

to deliver both of these services, confusion might arise as to which regulatory scheme would be applicable.⁷¹¹ We sought comment on whether and how to harmonize the dual systems of regulation governing cable and telephone companies where broadband or multiple services are provided over a single wire or multiple wires.⁷¹²

250. State authorities generally contend that, for now, the existing systems of regulation for cable and telephony should remain intact.⁷¹³ They argue for the preservation of state regulatory responsibility with respect to simple telephone inside wiring and are concerned about federal preemption of state regulations.⁷¹⁴ In contrast, a number of commenters addressing the issue of dual regulation urge the Commission to preempt state and local regulation of telephony and cable inside wire.⁷¹⁵ GTE argues for complete deregulation of cable inside wire.⁷¹⁶ Several commenters recommend that the Commission take other steps to provide guidance on dual regulation. Charter/Comcast suggest the establishment of a joint state/federal board to resolve issues related to dual regulation of wireline service providers.⁷¹⁷ RTE Group urges the Commission to develop guidelines to define the regulatory roles of both state public utility commissions and local franchising authorities.⁷¹⁸

2. Discussion

251. We do not believe that the record before us provides sufficient information to address the issues raised in the *Inside Wiring Notice*. Based on the current record, it appears that service providers will continue to use separate inside wiring to provide cable and telephone service for at least the near future. If and when circumstances change, we will revisit this issue with the goal of creating a single set of inside wiring rules.

⁷¹¹*Id.* at 2772-73.

⁷¹²*Id.*

⁷¹³California PUC Comments at 4-8; New York DPS Reply Comments at 4-7.

⁷¹⁴California PUC Comments at 4-9 (also suggesting that states be given the authority to regulate the maintenance of cable inside wire); New York DPS Reply Comments at 4-7.

⁷¹⁵PacTel Comments at 14-15 (additionally advocating less Commission oversight of telephony and cable inside wire); PacTel Reply Comments at 6-7; AT&T Comments at 19-20; DIRECTV Comments at 13; DIRECTV Reply Comments at 11; *see also* Building Industry Consulting Comments at 6-7; TIA Comments at 6-7.

⁷¹⁶GTE Comments at 20 (stating that neither the Commission nor local franchising authorities should continue to regulate rates for such wiring or, in the alternative, the Commission should discontinue cable inside wire rate regulation once a cable system faces effective competition).

⁷¹⁷Charter/Comcast Comments at 20-21.

⁷¹⁸RTE Group Comments at 4; RTE Group Reply Comments at 3.

L. Regulation of Simple and Complex and of Residential and Non-Residential Wiring

1. Background

252. In the *Inside Wiring Notice*, we described how Commission regulation of telephone inside wiring varies depending on whether simple or complex wiring is used to receive service.⁷¹⁹ Simple wiring includes wiring installations of up to four access lines. Section 68.213 governs the connection of simple wiring to the network.⁷²⁰ Complex wiring refers to all wiring other than simple wiring. Section 68.215 of our rules governs the connection of complex wiring to the network.⁷²¹ Most single dwelling units require only simple wiring, while MDUs and commercial settings require complex wiring. Installation and maintenance of complex inside wiring is largely unregulated. We note that, with respect to intrastate telephone service, the states regulate the prices, terms, and conditions of simple inside wire service.

253. By contrast, while our cable inside wiring rules do not differentiate between simple and complex wiring, they often make other distinctions. For example, the rules governing the disposition of wiring upon termination of service apply only to cable wiring installed by cable operators in residential dwelling units.⁷²² In the *Inside Wiring Notice*, we sought comment on whether, in light of the convergence of cable and telephone technologies, we should harmonize our rules with respect to simple versus complex wiring and residential versus non-residential wiring.⁷²³

254. A number of commenters addressing this issue contend that there is no need to revisit the rules that have deregulated the installation and maintenance of simple and complex telephone inside wire.⁷²⁴ NYNEX maintains that, as long as telephone and video services are provided over separate facilities, there is no need to change existing rules.⁷²⁵ Building Owners, et al., contend that, while it may make sense to account for the convergence in telephone and cable technologies, it does not make sense to adopt uniform rules for all kinds of property.⁷²⁶ GTE believes that it would be beneficial to establish standards governing the type and installation of both cable and telephone inside wire installed by carriers and independent contractors.⁷²⁷ New Jersey Ratepayer Advocate argues that the Commission should

⁷¹⁹*Inside Wiring Notice*, 11 FCC Rcd at 2762-63.

⁷²⁰Section 68.213 allows customers to connect wiring installations involving up to four access lines. 47 C.F.R. § 68.213; see also *Common Carrier Wiring Reconsideration Order*, *supra*.

⁷²¹47 C.F.R. § 68.215.

⁷²²See *Cable Wiring Order*, 8 FCC Rcd at 1436.

⁷²³*Inside Wiring Notice*, 11 FCC Rcd at 2764-65.

⁷²⁴See USTA Comments at 5; NTCA Reply Comments at 3-4; GTE Comments at 15.

⁷²⁵NYNEX Comments at 3.

⁷²⁶Building Owners, et al., Comments at 43.

⁷²⁷GTE Comments at 15.

harmonize the definitions within the common carrier and cable rules with regard to simple versus complex wiring and residential versus non-residential wiring.⁷²⁸ U S West maintains that the treatment for simple inside wiring for single-line applications should be consistent for cable and telephony.⁷²⁹ Building Industry Consulting recommends that the complex versus simple classifications be removed from Part 68 of our rules rather than extended to cable wiring and that a single set of regulations be applied to all telecommunications wiring.⁷³⁰

2. Discussion

255. We will not, at this time, establish common definitions in the common carrier and cable rules with regard to simple versus complex wiring and residential versus non-residential wiring. Relatively few parties commented on this specific issue, and even fewer parties proposed a change in our existing rules. In the telephone context, we believe that our distinction between simple and complex wiring has proven to be a workable and effective way to promote competition while ensuring network protection. Similarly, in the cable context, we agree with Building Owners, et al., that there may be substantial differences between residential and commercial buildings which would make it difficult to adopt uniform rules for all kinds of property.⁷³¹ We do not believe that the current record provides sufficient evidence to support the need for a modification of our rules, nor does it provide adequate guidance on the direction any such modification should take. We therefore will not modify our rules at this time.

