

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

In the Matter of )  
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)  
Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992 )  
)  
Review of the Commission's )  
Cable Attribution Rules )

CS Docket No. 98-82

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NOTICE OF PROPOSED RULEMAKING

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Comment Date: August 14, 1998

Reply Comment Date: September 3, 1998

By the Commission:

I. INTRODUCTION

1. With this *Notice of Proposed Rulemaking*, we initiate a review of our cable attribution rules, which define what constitutes a "cognizable interest" that triggers application of various Commission rules relating to the provision of cable television services. The attribution rules seek to identify those corporate, financial, partnership, ownership and other business relationships that confer on their holders a degree of ownership or other economic interest, or influence or control over an entity engaged in the provision of communications services such that the holders should be subject to the Commission's regulation. We are initiating this rulemaking in light of recent developments in the cable industry, including numerous strategic alliances, partnerships, system swaps, mergers and acquisitions among cable entities; various Commission proceedings related to the issue of cable ownership, such as the cross-ownership proceedings, horizontal ownership proceedings, and biennial review; and the Commission's review, in a separate proceeding, of the broadcast attribution rules on which many of our cable attribution rules were based.<sup>1</sup> Where appropriate, we provide a brief summary of the attribution issues contained in the *Broadcast Attribution Notice* and *Broadcast Attribution Further Notice*; for a full discussion of these issues, interested parties are directed to review those documents.

<sup>1</sup> See *Notice of Proposed Rule Making, Review of the Commission's Regulations Governing the Attribution of Mass Media Interests*, MM Docket Nos. 94-150, 92-51 and 87-154, FCC 94-324, 10 FCC Rcd 3606 (1995) ("*Broadcast Attribution Notice*"); *Further Notice of Proposed Rule Making, Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51 and 87-154, FCC 96-436, 11 FCC Rcd 19895 (1996) ("*Broadcast Attribution Further Notice*").

## II. NOTICE OF PROPOSED RULEMAKING

2. *Background.* The cable attribution rules are particularly significant in the context of a number of statutory provisions enacted as part of the Cable Television Consumer Protection and Competition Act of 1992<sup>2</sup> (the "1992 Cable Act"), including: (1) former Section 613(a)(1), which prohibited the common ownership of local television stations and cable systems that serve the same area (the "cable/broadcast station cross-ownership restriction");<sup>3</sup> (2) Section 613(f)(1)(A), which requires the Commission to establish reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest ("horizontal cable ownership limits");<sup>4</sup> (3) Section 613(f)(1)(B), which requires the Commission to establish reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest ("vertical occupancy limits");<sup>5</sup> (4) Section 613(a)(2), which prohibits a cable operator from holding a license to provide multichannel multipoint distribution service ("MMDS"), or from offering satellite master antennae television ("SMATV") service separate and apart from any franchised cable service, in any portion of the franchise area served by the cable operator's cable system (the "cable/MMDS" and "cable/SMATV" cross-ownership restrictions);<sup>6</sup> (5) Section 628, which, among other things, requires the Commission to establish safeguards

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<sup>2</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.* (1992).

<sup>3</sup> Section 613(a)(1) of the Communications Act of 1934, as amended (the "Communications Act"), 47 U.S.C. § 533(a)(1) (1992). The cable/broadcast station cross-ownership rule was first adopted by the Commission in 1970 and modified in 1992. *See Second Report and Order, Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals*, Docket No. 18397, 23 FCC 2d 816 (1970); *Report and Order, Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate The Prohibition on Common Ownership of Cable Television Systems and National Television Networks*, MM Docket No. 82-434, 7 FCC Rcd 6156, 6174 n.54 (1992); 47 C.F.R. § 76.501. The cable/broadcast station cross-ownership restriction was codified by statute in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984). Although the Telecommunications Act of 1996 eliminated the statutory cable/broadcast station cross-ownership restriction, it left in place the Commission's equivalent rule at 76 C.F.R. § 76.501, pending Commission review of our rules. *See* Section 202(i)(1) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"); *Joint Explanatory Statement of the Committee of Conference, Telecommunications Act of 1996*, S. Rep. 104-230 at 164 (February 1, 1996) ("The conferees do not intend that this repeal of the statutory prohibition should prejudice the outcome of any review by the Commission of its rules.") The 1996 Act also eliminated the prohibition on broadcast television networks' ownership or control of cable systems, and the Commission has amended our rule at 76 C.F.R. § 76.501 to eliminate the prohibition in conformity therewith. *See* 1996 Act, Section 202(f); *Order Implementing Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996*, CS Docket No. 95-56, FCC 96-112, 11 FCC Rcd 15115 (1996).

<sup>4</sup> Communications Act § 613(f)(1)(A), 47 U.S.C. § 533(f)(1)(A).

<sup>5</sup> Communications Act § 613(f)(1)(B), 47 U.S.C. § 533(f)(1)(B).

