

businesses in telecommunications.<sup>310</sup> In enacting Section 309(j), Congress found that "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries"<sup>311</sup> and that small businesses should "continue to have opportunities to become Commission licensees."<sup>312</sup> To this end, Section 309(j) requires the Commission to establish competitive bidding rules and other provisions to ensure that small businesses, businesses owned by minorities and women, and rural telephone companies (collectively referred to as "designated entities") have an opportunity to participate in the wireless telecommunications industry.

139. Section 309(j) requires that in designing systems of competitive bidding, the Commission "promot[e] economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses . . . and businesses owned by members of minority groups and women."<sup>313</sup> Section 309(j)(4)(D) requires that in prescribing regulations, the Commission "ensure that small business . . . and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures."<sup>314</sup>

140. The Commission has designed a number of incentives to encourage the participation of designated entities in the wireless spectrum-based services. For example, in the broadband PCS auctions, the Commission established entrepreneurs blocks in which participation was limited to applicants with \$125 million or less in annual gross revenues for the previous two years and total assets of \$500 million or less.<sup>315</sup> Other incentives have

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<sup>310</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6286.

<sup>311</sup> H.R. Rep. No. 111, 103rd Cong., 1st Sess. 254 (1993).

<sup>312</sup> *Id.* at 255.

<sup>313</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>314</sup> 47 U.S.C. § 309(j)(4)(D). Subsequent to Section 309(j)'s enactment, Congress eliminated the Commission's minority tax certificate program. Self-Employed Health Insurance Act of 1995, Pub L. No. 104-7, § 2, 109 Stat. 93 (1995).

<sup>315</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537. *See also Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136.

included reduced upfront payments,<sup>316</sup> bidding credits,<sup>317</sup> installment payment plans with favorable interest rates,<sup>318</sup> and reduced down payments on winning bids.<sup>319</sup> In establishing these competitive bidding rules, the Commission concluded that:

[t]he record clearly demonstrates that the primary impediment to participation by designated entities is lack of access to capital. This impediment arises for small businesses from the higher costs they face in raising capital and for businesses owned by minorities and women from lending discrimination as well. In this regard, it should be noted that although auctions have many beneficial aspects, they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the costs of entry into spectrum-based services.<sup>320</sup>

141. Many commenters noted that access to capital continues to be a primary barrier to small business participation in wireless services.<sup>321</sup> However, many stated that

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<sup>316</sup> See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5599-5600 (25% reduction for all broadband PCS C block small business applicants).

<sup>317</sup> See, e.g., *D, E & F Block Competitive Bidding Report and Order*, 11 FCC Rcd at 7875-7876 (25% bidding credit for small businesses and 15% bidding credit for very small businesses); *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 161 (25% bidding credit for small businesses in broadband PCS C block auctions); *900 MHz SMR*, 11 FCC Rcd at 1705-06 (15% bidding credit for very small businesses and 10% bidding credit for small businesses).

<sup>318</sup> See, e.g., *800 MHz SMR Order and NPRM*, 11 FCC Rcd at 1574; *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, Second Report and Order, 11 FCC Rcd 624, 662-663 (1996) (*GWCS Second Report and Order*).

<sup>319</sup> See, e.g., *GWCS Second Report and Order*, 11 FCC Rcd at 663.

<sup>320</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537.

<sup>321</sup> See, e.g., Small Business in Telecommunications Comments at ii; Integrated Communications Comments at 1; Center for Training and Careers Comments at 2; National Paging and Personal Communications Association Comments at 2; American Mobile

despite our incentives, the use of competitive bidding itself has become a barrier as it has resulted in higher costs for entry into wireless spectrum-based services.<sup>322</sup> For example, Small Business in Telecommunications argues that small companies paid more for spectrum at auction than large publicly-traded corporations.<sup>323</sup> Small Business in Telecommunications asserts that this dynamic was due to the likelihood that small licensees would draw competing bids from those entities that quickly recognize that in the "auction battle," the small business participant has limited resources, while large companies are scaring off competing bidders who presumed that the larger entity was both willing and able to continue the bidding process to high levels.<sup>324</sup> Small Business in Telecommunications further argues that the Commission should exercise a more judicious use of auctions, following a comprehensive examination of alternative licensing methods. It also contends that the Commission should closely evaluate the use of auctions in frequencies occupied with incumbents, especially where the incumbents are small businesses.<sup>325</sup>

142. As noted above, we have recognized previously that competitive bidding, despite the public interest benefits associated with its use, has the potential to erect another barrier for small businesses and other designated entities by raising the costs of entry into spectrum-based services.<sup>326</sup> However, we note that Section 309(j) provides mechanisms to address this potential problem, and the Commission has adopted special incentives for designated entities in various services. In addition, our policies regarding geographic partitioning and spectrum disaggregation should aid small businesses and other entrepreneurs through the creation of smaller, less capital intensive licenses that are more easily within the reach of smaller entities. Moreover, such policies may increase access to capital that can be

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Telecommunications Association Comments at 9; Williams Testimony at 1-2.

<sup>322</sup> See, e.g., Small Business in Telecommunications Comments at 9-38; Small Business in Telecommunications Reply Comments at 4-5; American Mobile Telecommunications Association Comments at 8, 10; National Wireless Resellers Association Comments at 4.

<sup>323</sup> Small Business in Telecommunications Comments at 25 & n.13. See also American Mobile Telecommunications Association Comments at 10.

<sup>324</sup> Small Business in Telecommunications Comments at 25.

<sup>325</sup> *Id.* at 38.

<sup>326</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537.

used to construct and maintain wireless systems.<sup>327</sup> We further note that small businesses have both participated in and been successful bidders in the majority of spectrum auctions we have conducted to date. Specifically, in our simultaneous multiple-round spectrum auctions, 79% of the auction bidders were small businesses (as defined for each respective service) and small businesses acquired 54% of the total licenses offered in these auctions.<sup>328</sup>

143. Finally, with respect to Small Business in Telecommunications' suggestion that the Commission examine alternatives to competitive bidding, we note that in granting the Commission authority to assign licenses through competitive bidding, Congress recognized the benefits of this assignment method in ensuring the efficient use of spectrum and faster deployment of new services and technologies to the public as opposed to other methods of licensing. Specifically, Congress found that other licensing methods such as lotteries and comparative hearings "in many respects . . . have not served the public interest."<sup>329</sup> Indeed, in authorizing the Commission's use of competitive bidding, Congress limited the Commission's authority to license spectrum using lotteries.<sup>330</sup> Consequently, we will

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<sup>327</sup> See *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, Notice of Proposed Rulemaking, 11 FCC Rcd at 10195-10196 (1996).

