which explicitly restricts operators' exercise of editorial control over leased access programming.[261] Section 612(c)(2) provides that "a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming," except in the case of programming containing obscenity or indecency, or to the minimum extent necessary to set a reasonable price.[262] We believe that requiring operators to accommodate all leased access requests when the programming does not contain obscenity or indecency, so long as there is available capacity, will most effectively restrict operators' exercise of editorial control, without impinging upon their discretion with regard to price and sexually-oriented programming. We also believe that such an approach will further the statutory objective to promote competition because it will reduce an operator's ability to select leased access programming based on anti-competitive motives.

100. We believe, however, that an operator should be allowed to make objective, content-neutral selections from among leased access programmers when the operator's available leased access channel capacity is insufficient to accommodate all pending leased access requests.[263] In the full-time channel context, this situation would arise if two or more leased access programmers requested the remaining available leased access space; in the part-time context, this situation could arise, for example, if two or more programmers requested the 8:00 p.m. to 9:00 p.m. time slot on the system's part-time leased access channel. In such situations, we believe that the cable operator should be allowed to make an objective, content-neutral selection among the competing programmers. For example, the operator could hold a lottery.[264] Or, the operator could base its decision on other objective, content-neutral criteria such as a programmer's non-profit status,[265] the amount of time a programmer is willing to lease,[266] or a programmer's willingness to pay the highest reasonable price for the capacity at issue.[267]

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[261] *Id.* The record reflects that many commenters are in favor of controlling an operator's selection of leased access programming through some variation of a first-come, first-served approach. *See* Asiavision Comments at 1; CME, et al. Comments at 25; Game Show Network Comments at 23-26; Intermedia/Armstrong Comments at 13-14; Telemiami Comments at 22; ValueVision Comments at 13-14; Viacom Comments at 13. *But see* NCTA Comments at 31-32; Outdoor Life, et al. Comments at 37; TCI Comments at 36-37; Daniels, et al. Reply at 10.

[262] Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

[263] *Further Notice* at para. 128.

[264] *See* Visual Media Comments at 7; CME, et al. Comments at 25.

[265] *See, e.g.*, CME, et al. Comments at 25-26.

[266] Several commenters support a preference for full-time programmers or programmers requesting the greatest total usage of channel capacity. *See* A&E, et al. Comments at 59-60; Lorilei Comments at 15; Outdoor Life, et al. Comments at 37.

[267] *But see* Viacom Comments at 13.

Allowing flexibility within this limited context will better enable operators to assure the growth and development of their cable systems.[268]

I. Procedures for Resolution of Disputes

1. Background

101. In the *Further Notice*, the Commission proposed to streamline its complaint process by establishing a rule that a leased access programmer may not file a complaint alleging that a leased access rate is unreasonable until an independent accountant has reviewed the cable operator's calculations and made a determination of the maximum rate.[269] We proposed to allow the operator to select the independent accountant when the parties cannot agree on a mutually acceptable accountant.[270] Our proposal required the accountant's review to be conducted within 60 days of the leased access programmer's request to the operator for a review.[271]

102. The Commission solicited comment on whether, in the absence of any evidence to the contrary, a determination by the accountant that the cable operator's rate exceeds the permissible rate should satisfy the complainant's burden to rebut, with clear and convincing evidence, the statutory presumption that an operator's rates are reasonable.[272] In addition, we tentatively concluded that the accountant's final report should be filed in the cable system's local public file in order to provide notice to other potential leased access programmers.[273] We asked whether, in the alternative, we should require operators to provide the accountant's final report to other leased access programmers upon request.[274] We sought comment on what type of information should be included in the accountant's final report and what type of information should remain confidential.[275] We also asked whether the responsibility for paying the accountant's expenses should be shared equally by both parties or borne only by the party proven

[268] *See* Daniels, et al. Comments at 23; NCTA Comments at 31-32; Outdoor Life, et al. Comments at 37; TCI Comments at 36-37; Time Warner Comments at 18; Travel Channel Comments at 23.

[269] *Further Notice* at para. 137.

[270] *Id.*

[271] *Id.*

[272] *Id. See also* Communications Act § 612(f), 47 U.S.C. § 532(f).

[273] *Further Notice* at para. 138.

[274] *Id.*

[275] *Id.*

incorrect by the accountant's report.[276] We also supported the use of alternative dispute resolution ("ADR") in cases where disputes are not resolved as a result of the accountant's final report.[277]

2. *Discussion*

103. We affirm our proposal to streamline the complaint process by requiring that an independent accountant make a determination of the cable operator's maximum permitted rate prior to the filing of any complaint alleging that the operator's rate is unreasonable.[278] We believe that such a requirement will preserve Commission resources by reducing the likelihood that unsubstantiated claims will be filed with the Commission. In the event that a complaint is filed with the Commission because the dispute remains unresolved despite the accountant's final report, there will be a rebuttable presumption that the accountant's findings are correct.[279] We disagree with the Game Show Network that both parties should be prohibited from challenging the accountant's final report because such a rule would conflict with a leased access programmer's statutory right to file a complaint.[280]

104. We will not adopt our proposal in the *Further Notice* to allow the cable operator to select an independent accountant in the event that the operator and leased access programmer fail to agree on a mutually acceptable accountant.[281] We agree with commenters that argue that such an approach may be unfair to the leased access programmer because it does not encourage the operator to find a mutually acceptable accountant.[282] Following the suggestion of the Game Show Network, we will require that if the parties cannot agree on a mutually acceptable accountant within five business days of the programmer's request for a review, they must each

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[276] *Id.*

[277] *Id.* at para. 139.

[278] *See id.* at para. 137. Several commenters favor an independent review of the cable operator's rate calculations. *See* Adelphia, et al. Comments at 27; Blab TV Comments at 10; WBGN-TV Comments at 2; Buckeye Comments at 12-13; CBA Comments at 12; Game Show Network Comments at 33-34; Landmark Comments at 2; Sherjan Comments at 2; VIPNA Comments at 15; Visual Media Comments at 9-10; TCI Reply at 13. *But see* CME, et al. Comments at 31-32; HITN Comments at 25; Intermedia/Armstrong Comments at 19-21; Lorilei Comments at 15-16; Paradise Reply at 2; Prime Radiant Comments at 10; RK Production Comments at 13-15; Telemiami Comments at 25-27; Daniels, et al Reply at 12-13.

[279] Adelphia, et al. Comments at 27 (there should be a rebuttable presumption that the accountant's findings are correct).

[280] Game Show Network Comments at 33. *See* Communications Act § 612(d), (e)(1), 47 U.S.C. § 532(d), (e)(1).

[281] *Further Notice* at para. 137.