<sup>6</sup> Communications Act § 613(a)(2), 47 U.S.C. § 533(a)(2) (now Communications Act § 613(a), 47 U.S.C. § 533(a)). The 1996 Act amends this provision to state that it does not apply to any cable operator in any franchise area in which that cable operator faces "effective competition." *See* 1996 Act § 202(i)(6), codified at Communications Act § 613(a)(3), 47 U.S.C. § 533(a)(3), and the Commission's rules implementing this provision

to prevent a cable operator with an attributable interest in a programming vendor from engaging in unfair or deceptive acts involving the distribution of programming to an unaffiliated multichannel video programming distributor ("program access" rules);<sup>7</sup> and (6) Section 616, which, among other things, restricts the activities of cable operators and other multichannel programming distributors when dealing with programming vendors, including prohibiting discrimination in the selection, terms, or conditions of carriage, on the basis of a vendor's affiliation or non-affiliation ("program carriage" rules).<sup>8</sup> Implementation of the foregoing rules serve two goals: (1) promoting diversity; and (2) deterring anticompetitive practices. As discussed below, for those cable ownership rules implemented to promote competition and diversity, the Commission adopted attribution rules from the broadcast context where the goal is the same. For those rules implemented to deter specific improper practices as well as to promote competition and diversity, the Commission adopted stricter attribution standards.

3. In 1984, the Commission conducted a comprehensive rulemaking proceeding and decided to adopt a single attribution standard for our cross-ownership rules which govern the extent to which a single entity may simultaneously hold ownership interests in broadcast stations, cable television systems, and newspaper entities.<sup>9</sup> Although we did not perform a separate analysis of the ownership structures of cable systems, we were "reasonably certain" that they were not sufficiently different from broadcasting to justify the adoption of a distinct benchmark.<sup>10</sup> The resulting standard (the "broadcast attribution standard") generally provides that partnership interests, direct ownership interests, and voting stock interests of 5% or more are attributable. For passive investors, the voting stock benchmark is 10%. Non-voting stock interests (including most "preferred" stock classes) are not attributable. There are several exceptions to the voting stock threshold, including a "single majority shareholder" exception, which provides that minority interests will not be attributed where a single shareholder owns more than 50% of the outstanding voting stock. In addition, the interests of "insulated" limited partners are not attributed.<sup>11</sup>

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at 47 C.F.R. §§ 21.912(e)(3), 76.501(f).

<sup>7</sup> Communications Act § 628(b), 47 U.S.C. § 548(b). See also *First Report and Order, Implementation of Sections 12 & 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming and Distribution and Carriage*, MM Docket 92-265, 8 FCC Rcd 3359, 3370 (1993) ("Program Access Order"), recon. granted in part, *Memorandum Opinion and Order on Reconsideration of the First Report and Order*, MM Docket No. 92-265, 10 FCC Rcd 1902 (1994) ("Mem. Op. on Recon. of Program Access Order").

<sup>8</sup> Communications Act § 616(a), 47 U.S.C. § 536(a). See also *Second Report and Order, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Video Programming Distribution and Carriage*, MM Docket No. 92-265, 9 FCC Rcd 2642, 2643-44 (1993) ("Program Carriage Order").

<sup>9</sup> See *Report and Order, Amendment of the Rules concerning Attribution of Ownership of Broadcast Licensees*, MM Docket No. 83-46, 97 FCC 2d 997, 1032 (1984), recon. in part, *Memorandum Opinion and Order*, MM Docket No. 83-46, FCC 85-252, 58 RR 2d 604 (rel. June 24, 1985), further recon. granted in part, *Memorandum Opinion and Order*, MM Docket No. 83-46, FCC 86-410, 1 FCC Rcd 802 (1986).

<sup>10</sup> *Id.* at 1033 n.85.

<sup>11</sup> See 47 C.F.R. § 73.3555 n.2 (an "insulated" limited partner is one certified as having "no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership").

4. In our rulemaking proceedings under the 1992 Cable Act, we determined that the broadcast attribution standard still governs broad structural rules, such as the horizontal cable ownership limits<sup>12</sup> and vertical channel occupancy limits,<sup>13</sup> that are designed to ensure competition and diversity in the video marketplace. In adopting the broadcast attribution standard for our rules restricting horizontal and vertical ownership, we also were guided by the legislative history of the 1992 Cable Act, which expressly suggested use of the broadcast attribution standard, and which directed that, along with the dangers of increased concentration, we should also consider the potential benefits of increased concentration -- e.g., increased economies of scale and increased capital investment in cable programming.<sup>14</sup> In light of these considerations, we found that a more restrictive attribution standard than the broadcast standard was not warranted for application to the structural rules.

5. We have adopted a more restrictive attribution standard, however, for those rules designed not only to promote competition and diversity, but also to deter specific discriminatory or improper conduct by cable operators or programmers. In contrast to the broadcast attribution standard, this more restrictive standard (1) considers a cable operator to have an attributable interest if it holds 5% or more of an entity's stock, whether voting or non-voting, (2) does not apply the single majority shareholder rule, and (3) attributes limited partnership interests of 5% or more, regardless of insulation.