M. Customer Premises Equipment

256. In the *Inside Wiring Notice*, we sought comment generally on the costs and benefits of harmonizing or revising our rules regarding customer premises equipment ("CPE") to accommodate the possible convergence of technologies used to receive and to interact with network-delivered video programming and telephony. We asked for comment on whether to establish rights of customers to provide and connect unregulated CPE to cable operators' networks.⁷³²

257. We believe that the issues raised in the *Inside Wiring Notice* have been superseded by the 1996 Act. The issues will be addressed in a separate ongoing Commission rulemaking proceeding arising under new Section 629 of the Communications Act.⁷³³

⁷²⁸New Jersey Ratepayer Advocate Comments at 4.

⁷²⁹U S West Comments at 12.

⁷³⁰Building Industry Consulting Comments at 4-5.

⁷³¹See Building Owners, et al., Comments at 43.

⁷³²*Inside Wiring Notice*, 11 FCC Rcd at 2779.

⁷³³See *Notice of Proposed Rulemaking*, CS Docket No. 97-80 (Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices), FCC 97-53 (released February 20, 1997).

IV. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

A. Exclusive Service Contracts

258. We believe that exclusive service contracts between MDU owners and MVPDs can be pro-competitive or anti-competitive, depending upon the circumstances involved. Some alternative providers have commented that in order to initiate service in an MDU, they must be able to use exclusive contracts to ensure their ability to recover investment costs.⁷³⁴ Other alternative providers have argued that the Commission should limit the ability of incumbent cable operators to enter into exclusive contracts with MDU owners.⁷³⁵

259. We seek comment on whether the Commission should adopt a "cap" on the length of exclusive contracts for all MVPDs that would limit the enforceability of exclusive contracts to the amount of time reasonably necessary for an MVPD to recover its specific capital costs of providing service to that MDU, including, but not limited to, the installation of inside wiring, headend equipment and other start-up costs.⁷³⁶ Commenters have suggested exclusivity periods such as five to six years,⁷³⁷ seven years⁷³⁸ and seven to ten years⁷³⁹ as reasonable. We seek comment on what would be a reasonable period of time for a provider to recoup its specific investment costs in an MDU. We seek comment on an approach under which a presumption that all existing and future exclusivity provisions would be enforceable for a maximum term of seven years, except for exceptional cases in which the MVPD could demonstrate that

⁷³⁴ICTA comments at 45; OpTel Comments at 7-8; OpTel Reply Comments at 2; OpTel Further Reply at 9; OpTel/MTS *ex parte* submission, dated July 23, 1996, at 2; Wireless Holdings Reply Comments at 2; GTE *ex parte* submission, dated May 15, 1997, at 1-2; ICTA *ex parte* submission, dated February 24, 1997, at 3-4; ICTA *ex parte* submission, dated February 27, 1997.

⁷³⁵*See, e.g.*, Bell Atlantic Comments at 5; MCI Reply Comments at 3; NYNEX Comments at 17; Ameritech *ex parte* submission, dated May 15, 1997; GTE Comments at 22 (existing cable operators should be barred from entering into or enforcing any exclusive arrangements in excess of 12 months in markets where alternative providers have announced an intention to enter).

⁷³⁶*See* GTE *ex parte* submission, dated May 15, 1997, at 2 (arguing that any rule limiting exclusive contracts to new installations must consider the service providers' total investment and not just inside wiring). By "specific investment costs" we mean those costs that are specific to a particular MDU and cannot be recovered elsewhere. For example, if a rooftop antenna can be removed and re-used on another building, it would not be a specific investment cost; the costs of installing and removing the antenna, however, would be a specific investment cost. *See also* OpTel *ex parte* submission, dated July 22, 1996 (advocating the difficulty of establishing any precise limit because of varying circumstances).

⁷³⁷*See* ICTA *ex parte* submission, dated February 27, 1997, at 3 (stating that it takes approximately 5-6 years for a service provider to recover its installment costs under an exclusive contract, disregarding the time value of money).

⁷³⁸*See* SBC/PacTel/PacBell *ex parte* submission, dated April 28, 1997, at 1 (proposing a rule that exclusive contracts be allowed only where a service provider has newly installed at least 75% of the inside wiring in an MDU and that the contract term be limited to 7 years from the time of new installation).

⁷³⁹*See* Further Reply of OpTel at 9 (stating that an exclusive period of seven to ten years is the minimum required in most cases to recover the investment required to serve an MDU).

it has not had a reasonable opportunity to recover its specific investment costs.⁷⁴⁰ We inquire whether there should be different treatment accorded existing contracts and future contracts. We also seek comment on the appropriate forum for such a showing and whether the enforceability of an exclusivity provision should be extended only for the time period reasonably necessary for the provider to recover its costs.

260. If a "cap" is adopted, we seek comment on whether service providers would generally be able to structure their business arrangements so as to recover their capital costs within that time limit.⁷⁴¹ After a video service provider has had an opportunity to recover its costs under an exclusive contract on a particular property, we seek comment on whether we should prohibit future exclusive contracts between the video service provider and the property owner, unless the service provider can demonstrate that the exclusive contract is necessary to recoup a substantial new investment in the property. We also inquire whether MDU owners should be afforded an opportunity to terminate the exclusive contract and retain the inside wiring, in exchange for a payment to the provider compensating it for unrecovered investment costs. We seek to determine what circumstances allow MDU owners and tenants to receive the benefits of technological improvements most expeditiously, while at the same time enhancing competition among MPVDs.

261. In the alternative, we seek comment on whether the Commission should only limit exclusive contracts where the MVPD involved possesses market power. The Supreme Court has noted: "Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."⁷⁴² We seek comment on circumstances encompassing the video distribution market and whether the Commission can and should restrict or prohibit MVPDs with market power from entering into or enforcing exclusive service contracts. In particular, we seek comment on how to define "market power" for these purposes, as well as how to define the relevant geographic market.

262. We are concerned about the administrative practicability of making market power determinations on a widespread, case-by-case basis and seek comment on whether we should establish any

⁷⁴⁰For instance, the exclusivity of a "perpetual" exclusive contract entered into in 1983 would no longer be enforceable; however, if the service provider completed a substantial rebuild of its plant in 1996, the provider may be able to show that it has not had a reasonable opportunity to recover its investment costs notwithstanding the fact that the exclusive contract was entered into more than seven years ago. Similarly, a provider may be able to show that it has not had an opportunity to recover its costs where it provided discounted service in the early years of an exclusive contract with the expectation of making its returns in later years. See Jones *ex parte* submission, dated January 8, 1997, at 1, 4; see also NCTA Reply Comments at 20-21 (any policy adopted by the Commission must protect the "legitimate business expectations" of the incumbent operator).

