12) of this section.

(7) For the hub station, as required pursuant to paragraph (a)(10)(ii) of this section, the call sign for a previously authorized earth station, the call sign of a pending earth station application, or the technical information in Schedule B, pursuant to § 25.115, if the earth station is to be licensed concurrently with the VMES terminals. The call sign of hub station is to be listed in the remote control section of the Form 312 Schedule B.

13. Amend § 25.271 by revising paragraph (b), the introductory text for paragraph (c) and paragraph (f) to read as follows:

§ 25.271 Control of transmitting stations.

* * * * *

(b) The licensee of a transmitting earth station, other than an ESV or a VMES, licensed under this part shall ensure that a trained operator is present on the earth station site, or at a designated remote control point for the earth station, at all times that transmissions are being conducted. No operator's license is required for a person to operate or perform maintenance on facilities authorized under this part.

(c) Authority will be granted to operate a transmitting earth station, other than an ESV or a VMES, by remote control only on the conditions that:

* * * * *

(f) Rules for control of transmitting ESVs are provided in §§ 25.221 and 25.222 and rules for control of transmitting VMESs are provided in § 25.XXX.

[FR Doc. E7–13718 Filed 7–17–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 07–42; FCC 07–18]

Implementation of Section 612 of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 and Section 616 of the Cable Television Consumer Protection and Competition Act of 1992

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on proposed rules and guidance to

implement sections 612 and 616 of the Communications Act. In the context of its review of recent merger transactions and comments filed in its Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, the Commission determined to review the program carriage complaint processes and initiate a notice of proposed rulemaking regarding leased access rules.

DATES: Comments for this proceeding are due on or before September 4, 2007; reply comments are due on or before September 21, 2007.

ADDRESSES: You may submit comments, identified by MB Docket No. 07–42, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Federal Communications Commission's Web Site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.

- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Katie Costello, Katie.Costello@fcc.gov of the Media Bureau, Policy Division, (202) 418–2233.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking (NPRM)*, FCC 07–18, adopted on March 2, 2007, and released on June 15, 2007. 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. These documents will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents 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).

Initial Paperwork Reduction Act of 1995 Analysis

This document seeks comment on potential revised and new information collection requirements. The Commission will invite the general public and the Office of Management and Budget (OMB) to comment at a later date on any rules developed as a result of this proceeding that require the collection of information, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. The Commission will publish a separate notice seeking public and agency comments, which 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. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. In this Notice of Proposed Rulemaking (“NPRM”), in light of issues raised in recent merger transactions and comments filed in the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 71 FR 66946–02, we review the Commission's leased access, 47 CFR sections 76.970 through 76.977, and program carriage, 47 CFR sections 76.1300 through 76.1302, complaint processes. We initiate this review in order to provide guidance and further implement Section 612 of the Communications Act of 1934, as amended (the Communications Act), 47 U.S.C. 532, which requires a cable operator to set aside channel capacity for commercial use by video programmers unaffiliated with the operator, and Section 616 of the Communications Act, 47 U.S.C. 536, which prohibits a cable operator or

other multichannel video programming distributor (“MVPD”) from requiring a financial interest in any program service as a condition for carriage of such service, from coercing a programmer to grant exclusive carriage rights, or from engaging in conduct that unreasonably restrains the ability of an unaffiliated programming vendor to compete fairly by discriminating against such vendor on the basis of affiliation or nonaffiliation.

II. Commercial Leased Access Rules

2. The commercial leased access (leased access) requirements are set forth in Section 612 of the Communications Act. The leased access rules require a cable operator to set aside channel capacity for commercial use by video programmers unaffiliated with the operator. The statutory framework for commercial leased access was first established by the Cable Communications Policy Act of 1984. Congress established leased access set-aside requirements in proportion to a system's total activated channel capacity.

3. In the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Congress broadened Section 612's explicit statutory purpose to include the promotion of competition in the delivery of diverse sources of video programming, and required the Commission: (a) To determine the maximum reasonable rates that a cable operator may establish for commercial use of designated channel capacity; (b) to establish reasonable terms and conditions for such use; and (c) to establish procedures for the expedited resolution of disputes concerning rates or carriage. Congress also required that the Commission's rules not adversely affect the operation, financial condition, or market development of the cable system.

4. The Commission adopted a maximum rate formula for full-time carriage on programming tiers based on the average implicit fee that other programmers are implicitly charged for carriage to permit the operator to recover its costs and earn a profit. The Commission also adopted a maximum rate for a la carte services based on the highest implicit fee that other a la carte services implicitly pay, and a prorated rate for part-time programming.