6. We have adopted the more restrictive standard for our rules imposing specific behavioral restraints on cable operators and programmers, such as our rules regarding program access and program carriage, both of which were designed, in part, to prevent cable operators from using their market power to engage in improper conduct.<sup>15</sup> In our program access rulemaking, we noted that the more restrictive standard was being adopted in light of Congress' purpose in adopting Section 628: curbing certain

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<sup>12</sup> See *Second Report and Order, Implementation of Sections 11 & 13 of Cable Television Consumer Protection and Competition Act of 1992 -- Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, 8 FCC Rcd 8565, 8568-69, 8577-8579 (1993) ("*Horizontal/Vertical Ownership Order*"). In the *Horizontal/Vertical Ownership Order*, the Commission voluntarily stayed the effective date of the horizontal ownership rules pending final judicial resolution of the District Court decision in *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C. 1993), *aff'd in part, Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), which held that the underlying statute violates the First Amendment. *Horizontal/Vertical Ownership Order* at ¶ 3. In August 1996, the D.C. Circuit Court consolidated the *Daniels* appeal and *Time Warner Entertainment Co., L.P. v. FCC*, No. 94-1035 (D.C. Cir. 1994), a challenge to the Commission's rules. *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979-80 (D.C. Cir. 1996). The D.C. Circuit determined to hold court proceedings in abeyance while the Commission reconsidered the horizontal ownership rules. *Id.*

<sup>13</sup> *Horizontal/Vertical Ownership Order*, 8 FCC Rcd at 8593-8596.

<sup>14</sup> See *Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. No. 92, 102d Cong., 1st Sess. 80 (1991). Congress' intent is reflected in the 1992 Cable Act § 11(f)(2), 47 U.S.C. § 533(f)(2), which requires the Commission to weigh both the dangers and the benefits of increased concentration in promulgating our rules.

<sup>15</sup> See *Program Access Order*, 8 FCC Rcd at 3370-71; *Program Carriage Order*, 9 FCC Rcd at 2650. See also 47 C.F.R. §§ 76.1000(b), 76.1300(a).

incentives to influence the behavior of affiliates to the detriment of competitors.<sup>16</sup> While we acknowledged that one of the rule's objectives was to promote general competition and diversity in the video marketplace, the additional anti-discrimination objective warranted "a relatively inclusive attribution rule."<sup>17</sup> Similarly, in the MMDS and SMATV cross-ownership context, we adopted the more restrictive attribution standard in order to prevent cable operators from "warehousing potential competition," as well as to encourage the development of competition to established cable operators by alternative multichannel video service providers.<sup>18</sup>

7. In addition, we have relied upon our attribution rules in defining when an entity is considered an "affiliate" for certain purposes under Title VI. For instance, we have applied the more restrictive attribution standard to the ratemaking context, for purposes of analyzing asset transfers and the provision of services between a cable operator and its affiliate.<sup>19</sup> We found that, in enacting the 1992 Cable Act, Congress intended to ensure that consumers pay reasonable rates for regulated cable services, and that it would be inconsistent with Congress' intent to allow cable operators to impose the costs of nonregulated activities on regulated cable services through improper cross-subsidization.<sup>20</sup> To deter such conduct, we held that the more restrictive attribution rule should apply. We also applied the more restrictive attribution standard to our rules limiting the amount of pass-throughs permitted for programming services affiliated with cable multiple system operators.<sup>21</sup> Those rules arose out of a concern about abuses that might occur if a vertically integrated cable operator were permitted to engage in unlimited pass-throughs to subscribers of the cost of programming that the operator obtained from an affiliated entity.<sup>22</sup>

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<sup>16</sup> See *Program Access Order*, 8 FCC Rcd at 3370-71, citing *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54 - 63.58*, CC Docket No. 87-266, 7 FCC Rcd 5781 (1992); see also *Mem. Op. on Recon. of Program Access Order*, 10 FCC Rcd 1902, 1911-27 (rejecting various proposed exemptions from 5% attribution standard).

<sup>17</sup> *Program Access Order*, 8 FCC Rcd at 3360, 3370. See 47 C.F.R. § 76.1000(b).

<sup>18</sup> See *Report and Order and Further Notice of Proposed Rulemaking, Implementation of Sections 11 & 13 of Cable Television Consumer Protection and Competition Act of 1992 -- Cross-Ownership Limitations and Antitrafficking Provisions*, MM Docket No. 92-264, 8 FCC Rcd 6828, 6843-46 (1993); see also 47 C.F.R. §§ 21.912 n.1, 76.501(d)-(e).

<sup>19</sup> See *Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Services*, MM Docket No. 93-215, 9 FCC Rcd 4527, 4663-68 (1994). See also 47 C.F.R. § 76.924(i).

<sup>20</sup> *Id.* at 4663-64.

<sup>21</sup> See *Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5787-88 (1993), citing 47 C.F.R. § 76.1000(b).