⁷⁴¹See ICTA *ex parte* submission, dated February 24, 1997, at 4 (broad provisos for the term of exclusive contracts to be extended to protect the service providers' business expectations and investments would spawn never-ending litigation and deprive the market of any certainty regarding the termination of these contracts, thus further hobbling competition). But see GTE *ex parte* submission, dated May 15, 1997, at 2 (arguing that too stringent a limit on the period in which a new entrant may recover its investment through an exclusive contract will force the new entrant to increase its price to subscribers, making it less able to compete with the entrenched cable operator).

⁷⁴²Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45 (1984), citing Standard Oil v. United States, 337 U.S. 293 (1949).

presumptions in this regard. We seek comment on whether our decision not to preempt state mandatory access statutes effectively means that non-cable MVPDs cannot enforce exclusive agreements in those states, even where such agreements may be pro-competitive. We also seek comment on any other issues relevant to the analysis of market power and exclusive contracts in the context of this proceeding.

263. In addition, we seek comment on whether the Commission can and should take any specific actions regarding so-called "perpetual" exclusive contracts (i.e., those running for the term of a cable franchise and any extensions thereof). For instance, under the market power approach, we seek comment on whether the Commission should adopt a presumption that the MVPDs involved possessed market power when such contracts were executed. Under the seven-year "cap" approach, we seek comment on whether "perpetual" exclusive contracts would simply fall within the general rule limiting the enforceability of exclusive contracts to seven years from execution unless the MVPD can demonstrate that it has not had a reasonable opportunity to recover its specific capital costs.

264. We also seek comment on whether we can and should adopt a "fresh look" for "perpetual" exclusive contracts. In addition, we seek comment on several implementation issues: (1) whether the "fresh look" would apply only to "perpetual" exclusive contracts and, if so, how such contracts reasonably can be distinguished from other long-term exclusive contracts; (2) the scope of the "fresh look" and how the "fresh look" period would be triggered to ensure a viable choice exists (e.g., whether the "fresh look" be applied on an MDU-by-MDU basis upon the request of a private cable operator able to serve the MDU, or more generally on a franchise-by-franchise basis where competitive choices exist in the franchise area); and (3) whether the "fresh look" would be a one-time opportunity or whether there could be additional "fresh look" windows in light of the development of new technology and the entry of new video service providers.

265. If we were to adopt a "fresh look" for "perpetual" exclusive contracts, we seek comment on whether we should open a 180-day "fresh look" window for MDU owners upon the effective date of our rules, unless the "perpetual" exclusive contract was entered into less than seven years earlier, in which case the "fresh look" window would open for that MDU at the end of the seven-year period. We also seek comment on whether the MVPD should be able to apply to the Commission for an extension if the MVPD can demonstrate that it has not had a reasonable opportunity to recover its specific capital costs by the end of this seven-year period. Further, we seek comment on whether, if an MDU owner does not enter into a new contract during its initial "fresh look" period, a new 180-day "fresh look" window should open at the expiration of each subsequent franchise period until the MDU owner opts out of its "perpetual" exclusive contract. We seek comment on whether this framework would protect MDU owners who do not have a competitive alternative and therefore would be prejudiced by a one-time "fresh look" window, while ensuring that the MVPDs involved have a reasonable opportunity to recover their costs.

266. We also seek comment on our statutory authority to adopt the exclusive contracts proposals discussed above. We also seek comment on any other constitutional, statutory or common law implications that these proposals raise.

B. Application of Cable Inside Wiring Rules to All MVPDs

267. We propose to apply our cable home wiring rules for single-unit installations to all MVPDs in the same manner that they apply to cable operators. We believe that applying those rules to all MVPDs would promote competitive parity and facilitate the ability of a subscriber whose premises was

initially wired by a non-cable MVPD to change providers. We seek comment on this proposal and on our authority to adopt it.

268. We also propose to expand to all MVPDs the rule we are adopting herein regarding cable subscribers' rights, prior to termination of service, to provide and install their own cable home wiring and to connect additional home wiring to the wiring installed and owned by the cable operator. We believe that applying this rule to all MVPDs will promote the same consumer benefits as in the cable context: increased competition and consumer choice, lower prices and greater technical innovation.⁷⁴³ We seek comment on this proposal, and in particular on the Commission's authority for expanding this rule to all MVPDs.

C. Signal Leakage Reporting Requirements

269. Section 76.615 of the Commission's signal leakage rules requires cable operators to file certain information with the Commission when operating in the aeronautical radio frequency bands.⁷⁴⁴ In particular, Section 76.615(b)(7) requires cable operators to file annually with the Commission the results of their signal leakage tests conducted pursuant to Section 76.611.⁷⁴⁵ We are concerned that the reporting requirements of Section 76.615(b)(7) may impose undue burdens on small broadband service providers, including small cable operators. We seek comment on whether certain categories of broadband service providers should be exempt from the filing requirements of Section 76.615(b)(7) and, if so, what criteria the Commission should use in defining those providers. We would not propose to exempt any broadband service providers from the testing requirements of Section 76.615(b)(7), but simply the requirement to report the results of such tests to the Commission. For instance, we seek comment on whether we should exempt small broadband service providers from the filing requirements of Section 76.615(b)(7) based on an existing definition in the Commission's rules,⁷⁴⁶ a particular number of subscribers served, the length of the cable plant or some other criteria. We seek comment on the risks to safety of life communications posed by such an exemption. We also seek comment on any other changes in this area that would reduce burdens, yet meet the goals of protecting against signal leakage.

D. Simultaneous Use of Home Run Wiring

270. As stated above, DIRECTV suggests that the Commission should establish a "virtual" demarcation point from which an alternative provider could share the wiring simultaneously with the cable operator.⁷⁴⁷ Other alternative providers endorse this view, if it is technically possible,⁷⁴⁸ and CEMA states

⁷⁴³See Section III.G. above.

⁷⁴⁴47 C.F.R. § 76.615.

⁷⁴⁵47 C.F.R. §§ 76.611 and 76.615(b)(7).

