

**F. Buying Groups: Joint and Several Liability**

52. In the *First Report and Order*, the Commission determined that:

the regulations we adopt include requirements that a buying group seeking unitary treatment from a programming vendor must agree to be financially responsible for any fees due under a contract to which it is a party. Alternatively, if individual members are contracting parties, they must agree to joint and several liability for commitments of the group.<sup>139</sup>

In the *Order on Reconsideration*, the Commission upheld this determination, and clarified that:

in those situations where a seller has reasonable doubts about the financial stability and responsibility of the buying group, it may insist on appropriate assurances of creditworthiness. Buying groups could satisfy this burden through various measures, such as requiring each individual member of the group to guarantee to the group its pro rata share of the fees due under a programming contract.<sup>140</sup>

53. Despite these determinations, SCBA asserts that certain programmers refuse to deal with cooperative buying groups unless the members thereof agree to joint and several liability. Accordingly, SCBA proposes that the Commission should clarify its program access rules to provide that any cooperative buying group that maintains adequate financial reserves should not be required to provide joint and several liability. We seek comment on SCBA's proposal. Specifically, we seek comment on what financial assurances cooperative buying groups can provide to programming distributors such that joint and several liability is not necessary, while adequately protecting programming distributors from the financial risks associated with such arrangements. For example, we seek comment on whether buying groups that maintain a cash reserve equal to one month's programming fees would satisfy such a requirement. In addition, we seek comment on any other proposals that would result in the elimination of joint and several liability while maintaining adequate protection for programmers.

**V. REGULATORY FLEXIBILITY ANALYSIS AND INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS**

54. The regulatory flexibility analysis is attached to this order as Appendix B. This NPRM contains proposals that have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new or modified information collection requirement on the public.

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<sup>139</sup>*First Report and Order*, 8 FCC Rcd at 3412 (footnote omitted).

<sup>140</sup>*Order on Reconsideration*, 10 FCC Rcd at 1948.

## VI. PROCEDURAL PROVISIONS

55. *Ex parte Rules - Non-Restricted Proceeding.* This is a permit but disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission's rules.<sup>141</sup>

56. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules,<sup>142</sup> interested parties may file comments on or before February 2, 1998 and reply comments on or before February 23, 1998. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. Parties are also asked to submit, if possible, draft rules that reflect their positions. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Deborah Klein of the Cable Services Bureau, 2033 M Street, N.W., 7th Floor, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

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

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<sup>141</sup>See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

<sup>142</sup>47 C.F.R. §§ 1.415, 1.419.

**VII. ORDERING CLAUSES**

58. **IT IS ORDERED** that the petition for rulemaking filed by Ameritech New Media, Inc. is granted as described in this Memorandum Opinion and Order and Notice of Proposed Rulemaking, and in all other respects denied.

59. **IT IS FURTHER ORDERED** that pursuant to Section 628 of the Communications Act of 1934, as amended,<sup>143</sup> **NOTICE IS HEREBY GIVEN** of the proposals described in this Notice of Proposed Rulemaking.

60. **IT IS FURTHER ORDERED** that the Secretary shall send a copy of this Memorandum Opinion and Order and Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance the Regulatory Flexibility Act, 5 U.S.C. § 603 (2).

**FEDERAL COMMUNICATIONS COMMISSION**



Magalie Roman Salas  
Secretary

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<sup>143</sup>47 U.S.C. §548.

APPENDIX A:

STANDARD PROTECTIVE ORDER AND DECLARATION FOR USE IN SECTION 628 PROGRAM ACCESS PROCEEDINGS

Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of [Name of Proceeding] ) ) ) ) ) )

PROTECTIVE ORDER

This Protective Order is intended to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from a person and privileged or confidential. It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

1. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph seven.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated

by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

- d. Declaration. "Declaration" means Attachment A to this Protective Order.
- e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.
- f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

2. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 1 of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R §§ 0.459 & 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

3. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement or if they execute the attached Declaration.

6. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

- a. Counsel for the Reviewing Parties to this proceeding including in-house counsel actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;
- b. Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding, except that disclosure to persons in a position to use this information for competitive commercial or business purposes shall be prohibited;
- c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

8. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

9. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly secured at all times.

10. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any

other deadline that may be prescribed by the Commission.

11. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;
- b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;
- c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and
- d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c. of this paragraph is not removed.

13. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The

Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

14. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

15. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

16. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

17. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

18. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

Attachment A to Standard Protective Order

DECLARATION

In the Matter of )  
 )  
 [Name of Proceeding] )  
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I, \_\_\_\_\_, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party.