5. The Commission seeks comment on the current status of leased access programming and on the following issues: Do programmers actually use leased access channels? To what extent are they able to use the set-aside channels? How many leased access channels do cable operators provide?

Which programmers are using those channels? Are programmers using the channels on a full-time or part-time basis? For what purposes are leased access channels used? Do cable operators turn down requests for leased access? If so, why? To what extent and for what purposes do the cable operators use the channels for themselves? Does the cable operators' option to use the channels contribute to programmers' lack of use of the set-aside channels? Are the terms in leased access agreements the same or similar to those that the cable operator has with its programmers? Do cable operators impose different requirements regarding, for example, insurance or termination provisions? If so, why? The Commission also seeks comment on the effectiveness of leased access enforcement, specifically on the costs associated with the complaint or other dispute resolution processes and whether there should be a defined time period for cable operators to respond to leased access requests or other aspects of the enforcement process. Regarding the Commission's rules that allow programmers to file complaints to challenge a cable operator's rates before the Commission, the Commission seeks comment on these issues: To what extent do programmers make use of the Commission's process to challenge rates that they believe violate the Commission's regulations? Is the process too burdensome? Is it effective? Should there be changes to the complaint process, such as an expedited complaint process before the Commission? The Commission's rules require a cable operator to respond to a programmer's request for rate information within 15 calendar days. The Commission seeks comment on whether cable operators are responsive to programmer's requests and whether they include all required information.

6. The Commission also seeks comment on its rate formula for leased access, such as specific methodologies that the Commission should consider and how such methodologies would better serve Congress' statutory objectives in a legally sustainable way.

7. The Commission's leased access rules involve calculations based on activated channels and location. Because of the development of digital signal processing and signal compression technologies, the number of video services carried on a cable system may no longer be a simple calculation and may change dynamically over time depending, for instance, on the degree of compression and whether the programming is carried in a standard or high definition digital

format. The Commission seeks comment on whether and how the digital transition affects channel capacity and channel count for purposes of the calculation of carriage obligations and average rates; whether, consistent with changes in technology, cable operators have updated their terms of access to facilities, such as allowing programmers to submit video to the operator via the Internet.

8. The Commission requests comment on whether leased access programmers should have the ability to request carriage on a specific tier and whether there is evidence that cable operators seek to place leased access programming on digital tiers or other less popular tiers, when leased access programmers would prefer the basic tier, whether cable operators have acted reasonably in regard to placing leased access channels at specific channel locations what specific reform measures should the Commission consider? The Commission seeks comment on which service tier leased access programs appear, and on which channel within the tier do cable operators place the programming and whether leased access rules apply to video-on-demand (VOD) or other technologies that do not fit a traditional "tier".

9. The Commission seeks comment on other ways that advances in technology or marketplace developments should affect the leased access rules, in particular, whether and how the deployment of advanced digital services (e.g., interactive electronic programming guides, addressable digital set-top boxes, VOD), should inform its review. The Commission seeks comment on any other issues that would properly inform its leased access inquiry.

III. Program Carriage Rules

10. Section 616 of the Communications Act directs the Commission to establish regulations governing program carriage agreements and related practices between cable operators or other MVPDs and video programming vendors. The Commission's program carriage rules prohibit a cable operator or other MVPD from requiring a financial interest in any program service as a condition for carriage of such service, from coercing a programmer to grant exclusive carriage rights, or from engaging in conduct that unreasonably restrains the ability of an unaffiliated programming vendor to compete fairly by discriminating against such vendor on the basis of affiliation or nonaffiliation.

11. In addition to establishing rules governing program carriage, the Commission has established procedures

for the review of program carriage complaints and has established appropriate penalties and remedies. These procedures generally provide for resolution of a complaint on the basis of a complaint, answer, and reply. However, the Commission has recognized that the staff may be unable in some cases to resolve carriage agreement complaints on the sole basis of a written record. In such cases, if the staff determines that the complainant has established a prima facie case but that disposition of the complaint would require the resolution of factual disputes or other extensive discovery, the staff is to notify the parties that they have the option of choosing Alternative Dispute Resolution (ADR) or an adjudicatory hearing before an Administrative Law Judge (ALJ). In terms of appropriate relief for violations of the program carriage rules, the Commission has stated that the appropriate relief will be determined on a case-by-case basis, and that appropriate remedies and sanctions may include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.