<sup>328</sup> These results include auctions for the narrowband PCS, broadband PCS, direct broadcast satellite, multipoint and/or multichannel distribution, 900 MHz SMR, and digital audio radio services. The Interactive Video and Data Service (IVDS) service auction was an oral outcry auction; thus, those results are excluded.

<sup>329</sup> H.R. Rep., No. 111, 103rd Cong., 1st Sess. 248. Congress noted that comparative hearings "frequently have been time consuming, causing technological progress and the delivery of services to suffer." *Id.* Lotteries, moreover, "engendered rampant speculation; undermined the integrity of the FCC's licensing process and, more importantly, frequently resulted in unqualified persons winning an FCC license. Many lottery applicants had no intention to build or operate a system using the spectrum, but instead only sought to acquire a license at nominal cost and then sell it, making a large profit and at the same time delaying the delivery of services to the public." *Id.*

<sup>330</sup> See 47 U.S.C. § 309(i)(1) (The Commission has the authority to use lotteries if "(A) there is more than one application for any initial license of construction permit which will involve a use of the electromagnetic spectrum; and (B) the Commission has determined that the use is not described in subsection [309](j)(2)(A)"). Section 309(j)(2)(A) authorizes the use of competitive bidding if, among other things, the principal use of the spectrum is for subscription-based services. 47 U.S.C. § 309(j)(2)(A).

continue to seek comment, where appropriate, on the use of competitive bidding to assign licenses for individual services in specific rulemaking proceedings, and we will continue to assign licenses for spectrum-based services through competitive bidding where permitted by the Communications Act and where we find that the public interest would be served. However, to the extent Small Business in Telecommunications suggests that we engage in a broad examination of our licensing alternatives, we note that Section 309(j)(12) requires the Commission, no later than September 30, 1997, to conduct a public inquiry and submit a report to Congress evaluating the use of competitive bidding, including the extent to which competitive bidding has improved the efficiency and effectiveness of the process for granting licenses and has facilitated the introduction of new spectrum-based technologies and the entry of new companies in the telecommunications market.<sup>331</sup> We anticipate requesting information from the public to be included in this report shortly.

144. In the *Market Entry Barriers Notice of Inquiry*, we asked for comment on whether our competitive bidding incentives have enhanced opportunities for small business participation. We also asked how existing incentives could be modified and invited suggestions for new mechanisms. In addition, we sought preliminary views on how Section 309(j) incentives have operated in the five completed auctions employing small business incentives.<sup>332</sup>

145. We received several comments in response to these inquiries. NextWave has a positive view of the competitive bidding incentives used thus far, stating that "[d]espite many setbacks, the Commission crafted a set of rules for and conducted the recent C block auction in a manner that has met, in substantial part, the Congressional mandate of "disseminating licenses among a wide variety of applicants."<sup>333</sup>

146. Other commenters, however, did not share this view. Thompson PCS states that very few small businesses won Basic Trading Area (BTA) licenses in the C block auction.<sup>334</sup> It believes this was because the criteria used to qualify as an entrepreneur was "far to [sic] lax."<sup>335</sup> PCS Alliance apparently agrees, calling the Commission's definition of

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<sup>331</sup> 47 U.S.C. § 309(j)(12).

<sup>332</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6308.

<sup>333</sup> NextWave Comments at 2.

<sup>334</sup> Thompson PCS Comments at 3.

<sup>335</sup> *Id.*

an "entrepreneur" for purposes of the C block auction "mystifying."<sup>336</sup> American Mobile Telecommunications Association, noting that small business bidders won 26% of the 900 MHz licenses auctioned earlier this year, questions whether such a level of participation by small businesses can be expected in future auctions.<sup>337</sup> It states that tiered bidding credits and installment payment plans are valuable, but have only a relatively limited impact on breaching entry barriers in non-entrepreneur block auctions.<sup>338</sup>

147. Other commenters allege that the Commission has a practice of changing rules in mid-stream.<sup>339</sup> Along these lines, minority and women entrepreneurs, in particular, complain that they lost financing once the Commission eliminated its race- and gender-specific competitive bidding provisions in light of *Adarand v. Peña*.<sup>340</sup> They argue that with the elimination of these special provisions, the incentives for many companies to offer financing or enter into strategic alliances with these entrepreneurs disappeared. As a result, many found it more difficult or even impossible to participate in the broadband PCS C block auction.<sup>341</sup> PCS Alliance states that these problems were exacerbated by the Commission's decision to issue licenses in the broadband PCS A and B blocks first.<sup>342</sup> Williams sums up his opinion of the success of the Commission's special incentives by stating that such incentives, where available, succeeded in generating substantial participation by small businesses and businesses owned by minorities or women in the auctioning process and a fair allocation of licenses was issued to the small and minority and women-owned businesses. However, where such incentives were not available, few, if any, small and minority and women-owned businesses acquired licenses.<sup>343</sup>

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<sup>336</sup> PCS Alliance Comments at 1.

<sup>337</sup> American Mobile Telecommunications Association Comments at n. 18.

<sup>338</sup> *Id.*

<sup>339</sup> *See, e.g.*, Integrated Communications Group et al. Comments at 2; PCS Alliance Comments at 1.

<sup>340</sup> 115 S.Ct. 2097 (1995) (*Adarand*). *See infra* ¶ 210 (discusses *Adarand*).

<sup>341</sup> *See, e.g.*, Integrated Communications Group Comments et al. at 2; Thompson PCS Comments at 1; Kansas Star Communications Comments at 2; PCS Alliance Comments at 1.

<sup>342</sup> PCS Alliance Comments at 1.

<sup>343</sup> Williams Testimony at 3. *See also infra* ¶ 219 (discusses related comments).

