

unimproved, permeable parking lots, and buffer zones.

* * * * *

4. Section 206.434 is amended by deleting paragraph (e) and redesignating paragraphs (f) and (g) as paragraphs (e) and (f).

Dated: April 24, 1998.

James L. Witt,

Director.

[FR Doc. 98-11641 Filed 4-30-98; 8:45 am]

BILLING CODE 6718-02-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98-54; FCC 98-68]

1998 Biennial Regulatory Review

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In the *Notice of Proposed Rulemaking* ("NPRM"), the Commission seeks comment or ways to simplify and make more uniform the Cable Television Service pleading and complaint process rules. This proceeding is initiated in conjunction with the Commission's 1998 biennial regulatory review. The intended effect of this proceeding is to reduce the regulatory burden on franchising authorities, cable operators, and other interested persons making filings under the rules.

DATES: Comments are due on or before June 22, 1998. Reply comments are due on or before July 7, 1998. Public Information requirements are due June 30, 1998.

ADDRESSES: Federal Communications Commission, 1919 M Street, NW., Room 222, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Thomas Horan, Consumer Protection and Competition Division, Cable Services Bureau, at (202) 418-7200.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Notice of Proposed Rulemaking* in CS Docket No. 98-54, FCC 98-68 which was adopted on April 13, 1998 and released on April 22, 1998. A copy of the complete item is available for inspection and copying during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, NW., Washington, D.C. 20554. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, D.C. 20036, (202) 857-

3800. The complete *Notice of Proposed Rulemaking* also is available on the Commission's Internet home page (<http://www.fcc.gov>).

Summary of Action:

I. Background

1. On April 13, 1998, the Federal Communications Commission ("Commission") adopted a *Notice of Proposed Rulemaking* which sought comment or ways to simplify and make more uniform the Cable Television Service pleading and complaint process rules, 47 CFR 76. The NPRM is summarized below.

A. Introduction

2. Under the Commission's current part 76 rules, the procedures for initiating Commission action on a cable television service issue vary depending on the rules upon which the pleading or complaint is based. Although there are practical and legal reasons for the different pleading procedures, there may be some common elements to every pleading or complaint that could be made uniform across the broad spectrum of issues raised under part 76. The Commission thus seeks comment on whether we can or should institute some uniform pleading process and, if so, what form it should take.

B. Discussion

3. The Commission is initiating this proceeding in conjunction with the Commission's 1998 biennial regulatory review pursuant to section 11 of the 1996 Telecommunications Act, 47 U.S.C. 161. Pursuant to section 11, Congress instructed the Commission to conduct a biennial review of regulations that apply to operations and activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be no longer in the public interest. Although section 11 does not specifically refer to cable operators, the Commission has determined that the first biennial review presents an opportunity for a thorough examination of all of the Commission's regulations. The Commission believes that, where possible, simplification of the complaint processes for part 76 rules by instituting a uniform system would likely serve the public interest by lessening confusion and reducing the regulatory burden on franchising authorities, cable operators, and other interested persons making filings under the part 76 rules.

4. At least thirteen different types of petitions or complaints could be filed to initiate Commission action related to the part 76 rules. Each type of petition or complaint has particular requirements regarding the conditions that must be satisfied before a filing can

be made, who must be served with the filing, and the deadline time for a response. One reason for this variation is that our rules have been adopted over a period of time in response to changes in the Communications Act and, more specifically, for changes with respect to cable issues passed in 1984, 1992, and 1996. The rules adopted to implement changes in the law may have adopted a complaint process with its own unique procedures when an existing complaint process would have been sufficient. For example, following the filing of a petition for special relief, interested persons may submit comments or oppositions within twenty days after the date of public notice of the filing of such petition. In contrast, with respect to a petition for an issuance of an order to show cause, interested persons may submit comments or oppositions within thirty days after the petition has been filed. In this proceeding, the Commission seeks comment on whether these types of differences should be maintained or whether in circumstances of similar pleadings, the procedural rules associated with those pleadings should be the same.

5. The rules associated with each different pleading type are designed to establish fair and expeditious procedures for receiving, considering, and resolving issues related to the cable television service rules. The Commission believes that there are some aspects of the pleading requirements in part 76 rules that could be made uniform. The Commission seeks comment on which aspects of the pleading processes can be made consistent regardless of the part 76 rule under which the complaint is being filed; or alternatively, which pleading processes are similar and should have similar procedures. Specifically, is it appropriate to have the same or different (1) periods of time to formulate and file a complaint; (2) service requirements; (3) pleading cycles; (4) affidavit and evidentiary requirements; and (5) burdens of proof? The Commission also seek proposals on how to achieve a more streamlined complaint process for part 76 pleadings. Specifically, the Commission seeks comment on those filing requirements, now unique to a particular type of pleading or complaint, that are beneficial and should be applied universally to all part 76 pleadings; and conversely, which filing requirements are not useful and should be eliminated.