12. The Commission seeks comment on whether and how its processes for resolving carriage disputes should be modified. Currently, the Commission's rules provide that any complainant alleging a violation of Section 616(a)(3)'s prohibition on discrimination must demonstrate that the alleged discrimination is on the basis of affiliation or nonaffiliation of a vendor, and that the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly. If, after reviewing the pleadings and supporting documentation filed by the parties, the Commission staff finds that the complainant has established a prima facie case under Section 76.1301(c), the staff may direct an ALJ to hold a hearing, issue a recommended decision on the facts underlying the discrimination claim and a recommended remedy, if necessary, and then return the matter to the Commission. The Commission seeks comment on these procedures, and, in particular, whether the elements of a prima facie case should be clarified.

13. The Commission has established timelines for the resolution of individual program carriage complaints. The Commission seeks comment on the effectiveness of this mechanism and whether similar changes or additional time limits would improve the existing process. For instance, whether specific time limits on the Commission, cable operators, or others would promote a

speedy and just resolution of these disputes.

14. The Commission seeks comment on whether it should adopt rules to address the complaint process; whether the Commission should adopt additional rules to protect programmers from potential retaliation if they file a complaint or whether the existing penalties for frivolous program carriage complaints are appropriate or should be modified.

15. Independent programmers assert that many cable operators require them to negotiate for carriage on a system-by-system basis, even while they negotiate national carriage agreements with other programmers. The Commission seeks comment on whether it should adopt rules that expressly allow independent programmers to seek nationwide access directly from multiple system cable operators and, if so, how such a process would operate.

16. The Commission seeks comment on any other issues that would properly inform its program carriage inquiry.

IV. Arbitration

17. The Commission seeks comment on the application of arbitration procedures to resolve leased access and program carriage disputes. Should the Commission establish arbitration procedures specifically for these types of complaints? If so, what procedures should be established? Should such procedures be elective or mandatory, and who should bear the costs of arbitration? What standard of review should the Commission employ in reviewing an arbitration decision if arbitration is required or otherwise used?

V. Procedural Matters

18. *Ex Parte Rules*. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206(a).

19. *Comment Information*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before 45 days after this *Notice of Proposed Rulemaking* is published in the **Federal Register**, and reply comments on or before 65 days of publication. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in*

Rulemaking Proceedings, 63 FR 24121 (1998).

Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the Web site for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer &

Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

20. *Initial Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *NPRM*. The IRFA is set forth below. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *NPRM*, and they should have a separate and distinct heading designating them as responses to the IRFA.

VI. Ordering Clauses

21. *It is ordered* that, pursuant to the authority contained in Sections 4(i), 303, 612 and 616 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 532 and 536, *notice is hereby given* of the proposals described in this Notice of Proposed Rulemaking.

22. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

Initial Regulatory Flexibility Analysis

23. As required by the Regulatory Flexibility Act of 1980, as amended (the RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact of the policies and rules proposed in this Notice of Proposed rulemaking (Notice) on a substantial number of small entities. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice indicated on the first page of this document. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the Notice and IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Regulatory Approaches

24. The focus of the leased access and program carriage provisions contained in Sections 612 and 616 of the Communications Act of 1934, as amended, adopted as part of the Cable

Television Consumer Protection and Competition Act of 1992, was to promote competition and diversity in the video programming marketplace and prevent cable systems, other MVPDs and affiliated programmers from preventing fair competition in video programming distribution through various practices. This proceeding requests comments on proposed changes to the Commission's rules to further enhance the Congressional objectives and respond to complaints that the rules are ineffective. Ultimately, these policies and rules are geared to the benefit of independent programmers, many of which may be small entities.

Legal Basis

25. The authority for the action proposed in the rulemaking is contained in Section 4(i), 303, 612 and 616 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 532 and 536.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

26. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").

27. *Cable and Other Program Distribution.* The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating \$12.5 million or less in revenue annually. This category includes, among others, cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, subscription television services and open video systems. According to Census Bureau data for 1997, there were 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million.

Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. We note, however, that the rules at issue in this Notice only apply at this time to cable operators, and not other MVPD providers.

28. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide. The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

29. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." The Commission has determined that there are 67,700,000 subscribers in the United States. Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

30. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that

delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution. This definition provides that a small entity is one with \$12.5 million or less in annual receipts. Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DIRECTV and EchoStar Communications Corporation ("EchoStar"), report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$12.5 million, and thus does not qualify as a small business. The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

31. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating \$12.5 million or less in annual receipts. Currently, there are approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the

trade association that represents PCOs. Individual PCOs often serve approximately 3,000–4,000 subscribers, but the larger operations serve as many as 15,000–55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs qualify as small entities.

