with the FCC, interested parties should serve counsel for petitioner as follows: Gregg P. Skall, Esq., Womble Carlyle Sandridge & Rice, 1401 Eye Street, NW., Seventh Floor, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Joyce L. Bernstein, *joyce.bernstein@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–252, adopted December 22, 2008, and released December 23, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC, 20554. This document 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.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* 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). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Michigan, is amended by adding DTV channel 32 and removing DTV channel 47 at Cadillac.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–509 Filed 1–12–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[CG Docket No. 05–231; FCC 08–255]

Closed Captioning of Video Programming

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on the application of the closed captioning rules to digital broadcasting, specifically to broadcasters that choose to use their digital allotment to multicast several streams of programming. The Commission's rules exempt video programming channels that produced annual gross revenues of less than $3 million during the previous calendar year from the Commission's closed captioning obligations. The Commission did not determine what constitutes a ''channel'' for purposes of satisfying this self-implementing exemption. The Commission therefore seeks comment on issues related to, for purposes of this exemption, whether each programming stream on a multicast signal constitutes a separate channel, or whether the broadcaster's entire operations attributable to its digital allotment should be considered one channel.

DATES: Comments are due on or before February 12, 2009. Reply comments are due on or before February 27, 2009.

ADDRESSES: Interested parties may submit comments identified by CG Docket No. 05–231, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System (ECFS), through the Commission's Web site: *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, in completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and CG Docket No. 05–231. Parties also may 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 <your e-mail address>.'' 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. 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 the Commission continues 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 Mail sent by 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 and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

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: Amelia Brown, Consumer and Governmental Affairs Bureau, Disability Rights Office at (202) 418–2799 or e-mail at *Amelia.Brown@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Closed Captioning of Video Programming*; *Closed Captioning Requirements for Digital Television Receivers*, Notice of Proposed Rulemaking (*2008 Digital Closed Captioning NPRM*), document FCC 08–255, adopted November 3, 2008, and released November 7, 2008, in CG Docket No. 05–231, seeking comment on matters concerning § 79.1(d)(12) of the Commission's rules and digital multicast channels. The full text of FCC 08–255 and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. FCC 08–255 and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact the Commission's duplicating contractor at its Web site, *http://www.bcpiweb.com*, or by calling 1–800–378–3160. FCC 08–255 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro/caption.html*. Parties who choose to file by paper should also submit their comments on compact disc. The compact disc should be submitted, along with three paper copies, to: Traci Randolph, Consumer and Governmental Affairs Bureau, Disability Rights Office, 445 12th Street, SW., Room 3–C425, Washington, DC 20554. Such submission should be on a compact disc formatted in an IBM compatible format using Word 2003 or a compatible software. The compact disc should be accompanied by a cover letter and should be submitted in ''read only'' mode. The compact disc should be clearly labeled with the commenter's name, proceeding (CG Docket No. 05–231), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the compact disc. The label also should include the following phrase: ''CD–Rom Copy—Not an Original.'' Each compact disc should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters filing by paper must send a compact disc copy to the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554.

Initial Paperwork Reduction Act of 1995 Analysis

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''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).

Synopsis

1. As the nation transitions from analog to digital broadcasting, the video programming and broadcasting landscape will change substantially. With analog broadcasting, broadcasters use their spectrum allocation to provide programming on a single channel. With digital broadcasting, broadcasters may use their digital allotment to multicast several streams of programming, known as ''multicasting.'' Section 79.1(d)(12) of the Commission's rules exempts video programming channels that produced annual gross revenues of less than $3 million during the previous calendar year from the Commission's closed captioning obligations. The Commission seeks comment on the application of § 79.1(d)(12) of the Commission's rules to digital broadcasting.

2. In 1997, when the Commission adopted the exemption for channels producing less than $3 million in revenues, it specified that ''[a]nnual gross revenues shall be calculated for each channel individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel.'' The Commission did not determine, however, what constitutes a ''channel'' for purposes of satisfying this self-implementing exemption. The Commission seeks comment on whether, for purposes of § 79.1(d)(12) of the Commission's rules, each programming stream on a multicast signal constitutes a separate channel, or whether the broadcaster's entire operations attributable to its digital allotment should be considered one channel.