⁷⁴⁶For example, we have defined a small cable system as any system that serves 15,000 or fewer subscribers and a small cable company as one serving a total of 400,000 or fewer subscribers over all of its systems. *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215 (Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation), 10 FCC Rcd at 7406.

⁷⁴⁷DIRECTV Comments at 8-10.

that some of its members are currently developing equipment that will allow multiple uses of a single broadband wire.⁷⁴⁹ Cable operators generally oppose DIRECTV's suggestion that two video service providers may share a single wire, stating that the alternative provider would have to use different frequency bands to avoid interference, and, while theoretically possible, most systems do not have sufficient bandwidth capacity to carry multiple MVPDs.⁷⁵⁰ DIRECTV acknowledges that only service providers that use different parts of the spectrum technically may be able to share a single wire.⁷⁵¹

271. We believe that the sharing of a single wire by multiple service providers deserves further exploration. We seek comment on DIRECTV's proposal that we require competing broadband service providers to share a single home run wire in MDUs. In particular, we seek comment on the current technical, practical and economic feasibility and limitations of sharing of home run wiring. We also seek comment on our legal authority to impose such a requirement and whether such a requirement would constitute an impermissible taking of private property under the Fifth Amendment.

V. REGULATORY FLEXIBILITY ACT ANALYSIS

A. Final Regulatory Flexibility Act Analysis

272. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 ("RFA"), Initial Regulatory Flexibility Analyses ("IRFAs") were incorporated in the *Inside Wiring Notice*, the *Cable Home Wiring Further Notice*, and the *Inside Wiring Further Notice*. The Commission sought written public comments on the proposals in these notices, including comments on the IRFAs. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 ("CWAAA"), Pub. L. No. 104-121, 110 Stat. 847 (1996).⁷⁵²

Need for Action and Objectives of the Rule

273. This *Order* adopts new procedural mechanisms to provide order and certainty regarding the disposition of MDU home run wiring upon termination of existing service. In addition, this *Order* promotes competition and consumer choice by establishing rules for the disposition of cable "loop through" wiring upon termination of service. This *Order* also permits consumers to provide or install their own cable home wiring, or redirect, reroute or connect additional wiring to the cable operator's home wiring. These rules will promote competition among MVPDs as well as cable wiring services, which will result in lower prices, greater technological innovation, and additional consumer choice. Finally, to protect

⁷⁴⁸See NYNEX Comments at 8-9; Batholdi Reply Comments at 16.

⁷⁴⁹CEMA Reply Comments at 13.

⁷⁵⁰Cox Comments at 19; Marcus Cable, et al., Comments at 6; Adelphia Comments at 5; CATA Comments at 4; TKR Comments at 5.

⁷⁵¹See Further Comments of DIRECTV at 5.

⁷⁵²Title II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601 *et seq.*

public safety and navigation frequencies, this *Order* applies the cable signal leakage rules to all broadband service providers that pose a similar threat of interference with licensed over-the-air communications.

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

274. In response to the IRFAs contained in the *Inside Wiring Notice* and the *Cable Home Wiring Further Notice*, Building Owners, et al., filed comments arguing that the proposed rules would have a significant effect on small residential and commercial building operators and that the Commission should exempt these entities from any final rules.⁷⁵³ In response to the IRFA contained in the *Inside Wiring Notice*, CATA filed comments and an ex parte submission requesting that the Commission rescind the *Inside Wiring Notice* and reissue it as a notice of inquiry or reissue it with specific proposed rules. CATA argues that the *Inside Wiring Notice* failed to propose specific rules, thereby preventing both the Commission staff and small entities from analyzing and commenting on the effects of proposed rules on small entities.⁷⁵⁴ RTE Group filed its comments and reply comments as "a response by a small business pursuant to Section 603 of the Regulatory Flexibility Act."⁷⁵⁵ The issues raised by RTE Group are addressed above. No comments were filed in response to the IRFA contained in the *Inside Wiring Further Notice*.

Description and Estimate of the Number of Small Entities Impacted

275. 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.⁷⁵⁶ 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.⁷⁵⁷ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").⁷⁵⁸ The rules we adopt in this *Order* will affect video service providers and MDU owners.

276. *Small MVPDs*: SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.⁷⁵⁹

⁷⁵³Building Owners, et al., IRFA Comments at 2-5.

⁷⁵⁴CATA IRFA Comments at 4; Ex Parte Letter from Barry Pineles, Bienstock & Clark, on behalf of CATA, to William Kennard, General Counsel, Federal Communications Commission (April 22, 1996) at 2.

⁷⁵⁵RTE Group Comments at 1; RTE Group Reply Comments at 1.

⁷⁵⁶5 U.S.C. § 604(a)(3).

⁷⁵⁷5 U.S.C. § 601(3).

⁷⁵⁸15 U.S.C. § 632.

⁷⁵⁹13 C.F.R. § 121.201 (SIC 4841).

This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1423 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 1992.⁷⁶⁰ We will address each service individually to provide a more succinct estimate of small entities.

277. *Cable Systems*: The Commission has developed its own definition of a small cable company for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.⁷⁶¹ Based on our most recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.⁷⁶² 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, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Order*.

278. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁷⁶³ 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.⁷⁶⁴ Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.⁷⁶⁵ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, 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.

279. *MMDS*: The Commission refined the definition of "small entity" for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more

⁷⁶⁰1992 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).

⁷⁶¹47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266 and 93-215, FCC 95-196, 10 FCC Rcd 7393 (1995).

⁷⁶²Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁷⁶³47 U.S.C. § 543(m)(2).

⁷⁶⁴47 C.F.R. § 76.1403(b).

⁷⁶⁵Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

than \$40 million for the preceding three calendar years.⁷⁶⁶ This definition of a small entity in the context of the Commission's *Report and Order* concerning MMDS auctions has been approved by the SBA.⁷⁶⁷

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

281. *ITFS*: There are presently 1,989 licensed educational ITFS stations and 97 licensed commercial ITFS stations. Educational institutions are included in the definition of a small business.⁷⁶⁸ However, we do not collect annual revenue data for ITFS licensees and are unable to ascertain how many of the 97 commercial stations would be categorized as small under the SBA definition. Thus, we believe that at least 1,989 ITFS licensees are small businesses.