<sup>22</sup> *Id.*

8. Similarly, in adopting a definition of "affiliate" for purposes of the leased access provisions<sup>23</sup> and the open video system provisions,<sup>24</sup> we adopted the more restrictive attribution standard.<sup>25</sup> We found that, in addition to promoting diversity, these provisions were designed to reduce the likelihood that cable operators and open video system operators will discriminate against or otherwise disfavor unaffiliated programming providers.<sup>26</sup> Given these dual objectives, we found that the more restrictive attribution standard was the appropriate standard for identifying the interests at issue.<sup>27</sup>

9. Finally, we note that in the "Cable Act Reform" proceeding<sup>28</sup> we are reviewing appropriate definitions of "affiliate" under other provisions of the 1996 Act, including the small operator provisions,<sup>29</sup> the new prong of the "effective competition" test,<sup>30</sup> and the cable-telco buy-out provisions.<sup>31</sup> Pending the adoption of final rules, we requested comments on the appropriate definition of "affiliate" for the cable-telco buyout provisions<sup>32</sup> and established interim rules for the small operator and "effective competition" provisions. For the small operator provisions, the interim rule adopted the definition of "affiliate" used for purposes of our small system cost-of-service rules.<sup>33</sup> Thus, an entity is deemed affiliated with a small cable operator if that entity has a 20% or greater equity interest in the operator (active or passive) or holds

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<sup>23</sup> Communications Act § 612, 47 U.S.C. § 532.

<sup>24</sup> Communications Act § 653, 47 U.S.C. § 573.

<sup>25</sup> See 47 C.F.R. §§ 76.970(b), 76.1500(g); *Second Report and Order and Second Order on Reconsideration of the First Report and Order, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Leased Commercial Access*, CS Docket No. 96-60, FCC 97-27, 12 FCC Rcd 5267 (1997), at paras. 118-121 ("*Leased Access Order*"); *Third Report and Order and Second Order on Reconsideration, Implementation of Section 302 of the Telecommunications Act of 1995; Open Video Systems*, CS Docket No. 96-46, FCC 96-334, 11 FCC Rcd 20227 (1996), at paras. 4-16 ("*OVS Order*").

<sup>26</sup> *OVS Order* at para. 14; *Leased Access Order* at para. 119.

<sup>27</sup> *OVS Order* at paras. 14-15; *Leased Access Order* at para. 119.

<sup>28</sup> See *Order and Notice of Proposed Rulemaking, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, FCC 96-154, 11 FCC Rcd 5937 (1996) ("*Cable Act Reform NPRM*").

<sup>29</sup> See Communications Act § 623(m)(2), 47 U.S.C. § 543(m)(2).

<sup>30</sup> See Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D).

<sup>31</sup> See Communications Act § 652, 47 U.S.C. § 572.

<sup>32</sup> *Cable Act Reform NPRM* at ¶ 96.

<sup>33</sup> *Cable Act Reform NPRM*, 11 FCC Rcd at 5947-48, citing 47 C.F.R. § 76.934(a). See also *Sixth Report and Order and Eleventh Order on Reconsideration, Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket Nos. 92-266 & 93-215, FCC 95-196, 10 FCC Rcd 7393 (1995).

de jure or de facto control over the operator.<sup>34</sup> By contrast, in the "effective competition" context, the Commission found it reasonable to adopt an interim rule that reflected the new Title I affiliation threshold that Congress has prescribed for other provisions of the Communications Act.<sup>35</sup> Under the new standard, an affiliate is an entity that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person, where the term "own" means to have an equity interest (or the equivalent thereof) of more than 10%.<sup>36</sup>

10. *Notice.* As noted above, we released the *Broadcast Attribution Notice* and the *Broadcast Attribution Further Notice* to review our broadcast attribution standard. Among the issues on which we solicited comment in the *Broadcast Attribution Notice* were: (1) whether to increase the voting stock ownership benchmark from 5 percent to 10 percent;<sup>37</sup> (2) whether to increase the passive investor stock ownership benchmark from 10 percent to 20 percent;<sup>38</sup> (3) whether to restrict or eliminate our single majority shareholder exemption and whether to attribute nonvoting shares in certain circumstances, such as where the minority or nonvoting shareholder has contributed a significant portion of the equity or debt financing;<sup>39</sup> (4) whether to revise our insulation criteria for limited partnership interests, and whether to adopt an equity benchmark for noninsulated limited partners;<sup>40</sup> (5) whether to treat interests in limited liability companies ("LLCs") and similar new business forms, such as registered limited liability partnerships ("RLLPs"), as we now treat limited partnerships;<sup>41</sup> (6) whether to eliminate the remaining aspects of our cross-interest policy that prevent individuals from having "meaningful" interests -- including key employee relationships, joint ventures, and nonattributable equity interests -- in two broadcast stations, or a daily newspaper and a broadcast station, or a television station and a cable system, when both outlets serve "substantially the same area;"<sup>42</sup> and (7) how to treat non-equity financial relationships and multiple business relationships that, although not individually attributable, could combine to create sufficient influence to warrant attribution.<sup>43</sup>

11. In addition to the issues raised in the *Broadcast Attribution Notice*, the *Broadcast Attribution Further Notice* explored additional proposals to increase the precision of the attribution rules.