3. Under the Commission's rules, programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, regardless of the multicast stream on which the programming airs, pursuant to the pass through rule. Given the pass through rule, it is likely that much of the programming delivered to broadcasters for airing on multicast streams will already be captioned, especially if it is programming provided by a network programmer, even if § 79.1(d)(12) of the Commission's rules applies to each multicast channel. The Commission seeks comment on what percentage of programming that airs on multicast streams, other than the main stream, is network programming, and how much of that programming is already captioned.

4. The Commission seeks comment on whether individual programming streams should not be considered separate channels for purposes of calculating revenues for purposes of § 79.1(d)(12) of the Commission's rules. In such circumstances, digital broadcasters would be exempt from the Commission's requirements under § 79.1(d)(12) of the Commission's rules only if their overall operations, taking into account all activities on all ''streams,'' received less than $3 million in revenues. The Commission seeks comment on the relative merits of this approach and its practical effects, including how this determination might affect program diversity, the airing of locally-originated programming, or the airing of other kinds of programming that may afford little or no economic return. The Commission also seeks comment on whether this approach may result in an increase in the number of petitions for exemption from the closed captioning requirements under the ''undue burden'' standard set forth in § 79.1(f) of the Commission's rules.

5. The Commission seeks comment on whether the $3 million revenue amount is a reasonable threshold for determining if secondary multicast streams should be exempt from the closed captioning requirements, or whether a smaller figure is appropriate and, if so, what that amount should be.

6. The Commission seeks comment on whether it is appropriate to adopt something other than a fixed revenue threshold for determining whether secondary multicast streams must be captioned. For example, comment is sought on whether the captioning requirements should be tied to a formula that considers the number of programming streams being offered (or some other variable), such as that used for determining a multicasting broadcaster's children's television programming requirements. Finally, the Commission seeks comment on similar alternatives for applying captioning

requirements to multicast program streams.

Initial Regulatory Flexibility Certification

7. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *2008 Digital Closed Captioning NPRM. See* 5 U.S.C. 603. 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 *2008 Digital Closed Captioning NPRM* provided in paragraph 43 of the Item. The Commission will send a copy of the *2008 Digital Closed Captioning NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). *See* 5 U.S.C. 603(a).

Need for, and Objectives of, the Proposed Rules

8. The Commission initiates this review relating to closed captioning in anticipation of the transition to digital television (DTV) by full power broadcasters, which will occur on February 18, 2009. This rulemaking proceeding proposes several options for the appropriate treatment of digital broadcasters that choose to use their digital allotment to multicast several streams of programming (known as ''multicasting''). In light of this new broadcasting environment, the *2008 Digital Closed Captioning NPRM* proposes several options for determining the closed captioning obligations for multicasting broadcasters. The *2008 Digital Closed Captioning NPRM* seeks comment on § 79.1(d)(12) of the Commission's rules, which exempts from the closed captioning obligations video programming channels that produced annual gross revenues of less than $3 million during the previous calendar year. 47 CFR 79.1(d)(12). In order to determine whether each stream of a digital broadcaster's multicast operation must be captioned, the Commission proposes several possible alternatives and the possible outcomes to each alternative.

9. The proposals set forth in the *2008 Digital Closed Captioning NPRM,* for which comment is sought, contemplate as possible outcomes the following: Treat each multicast stream as a separate channel and calculate their revenues separately; treat each multicast stream as a separate channel and calculate their revenues separately, but decrease the revenue threshold for determining whether the non-main programming streams must close caption; treat individual programming streams as one channel, in which case the revenues would be aggregated for purposes of determining if the exemption in § 79.1(d)(12) of the Commission's rules applies; or, impose a new non-revenue approach for deciding how much programming must be captioned on multicast streams.

Legal Basis

10. The authority for this proposed rulemaking is contained in sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 613.

Description and Estimate of the Number of Small Entities Impacted

11. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules. 5 U.S.C. 604(a)(3). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small business concern'' under section 3 of the Small Business Act. 5 U.S.C. 601(6). 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 SBA. 5 U.S.C. 632.

12. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data. *See* SBA, Programs and Services, SBA Pamphlet No. CO–0028, at page 40 (July 2002). A ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). Nationwide, as of 2002, there were approximately 1.6 million small organizations. ''Independent Sector, The New Nonprofit Almanac & Desk Reference'' (2002). The term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' 5 U.S.C. 601(5). Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. U.S. Census Bureau, ''Statistical Abstract of the United States: 2006,'' section 8, page 272, Table 415. The Commission estimates that, of this total, 84,377 entities were ''small governmental jurisdictions.'' The Commission assumes that the villages, school districts, and special districts are small, and total 48,558. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. Thus, the Commission estimates that most governmental jurisdictions are small.

13. *Wired Telecommunications Carriers.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.'' U.S. Census Bureau, 2002 NAICS Definitions, ''517110 Wired Telecommunications Carriers.'' The SBA has developed a small business size standard for wireline firms within the broad economic census category, ''Wired Telecommunications Carriers.'' 13 CFR 121.201, NAICS code 517110. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size: 2002 (Including Legal Form of Organization),'' Table 5, NAICS code 517110 (issued Nov. 2005). Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size: 2002 (Including Legal Form of Organization),'' Table 5, NAICS code 517110 (issued Nov. 2005). Thus, under this category and associated small business size standard, the majority of firms can be considered small.

14. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of

voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' (partial definition. The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The NAICS Code associated with this size standard is 517110. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. 13 CFR 121.201, NAICS code 517110. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

15. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide. 47 CFR 76.901(e) of the Commission's rules. The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995), published at 60 FR 35854, July 12, 1995. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. 47 CFR 76.901(c) of the Commission's rules. Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers. Warren Communications News, *Television & Cable Factbook 2006,* ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available. Thus, under this second size standard, most cable systems are small. Wired Telecommunications Carriers with fewer than 1,500 employees are considered to be small. *See* 13 CFR 121.201, NAICS code 517110.

16. *Cable System Operators.* 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.'' 47 U.S.C. 543(m)(2); *see* 47 CFR 6.901(f) of the Commission's rules and notes 1–3. The Commission has determined that 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. 47 CFR 76.901(f) of the Commission's rules; *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* DA 01–158 (Cable Services Bureau, January 24, 2001). Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, T*elevision & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857. The Commission notes that 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 the Commission is unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard. The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b) of the Commission's rules.

17. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. As noted, Wired Telecommunications Carriers with fewer than 1,500 employees are considered to be small, under the currently applicable SBA classification. NAICS Code 517110. The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having $13.5 million or less in annual receipts. 13 CFR 121.201, NAICS code 517110. According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). Thus, under this size standard, the majority of firms can be considered small.

18. *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. DBS falls under the SBA definition of ''Wireless Telecommunications Carriers (except satellite)'', which establishes as a small DBS company any DBS company which has less than 1,500 employees. 13 CFR 121.201, NAICS Code 517210. The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having $13.5 million or less in annual receipts. 13 CFR 121.201, NAICS code 517110. According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). Of this total, 1,087 firms had annual receipts of under $10 million,

and 43 firms had receipts of $10 million or more but less than $25 million. 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. DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide. *See* Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, FCC 05–13, paragraph 55 (released February 4, 2005) (2005 Cable Competition Report). EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *See* 2005 Cable Competition Report, paragraph 55. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of $13.5 million, and thus does not qualify as a small business. Rainbow DBS, which provides service under the brand name VOOM, reported an estimated 25,000 subscribers. *See* 2005 Cable Competition Report, paragraph 55. The fourth DBS operator, Dominion Video Satellite, Inc. (Dominion), offers religious (Christian) programming and does not report its annual receipts. Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *See* 2005 Cable Competition Report, paragraph 55. The Commission does not know of any source which provides this information and, thus, the Commission has no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, the Commission believes 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, the Commission acknowledges the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

19. *Television Broadcasting.* This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' U.S. Census Bureau, 2007 NAICS Definitions, ''515120 Television Broadcasting'' (partial definition). The SBA has created the following small business size standard for Television Broadcasting firms: those having $14 million or less in annual receipts. 13 CFR 121.201, NAICS code 515120 (updated for inflation in 2008). The Commission has estimated the number of licensed commercial television stations to be 1,379. *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2007,'' dated March 18, 2008. In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of $13 million or less. The Commission recognizes that BIA's estimate differs slightly from the FCC total. The Commission therefore estimates that the majority of commercial television broadcasters are small entities.