[282] CME, et al. Comments at 31; Game Show Network Comments at 34; Telemiami Comments at 26; VIPNA Comments at 15.

select an independent accountant on the sixth business day.[283] These two accountants will then have five business days to select a third independent accountant to perform the review. To account for their more limited resources, operators of systems entitled to small system relief will have 14 business days to select an independent accountant when no agreement can be reached.[284] The final accountant report must be completed within 60 days of when the final accountant is selected to perform the review.[285] We will amend our current rule requiring complaints to be filed within 60 days of the alleged violation to provide instead that complaints must be filed within 60 days of the completion of the final accountant report.[286]

105. We will require the operator to pay the full cost of the review if the final accountant report shows that the operator's rate exceeds the maximum permitted rate by more than a *de minimis* amount.[287] Otherwise, each party will pay their own expenses incurred in making the review and will split the cost of the final accountant's review. We believe that this approach is appropriate because, unlike the leased access programmer, the cable operator possesses all the information necessary to calculate its rates accurately and knows, or should know, whether its rates are excessive.

106. The Commission adopts its tentative conclusion that the final accountant report should be filed in the cable system's local public file.[288] Intermedia/Armstrong suggest that the information contained in the public file should be limited to a one-sentence statement summarizing the ultimate conclusion.[289] We believe, however, that if the information is to serve as adequate notice to other potential leased access programmers, the final accountant report must,

[283] *See* Game Show Network Comments at 34 (if the parties cannot agree on an accountant within five business days, the operator's and the programmer's designated accountants should select a neutral third accountant to perform the review).

[284] For this purpose, a cable system operator will have 14 business days to select an independent accountant if its system qualifies for small system relief under the standards adopted in the *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 7393, 7406, 7412-13 (1995) ("*Small System Order*") (a cable system is entitled to small system relief if it either: (a) serves 15,000 or fewer subscribers and is owned by a small cable company serving a total of 400,000 or fewer subscribers over all of its systems, or (b) has been granted special relief as provided for in the *Small System Order*).

[285] *See Further Notice* at para. 137.

[286] *See* 47 C.F.R. § 76.975(d).

[287] Several commenters argue that a cable operator should not be required to pay the accountant's fees unless the operator's rate is found to exceed the maximum permitted rate by more than 10% or 15%, thus indicating that the operator did not act in good faith. Adelphia, et al. Comments at 27; Buckeye Comments at 13; CBA Comments at 12; Game Show Network Comments at 33-34; Landmark Comments at 2; Sherjan Comments at 2; TCI Reply at 14.

[288] *Further Notice* at para. 138.

[289] Intermedia/Armstrong Comments at 21.

at a minimum, state the maximum permitted rate and explain, as fully as possible without revealing proprietary information,[290] how it was determined. The report must be signed, dated, and certified by the accountant.

107. As stated in the *Further Notice*, we strongly encourage parties to use ADR to settle disputes that are not resolved by the final accountant report.[291] We disagree with RK Production that ADR would be ineffectual because only the cable operator knows the pertinent facts of the case.[292] The cable operator has an incentive to provide the information necessary to resolve the dispute informally because, if the leased access programmer believes the operator is not cooperating fully, it can terminate the ADR proceedings and file its complaint with the Commission. Moreover, we note that some ADR processes -- e.g., a commercial arbitration under the rules of the American Arbitration Association[293] -- contain provisions for discovery. If parties attempt, but fail, to settle their dispute through ADR, we will make an exception to our requirement that complaints must be filed within 60 days of the completion of the final accountant report, provided that the leased access programmer certifies that its complaint was filed within 60 days of the termination of the ADR proceedings. The cable operator may rebut such a certification.

J. Contractual Issues

1. Background

108. Section 612(c)(4) grants the Commission the authority to establish reasonable terms and conditions for leased access use.[294] A few commenters have asked that we address certain contractual issues that arise in the negotiation of leased access contracts. Ambassadors for Christ Institute asserts that allowing operators to include contract termination provisions that allow the parties to terminate the contract for any reason leaves the leased access programmer unprotected. It claims that a minimum contract length of at least one year is necessary to justify other necessary business expenses, such as building leases and equipment purchases.[295] CBA and Blab

[290] *See, e.g.*, NCTA Reply at 24.

[291] *Further Notice* at para. 139. *See* Prime Radiant Comments at 10 (the early use of ADR may help resolve disputes prior to Commission review).

[292] RK Production Comments at 14.

[293] *See* Rule 10 of the Commercial Arbitration Rules of the American Arbitration Association, as amended and effective July 1, 1996.

[294] Communications Act § 612(c)(4), 47 U.S.C. § 532(c)(4).

[295] Ambassadors for Christ Institute Comments at 1.

TV urge the Commission to require five-year leases.[296] Paradise argues that long-term security is necessary to obtain financing.[297]

109. Strategic Video and Lorilei ask that the Commission address the issue of insurance requirements imposed by cable operators on leased access programmers.[298] Strategic Video argues that the cost of general liability and errors and omissions ("E&O") insurance (typically, according to Strategic Video, costing $4000 or more annually) represents a significant barrier to small independent producers. Strategic Video asks the Commission to limit the required amount of general liability insurance to no more than $250,000 or an amount no more than the operator is required to have by the local franchising authority, whichever is less, and that operators not be permitted to require E&O insurance in any amount.[299] Lorilei claims that operators often require $1 million to $5 million of coverage, which is very costly and difficult to obtain.[300] Lorilei argues that operators are sufficiently protected by their own insurance policies and by the indemnification provisions they impose on leased access programmers.[301]

2. *Discussion*

a. *Minimum Contract Length*

110. We find that the record before us is insufficient to determine what a reasonable minimum contract length would be. We recognize that the lack of long-term security could create difficulties for leased access programmers that need to obtain financing or to make long-term investments in leases and equipment. However, our rule that operators must accommodate all leased access requests so long as capacity exceeds demand guarantees that a leased access programmer will be assured of continued access at least until the operator's set-aside requirement is met.[302] We agree with Ambassadors for Christ Institute that operators should not be allowed to terminate leased access contracts for simply any reason asserted by the cable operator.[303] Termination provisions of leased access contracts must be commercially reasonable. Because we

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[296]CBA Comments at 9; Blab TV Reply at 11. *See also* CME, et al. Comments at 24; Asiavision Comments at 1.

[297]Paradise Reply at 3. *See also* Blab TV Reply at 11; Telemiami Reply at 27.

[298]Strategic Video Comments at 2; Lorilei Comments at 2.

[299]Strategic Video Comments at 2.

[300]Lorilei Comments at 2.

[301]*Id.*

[302]*See* Section II.H.