148. Many commenters provide suggestions for further enhancing opportunities for small businesses in the auction process. Williams states that the Commission should adopt entrepreneur blocks in other auctionable services and consider a tiered incentives process.<sup>344</sup> Several commenters suggest that the Commission adopt small business definitions that reflect true small businesses and take steps to avoid the possibility of large companies circumventing these definitions.<sup>345</sup> Thompson PCS states that the Commission should relax its PCS cross-ownership rules.<sup>346</sup> American Mobile Telecommunications Association suggests that the Commission also must consider its auction procedures in looking for ways to assist small businesses. For example, it argues that the Commission's use of simultaneous multiple round auctions places a burden on small businesses which generally do not have the resources to oversee a bidding process which can span months.<sup>347</sup>

149. We agree that we must continue to take steps to eliminate entry barriers and other burdens that discourage small businesses from participation in auctions for spectrum-based services. Some of the suggestions made by commenters already have been implemented. For example, the Commission continues to adopt special incentives to encourage the participation of small businesses in auctions. Indeed, the Commission has adopted or proposed tiered bidding credits and, in some cases, tiered installment payment plans as suggested in Williams' testimony in a number of services, such as: broadband PCS D, E & F block,<sup>348</sup> WCS,<sup>349</sup> 900 MHz SMR,<sup>350</sup> 800 MHz SMR,<sup>351</sup> Interactive Video and Data

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<sup>344</sup> Williams Testimony at 4, 5, 6. *See also* American Mobile Telecommunications Association Comments at 9 ("[E]ntrepreneur blocks that limit participation to genuinely small business defined on a service-by-service basis considering factors such as size of spectrum awards and expected capital requirements [are] a key to addressing what is otherwise a significant barrier to entry").

<sup>345</sup> TRA Communications Consultants Comments at 2; Thompson PCS Comments at 3. *See also* American Mobile Telecommunications Association Comments at n. 19 (most respondents to survey believe gross revenue test should be used to define small businesses).

<sup>346</sup> Thompson PCS Comments at 3.

<sup>347</sup> American Mobile Telecommunications Association Comments at 10. American Mobile Telecommunications Association notes that 70% of the respondents to its survey noted that they employ 15 or fewer employees, with more than half employing fewer than five employees.

<sup>348</sup> *D, E, and F Block Competitive Bidding Report and Order*, 11 FCC Rcd at 7842-7853.

Service (IVDS),<sup>352</sup> and paging.<sup>353</sup> The Commission also has eliminated the PCS cross-ownership rule.<sup>354</sup> In addition, the Commission is considering a number of changes to its competitive bidding procedures to increase the pace of auctions, and thereby, shorten the duration of each auction,<sup>355</sup> which would address, at least in part, the concerns of American Mobile Telecommunications Association noted above.

150. Finally, in the *Market Entry Barriers Notice of Inquiry*, we sought comment on whether we needed to do more to make sure that small businesses have meaningful opportunities to participate in the provision of spectrum-based services.<sup>356</sup> NextWave argues that the Commission should consider policies that support entrepreneurs in their efforts to build their systems, recognizing that these small businesses will need to build out quickly not only to comply with FCC rules, but also to reduce the lead time of licensees in the Broadband PCS "A" and "B" block. In furtherance of this objective, NextWave suggests that the Commission remain flexible in its approach to small businesses' and entrepreneurs' participation in the wireless industry. This could be accomplished by: (1) encouraging equipment vendor support by ensuring that Commission rules do not discourage vendor financing; (2) not requiring businesses that participate in the installment payment plan to sign a promissory note; (3) limiting the cross-collateralization of licenses; and (4) permitting a one-time deferral of interest payments.<sup>357</sup>

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<sup>349</sup> See *WCS Report and Order*, FCC 97-50, ¶ 193.

<sup>350</sup> *900 MHz SMR Order*, 11 FCC Rcd at 2645.

<sup>351</sup> *800 MHz SMR Order and NPRM*, 11 FCC Rcd at 1574.

<sup>352</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Tenth Report and Order, PP Docket No. 93-253, FCC 96-447 (released Nov. 21, 1996), ¶ 18.

<sup>353</sup> *Paging NPRM*, 11 FCC Rcd at 3134.

<sup>354</sup> *D, E & F Block Competitive Bidding Report and Order*, 11 FCC Rcd at 7875-7876.

<sup>355</sup> See *Competitive Bidding Part 1 Rules NPRM*, FCC 97-60.

<sup>356</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6308.

<sup>357</sup> NextWave Comments at 5-7.

151. We are considering some steps to facilitate faster build-out of PCS systems by entrepreneurs. For example, we recently adopted rules that shorten the voluntary negotiation period for relocation of microwave incumbents by PCS licensees in the "C," "D," "E," and "F" blocks from two years to one year.<sup>358</sup> We believe this rule change will help to eliminate an obstacle to entry for "C" and "F" block licensees by encouraging faster relocation of microwave incumbents and, therefore, enabling these licensees to more quickly build-out their PCS systems and commence operation. With respect to the issues raised by NextWave, we are considering the issue of cross-defaults in the context of our *Part 1 NPRM* proceeding.<sup>359</sup> In addition, we recently codified a procedure for requiring applicants eligible for the installment payment program to execute a promissory note and security agreement as a condition of participating in any installment payment plan that is offered by the Commission.<sup>360</sup> Since this practice is consistent with normal commercial and government lending practices we do not see, and NextWave has not demonstrated, how such a requirement presents a market entry barrier or other undue burden on small businesses. Finally, with respect to NextWave's request for a one-time deferral of interest payments, we note that our current rules already permit qualifying participants in the installment payment program to pay their installment payment within 90 days after its due date without any type of penalty. We also allow licensees to seek a three- to six-month grace period during which no installment payments need be made.<sup>361</sup> We believe these procedures give adequate latitude to businesses that request extra time to meet their obligations to the Commission and the government.

152. The Wireless Telecommunications Bureau is exploring using its current licensing databases to fashion specialized licensing databases which we anticipate will be of particular interest to small businesses. The objective is to provide small businesses with readily accessible information which will assist them in ascertaining additional opportunities for entry, expansion, or growth. The Bureau is exploring ways to provide interested parties with information concerning spectrum availability and types of services being provided by

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<sup>358</sup> *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, Second Report and Order, WT Docket No. 95-157, FCC 97-48 (released Feb. 27, 1997).

<sup>359</sup> See *Competitive Bidding Part 1 Rules NPRM*, FCC 97-60, at ¶¶ 76, 78. A cross-default provision would specify that if a licensee defaults on one installment payment loan, it would also default on any other installment payment loans it holds. *Id.* at ¶ 76.

<sup>360</sup> See *id.* at ¶ 10.