20. The Commission notes, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. 13 CFR 21.103(a)(1). The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

21. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380. *See FCC News Release*, ''Broadcast Station Totals as of December 31, 2007,'' dated March 18, 2008. These stations are non-profit, and therefore considered to be small entities. *See generally* 5 U.S.C. 601(4), (6). In addition, there are also 2,295 low power television stations (LPTV). *See FCC News Release*, ''Broadcast Station Totals as of December 31, 2007,'' dated March 18, 2008. Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

22. *Local Multipoint Distribution Service*. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689–90, paragraph 348 (1997), published at 62 FR 16514, April 7, 1997. The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 12 FCC Rcd 12545, 12689–90, paragraph 348. An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 12 FCC Rcd 12545, 12689–90, paragraph 348. The SBA has approved these small business size standards in the context of LMDS auctions. *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (January 6, 1998). There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and

387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses. Because some LMDS services may not have been auctioned, the SBA standard which applies to such services is Wireless Telecommunications Carriers (except satellite), pursuant to which a service is small if it has fewer than 1500 employees. The NAICS Code for this SBA classification is 51711.

23. *Wireless Telecommunications Carriers (except satellite).* NAICS code 517210. Wireless Telecommunications Carriers, except satellite, is a NAICS standard which has a size standard of fewer than 1500 employees. NAICS Code 517210. Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (BRS), formerly Multipoint Distribution Service (MDS), and the Educational Broadband Service (EBS), formerly Instructional Television Fixed Service (ITFS), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. The Commission estimates that the number of wireless cable subscribers is approximately 100,000, as of March 2005. As noted, within the category of Wireless Telecommunications Carriers, except satellite, such firms with fewer than 1500 employees are considered to be small. 13 CFR 121.201, NAICS Code 517210. The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having $13.5 million or less in annual receipts. 13 CFR 121.201, NAICS Code 517110. According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). The SBA small business size standard for the broad census category of Wireless Telecommunications Carriers, which consists of such entities with fewer than 1,500 employees, appears applicable to MDS and ITFS. Other standards also apply, as described.

24. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. 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 receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Wireless Telecommunications Carriers (except satellite). 13 CFR 121.201, NAICS Code 517210. As noted, within the category of Wireless Telecommunications Carriers, such firms with fewer than 1500 employees are considered to be small. 13 CFR 121.201, NAICS Code 517210. The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having $13.5 million or less in annual receipts. 13 CFR 121.201, NAICS Code 517110. According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). Information available to the Commission indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, the Commission estimates that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

25. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). The Commission estimates that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small entities.

26. *Open Video Services.* Open Video Service (OVS) systems provide subscription services. *See* 47 U.S.C. 573. The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having $13.5 million or less in annual receipts. 13 CFR 121.201, NAICS Code 517110. According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005). This standard has been replaced by the Wireless Telecommunications Carriers (except satellite) standard, which considers firms with fewer than 1,500 employees to be small. NAICS Code 517210. The Commission has certified approximately 100 OVS operators to serve 75 areas, and some of these are currently providing service. *See http://www.fcc.gov/csb/ovs/csovscer.html* (current as of June 2004). These data were collected when ''Cable and Other Program Distribution'' was the operative distribution technology. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have

not yet begun to generate revenues, the Commission concludes that those OVS operators remaining might qualify as small businesses that may be affected by the rules and policies adopted herein.

27. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

28. *Telephone Companies*. 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. 13 CFR 121.201, NAICS code 517110. According to Commission data, 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''Trends in Telephone Service'' at Table 5.3, Page 5–5 (February 2007). This source uses data that are current as of October 20, 2005. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 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. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

29. *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 NCAIS 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. 13 CFR 121.201, NAICS code 517110. According to Commission data, 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''Trends in Telephone Service'' at Table 5.3, Page 5–5 (February 2007). This source uses data that are current as of October 20, 2005. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 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. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

30. *Closed Captioning Services*. These entities are indirectly affected by the Commission's action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, ''Teleproduction and Other Postproduction Services'' and ''Court Reporting and Stenotype Services.''