[303]*See* Ambassadors for Christ Institute Comments at 1.

believe that this requirement affords leased access programmers adequate security, we decline at this time to establish a minimum contract length.

111. We will, however, require that operators not unreasonably limit the length of a contract with a leased access programmer. In assessing reasonableness in this context, we will weigh heavily the contract lengths that the operator enters into with the non-leased access programming services on its system.[304]

b. Insurance Requirements

112. At the outset, we note that the Cable Services Bureau recently confirmed an operator's right to require reasonable liability insurance coverage for leased access programming.[305] We decline to adopt specific conditions or limits regarding the amount of coverage or the type of insurance policy that operators may require because we believe that a specific restriction might not be appropriate for all situations. Instead, we will adopt a standard comparable to the standard that applies in the context of security deposits for leased access programming.[306] That is, insurance requirements must be reasonable in relation to the objective of the requirement. Cable operators will bear the burden of proof in establishing reasonableness. Similar to the rule for security deposits, insurance requirements may be sufficient to insure adequate coverage. Determinations of what is a "reasonable" insurance requirement will be based on the operator's practices with respect to insurance requirements imposed on non-leased access programmers,[307] the likelihood that the nature of the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors.

K. Technical Equipment Costs

1. Background

113. In the *Further Notice*, we sought comment on our proposal to include any technical costs incurred by the cable operator in offering leased access programming, such as the cost of scrambling, as an opportunity cost that could be included in calculating the maximum rate under

[304]We note that in our open video system rules, an open video system operator is required to allocate open channel capacity, if any is available, at least once every three years. *See Second Report and Order* in CS Docket No. 96-46, FCC 96-249 (released June 3, 1996) at para. 92. *See also* Telemiami Comments at 22.

[305]*See Anthony Giannotti v. Cablevision Systems Corporation*, 11 FCC Rcd 10441 (Cable Serv. Bur., September 6, 1996).

[306]*Reconsideration Order* at para. 53.

[307]*See* Telemiami Comments at 22.

our proposed cost/market rate formula.[308] No commenter objected to this proposal, although one commenter cautions that "programmers should be responsible for only those technical costs that are truly new and incremental costs to the particular leased access programmer."[309] Two commenters, SCBA and Tele-Media of Delaware, point out that small cable systems may not already possess the equipment necessary to carry the programming of a particular leased access programmer. These commenters both recommend that the Commission require the leased access programmer to pay the costs of any equipment that the operator must obtain in order to carry the leased access programming on the cable system.[310]

2. *Discussion*

114. The Commission's rules provide that cable operators must provide "the minimal level of technical support necessary for [leased access] users to present their material on the air . . . *provided however*, that leased access providers must reimburse operators for the reasonable cost of any technical support that operators actually provide."[311] We clarify that this provision entitles cable operators to charge an additional fee only for the reasonable cost of providing technical support to a leased access programmer that is not also provided to non-leased access programmers on the system. Cable operators may not impose a separate charge for the same kind of technical support that they already provide to non-leased access programmers because the maximum leased access rate represents what non-leased access programmers implicitly pay for carriage, including their technical costs. In other words, the maximum leased access rate already includes technical costs common to all programmers. Similarly, the operator cannot impose an additional charge on the leased access programmer to purchase additional equipment (e.g., when the current equipment is fully utilized) if the same type of equipment is used to serve non-leased access programmers. For example, the operator cannot add a charge for the costs of providing a satellite dish if it provides that type of technical support to non-leased access programmers at no additional charge. In contrast, the operator is entitled to add a charge to recover the costs of providing, for instance, a tape recorder or a camera if such technical equipment would be provided to non-leased access programmers for the same additional charge. The operator may also charge the leased access programmer for the use of technical equipment that is provided at

[308] *Further Notice* at para. 84.

[309] Telemiami Comments at 11. Prime Radiant notes that, under the 1996 Telecommunications Act, all programmers will be required to provide "closed captioning" as part of their programming in 1997 and recommends that the Commission adopt rules that clarify the requirements for leased access programmers and the associated cost of providing this capability. Prime Radiant Comments at 6.

[310] *See* Tele-Media of Delaware Comments at 8-9; SCBA Comments at 14-15. Tele-Media of Delaware also expresses concern about the cost to small operators of having to provide technical support to leased access programmers. We note that the *Rate Order* provides that "leased access programmers must reimburse operators for the reasonable cost of any technical support that operators actually provide." *Rate Order*, 8 FCC Rcd at 5941. *See also* 47 C.F.R. § 74.

[311] 47 C.F.R. § 76.971(c).

no charge for PEG access programming, provided that the franchise agreement requires the operator to provide the equipment, the equipment is not being used for any other non-leased access programming, and the operator's franchise agreement does not preclude such use.

115. If, in order to accommodate a leased access programmer, a cable operator must purchase technical equipment that is not of a type used by non-leased access programmers on the system, we believe that the operator should have the option of requiring the leased access programmer to pay the full purchase price of the equipment. Should the cable operator exercise this option, the leased access programmer will have all rights of ownership associated with the equipment under applicable state and local law. If, on the other hand, the operator prefers to own the technical equipment, it may purchase the equipment for itself and lease it to leased access programmers at a reasonable rate. We believe that this approach will protect leased access programmers, while assuring that the cable system's operation, financial condition or market development are not adversely affected.[312]

L. Definition of Affiliate

1. Background

116. Section 612(b)(1) states that "[a] cable operator shall designate channel capacity for commercial use by persons unaffiliated with the cable operator."[313] We note that the Telecommunications Act of 1996[314] added a new definition of "affiliate" in Section 3 of Title I of the Communications Act. This new provision defined "affiliate" for purposes of the Communications Act, unless the context otherwise requires, as:

> a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to "own an equity interest (or the equivalent thereof) of more than 10 percent."[315]

We also note, however, that Congress did not alter the separate definition of "affiliate" set forth under Title VI. Under Title VI, the term "affiliate" is defined, when used in relation to any

[312] *See* Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1).

[313] Communications Act § 612(b)(1), 47 U.S.C. § 532(b)(1).

[314] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, approved February 8, 1996 (the "1996 Act").