<sup>361</sup> 47 C.F.R. § 1.2110(e)(4)(ii).

existing licensees. We believe that the availability of such databases will facilitate small businesses' efforts to discover and realize partitioning and disaggregation opportunities.

### *C. Cable Services*

153. Before addressing the specific cable-related market entry concerns raised by commenters, we note that even prior to the enactment of Section 257, the Commission already had taken significant steps to minimize the impact of our regulations on small cable businesses. In 1995, we established a new form of cable rate regulation designed to take into account the unique circumstances of small cable systems and companies.<sup>362</sup> The *Small System Order* extended rate relief to approximately 7,000 small cable systems and is the most important action the Commission has taken on behalf of small systems since the imposition of rate regulation under the 1992 Cable Act.<sup>363</sup> By tailoring rules specifically for small cable systems, the *Small System Order* has had a significant impact in easing the burdens of regulation for smaller cable companies.

154. The commenters in this proceeding have brought to our attention certain additional areas in which they believe market entry barriers exist for small cable operators and other small video programming providers. These areas include access to programming, access to capital, the franchise renewal process, certain practices of incumbent cable systems, and pole attachment rights, all of which are discussed below.

#### *1. Access to Programming and Related Obstacles*

155. Several commenters assert that, due to their size, small cable operators have difficulty in obtaining programming on terms and conditions comparable to their larger

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<sup>362</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995) (*Small System Order*).

<sup>363</sup> In the *Small System Order*, we defined a small system as one serving 15,000 or fewer subscribers and a small cable company as one that serves no more than 400,000 subscribers across all of its systems. In addition, the Commission's Cable Services Bureau continues to entertain petitions for special relief from systems that slightly exceed the small system eligibility criteria but that can demonstrate sufficient similarities with eligible small systems so as to justify extending that relief to them as well.

competitors.<sup>364</sup> According to the Small Cable Business Association, huge price differentials for programming continue to exist that cannot be cost-justified. It also states that small cable operators have encountered difficulty due to the refusal of some independent programmers to deal with the National Cable Television Cooperative and thus are at a competitive disadvantage compared to large cable operators, DBS providers, and certain wireless providers.<sup>365</sup> Similarly, Watson Cable argues that exclusive agreements of larger cable companies with new programmers preclude access to such programming by small cable operators and asks the Commission to remove such barriers.<sup>366</sup> In a similar vein, the Small Cable Business Association argues that the Commission should restrict the ability of broadcasters to engage in disparate pricing of broadcast retransmission consent fees between large and small video programming distributors.<sup>367</sup>

156. These concerns implicate the program access rules we adopted pursuant to Section 628 of the Communications Act.<sup>368</sup> One of the purposes of Section 628 is to increase "competition and diversity in the multichannel video programming market . . . ." <sup>369</sup> In adopting program access rules, "the Commission sought to carry out Congress' preference

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<sup>364</sup> Small Cable Business Association Comments at 15. *See also* Southwest Missouri Cable Comments at 4; Press Broadcasting Reply Comments at 1-2. Describing itself as an independent broadcaster with only one television station, Press Broadcasting expresses support for the concerns voiced by Small Cable Business Association and Southwest Missouri Cable about the ability of small businesses to compete in a telecommunications marketplace dominated by vertically- or horizontally-integrated entities. According to Press Broadcasting, however, residual rates charged to cable operators for certain programming are significantly less than the rates charged to broadcasters for the same programming. It suggests that the Commission specifically inquire into the extent to which price differentials may distort the cost of programming. Press Broadcasting Reply Comments at 4.

<sup>365</sup> Small Cable Business Association Comments at 10-11, 18.

<sup>366</sup> Watson Cable Comments at 1-2.

<sup>367</sup> Small Cable Business Association Comments at iii & 16.

<sup>368</sup> 47 U.S.C. § 548. *See* 47 C.F.R. § 76.1000-76.1003.

<sup>369</sup> 47 U.S.C. § 548(a).

that program access disputes be resolved in the marketplace."<sup>370</sup> Based on this preference, we "specifically rejected a generally applicable approach to program access issues, such as requiring program vendors to offer their programming to all MVPDs [multichannel video programming distributors] at the same rate on the same terms."<sup>371</sup> Rather, Section 628 dictated that we narrowly tailor our rules to address conduct by vertically integrated programmers, i.e., programmers affiliated with cable operators.<sup>372</sup> Absent regulation, such programmers have the incentive and ability to favor their affiliated cable operators over competing MVPDs. Our rules thus "focus on discrimination between [MVPDs] that are in competition with each other."<sup>373</sup> Commenters in the instant proceeding urge us to expand the focus of the program access rules by more broadly regulating the disparity between programming rates paid by small cable operators and rates paid by larger MVPDs, even where that disparity does not involve competing MVPDs.

157. We do not deem it appropriate to seek to impose new regulations governing the relationship between programmers and distributors at the wholesale level. While higher programming rates obviously are not in the financial interest of smaller operators, this alone does not allow the Commission to step in with a new scheme of regulation. As discussed elsewhere in this item, our efforts to take account of the hardships faced by small cable systems have been aimed more at eliminating potentially burdensome regulatory requirements, rather than marketplace activity that does not appear to be intended to deter competition. The complaints articulated by commenters are consistent with the common practice of vendors offering discounts for bulk purchasers. Even our rules regulating vertically integrated programming vendors allow variations in rates, terms, and conditions when selling to a particular programming distributor based on "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor . . . ."<sup>374</sup> Likewise, Congress recently re-affirmed the right of a cable operator to engage in discriminatory pricing at the retail level by

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<sup>370</sup> *Applications of Turner Broadcasting System, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19595 (1996) (*Turner*).

<sup>371</sup> *Id.* at n.35.

<sup>372</sup> 47 U.S.C. § 548(b).

<sup>373</sup> *Applications of Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5859 (1996).

<sup>374</sup> 47 C.F.R. § 76.1002(b)(3).

offering bulk discounts to multiple dwelling units.<sup>375</sup> Although we found in 1992 that Congress sought to rely on the marketplace to the extent possible,<sup>376</sup> the Telecommunications Act of 1996 reflects an even more deregulatory intent on the part of Congress.<sup>377</sup> In this environment, we therefore do not believe it appropriate to seek to expand the scope of our program access rules to address the disparity in programming rates where competing MVPDs are not involved.