282. *DBS*: There are presently nine DBS licensees, some of which are not currently in operation. The Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. Although DBS service requires a great investment of capital for operation, we acknowledge that there are several new entrants in this field that may not yet have generated \$11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

283. *HSD*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by video service providers, of which 115 channels are scrambled and approximately 150 are unscrambled.⁷⁶⁹ HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming packager. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other video service providers; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing.

⁷⁶⁶47 C.F.R. § 21.961(b)(1).

⁷⁶⁷See *Report and Order* in MM Docket No. 94-31 and PP Docket No. 93-253, 10 FCC Rcd 9589 (1995).

⁷⁶⁸SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5).

⁷⁶⁹1996 *Competition Report*, FCC 96-496, at para. 49.

Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.⁷⁷⁰

284. According to the most recently available information, there are approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers.⁷⁷¹ These program packagers provide subscriptions to approximately 2,314,900 subscribers nationwide.⁷⁷² This is an average of about 77,163 subscribers per program packager. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small MSO. Furthermore, because this an average, it is likely that some program packagers may be substantially smaller.

285. *OVS*: The Commission has certified nine OVS operators. Because these services were introduced so recently and only one operator is currently offering programming to our knowledge, little financial information is available. Bell Atlantic (certified for operation in Dover) and Metropolitan Fiber Systems ("MFS," certified for operation in Boston and New York) have sufficient revenues to assure us that they do not qualify as small business entities. Two other operators, Residential Communications Network ("RCN," certified for operation in New York) and RCN/BETG (certified for operation in Boston), are MFS affiliates and thus also fail to qualify as small business concerns. However, Digital Broadcasting Open Video Systems (a general partnership certified for operation in southern California), Urban Communications Transport Corp. (a corporation certified for operation in New York and Westchester), and Microwave Satellite Technologies, Inc. (a corporation owned solely by Frank T. Matarazzo and certified for operation in New York) are either just beginning or have not yet started operations. Accordingly, we believe that three OVS licensees may qualify as small business concerns.

286. *SMATVs*: Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.⁷⁷³ Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September 1996.⁷⁷⁴ The ten largest SMATV operators together pass 815,740 units.⁷⁷⁵ If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

⁷⁷⁰ *Id.*

⁷⁷¹ *Id.*

⁷⁷² *Id.*

⁷⁷³ *Id.* at para. 81.

⁷⁷⁴ *Id.*

⁷⁷⁵ *Id.*

287. *LMDS*: Unlike the above pay television services, LMDS technology and spectrum allocation will allow licensees to provide wireless telephony, data, and/or video services. An LMDS provider is not limited in the number of potential applications that will be available for this service. Therefore, the definition of a small LMDS entity may be applicable to both cable and other pay television (SIC 4841) and/or radiotelephone communications companies (SIC 4812). The SBA definition for cable and other pay services is defined above. A small radiotelephone entity is one with 1500 employees or less.⁷⁷⁶ For the purposes of this proceeding, we include only an estimate of LMDS video service providers. The vast majority of LMDS entities providing video distribution could be small businesses under the SBA's definition of cable and pay television (SIC 4841). However, in the *LMDS Second Report and Order*, we defined a small LMDS provider as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding calendar years of less than \$40 million.⁷⁷⁷ We have not yet received approval by the SBA for this definition.

288. There is only one company, CellularVision, that is currently providing LMDS video services. Although the Commission does not collect data on annual receipts, we assume that CellularVision is a small business under both the SBA definition and our proposed auction rules. We tentatively conclude that a majority of the potential LMDS licensees will be small entities, as that term is defined by the SBA.

289. *MDU Operators*: The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings and dwellings other than apartment buildings, which include all such companies generating \$5 million or less in revenue annually.⁷⁷⁸ According to the Census Bureau, there were 26,960 operators of nonresidential buildings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992.⁷⁷⁹ Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992.⁷⁸⁰ The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

Reporting, Recordkeeping, and Other Compliance Requirements

290. *Disposition of MDU Home Run Wiring*: The *Order* requires MVPDs to comply with a set of procedural timetables for the disposition of home run wiring upon termination of service when an

⁷⁷⁶13 C.F.R. § 121.201.

⁷⁷⁷*Second Report and Order* in CC Docket No. 92-297, FCC 97-82 (released March 13, 1997).

⁷⁷⁸13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

⁷⁷⁹1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6512 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

⁷⁸⁰1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6513 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

MDU owner invokes the Commission's procedures. In addition, it requires MVPDs to include in future contracts with MDU owners a provision addressing the disposition of home run wiring upon the termination of the contract. It also requires the parties to cooperate to ensure as seamless a transition as possible for subscribers.

291. *Sharing of Molding:* The *Order* permits an MVPD to install home run wiring in an existing molding if the MDU owner determines that there is sufficient space, if the incumbent MVPD's ability to provide service is not impaired, and if the MDU owner gives its affirmative consent. If the MDU owner determines that there is not sufficient space, and the MDU owner will permit larger moldings, the MDU owner may install larger moldings at the alternative MVPD's expense.

292. *Disposition of Cable Home Wiring:* The *Order* requires MVPDs to implement their election to remove or abandon home wiring within seven days of learning that the home wiring will not be purchased.

293. *Customer Access to Cable Home Wiring before Termination of Service:* The *Order* requires cable operators to permit subscribers to provide or install their own cable home wiring, or redirect, reroute or connect additional wiring to the cable operator's home wiring, so long as no electronic or physical harm is caused to the cable system and the physical integrity of the cable operator's wiring remains intact. The cable operator may choose to impose requirements that any home wiring meet reasonable technical specifications, not to exceed the technical specifications of such wiring installed by the cable operator; however, the cable operator may require additional technical specifications to eliminate electronic or physical harm.

294. *Signal Leakage:* The *Order* extends the Commission's cable signal leakage rules to all broadband service providers that pose a similar threat of interference with frequencies used for over-the-air communications. Section 76.615(b)(7) of the cable signal leakage rules requires cable operators to file annually with the Commission the results of their signal leakage tests conducted pursuant to Section 76.611.

Significant Alternatives and Steps Taken to Minimize the Significant Economic Impact on a Substantial Number of Small Entities Consistent with the Stated Objectives This section analyzes the impact on small entities of the regulations adopted, amended, modified, or clarified in this *Order*.