[315] Communications Act § 3(1), 47 U.S.C. § 153(1).

person, to mean "another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person."[316]

117. Although the *Further Notice* did not specifically seek comment pertaining to the definition of affiliate, ValueVision urges the Commission to further define the term for purposes of leased access.[317] ValueVision claims that, in order to prevent evasion of leased access obligations, the definition of affiliate should include "any financial or business relationships, by contract or otherwise, directly or indirectly, between the cable operator and a cable programmer, which result in the potential ability of the cable operator to control or influence the programmer's business affairs."[318] In response, several commenters argue that ValueVision's definition is overly broad and without support in the Commission's rules.[319] In addition, Outdoor Life, et al. contend that a leased access programmer must be unaffiliated only with the cable operator of the particular cable system on which carriage is sought, not with any cable operator.[320]

2. *Discussion*

118. The Commission has already decided in other proceedings that the Title I definition of affiliate does not strictly apply to Title VI.[321] For purposes of Section 612, we will adopt the definition of affiliate that applies in the context of our program access rules under Section 628 and our open video system rules under Section 653.[322] As we do in those contexts, we will apply the definitions contained in the notes to 47 C.F.R. § 76.501 (which reflect the broadcast attribution rules contained in the notes to 47 C.F.R. § 73.3555), with certain modifications. Specifically, in contrast to the broadcast attribution rules reflected in § 76.501: (a) we will consider an entity to be a cable operator's affiliate if the cable operator holds 5% or more of the entity's stock, whether voting or non-voting; (b) we will not adopt a single majority shareholder

[316]Communications Act § 602(2), 47 U.S.C. § 522(2).

[317]ValueVision Comments at 9-12.

[318]*Id.* at 10.

[319]NCTA Reply at 23-24; Adelphia, et al. Reply at 5-6; Outdoor Life, et al. Reply at 18-19 (proposing adoption of the attribution criteria in Section 73.3555 of the Commission's rules); Time Warner Reply at 16-17 (proposing a "control" standard).

[320]Outdoor Life, et al. Reply at 16-17.

[321]*See Third Report and Order and Second Order on Reconsideration* in CS Docket No. 96-46, FCC 96-334 (released Aug. 8, 1996) at para. 12; *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85, FCC 96-154 (released April 9, 1996) at para. 77.

[322]*See Third Report and Order and Second Order on Reconsideration* in CS Docket No. 96-46, FCC 96-334 (released Aug. 8, 1996) at para. 13 (open video system standard); *First Report and Order* in MM Docket No. 92-265, 8 FCC Rcd 3359, 3370-71 (1993) (program access standard). *See also* 47 C.F.R. § 76.1000(b).

exception;[323] and (c) all limited partnership interests of 5% or greater will qualify, regardless of insulation.[324] In addition, actual working control, in whatever manner exercised, will also be deemed a cognizable interest.[325]

119. Section 612 is designed to promote diversity of programming sources and to reduce the ability of cable operators to discriminate against unaffiliated programming services for anti-competitive reasons. Because these dual objectives are analogous to the objectives of the program access and open video system rules,[326] adoption of a similar affiliation standard is warranted. Moreover, by adopting a definition of affiliate for leased access that is consistent with the program access standard, we avoid the possibility that a programmer will be considered a cable operator's affiliate for one purpose but not for another. We therefore decline to adopt Outdoor Life, et al.'s suggestion that we apply the broadcast attribution rules without modification.

120. We believe that the certainty provided by the definition we adopt above is preferable to the *ad hoc* inquiry proposed by ValueVision into whether a cable operator could control or influence a programmer's business affairs. We decline to adopt Time Warner's "control" standard on similar grounds. We also decline to adopt the Title I definition of "affiliate." As described above, we believe that our program access standard is the appropriate standard for identifying the interests at issue here. No commenter has proposed that we adopt the Title I standard, or provided any record evidence that would support such a standard. We have no basis to find that the Title I standard would identify the interests at issue as well as our program access standard.

121. We also clarify that leased access programmers are required to be unaffiliated only with the operator of the cable system on which they seek carriage. As discussed above, Section 612(b)(1) provides that leased access channel capacity shall be designated for use by programmers "unaffiliated with the cable operator."[327] We agree with Outdoor Life, et al. that use of the term

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[323]Under the single majority shareholder exception, where there is a single holder of more than 50% of a corporation's outstanding voting stock, minority voting stock interests in the corporation are not attributable to shareholders irrespective of whether they exceed the 5% benchmark. *See* 47 C.F.R. § 73.3555 note 2.

[324]*See* 47 C.F.R. § 76.1000(b).

[325]*See* 47 C.F.R. §§ 73.3555 note 1, 76.501 note 1. There is substantial case law interpreting the meaning of "control" under the broadcast attribution rules that we will apply here. *See, e.g.*, *Benjamin L. Dubb*, 16 FCC 274, 289 (1951); *WWIZ, Inc.*, 36 FCC 562 (1964), *recon. denied*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824, 828-29 (D.C. Cir. 1965), *cert. denied*, 383 US 967 (1966); *Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975), *modified*, 59 FCC 2d 1002 (1976); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981); *Metromedia, Inc.*, 98 FCC 2d 300, 306 (1984), *recon. denied*, 56 RR2d 1198 (1985), *appeal dismissed sub nom.*, *California Association of the Physically Handicapped v. FCC*, 778 F.2d 823 (D.C. Cir. 1985).

[326]*See, e.g.*, Communications Act § 653(b)(1)(A), 653(b)(1)(E), 47 U.S.C. § 573(b)(1)(A), 573(b)(1)(E).

[327]Communications Act § 612(b)(1), 47 U.S.C. § 532(b)(1).

"the" to modify "cable operator" clearly indicates that Congress was referring only to the cable operator of the particular system in question.[328] We believe that if Congress feared that affiliated programmers have an advantage in acquiring carriage from even rival cable operators, it would have disqualified all affiliated programmers by using "a" or "any" to modify "cable operator."[329] Furthermore, allowing a broader category of programmers to use leased access will advance the statutory purposes of promoting competition and diversity.

III. ORDER ON RECONSIDERATION

A. Maximum Rate Formula

1. Exclusion of Programming Revenues

122. In the *Reconsideration Order*, we clarified that programming revenues received by the operator from non-leased access programmers, such as sales commissions from home shopping networks, should not be included in the highest implicit fee calculation.[330] Since the highest implicit fee was intended to recover only the value of channel capacity, we determined that its calculation should not include the value of services, such as marketing, other than the provision of channel capacity.[331]

123. TCI contends that excluding sales commissions that cable operators receive from home shopping services will lead to low rates that will encourage migration of home shopping networks from existing cable channels to leased access.[332] We find that the effect of excluding sales commissions on future maximum leased access rates will be minimal given that this *Order*: (a) adopts the average implicit fee for tiered services which, unlike the highest implicit fee, is derived using all channels on the relevant tier(s), and (b) eliminates direct sales programming as a separate category for setting rates. We are therefore not persuaded that excluding sales commissions will result in the migration of home shopping networks to leased access.

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[328]Outdoor Life, et al. Reply at 16-17. Moreover, the term "the" modifies "operator" repeatedly throughout the leased access provisions. *See, e.g.*, Communications Act § 612(b)(1)(D), (b)(4), and (c)(1), 47 U.S.C. § 532(b)(1)(D), (b)(4), and (c)(1).