158. With respect to disparate pricing for programming acquired through broadcaster retransmission consent, Section 325 of the Communications Act<sup>378</sup> imposed upon the Commission the duty to ensure that its regulation of broadcaster retransmission consent did not conflict with its obligation under Section 623<sup>379</sup> to ensure that basic service rates are reasonable. Subject to this proviso, Congress expressly gave broadcasters flexibility to negotiate the terms of carriage and did not appear to exclude from the negotiating table such factors as the individual characteristics of the cable system requesting carriage. As the Senate Committee Report explaining Section 325 states, it "is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in the bill to dictate the outcome of the ensuing marketplace negotiations."<sup>380</sup> We thus are reluctant to limit the scope of negotiations under the retransmission provisions of Section 325 absent clear and persuasive evidence that the present system is not meeting the objectives Congress had in mind.

## 2. *Cable Technical Standards*

159. Southwest Missouri Cable asserts that the Commission's stringent proof of performance technical standards require considerable expense and expertise that many small

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<sup>375</sup> 1996 Act, § 301(b)(2).

<sup>376</sup> See *Turner*, 11 FCC Rcd 19595, at ¶ 23.

<sup>377</sup> S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

<sup>378</sup> 47 U.S.C. § 325.

<sup>379</sup> 47 U.S.C. § 543.

<sup>380</sup> Senate Committee on Energy and Commerce, S. Rep. No. 92, 102d Cong., 2nd Sess. at 36 (1991).

cable operators cannot afford.<sup>381</sup>

160. Our cable technical standards serve a number of important objectives, including ensuring broadcast signals retransmitted by cable systems are not subject to material degradation, promoting uniform and nationwide standards generally, and ensuring cable systems do not exceed our cable signal leakage standards by causing excessive radiation that might interfere with use of aeronautical radio services and thereby endanger life or property. In *Cable Television Technical Standards*,<sup>382</sup> we revised our cable technical rules and required proof of performance testing to ensure compliance. We emphasized that the newly revised rules were intended "to define the basic technical quality of service cable subscribers are entitled to receive."<sup>383</sup> In deciding to exempt small cable systems serving 1,000 or fewer subscribers from having to comply with the testing component of the new rules, we stated:

[A]lthough formal testing is often needed for the regulatory process to function, much less expensive subjective viewing tests may well be adequate in more limited subscriber situations where informal resolution of complaints will necessarily be the norm. Consequently, we will not impose any formal testing requirements on cable systems serving fewer than 1,000 subscribers. However, we believe that all subscribers are entitled to receive a signal consistent with our rules. . . . Should such systems not be in compliance, the Commission generally will not take enforcement action before giving such operators a reasonable time to take remedial action.<sup>384</sup>

In addition, we stated that we would allow local franchising authorities of small cable systems "to adopt less stringent standards" because they "are in the best position to evaluate the costs of compliance with technical standards and the impact that such costs will have on

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<sup>381</sup> Southwest Missouri Cable Comments at 4.

<sup>382</sup> *Cable Television Technical and Operational Requirements, Review of the Technical and Operational Requirements of Part 76 Cable Television*, Report and Order, 7 FCC Rcd 2021 (1992) (*Cable Television Technical Standards*).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at 2034.

the provision of cable service."<sup>385</sup> We continue to believe that this is a reasonable approach with respect to ensuring adequate signal quality and, absent a fuller reexamination, represents an appropriate balancing of the need for adequate technical standards and the interests of small cable businesses.<sup>386</sup>

161. Additional testing and reporting requirements apply when a cable operator transmits signals over aeronautical frequencies.<sup>387</sup> Although these rules further important safety considerations, it may be possible to eliminate certain reporting requirements to ease regulatory burdens on smaller entities, without jeopardizing public safety. After further examination, we will decide whether to propose relaxed reporting requirements in this context.

### 3. *Access to Capital and the Definition of "Affiliate"*

162. Commenters suggest the Commission could ease the difficulty small cable operators face in obtaining access to capital by narrowly defining the term "affiliate" as that term is used in the small cable operator provisions of the Telecommunications Act.<sup>388</sup> As enacted by the 1996 Act, Section 623(m) of the Communications Act,<sup>389</sup> grants partial and, in some cases, total rate deregulation to small cable operators in franchise areas where they serve 50,000 or fewer subscribers. As set forth in the *Cable Act Reform Order*, and pursuant to statutory definitions, a small cable operator is an operator that, directly and through its affiliates, serves fewer than 1% of all the subscribers in the United States and is not affiliated with entities having gross annual revenues exceeding \$250 million in the aggregate. The Commission has requested comment on the manner in which the term "affiliate" should be defined for purposes of determining whether a particular cable operator qualifies as a "small cable operator" entitled to rate deregulation.

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<sup>385</sup> *Id.*

<sup>386</sup> We note that the 1996 Act amended certain rules regarding enforcement of technical standards. See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, 5952 (1996) (*Cable Act Reform Order*). We have adopted interim rules, and soon will adopt final rules, implementing these provisions. *Id.*

<sup>387</sup> 47 C.F.R. §§ 76.610 - 76.614.

<sup>388</sup> 1996 Act, § 302(c). See *Cable Act Reform Order*, 11 FCC Rcd at 5947-48.

<sup>389</sup> 47 U.S.C. § 543(m).

163. A number of commenters argue that in determining whether one entity is affiliated with another, we should disregard purely passive investments.<sup>390</sup> According to the Small Cable Business Association, if the Commission defines the relationships that constitute an "affiliation" too broadly, small cable operators will be forced to choose between foregoing deregulation or foregoing outside financing even though Congress intended deregulation to foster access to capital.<sup>391</sup> This, it argues, would undercut Congress' effort in the Telecommunications Act to deregulate small cable businesses and might destabilize capital markets.<sup>392</sup> Commenters recommend that the Commission adopt an affiliation standard that excludes passive investments by establishing reasonable definitions and setting non-restrictive affiliation rules that give small cable access to sources of capital funding.<sup>393</sup>

164. The Commission intends to give full and careful consideration to the concerns raised by small cable companies in the *Cable Act Reform* proceeding (Docket 96-85), including the extent to which it would be appropriate to define the term "affiliated" to exclude passive investments in small cable companies. The commenters have raised important issues concerning the benefits of permitting such passive investments, but we note that substantial countervailing arguments also have been made that merit our consideration. We expect to address and resolve these issues in the near future.