295. *Disposition of MDU Home Run Wiring:* We considered several alternatives for the disposition of MDU home run wiring, including: (1) creating a single demarcation point for cable and telephony providers; (2) moving the cable demarcation point; and (3) maintaining our current rules. The record indicates that MDU owners often object to the installation of multiple home run wires for reasons including aesthetics, space limitations, the avoidance of disruption and inconvenience, and the potential for property damage. Small video service providers often are new entrants that will have to install new home run wiring (if they cannot use the existing wiring), while incumbent service providers often are established entities that may resist efforts by both new entrants and MDU operators to arrange for use of the existing wiring. By bringing order and certainty to the disposition of the home run wiring upon termination of service, the rules adopted herein advance the interests of both small video service providers and small MDU owners.

296. *Transfer of Ownership of Home Run Wiring in Future Installations:* We considered adopting a requirement that, for future installations, MVPDs transfer ownership of home run wiring to MDU owners. We instead decided to require MVPDs to include in future contracts with MDU owners a provision addressing the disposition of home run wiring upon termination of the contract. This requirement will provide all MDU owners, including small MDU owners, the flexibility to negotiate for ownership of the home run wiring.

297. *Sharing of Molding:* We considered not requiring the sharing of molding even when empty space exists. We concluded, however, that the ability to share molding often may assist small MVPDs, which frequently are new entrants, to gain access to MDUs. We considered Time Warner's proposal to allow affected MVPDs and the MDU owner to determine whether the molding contains adequate space. Our rule, however, does not require the concurrence of the affected MVPDs in the determination of whether adequate space exists.

298. *Customer Access to Cable Home Wiring before Termination of Service:* We believe that subscriber access to home wiring will advance the interests of small entities. As customers gain the ability to select who will install and maintain their home wiring, small entities will be able to compete with the incumbent cable operator to provide such services.

299. *Signal Leakage:* This *Order* extends the Commission's cable signal leakage rules to all broadband service providers that pose a similar threat of interference with frequencies used for over-the-air communications. Although this modification will impact small broadband service providers, we are exploring the possibility of exempting certain categories of broadband service providers from the reporting requirements of the signal leakage rules.⁷⁸¹

Report to Congress

300. The Commission shall send a copy of this *Order*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this *Order* and this FRFA (or summaries thereof) will also be published in the Federal Register, pursuant to 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

B. Initial Regulatory Flexibility Act Analysis

301. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, ("RFA"), the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected significant impact on small entities by the policies and rules proposed in this *Second Further Notice*. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing procedures as other comments in this proceeding, but they must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this *Second Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the RFA. In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register, pursuant to 5 U.S.C. § 603(a).

⁷⁸¹See the discussion of signal leakage requirements in the IRFA section below.

Need for Action and Objectives of the Proposed Rules

302. The Commission issues this *Second Further Notice* to consider additional rules to promote competition and enhance consumer choice. In particular, we seek comment on the competitive implications of exclusive service contracts between MDU owners and MVPDs, and whether we should: (1) limit exclusive contracts to a time certain; (2) adopt restrictions on the ability of MVPDs to enter into exclusive contracts; or (3) adopt a "fresh look" for "perpetual" exclusive contracts. In addition, we propose to expand to all MVPDs the rule regarding cable subscribers' rights, prior to termination of service, to provide and install their own cable home wiring and to connect additional home wiring to the wiring installed and owned by the MVPD. We also ask whether certain categories of broadband service providers (e.g., small broadband service providers, including small cable operators) should be exempt from the signal leakage reporting requirements in Section 76.615(b)(7). Finally, we seek comment on the current technical, practical, economic, and legal limitations of requiring competing broadband service providers to share a single home run wire in MDUs.

Legal Basis

303. This *Second Further Notice* is adopted pursuant to Sections 1, 4, 224, 251, 303, 601, 623, 624, and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 224, 251, 303, 521, 543, 544, and 552.

Description and Estimate of the Number of Small Entities Impacted

304. 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.⁷⁸² 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.⁷⁸³ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").⁷⁸⁴ The rules we propose in this *Second Further Notice* will affect MVPDs and MDU owners.

305. *Small MVPDs*: SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.⁷⁸⁵ This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1423 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

⁷⁸² 5 U.S.C. § 604(a)(3).

⁷⁸³ 5 U.S.C. § 601(3).

⁷⁸⁴ 15 U.S.C. § 632.

⁷⁸⁵ 13 C.F.R. § 121.201 (SIC 4841).

of 1992.⁷⁸⁶ We will address each service individually to provide a more succinct estimate of small entities.

306. *Cable Systems*: The Commission has developed its own definition of a small cable company for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.⁷⁸⁷ Based on our most recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.⁷⁸⁸ 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, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules proposed in this *Second Further Notice*.

307. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁷⁸⁹ 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.⁷⁹⁰ Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.⁷⁹¹ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, 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.

308. *MMDS*: The Commission refined the definition of "small entity" for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.⁷⁹² This definition of a small entity in the context of the Commission's *Report and Order* concerning MMDS auctions has been approved by the SBA.⁷⁹³

⁷⁸⁶1992 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).

⁷⁸⁷47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266 and 93-215, FCC 95-196, 10 FCC Rcd 7393 (1995).

⁷⁸⁸Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁷⁸⁹47 U.S.C. § 543(m)(2).

⁷⁹⁰47 C.F.R. § 76.1403(b).

⁷⁹¹Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁷⁹²47 C.F.R. § 21.961(b)(1).

⁷⁹³See *Report and Order* in MM Docket No. 94-31 and PP Docket No. 93-253, 10 FCC Rcd 9589 (1995).

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

310. *ITFS*: There are presently 1,989 licensed educational ITFS stations and 97 licensed commercial ITFS stations. Educational institutions are included in the definition of a small business.⁷⁹⁴ However, we do not collect annual revenue data for ITFS licensees and are unable to ascertain how many of the 97 commercial stations would be categorized as small under the SBA definition. Thus, we believe that at least 1,989 ITFS licensees are small businesses.

311. *DBS*: There are presently nine DBS licensees, some of which are not currently in operation. The Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. Although DBS service requires a great investment of capital for operation, we acknowledge that there are several new entrants in this field that may not yet have generated \$11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

312. *HSD*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by video service providers, of which 115 channels are scrambled and approximately 150 are unscrambled.⁷⁹⁵ HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming packager. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other video service providers; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.⁷⁹⁶

313. According to the most recently available information, there are approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers.⁷⁹⁷ These program

⁷⁹⁴SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5).