32. *Home Satellite Dish (“HSD”) Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers’ receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003 and June 2004, HSD subscribership fell from 502,191 subscribers to 335,766 subscribers, a decline of more than 33 percent. The Commission has no information regarding the annual revenue of the four C-Band distributors.

33. *Wireless Cable Systems.* Wireless cable systems use the Multipoint Distribution Service (“MDS”) and Instructional Television Fixed Service (“ITFS”) frequencies in the 2 GHz band to transmit video programming and provide broadband services to subscribers. Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for

two-way video telecommunications. As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$12.5 million in annual receipts, appears applicable to MDS, ITFS and LMDS. In addition, the Commission has defined small MDS and LMDS entities in the context of Commission license auctions.

34. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$12.5 million annually. Therefore, we estimate that there are approximately 850 small MDS providers as defined by the SBA and the Commission’s auction rules.

35. While SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

36. In the 1998 and 1999 LMDS auctions, the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a “very small business,” which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years. These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction,

104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

37. *Open Video Systems (“OVS”).* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with \$12.5 million or less in annual receipts. The Commission has certified 25 OVS operators with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2003, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households. Among BSPs, however, those operating under the OVS framework are in the minority, with approximately eight percent operating with an OVS certification. Serving approximately 460,000 of these subscribers, Affiliates of Residential Communications Network, Inc. (“RCN”) is currently the largest BSP and 11th largest MVPD. RCN received approval to operate OVS systems in New York City, Boston, Washington, DC and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

38. *Program Producers and Distributors.* The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will use the SBA classifications of Motion Picture and Video Tape Production (NAICS Code 51211), Motion Picture and Video Tape Distribution (NAICS Code 42199), and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71132, 51229, 53249). These SBA definitions provide that a small entity in the cable

television programming industry is an entity with \$21.5 million or less in annual receipts for NAICS Codes 56131, 51211, 42199, and 51212, and \$5 million or less in annual receipts for NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71131, 71132, 51229, and 53249. Census Bureau data indicate the following: (a) There were 7,265 firms in the United States classified as Motion Picture and Video Production (NAICS Code 51211), and that 6,987 of these firms had \$16.999 million or less in annual receipts and 7,002 of these firms had \$24.999 million or less in annual receipts; (b) there were 1,139 firms classified as Motion Picture and Video Tape Distribution (NAICS Codes 42199 and 51212), and 1007 of these firms had \$16.999 million or less in annual receipts and 1013 of these firms had \$24.999 million or less in annual receipts; and (c) there were 5,671 firms in the United States classified as Theatrical Producers and Services (NAICS Codes 56131, 71111, 71141, 561599, 71151, 51229, and 53249), and 5627 of these firms had \$4.999 million or less in annual receipts.

39. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated. Thus, we estimate that our rules may affect approximately 6,987 small entities primarily engaged in the production and distribution of taped cable television programs and 5,627 small producers of live programs that may be affected by the rules adopted in this proceeding.

40. A "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.

41. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,303 carriers have

reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.

42. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.

43. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) Operate generation facilities that produce electric energy; (2) operate transmission

systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer." The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours." According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year. Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

Description of Proposed Reporting, Recordkeeping and Other Compliance Requirements

44. The NPRM seeks comment on a range of potential changes to existing reporting, recordkeeping or other compliance requirements. Regarding the Commission's rules implementing Section 612 of the Communications Act, the NPRM seeks comment on all aspects of the commercial leased access rules, as well as dispute resolution procedures. Similarly, regarding the Commission's rules implementing Section 616 of the Communications Act, the NPRM seeks comment on whether and how the Commission's dispute resolution and other rules should be modified.

Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

45. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The NPRM seeks comment on the Commission's rules implementing Sections 612 and 616 of the Communications Act, as amended.

While most of the leased access and program carriage complaints have been filed against large entities or affiliates of large entities, some small entities may be affected by any rule changes.

Therefore, this NPRM invites comment on issues that may impact some small entities. In addition, this NPRM seeks comment on whether the Commission's rules and their enforcement are successful in promoting competition and diversity in the video programming marketplace and preventing cable

systems and other MVPDs from preventing fair competition in video programming distribution through various practices. Those policies and rules are designed to promote and protect the interests of independent programmers in the video distribution marketplace and many of the programmers will qualify as small entities. In the event that the Commission modifies its rules in this proceeding, it will explain the steps that it has taken to minimize significant

impacts on small entities and the significant alternatives that it has considered.

Federal Rules Which Duplicate, Overlap, or Conflict With the Commission's Proposals

46. None.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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