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<sup>34</sup> See *Cable Act Reform NPRM*, 11 FCC Rcd at 5947-48.

<sup>35</sup> *Id.* at 5943-44.

<sup>36</sup> See Communications Act § 3(1), 47 U.S.C. § 153(1); see also 47 C.F.R. § 76.1401(b).

<sup>37</sup> *Broadcast Attribution Notice* at paras. 18-46.

<sup>38</sup> *Id.* at paras. 47-50. We also invited comment on our tentative conclusion not to expand the passive investor class to include pension funds, investment and commercial banks, and certain investment advisors.

<sup>39</sup> *Id.* at paras. 51-54.

<sup>40</sup> *Id.* at paras. 55-63.

<sup>41</sup> *Id.* at paras. at 64-75.

<sup>42</sup> *Id.* at paras. 76-92.

<sup>43</sup> *Id.* at paras. 93-100.

First, we invited comment on whether we should add a new "equity or debt plus" ("EDP") attribution rule. Under such a rule, where an interest holder is a program supplier or same-market media entity, we will attribute its otherwise non-attributable equity and/or debt interests in a licensee or other media entity subject to the cross-ownership rules if those aggregated interests exceed a specified benchmark, proposed to be set at 33 percent.<sup>44</sup> Second, we tentatively concluded that we should treat television time brokerage agreements or local marketing agreements ("LMAs") the same as radio LMAs, and also count radio and television LMAs toward all applicable ownership limits.<sup>45</sup> Third, we invited comment as to whether we should attribute joint sales agreements ("JSAs") in certain circumstances.<sup>46</sup> Fourth, we invited comments on a Commission staff study of attributable ownership interests in broadcast television stations, appended to the *Broadcast Attribution Further Notice*, and on the implications of this study regarding the impact of the proposed attribution rule changes, particularly as to the voting stock benchmarks.<sup>47</sup> Fifth, we sought comments on whether a transition period or grandfathering of existing interests is appropriate. We tentatively concluded that any grandfathering should apply only to the current interest holder and that interests acquired on or after December 15, 1994, the date of adoption of the *Broadcast Attribution Notice*, should be subject to any final rules adopted.<sup>48</sup> Finally, we invited comments as to whether we should apply broadcast attribution criteria and add a new EDP attribution rule for purposes of the cable/Multipoint Distribution Service ("MDS") cross-ownership restrictions.<sup>49</sup>

12. This *Notice* initiates a similar review of attribution issues as they specifically relate to our cable rules.<sup>50</sup> We note that the ownership attribution rules are intended to identify those relationships that confer on their holders a degree of influence or control over key business decisions, including budget, personnel, programming, and technology practices of cable entities, such that the holders should be subject to the Commission's regulations. In addition, the attribution rules may be used to identify ownership or other relationships that could provide the entities involved with economic incentives to operate in conflict

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<sup>44</sup> *Broadcast Attribution Further Notice* at paras. 8-25.

<sup>45</sup> *Id.* at paras. 26-31. For purposes of applying the radio LMA rules, the Commission's rules define time brokerage as "the sale by a licensee of discrete blocks of time to a 'broker' that supplies the programming to fill that time and sells the commercial spot announcements in it." 47 C.F.R. § 73.3555(a)(4)(iii). The *Broadcast Attribution Further Notice* refers to LMAs as "those time brokerage agreements involving a broker that is a licensee of one or more stations in the same market as the brokered station." *Id.* at para. 2 n. 4.

<sup>46</sup> *Id.* at paras. 32-35. JSAs are agreements between broadcasters for the joint sales of broadcast commercial time. *Id.* at para. 33.

<sup>47</sup> *Id.* at paras. 36-38 and Commission staff study attached thereto.

<sup>48</sup> *Id.* at paras. 39-42. We reiterated that the issue of grandfathering of television LMAs would be addressed separately in the television local ownership proceeding. *Id.* at para. 40.

<sup>49</sup> *Id.* at paras. 43-44.