⁷⁹⁵1996 *Competition Report*, FCC 96-496, at para. 49.

⁷⁹⁶*Id.*

⁷⁹⁷*Id.*

packagers provide subscriptions to approximately 2,314,900 subscribers nationwide.⁷⁹⁸ This is an average of about 77,163 subscribers per program packager. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small MSO. Furthermore, because this an average, it is likely that some program packagers may be substantially smaller.

314. *OVS*: The Commission has certified nine OVS operators. Because these services were introduced so recently and only one operator is currently offering programming to our knowledge, little financial information is available. Bell Atlantic (certified for operation in Dover) and Metropolitan Fiber Systems ("MFS," certified for operation in Boston and New York) have sufficient revenues to assure us that they do not qualify as small business entities. Two other operators, Residential Communications Network ("RCN," certified for operation in New York) and RCN/BETG (certified for operation in Boston), are MFS affiliates and thus also fail to qualify as small business concerns. However, Digital Broadcasting Open Video Systems (a general partnership certified for operation in southern California), Urban Communications Transport Corp. (a corporation certified for operation in New York and Westchester), and Microwave Satellite Technologies, Inc. (a corporation owned solely by Frank T. Matarazzo and certified for operation in New York) are either just beginning or have not yet started operations. Accordingly, we believe that three OVS licensees may qualify as small business concerns.

315. *SMATVs*: Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.⁷⁹⁹ Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September 1996.⁸⁰⁰ The ten largest SMATV operators together pass 815,740 units.⁸⁰¹ If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

316. *LMDS*: Unlike the above pay television services, LMDS technology and spectrum allocation will allow licensees to provide wireless telephony, data, and/or video services. An LMDS provider is not limited in the number of potential applications that will be available for this service. Therefore, the definition of a small LMDS entity may be applicable to both cable and other pay television (SIC 4841) and/or radiotelephone communications companies (SIC 4812). The SBA definition for cable and other pay services is defined above. A small radiotelephone entity is one with 1500 employees or less.⁸⁰² For the purposes of this proceeding, we include only an estimate of LMDS video service providers. The vast majority of LMDS entities providing video distribution could be small businesses

⁷⁹⁸*Id.*

⁷⁹⁹*Id.* at para. 81.

⁸⁰⁰*Id.*

⁸⁰¹*Id.*

⁸⁰²13 C.F.R. § 121.201.

under the SBA's definition of cable and pay television (SIC 4841). However, in the *LMDS Second Report and Order*, we defined a small LMDS provider as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding calendar years of less than \$40 million.⁸⁰³ We have not yet received approval by the SBA for this definition.

317. There is only one company, CellularVision, that is currently providing LMDS video services. Although the Commission does not collect data on annual receipts, we assume that CellularVision is a small business under both the SBA definition and our proposed auction rules. We tentatively conclude that a majority of the potential LMDS licensees will be small entities, as that term is defined by the SBA.

318. *MDU Operators*: The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings and dwellings other than apartment buildings, which include all such companies generating \$5 million or less in revenue annually.⁸⁰⁴ According to the Census Bureau, there were 26,960 operators of nonresidential buildings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992.⁸⁰⁵ Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992.⁸⁰⁶ The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

Reporting, Recordkeeping, and Other Compliance Requirements

319. The *Second Further Notice* seeks comment on whether small broadband service providers, including small cable operators, should be exempt from the signal leakage reporting requirements in Section 76.615(b)(7). Such an exemption would relieve qualifying providers from only the relevant filing requirements, but not from the signal leakage testing requirements.

Significant Alternatives and Steps Taken to Minimize the Significant Economic Impact on a Substantial Number of Small Entities Consistent with the Stated Objectives This section analyzes the impact on small entities of the regulations proposed or considered in the *Second Further Notice*.

320. The *Second Further Notice* seeks comment on several proposals which could minimize the economic impact on a substantial number of small entities. For instance, in seeking comment on what

⁸⁰³*Second Report and Order* in CC Docket No. 92-297, FCC 97-82 (released March 13, 1997).

⁸⁰⁴13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

⁸⁰⁵1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6512 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

⁸⁰⁶1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6513 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

policies should be adopted with respect to exclusive contracts, the Commission raises the option of a limit on the length of exclusive contracts that would still permit a small MVPD to obtain exclusive contracts for the period of time necessary to recover its investment costs in the MDU building. In addition, the Commission seeks comment on whether small broadband service providers, including small cable operators, should be exempt from the signal leakage reporting requirements in Section 76.615(b)(7). The issue of whether competing providers should be required to share home run wiring explores the possibility of another means by which small MVPDs may be able to access MDUs. Commenters are invited to address the economic impact of these proposals on small entities and offer any alternatives.

Federal Rules That May Duplicate, Overlap, or Conflict with the Proposed Rules

None.

VI. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

321. The requirements adopted in this *Report and Order and Second Further Notice of Proposed Rulemaking* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the information collection requirements contained in this *Report and Order and Second Further Notice of Proposed Rulemaking*, as required by the 1995 Act. Public comments are due 60 days from date of publication of this *Report and Order and Second Further Notice of Proposed Rulemaking* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

322. Written comments by the public on the modified information collection requirements are due 60 days from date of publication of this *Report and Order and Second Further Notice of Proposed Rulemaking* in the Federal Register. Comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information on the information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

VII. PROCEDURAL PROVISIONS

323. *Ex parte Rules - "Permit-but-Disclose" Proceeding.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules.⁸⁰⁷ Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely

⁸⁰⁷47 C.F.R. § 1.1206(b), as revised.

a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.⁸⁰⁸ Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).⁸⁰⁹

324. *Filing of Comments and Reply Comments.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,⁸¹⁰ interested parties may file comments on or before December 23, 1997, and reply comments on or before January 22, 1998. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street NW, Washington DC 20554.

VIII. ORDERING CLAUSES

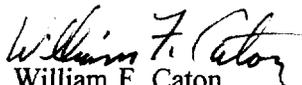
325. IT IS ORDERED that, pursuant to Sections 1, 4(i), 201-205, 214-215, 220, 303, 623, 624 and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 214-215, 220, 303, 543, 544 and 552, the Commission's rules are hereby amended as set forth in Appendix A.