II. Procedural Matters

A. Regulatory Flexibility Analysis

6. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, the Commission has prepared an Initial

Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals in the *NPRM*. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

1. Need for, and objectives of, the proposed rules.

7. The Commission has proposed to simply and unify the pleading and complaint process rules for Cable Television Service, 47 CFR 76. The Commission has tentatively concluded that such a procedure would serve the public interest by making the pleading and complaint process for 47 CFR 76 less confusing and less burdensome.

2. Legal basis.

8. The authority for the action proposed for this rulemaking is contained in Section 4 of the Communications Act of 1934, 47 U.S.C. 154.

3. Description and estimate of the number of small entities

9. The Commission is required to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business" and "small organization." In addition, the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act. 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) meets any additional criteria established by the Small Business Administration ("SBA").

10. *Small MVPDs*. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts. This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1,758 total cable and other pay television services and 1,423 had less than \$11 million in revenue. The Commission addresses below each service

individually to provide a more precise estimate of small entities.

11. *Cable Systems*. The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under 47 CFR 76.901(e), a "small cable company" is one serving fewer than 400,000 subscribers nationwide. Based on our most recent information, the Commission estimates that there were 1439 cable operators that qualified as small cable companies 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 fewer than 1439 small entity cable system operators that may be affected by the decisions and rules the Commission is adopting. The Commission believes that only a small percentage of these entities currently provide qualifying "telecommunications services" as required by the Communications Act and, therefore, estimate that the number of such entities are significantly fewer than noted.

12. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% 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 61,700,000 subscribers in the United States. Therefore, the Commission found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate. Based on available data, the Commission finds that the number of cable operators serving 617,000 subscribers or less totals 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, the Commission is unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

13. *Multipoint Multichannel Distribution Systems ("MMDS")*. The Commission refined the definition of "small entity" for the auction of MMDS as an entity that together with its

affiliates has average gross annual revenues that are not more than \$40 million for the preceding three calendar years. This definition of a small entity in the context of MMDS auctions has been approved by the SBA.

14. The Commission completed its MMDS auction in March 1996 for authorizations in 493 basic trading areas ("BTAs"). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MMDS is an especially competitive service, with approximately 1573 previously authorized and proposed MMDS facilities. Information available to us indicates that no MMDS facility generates revenue in excess of \$11 million annually. The Commission concludes that, for purposes of this FRFA, there are approximately 1634 small MMDS providers as defined by the SBA and the Commission's auction rules.

15. *Direct Broadcast Satellite ("DBS")*. Because DBS provides subscription services, DBS falls within the SBA definition of cable and other pay television services (SIC 4841). As of December 1996, there were eight DBS licensees. Estimates of 1996 revenues for various DBS operators are significantly greater than \$11,000,000 and range from a low of \$31,132,000 for Alphastar to a high of \$1,100,000,000 for Primestar. Accordingly, the Commission concludes that no DBS operator qualifies as a small entity.

16. *Home Satellite Dish ("HSD")*. The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled. HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming packager. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only nonsubscription programming; and (3) viewers who receive satellite programming services illegally without subscribing.

17. According to the most recently available information, there are

approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers. These program packagers provide subscriptions to approximately 2,314,900 subscribers nationwide. This is an average of about 77,163 subscribers per program packager. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small multiple system operator ("MSO"). Furthermore, because this an average, it is likely that some program packagers may be substantially smaller.

18. *Open Video System ("OVS")*. The Commission has certified nine OVS operators. Of these nine, only two are providing service. On October 17, 1996, Bell Atlantic received approval for its certification to convert its Dover, New Jersey Video Dialtone ("VDT") system to OVS. Bell Atlantic subsequently purchased the division of Futurevision which had been the only operating program package provider on the Dover system, and has begun offering programming on this system using these resources. Metropolitan Fiber Systems was granted certifications on December 9, 1996, for the operation of OVS systems in Boston and New York, both of which are being used to provide programming. Bell Atlantic and Metropolitan Fiber Systems have sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. The Commission believes that one OVS licensee may qualify as a small business concern. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, the Commission concludes that at least some of the OVS operators qualify as small entities.

19. *Satellite Master Antenna Television ("SMATVs")*. Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995. Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September 1996. The ten largest SMATV operators together pass 815,740 units. If the Commission assumes that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, the Commission is 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 SMATVs, the Commission concludes that a substantial number of SMATV operators qualify as small entities.

20. *Local Multipoint Distribution System ("LMDS")*. Unlike the above pay television services, LMDS technology and spectrum allocation will allow licensees to provide wireless telephony, data, and/or video services. A LMDS provider is not limited in the number of potential applications that will be available for this service. Therefore, the definition of a small LMDS entity may be applicable to both cable and other pay television (SIC 4841) and/or radiotelephone communications companies (SIC 4812). The SBA definition for cable and other pay services is defined above. A small radiotelephone entity is one with 1500 employees or less. However, for the purposes of this NPRM, the Commission includes only an estimate of LMDS video service providers.

21. LMDS is a service for which licenses were auctioned by the FCC beginning in February 1998. The vast majority of LMDS entities providing video distribution could be small businesses under the SBA's definition of cable and pay television (SIC 4841). However, the Commission proposed to define a small LMDS provider as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding calendar years of less than \$40 million. The Commission has not yet received approval by the SBA for this definition.