(signed) \_\_\_\_\_

(printed name) \_\_\_\_\_

(representing) \_\_\_\_\_

(title) \_\_\_\_\_

(employer) \_\_\_\_\_

(address) \_\_\_\_\_

\_\_\_\_\_

(phone) \_\_\_\_\_

(date) \_\_\_\_\_

**APPENDIX B:**  
**REGULATORY FLEXIBILITY ANALYSIS**

**Initial Regulatory Flexibility Act Analysis For the Notice of Proposed Rulemaking**

1. As required by the Regulatory Flexibility Act of 1980 ("RFA"),<sup>144</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected significant economic impact on small entities by the policies and rules proposed in this NPRM. Written public comments are requested in the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines established in paragraph [\_\_] of the NPRM. The Secretary shall send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA") in accordance with the RFA.

2. *Need for Action and Objectives of the Proposed Rule.* In 1993, the Commission adopted its current rules intended to protect, pursuant to Section 628 of the Communications Act, the right of multichannel video programming providers to obtain access to specified types of video programming. Ameritech filed a petition for rulemaking proposing that certain aspects of the Commission's program access rules be amended to better ensure the Communication Act's program access requirements. In this NPRM, we seek comment as to whether certain aspects of the Commission's program access rules should be amended to better enforce the Communication Act's program access requirements.

3. *Legal Basis.* The authority for the action proposed for this rulemaking is contained in Sections 4(i), 303(r), and 628 of the Communications Act.<sup>145</sup>

4. *Description and Estimate of the Number of Small Entities Impacted.* 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. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.<sup>146</sup> Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated;

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<sup>144</sup>5 U.S.C. §§601-612.

<sup>145</sup>47 U.S.C §§4(i), 303(r), 548.

<sup>146</sup>5 U.S.C. § 601(3) (1980) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after an opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes definitions in the Federal Register.

(2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>147</sup>

5. *Small MVPDs*: The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.<sup>148</sup> This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1,758 total cable and other pay television services and 1,423 had less than \$11 million in revenue.<sup>149</sup> We address below each service individually to provide a more precise estimate of small entities.

6. *Cable Systems*: The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>150</sup> 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.<sup>151</sup> 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 we are adopting. We believe that only a small percentage of these entities currently provide qualifying "telecommunications services" as required by the Communications Act and, therefore, estimate that the number of such entities are significantly fewer than noted.

7. 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."<sup>152</sup> The Commission

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<sup>147</sup>Small Business Act, 15 U.S.C. § 632.

<sup>148</sup>13 C.F.R. § 121.201 (SIC 4841).

<sup>149</sup>U.S. Department of Commerce, Bureau of the Census, Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

<sup>150</sup>47 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. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995).

<sup>151</sup>Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>152</sup>47 U.S.C. § 543(m)(2).

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.<sup>153</sup> Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.<sup>154</sup> 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.

8. *Multipoint Multichannel Distribution Systems ("MMDS")*: The Commission refined the definition of "small entity" for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.<sup>155</sup> This definition of a small entity in the context of MMDS auctions has been approved by the SBA.<sup>156</sup>

9. 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 conclude that, for purposes of this FRFA, there are approximately 1634 small MMDS providers as defined by the SBA and the Commission's auction rules.

10. *Direct Broadcast Satellite ("DBS")*: Because DBS provides subscription services, DBS falls within the SBA definition of cable and other pay television services (SIC 4841). As of December 1996, there were eight DBS licensees. However, 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 affected by these proposed rules. Although DBS service requires a great investment of capital for operation, in the *Notice*, we acknowledged 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. Since the publication of the *Notice*, however, more information has become available. Estimates of 1996

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<sup>153</sup>47 C.F.R. § 76.1403(b) (SIC 4833).

<sup>154</sup>Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>155</sup>47 C.F.R. § 21.961(b)(1).

<sup>156</sup>See *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-31 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

revenues for various DBS operators are significantly greater than \$11,000,000 and range from a low of \$31,132,000 for Alphastar<sup>157</sup> to a high of \$1,100,000,000 for Primestar.<sup>158</sup> Accordingly, we now conclude that no DBS operator qualifies as a small entity.