<sup>50</sup> We have received informal communications suggesting such a comprehensive review of our attribution rules. See, e.g., Letter from S. White Rhyne and Robert L. Petit of the Federal Communications Bar Association to Reed E. Hundt, dated January 30, 1995 (urging the Commission, as part of "reinventing government" efforts, to initiate a comprehensive review of the attribution tests used by its various bureaus and offices in order to promote consistency of interpretation and process).

with the objectives of the particular cable regulation at issue. We seek comment on the same issues raised in the broadcast attribution proceedings as they pertain to the cable industry, and on whether and how these issues should factor into the review of our cable attribution rules. In particular, we ask commenters to focus on: (1) the proposed "equity or debt plus" addition to the current attribution rules, and specifically those relationships in the cable context that may provide sufficient incentive and ability for an otherwise nonattributable interest holder to exert an attributable influence or control; (2) the attribution of certain contractual or other business relationships in the cable context (including affiliations that allow different cable entities to purchase programming, technology or equipment on common terms, analogous to JSAs and LMAs in the broadcast context) that may implicate diversity and competition concerns, irrespective of debt or equity; (3) the impact of raising the stock ownership benchmark for active and passive investors in the cable context, particularly seeking empirical data and analysis similar to the Commission staff study on the same subject in the broadcasting context; (4) whether to retain, modify, or eliminate the single majority shareholder exemption; and (5) whether a transition period or grandfathering of existing interests is appropriate if we decide to adopt more restrictive attribution rules. Because the *Broadcast Attribution Notice* and the *Broadcast Attribution Further Notice* already address application of the attribution rules to the cable/MMDS and the cable/broadcast cross-ownership restrictions, we will not revisit and therefore do not seek comment on those issues in this proceeding.<sup>51</sup>

13. We seek comment on whether the assumptions underlying our cable attribution rules are still valid. In particular, we solicit comment on whether any relevant differences exist between the cable and broadcasting industries that would support a distinct cable attribution standard even for those cable rules designed, like our broadcasting ownership rules, to ensure competition and diversity. We note that the broadcast attribution rules focus primarily on those relationships which confer on their holders influence or control over a broadcaster's key business decisions in the areas of budget, personnel and programming. We seek comment on whether, in the cable context, these are the appropriate key business areas and whether the underlying areas of concern should include cable entities' technology decisions and practices. We seek comment on whether there are differences in ownership, financing or management structures, industry health, typical stockholdings, informal business arrangements, or outside financial claims that render one of the industries more or less subject to the types of influence or control that our attribution rules seek to identify. Also, because our current cable attribution rules do not distinguish between types of cable operators, we seek comment on whether any relevant differences exist among cable operators that would warrant different attribution rules.

14. We also solicit comment on whether and how we should re-evaluate the more restrictive attribution standard applicable to certain of the rules described above, such as the program access and program carriage rules and the cable/MMDS and cable/SMATV cross-ownership restrictions. In particular, we seek comment on: (1) whether the more restrictive standard serves the purposes for which it was intended; (2) whether the more restrictive standard is over- or under-inclusive; (3) whether the more restrictive attribution standard should be revised in relation to the broadcast attribution standard; (4) whether these two attribution standards should be treated as completely separate and independent formulations; and (5) whether, in view of the purposes it serves, we should require a more compelling showing before modifying the more restrictive standard.

15. We seek comment on whether and how any changes in our cable attribution rules should

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<sup>51</sup> See, e.g., *Broadcast Attribution Further Notice* at paras. 3, 43.

affect our various definitions of "affiliate."<sup>52</sup> In particular, we seek comment on whether and how those affiliation rules that are expressly based on our cable attribution rules should change if the underlying attribution rules are changed.

16. We seek comment as to the business arrangements involved in recent cable system partnerships, joint ventures, swaps, transfers, mergers and acquisitions, particularly those transactions announced or consummated in 1997 or thereafter, including those discussed in the Commission's 1997 annual report on the status of competition in the delivery of video programming.<sup>53</sup> Commenters should identify the entities involved in each transaction, the projected date of consummation, details of the new structure including: the percentage and nature (e.g., voting or non-voting, limited or general partnership, insulated or non-insulated, rights of conversion) of each entity's ownership interests, the number of officers, directors, and other key personnel appointed by each entity to a management committee, board or other governing body, the portion of the equity or debt financing contributed by each entity, and any authority or power held by each entity to review, veto or otherwise influence the management or operation of the cable systems, as well as the ability to purchase programming, technology, or equipment under common contract terms. We seek information, in particular, as to any business arrangements undertaken to insulate one or more parties to these transactions from control or influence over key business aspects of the cable systems at issue. We also seek comment as to the development of the Commission's cable attribution rules to avoid inconsistency with any other statutes or regulations (e.g., those of the Internal Revenue Service or the Financial Accounting Standards Board) that may influence the structuring of the business arrangements at issue.

17. With respect to each ownership or relational interest discussed herein, we seek comment on whether the specified level or degree of ownership interest in, or relationship to, an entity would be likely to impart the ability to influence or control the operations of that entity, including core areas such as budget, personnel, programming, technology, or competitive practices, such that the ownership rules should be implicated. Consistent with the purpose of Section 257 of the 1996 Act to reduce market entry barriers for small businesses,<sup>54</sup> we also seek comment on the impact that any changes to our cable ownership attribution or affiliation standards will have on market entry barriers for small businesses. We ask interested parties to support their comments with empirical data and economic analyses regarding levels of influence in business organizations and current market conditions.

