

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

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In the Matter of:)
)
1998 Biennial Regulatory Review--)
)
Part 76 - Cable Television Service)
Pleading and Complaint Rules)

CS Docket No. 98-54

REPORT AND ORDER

Adopted: December 18, 1998

Released: January 8, 1999

By the Commission:

I. INTRODUCTION

1. In this Report and Order ("Order"), we reorganize and simplify the Commission's Part 76 Cable Television Service pleading and complaint process rules.¹ These changes make the Part 76 rules more concise and easier to use than our current rules and will serve the public interest by lessening confusion and reducing the regulatory burden on franchising authorities, cable operators, and other interested persons making filings under Part 76.

II. BACKGROUND

2. This proceeding was initiated by a Notice of Proposed Rulemaking ("Notice") released on April 22, 1998.² The Notice was conceived as an adjunct to the Commission's 1998 biennial regulatory review³ pursuant to Section 11 of the 1996 Telecommunications Act ("1996 Act").⁴ Section 11 of the 1996 Act instructed the Commission "to conduct a biennial review of regulations that apply to operations and activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be no longer in the public interest."⁵ Although Section 11 does not specifically refer to cable operators, the Commission has determined that the first biennial review presents an

¹47 C.F.R. §§ 76.1-76.1514.

²See *1998 Biennial Regulatory Review -- Part 76 - Cable Television Service Pleading and Complaint Rules*, CS Docket No. 98-54, *Notice of Proposed Rulemaking*, 13 FCC Rcd 10644 (1998) ("Notice").

³47 U.S.C. § 161; see FCC News Release, *1998 Biennial Review of FCC Regulations Begun Early* (Nov. 18, 1997).

⁴Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁵47 U.S.C. § 161.

opportunity for a thorough examination of all of the Commission's regulations. Five comments and three reply comments were received in response to the Notice.⁶

3. In the Notice, we noted that each type of petition or complaint made pursuant to the Part 76 rules has particular requirements regarding the procedures that must be followed before a filing can be made, who must be served with the filing, and the deadline time for a response. Although the procedural rules accompanying each different type of pleading are designed to establish fair and expeditious procedures for receiving, considering, and resolving issues, we stated our belief in the Notice that many aspects of our pleading requirements could be streamlined. We sought comment on which pleading processes should have uniform procedures. We also sought proposals on how to achieve an overall streamlined complaint process for Part 76 pleadings.

III. DISCUSSION

4. Commenters did not file comments specifying comprehensive proposals for streamlining our Part 76 rules.⁷ However, commenters generally support the idea of harmonizing, to the extent practicable, the pleading and complaint rules of Part 76.⁸ WCA supports a uniform pleading cycle, maintaining that a single uniform pleading cycle would eliminate confusion and better serve the public interest.⁹ NCTA, however, recognizes that there are limitations to the Commission's ability to standardize all Part 76 pleadings, such as statutory deadlines for resolving certain types of disputes.¹⁰ NCTA notes that some areas, such as must-carry, have statutory deadlines imposed by Congress,¹¹ while in other areas, Congress instructs the Commission to provide "expedited review" of complaints.¹² We agree that a common set of procedures for all pleading and complaints filed pursuant to Part 76 is not feasible. Nonetheless, as discussed below, it is possible to standardize the procedural requirements for many of the Part 76 filings and to eliminate redundant sections of the rules. By this Order we implement changes to our rules to achieve this result.

5. This Order implements several rule changes designed to consolidate the procedural requirements for most Part 76 filings. We codify these requirements at Sections 76.6 through 76.10 of the Commission's rules. We believe that these amendments will make it easier to reference specific

⁶Comments were filed by Ameritech New Media, Inc. ("Ameritech"), the National Cable Television Association ("NCTA"), the Small Cable Business Association ("SCBA"), Tele-Communications, Inc. ("TCI"), and the Wireless Communications Association International ("WCA"). Replies were filed by Ameritech, BellSouth and the National Association of Telecommunications Officers and Advisors ("NATOA").

⁷Commenters' proposals applicable to specific rule sections are discussed below.

⁸BellSouth Reply at 1; NATOA Reply at 8; NCTA Comments at 1; TCI Comments at 1; WCA Comments at 1.

⁹WCA Comments at 2.

¹⁰NCTA Comments at 2.

¹¹*Id.* at 2, citing 47 U.S.C. § 534(d)(3) (120 day deadline to resolve must carry complaints).