22. There is only one company, CellularVision, that is currently providing LMDS video services. Although the Commission does not collect data on annual receipts, the Commission assumes that CellularVision is a small business under both the SBA definition and our proposed auction rules. Accordingly, the Commission affirms its tentative conclusion that a majority of the potential LMDS licensees will be small entities, as that term is defined by the SBA.

23. *Program Producers and Distributors*. The Commission has not developed a definition of small entities applicable to producers or distributors of television programs. Therefore, the Commission will utilize the SBA classifications of Motion Picture and Video Tape Production (SIC 7812), Motion Picture and Video Tape Distribution (SIC 7822), and Theatrical Producers (Except Motion Pictures) and

Miscellaneous Theatrical Services (SIC 7922). These SBA definitions provide that a small entity in the television programming industry is an entity with \$21.5 million or less in annual receipts for SIC 7812 and 7822, and \$5 million or less in annual receipts for SIC 7922. The 1992 Bureau of the Census data indicate the following: (1) there were 7265 U.S. firms classified as Motion Picture and Video Production (SIC 7812), and that 6987 of these firms had \$16,999 million or less in annual receipts and 7002 of these firms had \$24,999 million or less in annual receipts; (2) there were 1139 U.S. firms classified as Motion Picture and Tape Distribution (SIC 7822), and that 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 (3) there were 5671 U.S. firms classified as Theatrical Producers and Services (SIC 7922), and that 5627 of these firms had less than \$5 million in annual receipts.

24. Each of these SIC categories is very broad and includes firms that may be engaged in various industries including television. Specific figures are not available as to how many of these firms exclusively produce and/or distribute programming for television or how many are independently owned and operated. Consequently, the Commission concludes that there are approximately 6987 small entities that produce and distribute taped television programs, 1013 small entities primarily engaged in the distribution of taped television programs, and 5627 small producers of live television programs that may be affected by the rules adopted in this proceeding.

4. Description of reporting, recordkeeping, and other compliance requirements

25. The Commission is not proposing any new or modified recordkeeping or information collection requirements.

5. Significant alternatives which minimize the impact on small entities, and which are consistent with stated objectives.

26. The Notice solicits comments and proposals for means to simplify or make uniform 47 CFR 76 pleading and complaint process rules. Any significant alternatives presented in the comments will be considered.

6. Federal rules which overlap, duplicate, or conflict with these rules.

27. None.

7. Report to Congress.

28. The Commission shall send a copy of this IRFA along with this Notice in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, codified at 5

U.S.C. 801(a)(1)(A). A copy of this IRFA will also be published in the **Federal Register**.

B. Paperwork Reduction Act of 1995 Analysis

29. The requirements proposed in this Notice have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and would impose new and modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the proposed information collection requirements contained in this Notice, as required by the 1995 Act. Public comments are due June 30, 1998. Comments 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 would 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.

30. Written comments by the public on the proposed new and modified information collection requirements are due June 30, 1998. Comments should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov. For additional information on the proposed information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

C. Ex Parte Presentations

31. The *NPRM* is a permit but disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206(a).

D. Comments

32. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before June 22, 1998 and reply comments on or before July 7, 1998. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. Parties are also asked to submit, if possible, draft rules that reflect their positions. If you want each

Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW., Room 222, Washington, D.C. 20554, with a copy to Thomas Horan of the Cable Services Bureau, 2033 M Street, NW., 7th Floor, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, NW., Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, NW., Room 239, Washington, D.C. 20554.

33. Parties are also asked to submit comments and reply comments on diskette, where possible. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Thomas Horan of the Cable Services Bureau, 2033 M Street, NW., 7th Floor, Washington, D.C. 20554. Such a submission must be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98-11617 Filed 4-30-98; 8:45 am]

BILLING CODE 6712-01-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 980414094-8094-01; I.D. No. 091797A]

RIN 0648-AK55

Endangered and Threatened Wildlife and Plants; Definition of "Harm"

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

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule defines the term "harm," which is contained in the definition of "take" in the Endangered Species Act. The purpose of this rulemaking is to clarify the type of harm that may result in a take of a listed species under the ESA. This is not a change in existing law. This proposed rule defines the term "harm" to include any act which actually kills or injures fish or wildlife. Such acts may include significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife.

DATES: Comments must be received by June 30, 1998.

ADDRESSES: Comments should be sent to Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Joe Blum, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, phone (301)713-1401 or Garth Griffin, NMFS, 525 NE Oregon St, Suite 500, Portland, OR 97232, phone (503)231-2005.

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the ESA makes it illegal to take an endangered species of fish or wildlife. The definition of "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." (16 U.S.C. 1532(19)). The U.S. Fish and Wildlife Service (FWS) issued a regulation further defining the term "harm" to eliminate confusion concerning its meaning (40 FR 44412; 46 FR 54748). The FWS' definition of "harm" has been upheld by the Supreme Court as a reasonable interpretation of the term and supported by the broad purpose of the ESA to conserve endangered and threatened