31. The first category of *Teleproduction and Other Postproduction Services* ''comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects.'' The relevant size standard for small businesses in these services is an annual revenue of less than $29.5 million. U.S. Census Bureau, 2002 NAICS Definitions, ''512191 Teleproduction and Other Postproduction Services.'' The size standard is $29.5 million. For this category, Census Bureau data for 2002 show that there were 1,316 firms that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 512191 (issued November 2005). Of this total, 1,301 firms had annual receipts of under $25 million, and 10 firms had receipts of $25 million to $49,999,999. U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 512191 (issued Nov. 2005). An additional 5 firms had annual receipts of $50 million or more. Consequently, the Commission estimates that the majority of *Teleproduction and Other Postproduction Services* firms are small entities that might be affected by our action.

32. The second category of *Court Reporting and Stenotype Services* ''comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.'' The size standard for small businesses in these services is an annual revenue of less than $7 million. U.S. Census Bureau, 2002 NAICS Definitions, ''561492 Court Reporting and Stenotype Services.'' The size standard is $7 million. For this category, Census Bureau data for 2002 show that there were 2,487 firms that operated for the entire year. U.S. Census Bureau, 2002 Economic Census, Subject Series: Administrative and Support and Waste Management and Remediation Services, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 561492 (issued Nov. 2005). Of this total, 2,461 firms had annual receipts of under $5 million, and 16 firms had receipts of $5 million to $9,999,999. U.S. Census Bureau, 2002 Economic Census, Subject Series: Administrative and Support and Waste Management and Remediation Services, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 561492 (issued Nov. 2005). An additional 10 firms had annual receipts of $10 million or more. Consequently, the Commission estimates that the majority of *Court Reporting and Stenotype Services* firms are small entities that might be affected by our action.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

33. The Commission does not anticipate that the proposals contained in the *2008 Digital Closed Captioning NPRM* will impose additional reporting, recordkeeping or compliance requirements.

Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

34. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (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. 5 U.S.C. 603(b).

35. How the Commission resolves the question of how to treat digital multicast streams for purposes of the closed captioning rules is important, for purposes of § 79.1(d)(12) of the Commission's rules, which exempts from the closed captioning obligations video programming channels that produced annual gross revenues of less than $3 million during the previous calendar year. By its very nature, current § 79.1(d)(12) of the Commission's rules decreases the closed captioning burden on entities whose annual gross revenues for the previous year were less than $3 million. With regard to the proposal to treat each of the multicast streams individually, the *2008 Digital Closed Captioning NPRM* suggests that this likely will result in less captioned programming being available, and seeks comment on this assumption. Although this decision may decrease burdens on small businesses, it may mean that individuals who rely on closed captioning are burdened. At the same time, however, if the majority of programming aired on secondary multicast streams is already captioned, it is possible that the percentage of available captioning will not be greatly affected, given that programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, pursuant to the existing pass through rule, which is unaffected by the *2008 Digital Closed Captioning NPRM.* The Commission notes that, under the Commission's rules, programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, regardless of the multicast stream on which the programming airs. *See* 47 CFR 79.1(c) of the Commission's rules. Another alternative being considered by the Commission would retain the concept that each stream of multicast programming is separate, but the revenue threshold for determining whether one of the non-main programming streams is exempt would be less than $3 million. Given the general nature of the programming on such channels, the Commission seeks comment on whether a smaller figure may be appropriate.

36. In the alternative, if the Commission adopts the proposal to aggregate the revenues of all multicast streams, digital broadcasters would be exempt from the Commission's captioning requirements under § 79.1(d)(12) of the Commission's rules only if their overall operations, taking into account all activities on all ''streams,'' received less than $3 million in revenues. However, the *2008 Digital Closed Captioning NPRM* notes that this conclusion might affect program diversity, the airing of locally-originated programming, or the airing of other kinds of programming that may afford little or no economic return. The Commission further seeks comment on whether it also may result in an increase in the number of petitions for exemption from the closed captioning requirements based on the undue burden standard in the Commission's current rules. *See* 47 CFR 79.1(f) of the Commission's rules.

37. The last alternative the *2008 Digital Closed Captioning NPRM* considers is the establishment of a captioning requirement that is not dependant on revenues but relies on some other criteria, such as a formula that considers the number of programming streams being offered (or some other variable) in order to determine captioning obligations.

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

38. None.

Ordering Clauses

Pursuant to sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 613, the *Notice of Proposed Rulemaking is adopted*.

The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

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