#### 4. *Franchise Renewal Process*

165. The Small Cable Business Association maintains that many cable operators face significant abuse in the franchise renewal process because municipalities fail to follow the procedural protections of 47 U.S.C. § 546, and, in other instances, demand system upgrades wholly unrelated to community needs and costs or seek compensation in excess of the five percent franchise fee cap.<sup>394</sup> According to the Small Cable Business Association, because municipalities are shielded from liability for damages under 47 U.S.C. § 555A, they maintain positions contrary to federal law and force cable operators to choose between

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<sup>390</sup> National Cable Television Association Comments at 7-8; Small Cable Business Association Comments at 9, 14.

<sup>391</sup> Small Cable Business Association Comments at 14-15.

<sup>392</sup> *Id.* at iii, 9, 14.

<sup>393</sup> *Id.*; National Cable Television Association Comments at 7-8.

<sup>394</sup> Small Cable Business Association Reply Comments at 4-5.

unreasonable franchise renewal terms, litigation, or shutting down the cable system.<sup>395</sup> The Small Cable Business Association recommends that the Commission initiate an inquiry into the franchise renewal processes that exist at the municipal level and, from this investigation, recommend to Congress changes in federal law that will more affirmatively preempt overreaching by local franchise authorities.<sup>396</sup> Along similar lines, Watson Cable states that Commission staff should draft a model franchise that is fair and equitable to all parties.<sup>397</sup>

166. As the commenters recognize, Section 626(e)(1) expressly provides for a right of judicial appeal for cable operators who have been denied renewal or have been "adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements" of Section 626. In view of Congress' enactment of a specific judicial remedy, and in the absence of specific information that abuses have occurred, we believe it would be premature at this juncture to move forward on the Small Cable Business Association's proposal. Nevertheless, commenters are free to bring to the Commission's attention documented instances of abuse and, if appropriate, we shall recommend legislative initiatives to address any such issues.

#### 5. *Leased Access Requirements*

167. Southwest Missouri Cable argues that imposing leased access requirements is not practicable, is a severe economic burden imposed on small business, and is totally unnecessary.<sup>398</sup> The Small Cable Business Association states the Commission should adopt leased access rules that adequately compensate small cable companies for their true costs in meeting leased access requests so that such requirements do not cripple small cable financially or competitively.<sup>399</sup>

168. Blab Television, on the other hand, asserts that the present regulatory framework involves application of an extremely complex economic formula and, under it,

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<sup>395</sup> *Id.* at 5.

<sup>396</sup> *Id.*

<sup>397</sup> Watson Cable Comments at 2.

<sup>398</sup> Southwest Missouri Cable Comments at 4.

<sup>399</sup> Small Cable Business Association at 20.

prospective leased access programmers cannot create sensible business plans.<sup>400</sup> It maintains that the complexity of Commission rules and the inaccessibility of underlying information from cable operators make it extremely difficult to determine if a given rate is "reasonable" under the statute and that, consequently, leased access programmers face artificially high carriage rates.<sup>401</sup> Blab Television states that a low, across-the-board, fixed rate would eliminate market entry barriers and protect both programmers and cable operators. It also advocates a fixed rate should serve as a rebuttable presumption that can be overcome by specific evidence provided by a cable operator.<sup>402</sup>

169. Section 612 imposes leased access requirements on cable systems generally.<sup>403</sup> Pursuant to Section 612(b)(1)(D), the leased access rules do not apply to cable systems with fewer than 36 activated channels, except to the extent required by the terms of a franchise agreement that predates enactment of the statute.<sup>404</sup> This provision exempts many smaller cable operators from leased access requirements altogether. Although the statute imposes leased access requirements on small systems that have 36 or more activated channels,<sup>405</sup> the Commission recently modified our leased access rules and included special provisions lessening the burden of leased access for qualifying small systems.<sup>406</sup> The new rules excuse operators of eligible small systems from having to respond to requests for leased access unless the leased access programmer provides specified information designed to show that its

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<sup>400</sup> On January 3, 1997, Blab Television filed a "Motion for Leave to File Late Comments" from Blab Television. We have granted its motion, and its comments have been included and considered in the record of this proceeding.

<sup>401</sup> Blab Television Comments at 5-7.

<sup>402</sup> *Id.* at 8-9.

<sup>403</sup> 47 U.S.C. § 532.

<sup>404</sup> 47 U.S.C. § 532(b)(1)(D).

<sup>405</sup> 47 U.S.C. § 532(b)(1)(A)-(C).

<sup>406</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access*, Second Report and Order and Second Order on Reconsideration, CS Docket No. 96-60, FCC 97-27 (released Feb. 4, 1997). See 47 U.S.C. § 532.

request is bona fide.<sup>407</sup> The rules also give qualifying small system operators twice as much time as other cable operators to comply with certain procedural deadlines that are triggered when a programmer makes a valid request for leased access time.<sup>408</sup> In addition, the revised rules also should benefit small leased access programmers, such as Blab Television, because the rules should result in lower maximum rates for tiered services, permit resale, grant access to highly penetrated tiers, and require part-time rates to be prorated without a surcharge.<sup>409</sup> While the new rules do not adopt the approach recommended by Blab Television, they include an "average implicit fee" formula for calculating the maximum reasonable rate, which should lead to reduced rates for users such as Blab Television. We believe the modified leased access rules strike the proper balance required to ensure that the congressional objectives underlying Section 612 are fully realized without imposing onerous burdens on small cable systems.

#### 6. *Access Contracts to Multiple Dwelling Units*

170. OpTel maintains that cable operators often enter into service contracts with owners of multiple dwelling units (MDUs) that end up being "perpetual" and thus allow franchised cable operators to lock-up whole blocks of subscribers.<sup>410</sup> According to OpTel, these perpetual contracts block market entry and slow the development of competition.<sup>411</sup> It maintains that the Commission should apply a "fresh look" policy to perpetual or other long-term contracts and provide an opportunity for MDU owners or managers to escape such contracts.<sup>412</sup> OpTel contends that the Commission has applied the "fresh look" approach in the common carrier area and has the authority to apply it in this context. Applying this policy would make it easier for an incumbent provider's established customers to consider taking service from new entrants and obtain the benefits of a new, more competitive environment, according to OpTel.<sup>413</sup> In a similar vein, Watson Cable states that exclusive

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<sup>407</sup> *Id.* at ¶ 134.