326. IT IS FURTHER ORDERED that the rules as amended in Appendix A will become effective upon approval by OMB. The Commission will publish a document at a later date announcing the effective date of these rules.

327. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4(i), 201-205, 214-215, 220, 303, 623, 624 and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 214-215, 220, 303, 543, 544 and 552, NOTICE IS HEREBY GIVEN of proposed amendments to the Commission's rules, in accordance with the proposals, discussions and statements of issues in the *Second Further Notice of Proposed Rulemaking*, and COMMENT IS SOUGHT regarding such proposals, discussions and statements of issues.

328. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Report and Order and Second Further Notice of Proposed Rulemaking*, including the Initial and Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

⁸⁰⁸See 47 C.F.R. § 1.1206(b)(2), as revised.

⁸⁰⁹47 C.F.R. § 1.1206(b).

⁸¹⁰47 C.F.R. §§ 1.415 and 1.419.

APPENDIX A

Revised Rules

Part 76 of title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.5 is amended by revising paragraph (mm)(2) to read as follows:

Sec. 76.5 Definitions.

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(mm) * * *

(2) For new and existing multiple dwelling unit installations with non-loop-through wiring configurations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber's dwelling unit.

(3) For new and existing multiple dwelling unit installations with loop-through wiring configurations, the demarcation points shall be at (or about) twelve inches outside of where the cable wire enters or exits the first and last individual dwelling units on the loop, or, where the wire is physically inaccessible at such point(s), the closest practicable point thereto that does not require access to an individual subscriber's dwelling unit.

(4) As used in this subsection, the term "physically inaccessible" describes a location that (i) would require significant modification of, or significant damage to, preexisting structural elements, and (ii) would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.

Note to paragraph (mm)(4): For example, wiring embedded in brick, metal conduit or cinder blocks with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not.

3. Section 76.613 is amended by revising the heading and by revising paragraphs (b), (c), and (d) to read as follows:

Sec. 76.613 Interference from a multichannel video programming distributor ("MVPD").

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(b) An MVPD that causes harmful interference shall promptly take appropriate measures to eliminate the harmful interference.

(c) If harmful interference to radio communications involving the safety of life and protection of property cannot be promptly eliminated by the application of suitable techniques, operation of the offending MVPD or appropriate elements thereof shall immediately be suspended upon notification by the District Director and/or Resident Agent of the Commission's local field office, and shall not be resumed until the interference has been eliminated to the satisfaction of the District Director and/or Resident Agent. When authorized by the District Director and/or Resident Agent, short test operations may be made during the period of suspended operation to check the efficacy of remedial measures.

(d) The MVPD may be required by the District Director and/or Resident Agent to prepare and submit a report regarding the cause(s) of the interference, corrective measures planned or taken, and the efficacy of the remedial measures.

4. Section 76.620 is added to read as follows:

Sec. 76.620 Non-cable multichannel video programming distributors ("MVPDs").

(a) Sections 76.605(a)(12), 76.610, 76.611, 76.612, 76.614, 76.615(b)(1-6), 76.616, and 76.617 shall apply to all non-cable MVPDs. However, non-cable MVPD systems that are substantially built as of January 1, 1998 shall not be subject to these sections until January 1, 2003. "Substantially built" shall be defined as having 75 percent of the distribution plant completed. As of January 1, 2003, Section 76.615(b)(7) shall apply to all non-cable MVPDs.

(b) To comply with Section 76.615(b)(2), a non-cable MVPD shall submit its Internal Revenue Service's Employer Identification (E.I.) number instead of an FCC identifier.

5. Subpart M is amended by revising the heading to read as follows:

Subpart M -- Cable Inside Wiring

6. Section 76.800 is added to read as follows:

Sec. 76.800 Definitions.

(a) *MDU*. A multiple dwelling unit building (e.g., an apartment building, condominium building or cooperative).

(b) *MDU owner*. The entity that owns or controls the common areas of a multiple dwelling unit building.

(c) *MVPD*. A multichannel video programming distributor, as that term is defined in Section 602(13) of the Communications Act, 47 U.S.C. § 522(13).

(d) *Home run wiring*. The wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop.

7. Section 76.802 is amended by revising paragraphs (a) and (g), and adding paragraph (l) to read as follows:

Sec. 76.802 Disposition of cable home wiring.

(a) (1) Upon voluntary termination of cable service by a subscriber in a single unit installation, a cable operator shall not remove the cable home wiring unless it gives the subscriber the opportunity to purchase the wiring at the replacement cost, and the subscriber declines. If the subscriber declines to purchase the cable home wiring, the cable system operator must then remove the cable home wiring within seven days of the subscriber's decision, under normal operating conditions, or make no subsequent attempt to remove it or to restrict its use.

(2) Upon voluntary termination of cable service by an individual subscriber in a multiple-unit installation, a cable operator shall not be entitled to remove the cable home wiring unless: (i) it gives the subscriber the opportunity to purchase the wiring at the replacement cost; (ii) the subscriber declines, and (iii) neither the MDU owner nor an alternative MVPD, where permitted by the MDU owner, has provided reasonable advance notice to the incumbent provider that it would purchase the cable home wiring pursuant to this section if and when a subscriber declines. If the cable system operator is entitled to remove the cable home wiring, it must then remove the wiring within seven days of the subscriber's decision, under normal operating conditions, or make no subsequent attempt to remove it or to restrict its use.

(3) The cost of the cable home wiring is to be based on the replacement cost per foot of the wiring on the subscriber's side of the demarcation point multiplied by the length in feet of such wiring, and the replacement cost of any passive splitters located on the subscriber's side of the demarcation point.

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(g) If the cable operator adheres to the procedures described in paragraph (b) of this section, and the subscriber asks for more time to make a decision regarding whether to purchase the home wiring, the seven (7) day period described in paragraph (b) of this section will not begin running until the subscriber declines to purchase the wiring; ***

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(l) The provisions of Section 76.802, except for Section 76.802(a)(1), shall apply to all MVPDs in the same manner that they apply to cable operators.

8. Section 76.804 is added to read as follows:

Sec. 76.804 Disposition of home run wiring.

(a) *Building-by-building disposition of home run wiring:* (1) Where an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner, the MDU owner may give the MVPD a minimum of 90 days' written notice that its access to the entire building will be terminated to invoke the procedures in this section. The MVPD will then have 30 days to notify the MDU