[329]As Outdoor Life, et al. note, Congress has indeed used a broader modifier to indicate when affiliation with any cable operator is its intended meaning. Outdoor Life, et al. Reply at 16. *See, e.g.*, Communications Act § 628(b), 47 U.S.C. § 548(b) ("a satellite cable programming vendor in which *a* cable operator has an attributable interest") (emphasis added).

[330]*Reconsideration Order* at para. 37.

[331]*Id.*

[332]TCI Petition for Reconsideration at 47-48. *See also* Adelphia, et al. Comments at 18 (the exclusion of sales commissions undercompensates cable operators).

Accordingly, we decline to change our previous determination that such programming revenues should be excluded from the computation of maximum leased access rates.

2. *Averaging Subscriber Penetration for A La Carte Channels*

124. The *Reconsideration Order* clarified that in order to calculate the maximum rate when leased access programming is offered as an a la carte service, the highest per-subscriber implicit fee should be multiplied by the average number of subscribers that subscribe to the operator's a la carte services.[333] Our reasoning was that operators would be unfairly penalized for low subscribership to a leased access programmer's a la carte service if we required the highest per-subscriber implicit fee to be multiplied by the actual number of subscribers that purchased the leased access programming.[334] TCI and NCTA seem to assert that, for a la carte services, the highest per-subscriber implicit fee should be multiplied by the number of subscribers that subscribe to the operator's a la carte service with the highest subscriber penetration.[335] TCI and NCTA's rationale is that the higher rate will discourage certain a la carte services from migrating to leased access.[336]

125. As discussed above in Section II.B.2.d., we will continue to permit cable operators to use the highest implicit fee formula to set maximum reasonable rates for leased access programming that is carried as an a la carte service. We believe, however, that it is most appropriate to require operators to determine on an aggregate basis for a single channel which of their a la carte services has the highest implicit fee. For example, if Channel A on a given cable system has a per-subscriber implicit fee of $1.00 and has 2000 subscribers, its aggregate implicit fee is $2000. If Channel B has a per-subscriber implicit fee of $1.50 and 1000 subscribers, its aggregate implicit fee is $1500. Of these channels, Channel A has the highest aggregate implicit fee even though it has a lower per-subscriber implicit fee than Channel B. Therefore, assuming these two channels are the only channels offered on an a la carte basis, the amount that is implicitly paid for Channel A would be the maximum rate that the operator may charge a leased access programmer that wishes to be carried as an a la carte service.

126. We believe that this formulation accurately represents the highest amount that a non-leased access programmer has agreed to implicitly pay the operator for carriage as an a la carte service. Thus, it will discourage existing a la carte services from migrating to leased access, but it will also avoid artificially inflating the maximum rate as we believe TCI and NCTA's apparent proposal has the potential to do. Accordingly, on reconsideration, we conclude that operators should not be required to multiply the highest per-subscriber implicit fee by the average

[333] *Reconsideration Order* at para. 39.

[334] *Id.*

[335] TCI Petition for Reconsideration at 47-48; NCTA Comments at 23 n.61.

[336] TCI Petition for Reconsideration at 47-48; NCTA Commments at 23 n.61.

number of subscribers that subscribe to the operator's a la carte services. We will instead require operators to determine which a la carte service has the highest implicit fee by comparing their implicit fees on an aggregate basis.

B. Provision of Initial Leased Access Information

1. Response Period

127. In the *Reconsideration Order*, we stated that our leased access complaint process had revealed that cable operators often did not provide rate information in a timely manner, despite our rule requiring a schedule of rates to be provided to prospective leased access programmers upon request.[337] We clarified that the purpose of the rule was to insure that the initial information a potential programmer might need in order to pursue leased access on a particular cable system be provided as soon as practicable.[338] In order to facilitate the provision of such information to potential leased access programmers, we required an operator to provide the following information within seven business days of a request regarding leased access: (a) a complete schedule of the operator's full-time and part-time leased access rates; (b) how much of the cable operator's leased access set-aside capacity is available;[339] (c) rates associated with technical and studio costs; and (d) if specifically requested, a sample leased access contract.[340]

128. Several commenters argue that an extension of the cable operator's response period from seven business days to 15 business days would greatly assist cable operators without unduly burdening potential leased access programmers.[341] Intermedia/Armstrong propose that the response time should be 30 days, arguing that operators receiving leased access requests by mail have less than seven business days to respond because the Commission's rules measure the response period from the date the request is made.[342] SCBA recommends that the Commission allow operators of small cable systems 30 days to provide a written response stating whether it has unused channel capacity available.[343] SCBA also asks the Commission to allow operators of small systems a response time of 60 days to provide the other leased access information that is

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[337] *Reconsideration Order* at para. 40.

[338] *Id.*

[339] We wish to remind operators that the relevant information is how much of their leased access set-aside requirement remains unfilled, not how much open capacity remains on their system.

[340] *Reconsideration Order* at para. 40. *See also* 47 C.F.R. § 76.970(e).

[341] TCI Petition for Reconsideration at 49; Daniels, et al. Petition for Reconsideration at 25; NCTA Comments on Information Collection Requirements at 2-3.

[342] *See* Intermedia/Armstrong Petition for Reconsideration at 2-4.

[343] SCBA Comments at 29.

required by the Commission's rules.[344] SCBA contends that a seven-day response period will force operators of small systems to prepare the required information prior to receiving an inquiry concerning leased access.[345] SCBA claims that this preparation will require a significant diversion of management time and the likely use of outside counsel and/or consultants, which is unwarranted in light of the fact that virtually no small system operator has ever received a request for leased access information.[346] Programmers such as ValueVision and HITN, however, oppose any change in the seven business day rule, arguing that the rule is necessary to ensure that cable operators provide leased access information in a timely manner.[347]

129. As an initial matter, we wish to stress our expectation that cable operators will respond to all leased access requests in a complete and timely manner. While we recognize the importance of prompt disclosure of the required information by cable operators, we nevertheless believe that an extension of the response period is justified. We will therefore modify our rule to require operators to respond to a leased access request within 15 calendar days of the date the leased access programmer makes the request. Such an extension should insure that operators have a reasonable length of time to process leased access requests even when those requests are received through the mail. In order to provide more certainty regarding the date of a request, we will also modify our rule to require that all requests for leased access be made in writing and specify the date they are sent to the operator.[348]

130. We agree with SCBA that it is appropriate to grant certain operators of small systems additional time in which to provide the required information to potential leased access programmers. We therefore will allow operators of systems subject to small system relief 30 calendar days from the date of a leased access request to provide the required information, rather than the 15 calendar days in which other operators must respond.[349] Thus, in accordance with SCBA's request, we will allow the operators of systems subject to small system relief 30 calendar days to specify how much leased access set-aside capacity is available. We decline, however, to

[344]*See* SCBA Comments at 32; SCBA Comments on Information Collection Requirements at 6-7.