11. *Home Satellite Dish ("HSD")*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled.<sup>159</sup> HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming packager. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only nonsubscription programming; and (3) viewers who receive satellite programming services illegally without subscribing.<sup>160</sup>

12. According to the most recently available information, there are approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers.<sup>161</sup> These program packagers provide subscriptions to approximately 2,314,900 subscribers nationwide.<sup>162</sup> This is an average of about 77,163 subscribers per program packager. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small multiple system operator ("MSO"). Furthermore, because this an average, it is likely that some program packagers may be substantially smaller.

13. *Open Video System ("OVS")*: The Commission has certified nine OVS operators. Of these nine, only two are providing service. On October 17, 1996, Bell Atlantic received approval for its certification to convert its Dover, New Jersey Video Dialtone ("VDT") system to OVS.<sup>163</sup> Bell Atlantic subsequently purchased the division of Futurevision which had been the

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<sup>157</sup>Alphastar Press Release (via Canada Newswire), March 20, 1997. Revenues were originally stated in Canadian Dollars (\$42,915,000 Canadian). Revenues were recalculated using an exchange rate of \$1.3785 (Can) = \$1.00 (US). Revenues stated include revenues for C-band service.

<sup>158</sup>*The SkyTrends Report: 1996-1997*.

<sup>159</sup>*1996 Competition Report*, 12 FCC Rcd at 4385 ¶ 49.

<sup>160</sup>*Id.* at ¶ 50.

<sup>161</sup>*Id.*

<sup>162</sup>*Id.*

<sup>163</sup>*Bell Atlantic-New Jersey, Inc. (Certification to Operate an Open Video System)*, 11 FCC Rcd 13249 (CSB 1996) ("*Bell Atlantic OVS Certification*").

only operating program package provider on the Dover system, and has begun offering programming on this system using these resources.<sup>164</sup> Metropolitan Fiber Systems was granted certifications on December 9, 1996, for the operation of OVS systems in Boston and New York, both of which are being used to provide programming.<sup>165</sup> Bell Atlantic and Metropolitan Fiber Systems have sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. We believe that one OVS licensee may qualify as a small business concern. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

14. *Satellite Master Antenna Television ("SMATVs")*: Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.<sup>166</sup> Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September 1996.<sup>167</sup> The ten largest SMATV operators together pass 815,740 units.<sup>168</sup> 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 conclude that a substantial number of SMATV operators qualify as small entities.

15. *Local Multipoint Distribution System ("LMDS")*: Unlike the above pay television services, LMDS technology and spectrum allocation will allow licensees to provide wireless telephony, data, and/or video services. A LMDS provider is not limited in the number of potential applications that will be available for this service. Therefore, the definition of a small LMDS entity may be applicable to both cable and other pay television (SIC 4841) and/or radiotelephone communications companies (SIC 4812). The SBA definition for cable and other pay services is defined in paragraph 59 *supra*. A small radiotelephone entity is one with 1500 employees or less.<sup>169</sup> However, for the purposes of this *Memorandum Opinion and Order and*

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<sup>164</sup>Bell Atlantic, *Bell Atlantic Now Offering Video Services in Dover Township New Jersey* (news release), Nov. 1, 1996.

<sup>165</sup>See *Metropolitan Fiber Systems/New York, Inc. (Certification to Operate an Open Video System)*, Consolidated Order, 11 FCC Rcd 20896, DA 96-2075 (CSB Dec. 9, 1996).

<sup>166</sup>1996 *Competition Report*, 12 FCC Rcd at 4403-4404 ¶ 81.

<sup>167</sup>*Id.*

<sup>168</sup>*Id.*

<sup>169</sup>13 C.F.R. § 121.201.

*Notice of Proposed Rulemaking*, we include only an estimate of LMDS video service providers.

16. LMDS is a service that is expected to be auctioned by the FCC in 1998. The vast majority of LMDS entities providing video distribution could be small businesses under the SBA's definition of cable and pay television (SIC 4841).<sup>170</sup> However, in the *Third NPRM*,<sup>171</sup> we proposed to define a small LMDS provider as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding calendar years of less than \$40 million. We have not yet received approval by the SBA for this definition.

17. 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. Accordingly, we affirm our tentative conclusion that a majority of the potential LMDS licensees will be small entities, as that term is defined by the SBA.

18. *Program Producers and Distributors*: The Commission has not developed a definition of small entities applicable to producers or distributors of television programs.<sup>172</sup> Therefore, we will utilize the SBA classifications of Motion Picture and Video Tape Production (SIC 7812),<sup>173</sup> Motion Picture and Video Tape Distribution (SIC 7822),<sup>174</sup> and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).<sup>175</sup> These SBA definitions provide that a small entity in the television programming industry is an entity with \$21.5 million or less in annual receipts for SIC 7812 and 7822, and \$5 million or less in

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<sup>170</sup>See para. 269 *supra* for an estimate of the number of entities under SIC 4841.