<sup>408</sup> *Id.* at ¶¶ 104, 130.

<sup>409</sup> *Id.* at ¶ 160.

<sup>410</sup> OpTel Comments at 1-3.

<sup>411</sup> *Id.* at 4-5.

<sup>412</sup> *Id.* at 5-8.

<sup>413</sup> *Id.* at 5-9.

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agreements of larger cable companies with apartment complexes deny access to smaller cable companies that serve the same area.<sup>414</sup>

171. The National Cable Television Association and Tele-Communications, Inc. argue in reply comments that OpTel's proposal proceeds from faulty factual and legal premises and should not be considered in this proceeding.<sup>415</sup> They maintain that OpTel's proposal would seek abrogation of private contractual arrangements in order to allow it to obtain a competitive advantage over franchised cable operators even though no proof exists that the exclusive agreements cable operators have are the result of any different process than other MVPD agreements in existence today.<sup>416</sup> Moreover, both the National Cable Television Association and Tele-Communications, Inc. state that the contracts about which OpTel is concerned are not the type of market entry barrier contemplated by Section 257 because they do not reflect legal or regulatory barriers nor result from disparities in the ability to raise capital. Instead, such contracts are the result of arms-length, privately-negotiated agreements which are equally available to franchised cable operators and other MVPDs.<sup>417</sup>

172. These issues are related to matters that are the subject of a pending proceeding known as the "Inside Wiring" rulemaking,<sup>418</sup> where the Commission is addressing, among other things, the ability of a cable operator or other MVPDs to claim ownership or control over wiring installed within MDUs. The Commission is considering whether MDU owners and residents have sufficient flexibility to choose between competing MVPDs, or whether Commission action would be appropriate. We believe the Inside Wiring rulemaking is the better forum to address the MDU issues raised by commenters in the instant proceeding.

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<sup>414</sup> Watson Cable Comments at 1-2.

<sup>415</sup> National Cable Television Association Reply Comments at 2; Tele-Communications, Inc. Reply Comments at 3.

<sup>416</sup> National Cable Television Association Reply Comments at 3-4; Tele-Communications, Inc. Reply Comments at 3-4.

<sup>417</sup> National Cable Television Association Reply Comments at 5; Tele-Communications, Inc. Reply Comments at 2-4.

<sup>418</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, Final Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561 (1996).

The Commission intends to act in the Inside Wiring proceeding shortly, and will address issues related to MDUs in an appropriate manner.

### 7. *Pole Attachment-Related Impediments*

173. Both the Small Cable Business Association and the National Cable Television Association maintain that cable systems that operate in rural areas face entry barriers and competitive barriers from electrical and telephone cooperatives because the rates and conditions which these entities charge for pole attachment usage are not subject to pole attachment regulation.<sup>419</sup> They recommend that the Commission inform Congress of entry barriers imposed by rural electric and telephone cooperatives that are currently exempt from federal restrictions.<sup>420</sup>

174. Specifically, they ask that we propose to Congress a statutory amendment to Section 224 of the Communications Act,<sup>421</sup> that would apply the pole attachment/access to right-of-way rules to telephone cooperatives and electric cooperatives. Those rules generally require a "utility" to grant cable operators and telecommunications providers (other than ILECs) access to any poles, ducts, conduits and rights-of-way owned or controlled by a utility and used, in whole or in part, for wire communication. The rules also regulate the rates and terms a utility may impose on cable operators and telecommunications carriers seeking access to the utility's facilities. The current law excludes from the definition of utility "any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State."<sup>422</sup> Telephone cooperatives and electric cooperatives thus are excluded from the definition of "utility." Small rural cable operators complain that cooperatives charge them exorbitant rates for pole attachments or deny access altogether. In their view, this problem is exacerbated by the fact that many cooperatives have become DBS retailers. They argue that the exemption under the pole attachment provisions of the Communications Act and our corresponding rules gives cooperatives the ability to raise their competitors' cost of doing business.

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<sup>419</sup> Small Cable Business Association Reply Comments at 1-3; National Cable Television Association Comments at 15-16.

<sup>420</sup> Small Cable Business Association Comments at 2. On the subject of pole attachments, Watson Cable maintains that larger companies tie up valuable space that does not allow for placement of additional lines on existing poles. Watson Cable Comments at 1.

<sup>421</sup> 47 U.S.C. § 224.

<sup>422</sup> 47 U.S.C. § 224(a)(1).

175. When it created this exemption almost twenty years ago, Congress found that "cooperative utilities charge the lowest pole rates" to pole users.<sup>423</sup> Further, in the rural areas generally served by cooperatives, the technical quality of over-the-air television was often poor, giving the customer-owners of these utilities "an added incentive to foster the growth of cable television in their areas."<sup>424</sup> The comments indicate that much has changed with respect to the conditions that gave rise to the exemption. Instead of charging the lowest rates, cooperative utilities now charge the highest rates, according to the comments. To the extent cooperatives offer DBS service, their incentive to foster the growth of cable television may have turned into a disincentive. While the comments thus suggest that some of the circumstances that gave rise to the exemption no longer exist, the record in this proceeding provides an inadequate basis to make a firm recommendation whether to retain or eliminate the exemption. We will continue to consider the matter.

#### 8. *Other Matters*

176. The Commission is examining other areas not specifically raised in the Section 257 proceeding that have the potential for imposing barriers on small cable businesses. For example, the Commission is revisiting its current regulation that requires cable operators to be able to override normal programming to give viewers notice of a national emergency.<sup>425</sup> Under current rules, cable systems must "provide a video interruption and an audio EAS (Emergency Alert System) message on all channels,"<sup>426</sup> which can require the purchase, installation, and maintenance of special equipment. The Commission is giving careful consideration to whether an extended implementation schedule for smaller cable systems can be developed that would satisfy Section 624,<sup>427</sup> without undermining the congressional intent underlying that section.

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<sup>423</sup> S. Rep. No. 580, 95th Cong., 2d Sess. at 18 (1978).

<sup>424</sup> *Id.*

<sup>425</sup> See *Amendment of Part 73, Subpart G of the Commission's Rules Regarding the Emergency Broadcast System*, Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 1786 (1994). See also *Amendment of Part 73, Subpart G of the Commission's Rules Regarding the Emergency Broadcast System*, Memorandum Opinion and Order, 10 FCC Rcd 11494 (1995).