[345]SCBA Comments at 31-32; SCBA Comments on Information Collection Requirements at 6.

[346]SCBA Comments at 31-32; SCBA Comments on Information Collection Requirements at 6.

[347]*See* ValueVision Opposition at 1-2; HITN Comments at 22-24.

[348]We note that our previous rule allowing requests to be made by telephone was not approved by the Office of Management and Budget. Several commenters agree that the Commission should require leased access requests to be in writing. *See* Daniels, et al. Petition for Reconsideration at 25; TCI Petition for Reconsideration at 48-49; NCTA Comments on Information Collection Requirements at 1-2.

[349]For this purpose, systems subject to small system relief are described under the standards adopted in the *Small System Order*, 10 FCC Rcd at 7406, 7412-13 (a cable system is entitled to small system relief if it either: (a) serves 15,000 or fewer subscribers and is owned by a small cable company serving a total of 400,000 or fewer subscribers over all of its systems, or (b) has been granted special relief as provided for in the *Small System Order*).

adopt SCBA's proposal to provide such operators 60 calendar days from the date of a request to provide the other required leased access information. We believe that by allowing such operators a full 30 days to compile the required information, the rule we adopt should minimize any potential need for these operators to prepare the information in advance of a leased access request while ensuring that potential leased access programmers receive the required information in a timely fashion.

2. *Preconditions To Providing Initial Leased Access Information*

131. In the *Reconsideration Order*, we stated that because cable operators must provide leased access information to programmers within seven business days of a programmer's request, operators may not impose preconditions to supplying the information.[350] We believed that this rule was necessary because, in the past, some operators had required that prospective programmers supply extensive financial or other data before the operators would provide any leased access information to a programmer, thus discouraging leased access use.

132. Intermedia/Armstrong seek reconsideration of this rule, arguing that if cable operators were allowed to request some basic information from the programmer, they could avoid compiling and providing unnecessary information and would be able to provide better service to programmers.[351] In particular, Intermedia/Armstrong argue that operators should be permitted to ask on which cable system and on which tier the programmer seeks access and whether the programming could be considered indecent.[352] SCBA recommends that the Commission require operators of small cable systems to provide leased access information only in response to "bona fide" leased access requests.[353] SCBA defines such requests as those accompanied by a $500 deposit intended to defray any costs the small system operator may incur while negotiating with the programmer and computing the leased access rates.[354] ValueVision, on the other hand, argues that Intermedia/Armstrong provide no rational basis for conditioning the provision of leased access information on programmers supplying information to the operator.[355] ValueVision also notes that Intermedia/Armstrong in particular have failed to respond to ValueVision's repeated requests for leased access information.[356]

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[350] *Reconsideration Order* at para. 40.

[351] Intermedia/Armstrong Petition for Reconsideration at 5-6.

[352] *Id.*

[353] SCBA Comments at 27-30.

[354] *Id.* at 29-30.

[355] ValueVision Opposition at 2 n.2.

[356] *Id.* at 2 and n.1.

133. Because we remain concerned that requests for programmer information will be used by operators to discourage leased access use, we will not allow operators to ask for any information before responding to a leased access request unless the information is necessary to prepare the required response. For instance, we clarify that if a leased access request does not specify for which cable system access is sought, the cable operator may ask the programmer for this information because maximum rates are calculated on a per-system basis. On the other hand, we do not believe that information from the programmer regarding its tier preference is necessary for the operator to provide the required information, since the operator may place a programmer demanding access to a tier on any tier with more than 50% subscriber penetration.[357] We also believe that operators should not be entitled to inquire about the content of the programming before responding to a request because such information is not relevant to the required rate and capacity information.

134. We will, however, allow an exception for systems subject to small system relief because their initial costs of providing this information may be higher than other systems.[358] We agree with SCBA that certain operators of small systems should only be required to respond to "bona fide" leased access requests. Therefore, we find that operators of systems subject to small system relief do not have to provide the required information until the leased access programmer supplies the following information: (a) desired length of contract term, (b) time slot desired, (c) anticipated commencement date for carriage, and (d) the nature of the programming. Because we believe that such information sufficiently demonstrates an intent to obtain access, we do not agree with SCBA that operators of small systems may require leased access programmers to pay a $500 deposit in order to defray operators' negotiation and rate computation expenses.[359]

3. *Obligation to Provide Information Regarding the Amount of Available Leased Access Capacity*

135. TCI and NCTA ask the Commission to reconsider its requirement that cable operators provide potential leased access users with information about how much set-aside capacity is available on their systems because providing such information is unduly burdensome and unnecessary.[360] Both commenters argue that potential leased access programmers only need to know whether there is at least one channel available for their use and do not need to know

[357] *See* Section II.E.

[358] For this purpose, systems subject to small system relief are described under the standards adopted in the *Small System Order*, 10 FCC Rcd at 7406, 7412-13 (a cable system is entitled to small system relief if it either: (a) serves 15,000 or fewer subscribers and is owned by a small cable company serving a total of 400,000 or fewer subscribers over all of its systems, or (b) has been granted special relief as provided for in the *Small System Order*).

[359] SCBA Comments at 29-30.

[360] TCI Petition for Reconsideration at 49-50; NCTA Comments on Information Collection Requirements at 2.

how many other leased access channels remain available.[361] In addition, TCI and NCTA allege that supplying the information would be unduly burdensome because the formula used to calculate the set-aside requirement is complex and that changing circumstances continually affect the calculation.[362] We disagree. We believe that information concerning overall available channel capacity may be of use to a potential leased access programmer in deciding which cable system best meets its needs, particularly if the programmer wishes to lease more than one channel. Moreover, we do not believe that calculating a system's available leased access capacity is difficult, particularly with the clarifications of our rules regarding the methodology for calculating set-aside requirements.[363] Finally, we have granted cable operators additional time in which to supply the information, and this additional time should make supplying the information less burdensome.[364] We therefore decline to amend our rules as TCI and NCTA suggest.

C. Time Increments

136. In the *Reconsideration Order*, we stated that we will not require operators to accept leases that are for less than half-hour intervals.[365] TCI asserts that the Commission should not require cable operators to accept part-time leased access contracts in half-hour increments because this rule will result in a proliferation of infomercials and 900 number programming.[366] Other commenters propose that cable operators should be permitted to impose a two-hour minimum for leased access programming.[367] We find that commenters have presented no compelling new arguments or evidence on this issue, and we therefore decline to alter our current rule. As we noted above, part-time leased access programming provides much of the competition and diversity of programming sources that Section 612 was intended to promote.[368] As we stated in the *Reconsideration Order*, the most common programming time increment is typically one-half to one hour.[369] We therefore continue to believe that permitting operators to exclude leased access

[361]TCI Petition for Reconsideration at 49-50; NCTA Comments on Information Collection Requirements at 2.