<sup>171</sup>*In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services and Suite 12 Group Petition for Pioneer's Preference*, ("Third NPRM") CC Docket No. 92-297, 11 F.C.C. Rcd. 53 (1995), ¶ 188.

<sup>172</sup>The term "television programs" is used in this context to include all video programming outlets, e.g., cable, DBS.

<sup>173</sup>"Establishments primarily engaged in the production of theatrical and nontheatrical motion pictures and video tapes for exhibition or sale, including educational, industrial, and religious films. Included in the industry are establishments engaged in both production and distribution. Producers of live radio and television programs are classified in Industry 7922." Standard Industrial Classification Manual, SIC 7812, Executive Office of the President, Office of Management and Budget (1987) (OMB SIC Manual).

<sup>174</sup>"Establishments primarily engaged in the distribution (rental or sale) of theatrical and nontheatrical motion picture films or in the distribution of video tapes and disks, except to the general public." OMB SIC Manual, SIC 7822.

<sup>175</sup>"Establishments primarily engaged in providing live theatrical presentations, such as road companies and summer theaters. . . . Also included in this industry are producers of . . . live television programs." OMB SIC Manual, SIC 7922.

annual receipts for SIC 7922.<sup>176</sup> The 1992 Bureau of the Census data indicate the following: (1) there were 7265 U.S. firms classified as Motion Picture and Video Production (SIC 7812), and that 6987 of these firms had \$16,999 million or less in annual receipts and 7002 of these firms had \$24,999 million or less in annual receipts;<sup>177</sup> (2) there were 1139 U.S. firms classified as Motion Picture and Tape Distribution (SIC 7822), and that 1007 of these firms had \$16,999 million or less in annual receipts and 1013 of these firms had \$24,999 million or less in annual receipts;<sup>178</sup> and (3) there were 5671 U.S. firms classified as Theatrical Producers and Services (SIC 7922), and that 5627 of these firms had less than \$5 million in annual receipts.<sup>179</sup>

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

20. *Reporting, Recordkeeping, and other Compliance Requirements:* The rules proposed in this *Notice* will not require a change in record keeping requirements.

21. *Significant Alternatives Which Minimize the Impact on Small Entities and which are Consistent with Stated Objectives:* The NPRM proposes various alternatives which may expand access to video programming by small entities.

22. *Federal Rules which Overlap, Duplicate, or Conflict with the Commission's Proposal:* None.

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<sup>176</sup>13 C.F.R. § 121.201.

<sup>177</sup>U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC 7812, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration) (SBA 1992 Census Report). The Census data do not include a category for \$21.5 million. Therefore, we have reported the closest increment below and above the \$21.5 million threshold. There is a difference of 15 firms between the \$16,999 and \$24,999 million annual receipt categories. It is possible that these 15 firms could have annual receipts of \$21.5 million or less and, therefore, would be classified as small businesses.

<sup>178</sup>SBA 1992 Census Report, SIC 7812. The Census data does not include a category for \$21.5 million; therefore, we have reported the closest increment below and above the \$21.5 million benchmark. There is a difference of 6 firms between the \$16,999 and \$24,999 million annual receipt categories. It is possible that these 6 firms could have annual receipts of \$21.5 million or less and, therefore, would be classified as small businesses.

<sup>179</sup>SBA 1992 Census Report, SIC 7922.

SEPARATE STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT ROTH

In re: Ameritech New Media, Inc.: Memorandum Opinion and Order and Notice of Proposed Rulemaking

In connection with the Notice of Proposed Rulemaking regarding the possible application of our program-access rules to certain kinds of terrestrially-delivered programming, I would like to emphasize that the Commission's duty in this area -- as in all areas -- is to faithfully implement the law that Congress passed and that the President signed.

Section 628 of the Communications Act, the statutory basis for our existing program-access scheme, by its terms governs the provision of "satellite cable programming" and "satellite broadcast programming." Although we today seek comment on the propriety of extending program-access rules to terrestrially-delivered programming in some circumstances, in the end we may well conclude that we lack the statutory authority to do so and that Congress, rather than this Commission, is the appropriate governmental entity to redress any competitive issues that may exist with respect to programming that is not transmitted (or retransmitted) by satellite.