### III. CONCLUSION

18. The cable attribution rules play a crucial role in the Commission's effort to ensure a competitive, diverse, and fair video marketplace. The purpose of this review is to examine whether our current cable attribution rules are accomplishing those goals, and to determine whether fewer, additional or different restrictions are warranted.

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<sup>52</sup> See, e.g., 47 C.F.R. §§ 76.924(i), 76.970(b), 76.1500(g), 76.1401(b).

<sup>53</sup> *Fourth Annual Report, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC 97-423, CS Docket No. 97-141 at ¶¶ 142-148 (rel. Jan. 13, 1998).

<sup>54</sup> See 47 U.S.C. § 257.

#### IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

19. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 ("RFA"), the Commission is incorporating an Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact on small entities of any policies or proposals contained in this *Notice of Proposed Rule Making* ("*Notice*"). Written public comments concerning the effect of the proposals in the *Notice*, including the IRFA, on small businesses are requested. Comments must be identified as responses to the IRFA and must be filed by the deadlines for the submission of comments in this proceeding. The Secretary shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.<sup>55</sup> In addition, this *Notice* and IRFA will be published in the Federal Register.<sup>56</sup>

##### A. Need for, and Objectives of, the Proposed Rules

20. This proceeding is being initiated to obtain comment on whether the Commission's cable attribution and affiliation rules continue to serve their intended goals, and whether certain aspects of those rules should be revised to make them more effective. The actions proposed in the *Notice* are intended to ensure that the Commission effectively implements the various cable rules that include an attribution or affiliation standard by identifying those interests that may result in undue market power by large entities, such as large cable multiple systems owners, and undermine a competitive, diverse and fair marketplace.

##### B. Legal Basis

21. Authority for the actions proposed in this *Notice* is contained in Sections 4, 303, 612, 613, 616, 623, 628, 652 and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 532, 533, 536, 543, 548, 572 & 573.

##### C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

22. The RFA generally defines "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 the Small Business Act unless the Commission has developed one or more definitions that are appropriate for its activities.<sup>57</sup> A small business concern is one which: (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").<sup>58</sup> The Small Business Enforcement Fairness Act of 1996 (SBREFA) provision of the RFA also applies to nonprofit organizations

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<sup>55</sup> 5 U.S.C. § 603(a).

<sup>56</sup> *See id.*

<sup>57</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

<sup>58</sup> 15 U.S.C. § 632.

and to governmental organizations such as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.<sup>59</sup> Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."<sup>60</sup>

### Local Franchising Authorities

23. There are 85,006 governmental entities in the United States.<sup>61</sup> This number includes such entities as states, counties, cities, utility districts and school districts. We note that any official actions with respect to cable systems will typically be undertaken by local franchising authorities ("LFAs"), which primarily consist of counties, cities and towns. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states, which typically are not LFAs. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000. Thus, approximately 37,500 "small governmental jurisdictions" may be affected by the rules proposed in this *Notice*.

### Cable Services or Systems

24. SBA has developed a definition of small entities for cable and other pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services, which includes all such companies with annual gross revenues of \$11 million or less.<sup>62</sup> This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 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.<sup>63</sup>

25. The Commission has developed its own definition of a "small cable company" and "small system" for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is

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<sup>59</sup> 5 U.S.C. § 601(5).

<sup>60</sup> While we tentatively believe that the SBA's definition of "small business" greatly overstates the number of cable entities that are small businesses and is not suitable for purposes of determining the impact of any proposals on small cable entities, for purposes of this *Notice*, we utilize the SBA's definition in determining the number of small businesses to which the proposed rules would apply.

<sup>61</sup> United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

<sup>62</sup> 13 C.F.R. §121.201.

<sup>63</sup> 1992 Census, *supra*, at Firm Size 1-123. See *Memorandum Opinion and Order and Notice of Proposed Rule Making, Implementation of Sections of the Cable Telecommunications Consumer Protection and Competition Act of 1992, Rate Regulation and Cable Pricing Flexibility*, MM Docket No. 92-266 and CS Docket No. 96-157, 11 FCC Rcd 9517, 9531 (1996).

one serving fewer than 400,000 subscribers nationwide.<sup>64</sup> Based on our most recent information, we estimate that there were 1,439 cable companies that qualified as small cable companies at the end of 1995.<sup>65</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 companies. Consequently, we estimate that there are fewer than 1,439 small entity cable companies that may be affected by the proposal adopted in this *Notice*. The Commission's rules also define a "small system," for the purposes of cable rate regulation, as a cable system with 15,000 or fewer subscribers.<sup>66</sup> We do not request nor do we collect information concerning cable systems serving 15,000 or fewer subscribers and thus are unable to estimate at this time the number of small cable systems nationwide.

26. The Communications Act also contains a definition of a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>67</sup> 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 is 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>68</sup> Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.<sup>69</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. We are likewise unable to estimate the number of these small cable operators that serve 50,000 or fewer subscribers in a franchise area.