[362]TCI Petition for Reconsideration at 49-50; NCTA Comments on Information Collection Requirements at 2.

[363]*See* ValueVision Opposition at 3 (the amount of available leased access capacity is readily known to the operator and easy to provide).

[364]*See* Section III.B.1.

[365]*Reconsideration Order* at para. 47.

[366]TCI Petition for Reconsideration at 44-46 (arguing that infomercial programming will adversely affect cable operators' market development and the existing commercial marketplace, and will harm existing programmers that are preempted by small increments of leased access time).

[367]Daniels, et al. Petition for Reconsideration at 25-26; E!, et al. Reply Comments at 6.

[368]Section II.C.2.a.

[369]*Reconsideration Order* at para. 47.

programming seeking half-hour increments would unfairly deny access to a substantial number of potential programmers. Moreover, we believe that the rules we adopt above regarding part-time use address TCI's concern that a half-hour minimum will cause excessive migration of current infomercial programming to leased access channels and will lead to excessive displacement of existing non-leased access programmers.[370] We clarify that the leased access rate for a half-hour program must be prorated to reflect the length of the program (i.e., hourly rates cannot be charged for half-hour programs).

D. Calculation of Statutory Set-Aside Requirement

137. Section 612 requires a cable system to set aside up to 15% of its activated channels for leased access. For operators with 100 or fewer activated channels, the statutory set-aside requirements for leased access channels are expressed as a percentage of "channels not otherwise required for use by federal law or regulation."[371] In the *Reconsideration Order*, we clarified that for purposes of calculating the set-aside requirements, channels carrying retransmission consent stations must be included in the calculation because they are not "required by federal law or regulation."[372] TCI and Daniels, et al. argue that retransmission consent stations should be excluded because they are the functional equivalent of must-carry stations, and given that cable operators have no control over the choice between retransmission consent and must-carry, they must proceed under the assumption that each qualified local television station will elect must-carry.[373] We decline to adopt this proposed change. The carriage of stations electing retransmission consent is not required by federal law or regulation.[374] So long as a cable operator decides to carry a local television station on a voluntary, retransmission consent basis, we do not believe that the station's unexercised must- carry rights make it the equivalent of a station that invoked its must-carry rights to obtain carriage. We will, however, clarify that channels which cannot be used due to technical and safety regulations of the federal government, such as aeronautical channels, should be excluded when calculating the set-aside requirement for cable systems that have 100 channels or less.[375]

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[370] *See* Section II.C.

[371] Communications Act § 612(b)(1), 47 U.S.C. § 532(b)(1).

[372] *Reconsideration Order* at para. 55.

[373] *See* TCI Petition for Reconsideration at 46-47; Daniels, et al. Petition for Reconsideration at 26.

[374] *See* ValueVision Opposition at 3 (federal law does not compel cable operators to carry retransmission consent stations -- in fact, Section 325(b) prohibits carriage without a station's consent).

[375] 1984 House Report at 48-49 (specifying the exclusion of these channels for systems with 100 channels or less).

E. Billing and Collection Services

138. Section 612(c)(4)(A)(ii) grants the Commission the authority to establish reasonable terms and conditions for the billing of rates to subscribers and for the collection of revenue from subscribers for leased access channels.[376] In the *Rate Order*, we required cable operators to provide billing and collection services to leased access programmers unless operators could demonstrate the existence of third-party billing and collection services which, in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered to comparable non-leased access programmers.[377] In both the *Rate Order* and the *Reconsideration Order*, we declined to adopt specific rules regarding rates for such services.[378]

139. VIPNA and HITN argue that the Commission should establish specific rules relating to the rates that cable operators can charge for billing and collection services.[379] These commenters, however, do not present any specific guidelines for establishing rates for billing and collection services. Moreover, their arguments regarding this issue were fully considered and rejected in the *Reconsideration Order*.[380] We therefore decline to modify our current rule.

IV. MARKET ENTRY ANALYSIS

140. We note that Section 257 of the Communications Act requires the Commission to complete a proceeding to identify and eliminate market entry barriers for entrepreneurs and other small businesses in the telecommunications industry.[381] The Commission is directed to promote a diversity of media voices and vigorous economic competition, among other things.[382] We believe that this *Order* is consistent with the objectives of Section 257 in that it establishes rates, terms, and conditions for leased access that are intended to promote diversity and competition. We also believe that our provisions for part-time leased access are especially suited to allow small or entrepreneurial leased access programmers to enter the telecommunications programming marketplace.

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[376]Communications Act § 612(c)(4)(A)(ii), 47 U.S.C. § 532(c)(4)(A)(ii).

[377]*Rate Order*, 8 FCC Rcd at 5944-5945.

[378]*See Rate Order*, 8 FCC Rcd at 5945; *Reconsideration Order* at para. 51.

[379]*See* VIPNA Comments at 6; HITN Comments at 24.

[380]*See Reconsideration Order* at para. 51.

[381]Communications Act § 257(a), 47 U.S.C. § 257(a).

[382]Communications Act § 257(b), 47 U.S.C. § 257(b).

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

141. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, ("RFA"), an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Further Notice*.[383] The Commission sought written public comments on the proposals in the *Further Notice*, including comments on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA, as amended.

A. Need for Action and Objectives of the Rule

142. Section 612 of the Communications Act requires the Commission to establish reasonable terms and conditions, including maximum reasonable rates, for leased access on cable systems. The purpose of this action is to amend the Commission's rules regarding leased access, including the rules for calculating maximum reasonable rates. The statutory objectives of the leased access provisions are to promote competition in the delivery of diverse programming sources and to assure the widest possible diversity of programming sources in a manner that is consistent with the growth and development of cable systems.

B. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

143. In response to the IRFA, SCBA filed comments criticizing the Commission for failing to estimate the number of small cable systems and small cable operators that would be affected by the regulations proposed in the *Further Notice*.[384] SCBA argues that, as reflected in the *Small System Order*, the Commission has extensive data regarding the existence of small cable entities.[385] SCBA also claims the Commission neither sought specific comment regarding the impact of its proposals on small cable entities nor asked for alternatives.[386] SCBA urges the Commission to adopt the alternatives for small cable systems that it has proposed in this proceeding.[387] In its filings, SCBA raises the following issues and alternatives.