<sup>426</sup> 47 C.F.R. § 11.51(g)(2).

<sup>427</sup> 47 U.S.C. § 544.

177. In a separate proceeding, we have sought comment on the implementation of Section 713 which requires the Commission to prescribe rules mandating that video programming be closed captioned for the benefit of persons with hearing disabilities.<sup>428</sup> Section 713(d) allows the Commission to exempt classes of video programmers and providers from our rules where the provision of closed captioning would be "economically burdensome."<sup>429</sup> The *Closed Captioning Notice* recognizes the market entry objectives of Section 257<sup>430</sup> and seeks comment on whether we should define economic burdens based on the size of the programmer or provider.<sup>431</sup>

#### D. *Mass Media Services*

178. In the mass media area, the Commission already has made considerable progress in reducing regulatory hurdles that may impact small businesses and impede entry. We have streamlined and improved our processes so that the average time for processing routine television station sales has been reduced from three months to two months and the average time for processing non-routine radio station sales from twelve months to five months. The Mass Media Bureau also has begun publishing radio application status and station technical information on the Internet so that it is readily available to the public. It has commenced work on a project to provide for electronic filing of broadcast applications, which will scan for incomplete or inaccurate applications and provide for automatic computer analysis of interference issues. The Commission also plans to resolve the proceeding instituted to reform the comparative hearing process for the award of new broadcast licenses. All of these efforts should significantly assist small businesses by generally easing the burdens and delays associated with the regulatory process.

179. The commenters have raised additional entry barrier issues and these are addressed below.

#### 1. *Low Power Television*

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<sup>428</sup> 47 U.S.C. § 613. See *In the Matter of Closed Captioning and Video Description of Video Programming*, Notice of Proposed Rulemaking, 12 FCC Rcd 1044 (1997) (*Closed Captioning Notice*).

<sup>429</sup> 47 U.S.C. § 613(d)(1).

<sup>430</sup> *Closed Captioning Notice*, FCC 97-4, at ¶ 85 & n.165.

<sup>431</sup> *Id.* at ¶ 71.

180. Community Broadcasters Association argues that small businesses, particularly, low power television (LPTV), have not been given the amount of regulatory attention they deserve and that Section 257 requires.<sup>432</sup> More specifically, some commenters state that Section 257's goal of diversity will be rendered virtually meaningless under the Commission's proposed digital television (DTV) conversion proposal because low power television stands to lose approximately forty-five percent of its stations, thereby decreasing diversified ownership which will result in significantly less diversified programming.<sup>433</sup> These commenters maintain that the Commission must realize that, regardless of financial and other non-regulatory hurdles that small businesses face, potential investors are less likely to invest in such services if regulatory hurdles accompany business risks and handicap an enterprise.<sup>434</sup>

181. According to these interests, the Commission should change its "small business" focus from trying to facilitate multi-billion dollar bidding in spectrum auctions to assisting currently-existing businesses that are truly small so that these business are not eradicated. In particular, these commenters believe the Commission should propose multiple classes of DTV -- full power and small stations -- and open a second window for these smaller DTV allotments and designate only low power television station licensees as eligible.<sup>435</sup> They urge the Commission to use a wide range of solutions proposed by the low power television industry to protect as many existing low power television authorizations as possible and to accommodate as many of these businesses with DTV conversion channels as feasible.<sup>436</sup> For this purpose, one commenter recommends that substantial preferences be given to small business applicants and a higher preference to those who do not own any full-time radio or television stations.<sup>437</sup> Another commenter states that the Commission should stop blocking proposals to improve low power television facilities.<sup>438</sup>

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<sup>432</sup> Community Broadcasters Association Comments at 2.

<sup>433</sup> Moore Broadcasting Comments at 1; Abacus Television Comments at 4.

<sup>434</sup> Community Broadcasters Association Comments at 2.

<sup>435</sup> Abacus Television Comments at 5.

<sup>436</sup> *Id.* at 6.

<sup>437</sup> TRA Communications Consultants and Skinner Comments at 4.

<sup>438</sup> Moore Broadcasting Comments at 5.

182. With respect to concerns expressed by some commenters about the impact of the conversion of DTV on LPTV stations, on April 21, 1997, the Commission released the *DTV Fifth Report and Order* in MM Docket No. 87-268,<sup>439</sup> which issued initial licenses and established the service rules for DTV.<sup>440</sup> In the *DTV Fifth Report and Order*, following Congress' direction in Section 336(a)(1) of the 1996 Act,<sup>441</sup> we determined that initial eligibility for DTV licenses should be limited to those full-power broadcasters who, as of the date of issuance of the initial digital licenses, hold a license to operate a television broadcast station or a permit to construct such a station, or both. We reiterated our previous determination that there is insufficient spectrum to include LPTV stations and translators, which are secondary under our rules and policies, to be initially eligible for a DTV channel and that we had not been able to find a means of resolving this problem. However, we also pointed out that limiting initial eligibility to full-power broadcasters does not necessarily exclude LPTV stations from the conversion to DTV.

183. On the same day, in the *DTV Sixth Report and Order* in MM Docket No. 87-268,<sup>442</sup> we adopted a number of measures intended to minimize the impact of DTV implementation on existing LPTV service.<sup>443</sup> These measures include many of the changes to the technical rules requested by the LPTV and TV translator industries. The new rules

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<sup>439</sup> See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, MM Docket No. 87-268, FCC 97-116 (released Apr. 21, 1997) (*DTV Fifth Report and Order*).

<sup>440</sup> See *DTV Sixth Further Notice*, 11 FCC Rcd 10968. While this proceeding progressed further, all-digital advanced television systems were developed. Thereafter, the Commission began to refer to "advanced television" as "digital television" or "DTV" in recognition that, with the development of the technology, any advanced television system was certain to be digital. See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd 17771, 17773 (1996).

<sup>441</sup> 47 U.S.C. § 336(a)(1).

<sup>442</sup> See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, MM Docket No. 87-268, FCC 97-115, ¶¶ 6, 114-147 (released Apr. 21, 1997) (*DTV Sixth Report and Order*) (adopting a Table of Allotments for DTV, rules for initial DTV allotments, procedures for assigning DTV frequencies, and plans for spectrum recovery). Thus, LPTV stations will continue to have secondary status to full-service television stations. See 47 C.F.R. § 73.702(b).

<sup>443</sup> *DTV Fifth Report and Order*, at ¶ 18.