#### Satellite Master Antennae Television ("SMATV") Operators

27. Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.<sup>70</sup> Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September 1996.<sup>71</sup> The ten largest SMATV operators together pass

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<sup>64</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable company is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration, Implementation of Sections of the 1992 Cable Act: Rate Regulation*, MM Docket Nos. 92-266 & 93-215, 10 FCC Rcd 7393 (1995).

<sup>65</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>66</sup> 47 C.F.R. § 76.901(c).

<sup>67</sup> 47 U.S.C. § 543(m)(2).

<sup>68</sup> 47 C.F.R. § 76.1403(b).

<sup>69</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>70</sup> *Id.* at para. 81.

<sup>71</sup> *Id.*

815,740 units.<sup>72</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 believe that a substantial number of SMATV operators qualify as small entities.

### Local Exchange Carriers ("LECs")

28. Neither the Commission nor the SBA has developed a definition for small LECs. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>73</sup> The most reliable source of information regarding the number of LECs nationwide is the data that we collect annually in connection with the TRS Worksheet.<sup>74</sup> According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.<sup>75</sup> We do not have information on the number of carriers that are not independently owned and operated, nor what carriers have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs.

### Cable Programmers

29. The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will utilize the SBA classifications of Motion Picture and Video Tape Production (SIC 7812),<sup>76</sup> and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).<sup>77</sup> These SBA definitions provide that a small entity in the cable television programming industry is an entity with \$21.5 million or less in annual receipts for SIC

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<sup>72</sup> *Id.*

<sup>73</sup> 47 C.F.R. § 121.201; SIC Code 4813.

<sup>74</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Table 1 (Average Total Telecommunications Revenue Reported by Class of Carrier) (December 1996) ("TRS Worksheet").

<sup>75</sup> *Id.*

<sup>76</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>77</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.

7812, and \$5 million or less in annual receipts for SIC 7922.<sup>78</sup> Census Bureau data indicate the following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (SIC 7812), and that 6,987 of these firms had \$16.999 million or less in annual receipts and 7,002 of these firms had \$24.999 million or less in annual receipts;<sup>79</sup> and (b) there were 5,671 firms in the United States classified as Theatrical Producers and Services (SIC 7922), and that 5627 of these firms had \$4.999 million or less in annual receipts.<sup>80</sup>

**D. Description of Projected Recording, Record keeping, and Other Compliance Requirements**

30. If our cable ownership attribution or affiliation standards are changed, the Commission may have to change certain cable reporting requirements and cable entities may be required to observe new recording, record keeping or other compliance requirements that would be necessary to ensure compliance with the new attribution or affiliation standards. Cable entities also may have to adjust the organization of their business interests in order to comply with any new attribution or affiliation standards that we may adopt.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

31. The actions proposed in the *Notice* are intended to ensure that the Commission effectively implements the various cable rules that include an attribution or affiliation standard by identifying more accurately those interests that may result in undue market power by large entities, such as large cable multiple systems owners, and undermine a competitive, diverse and fair marketplace. Accordingly, as discussed in the above descriptions of the proposed rule changes, and in the *Broadcast Attribution Notice* and *Broadcast Attribution Further Notice*, the approaches proposed in this *Notice* should promote fairness and diversity for all cable systems and other small entities listed above. We invite comments on these approaches, including comment on whether alternative approaches will mitigate any unwarranted expenses incurred by smaller entities by virtue of their size alone.

**F. Federal Rules that Overlap, Duplicate or Conflict with the Proposed Rules**

32. None.

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<sup>78</sup> 13 C.F.R. § 121.201.

<sup>79</sup> U.S. Small Business Administration, *1992 Economic Census Industry and Enterprise Report*, Table 2D, SIC 7812, (U.S. Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration) ("SBA 1992 Census Report"). Because the Census data do not include a category for \$21.5 million, 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 would therefore be classified as small businesses.

<sup>80</sup> SBA 1992 Census Report, SIC 7922.

**V. PAPERWORK REDUCTION ACT**

33. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act"). The Commission has determined that, if we change our cable ownership attribution or affiliation standards, the Commission may have to require cable entities to comply with new or modified information collection requirements that would be necessary to ensure compliance with the new attribution or affiliation standards. If the Commission, in a subsequent rulemaking in this proceeding, implements new or modified information collection requirements, those requirements will first be subject to approval by the Office of Management and Budget as prescribed by the Act.

**VI. PROCEDURAL PROVISIONS**

34. 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. 47 C.F.R. § 1.1206(b), as revised. 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 a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 C.F.R. § 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

35. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments are due August 14, 1998, and reply comments are due September 3, 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, N.W. Washington, D.C. 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 N.W., Washington D.C. 20554.

**VII. ORDERING CLAUSES**

36. Accordingly, IT IS HEREBY ORDERED that pursuant to the authority in Sections 4, 303, 612, 613, 616, 623, 628, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 532, 533, 536, 543, 548, 572 and 573, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this *Notice of Proposed Rulemaking*, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

37. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION



Maggie Roman Salas  
Secretary