144. *Information Collection Issues.* As discussed above in Section III.B.1., SCBA argues that the Commission's seven business-day response time for providing leased access

[383]The IRFA was drafted prior to when the RFA was amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996," codified at 5 U.S.C. § 601 *et seq.* (1996) ("SBREFA").

[384]SCBA Comments on the IRFA at 3-4.

[385]*Id.*

[386]*Id.* at 4.

[387]*Id.*

information imposes significant burdens on small cable systems.[388] SCBA recommends that the Commission allow small system operators 30 days to provide a written response stating whether unused leased access capacity is available and 60 days to provide the remaining required information.[389] SCBA also requests that the Commission allow small system operators to respond only to "bona fide" leased access requests.[390]

145. *Rate Issues.* SCBA argues that the Commission's proposed cost/market rate formula would not adequately compensate small system operators for the following reasons:[391]

(a) *Full-Time Rates.* SCBA contends that because small system operators often receive no advertising revenues, the Commission's cost/market rate formula could result in leased access rates of zero or less.[392] Among other things, SCBA suggests that the Commission revise the proposed formula to allow small system operators to recover all operating costs reflected on FCC Form 1230, instead of using subscriber revenue as a surrogate for such costs.[393] Alternatively, SCBA proposes allowing operators of small systems to charge market rates for all leased access programmers regardless of demand, particularly if the party requesting access is affiliated with the provider of a competing multi-channel video programming service.[394]

(b) *Part-Time Rates.* SCBA argues that if the full-time rate under the proposed cost/market rate formula is prorated, the per hour or half-hour rates for small systems would be lower than advertising rates, which would create a flood of requests for part-time leased access.[395]

(c) *Transaction Costs.* SCBA contends that leased access contracts create higher transaction costs than other programming contracts because leased access agreements are negotiated more frequently and must be negotiated on a system-by-

[388] SCBA Comments at 31-32; SCBA Comments on Information Collection Requirements at 5-7.

[389] SCBA Comments at 29, 31-32; SCBA Comments on Information Collection Requirements at 6-7.

[390] SCBA Comments at 27-30; SCBA Comments on Information Collection Requirements at 7.

[391] We note that, to a large extent, Tele-Media of Delaware's Comments mirror SCBA's Comments.

[392] SCBA Comments at 5-7. *See also* SCBA Reply at 2.

[393] SCBA Comments at 19-20.

[394] *Id.* at 21-22.

[395] *Id.* at 8.

system basis.[396] SCBA proposes that the Commission remedy this problem for small system operators by allowing them to include an additional amount of at least $1,000 in their leased access rate calculations.[397]

(d) *Technical Costs.* SCBA argues that additional headend equipment used to add leased access channels will result in high per-subscriber costs for small systems.[398] SCBA proposes that the Commission allow small system operators to charge leased access programmers for all technology costs related to leased access.[399]

(e) *Transition Period.* SCBA argues that the Commission should phase in leased access obligations for small cable systems to avoid the disruption to current programming line-ups that the proposed cost/market rate formula would create.[400]

(f) *Advance Channel Designations.* The *Further Notice* proposed that a cable operator must place in its public file a list of the specific channels it intends to use for leased access programming.[401] SCBA argues that small system operators should only be required to provide the required leased access information following receipt of a "bona fide" request.[402]

146. In reviewing the record before us, we have identified issues that may impact small leased access programmers, such as maximum rate calculations, part-time use of leased access, resale, tier and channel placement, preferential access, dispute resolution procedures, certain contractual issues, technical equipment costs, and the definition of affiliate. In this *Order*, we have addressed comments from leased access programmers regarding these issues.

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[396] *Id.* at 9-11.

[397] *Id.* at 18.

[398] *Id.* at 14.

[399] *Id.* at 14-15, 18-19.

[400] *Id.* at 22-26.

[401] *See Further Notice* at para. 76.

[402] SCBA Comments at 32.

C. Description and Estimate of the Number of Small Entities Impacted.

147. 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 proposed rules.[403] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and the same meaning as the term "small business concern" under Section 3 of the Small Business Act.[404] Under the Small Business Act, a "small business concern" is one which: (a) is independently owned and operated; (b) is not dominant in its field of operation; and (c) satisfies any additional criteria established by the Small Business Administration ("SBA").[405] The rules we adopt in this *Order* will affect cable systems and cable programmers.

148. *Cable Systems*: 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 revenue annually.[406] While this definition includes small cable entities, it also includes closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. Thus, the definition includes many small entities that will not be directly impacted by our leased access rules. According to the Census Bureau, there were 1,423 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[407] We note that not only does this estimate include small entities other than small cable entities, but the majority of the small cable systems included within this estimate have less than 36 channels and therefore are not subject to the Commission's leased access regulations. We therefore estimate that, based on the SBA definition, the number of small cable entities likely to be impacted by our rules will be significantly less than 1,423 entities.

149. The Commission has developed its own definition of a small cable system for purposes of rate regulation. Under the Commission's rules, cable systems serving fewer than 15,000 subscribers are considered small systems, and small systems owned by small cable companies serving fewer than 400,000 subscribers nationwide are entitled to small system

[403] 5 U.S.C. § 604(a)(3).

[404] 5 U.S.C. § 601(3).

[405] 15 U.S.C. § 632.

[406] 13 C.F.R. Part 121.201 (SIC 4841).

[407] 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

relief.[408] This definition is both broader and narrower than that of the SBA. The definition is broader in that it includes larger cable systems than the SBA definition.[409] It is narrower in that, unlike the SBA definition, it does not include closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, or subscription television services. Our most recent information indicates that, under the Commission's definition, there were 1,439 systems entitled to small system relief at the end of 1995.[410] Of these systems, we estimate that approximately 614 systems offer more than 36 channels, and thus are subject to our leased access rules.

150. 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 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."[411] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we 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.[412] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[413] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we are 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.

151. *Cable Programmers*: We anticipate that both small leased access programmers and small non-leased access programmers may be impacted by our leased access rules. The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will utilize the SBA classifications of

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[408] 47 C.F.R. § 76.901(c), (e). *See also Small System Order*, 10 FCC Rcd at 7406-7413. In addition, qualifying cable systems may also be granted small system relief, as provided for in the *Small System Order*. *Small System Order*, 10 FCC Rcd at 7412-7413. For purposes of leased access, SCBA supports using the Commission's definition of small systems in the *Small System Order*. SCBA Comments at 17-18, 20-21.

[409] The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Small System Order* at 10 FCC Rcd 7409-7410.

[410] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for December 30, 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, there may be fewer than 1,439 systems entitled to small system relief.

[411] Communications Act § 623(m)(2), 47 U.S.C. § 543(m)(2).

[412] 47 C.F.R. § 76.1403(b).

[413] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for December 30, 1995).