¹²NCTA Comments at 3, *citing* 47 U.S.C. § 548(f)(1) (program access).

procedural requirements. We also eliminate the provisions rendered redundant by the amendments adopted in this Order.¹³

6. We agree with the comments filed by WCA and NCTA suggesting that, to the extent possible, the Commission should adopt uniform pleading requirements.¹⁴ Prior to this Order, Part 76 had several largely redundant provisions setting forth general pleading requirements applicable to various procedures provided for therein.¹⁵ To eliminate these redundant requirements, we adopt Section 76.6, which contains the general pleading requirements for all written submissions made pursuant to Part 76. This includes universal requirements such as that pleadings must be clear, concise, and explicit, and that legal arguments must be supported by statutory authority.

7. In addition, Section 76.6 will require that all submissions be verified by the submitting party or by the party's attorney. Further, each submission must contain a written verification that the signatory has read the submission and to the best of his or her knowledge, the submission is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.¹⁶ Prior to this amendment not all submissions pursuant to the Part 76 rules required verification. We believe that the requirement of verification is appropriate to ensure that pleadings submitted pursuant to Part 76 are filed after due consideration and investigation.

8. In order to establish a standard provision for Part 76 pleadings, we amend Section 76.7 to provide a uniform filing format, deadlines, and other procedural requirements which most pleadings filed pursuant to Part 76 will follow. Unless a particular rule section contains specialized pleading requirements, a party should file a petition that complies with the provisions of Section 76.7.¹⁷ To the extent a conflict is perceived between the general pleading requirements of Section 76.7 and the procedural requirements of a specific section, the procedural requirements of the specific section should be followed. Among the filings now filed pursuant to Section 76.7 are petitions seeking special relief, waivers, show cause orders, and forfeiture proceedings.

9. To comport with its new generalized nature, those portions of Section 76.7 which pertain only to must-carry complaints have been moved to Section 76.61 of our rules (Disputes Concerning Carriage) thereby incorporating all unique procedural aspects of must carry complaints in that rule. Section 76.61 is further amended to merge the specific requirements of must-carry complaints filed by

¹³For example, we believe that the amendments to the program access procedural rules and carriage agreement procedural rules make these rules more concise and clear. *See* 47 C.F.R. §§ 76.1003 and 76.1302.

¹⁴NCTA Comments at 3; WCA Comments at 4.

¹⁵*See* 47 C.F.R. §§ 76.1003, 76.1302, 76.1513.

¹⁶Submissions filed electronically should follow the verification requirements of 47 C.F.R. § 1.52.

¹⁷*See* Appendix A, 47 C.F.R. § 76.7.

local commercial television stations¹⁸ and must-carry complaints filed by local noncommercial educational television stations in one rule.¹⁹

10. We have also consolidated the procedures regarding petitions for effective competition. Although the underlying substantive law is contained in a single section of the Communications Act, the Commission's rules, prior to this Order, specified several different procedures for filing a petition with the Commission seeking a determination of effective competition.²⁰ Cable operators could file a petition for reconsideration of certification,²¹ a petition for revocation of certification,²² or, if the petitioner was claiming local exchange carrier ("LEC") effective competition, our interim procedures, adopted following enactment of the Telecommunications Act of 1996 (the "1996 Act"), require LEC effective competition cases to be filed as petitions for special relief under Section 76.7.²³ Because of the commonality of these petitions, we are amending our rules to achieve a uniform procedure applicable to all petitions seeking a determination of effective competition, except petitions for reconsideration of certification which will continue to be filed pursuant to the procedural provisions set forth in Section 1.106 of the Commission's rules.²⁴ We are changing the procedures of Section 76.914 (Revocation of Certification) to require that petitions filed as a result of these rules follow the procedures set forth in Section 76.7. The result of these changes is that all effective competition petitions filed pursuant to Section 76.7 will be placed on public notice and have the same 20 day deadline to file comments or oppositions and 10 days to reply currently afforded LEC effective competition petitions. Previously, petitions for revocation of certification provided 30 days to file comments and oppositions and 15 days to reply based on the date of service on the franchising authority.²⁵ We believe that this change in filing procedures will not unduly burden the parties to these proceedings, and is necessary to achieve the benefit that common procedures provide.

11. Several current rules contain redundant provisions related to the referral of proceedings for an adjudicatory hearing before an administrative law judge ("ALJ"). Section 76.7 is hereby revised

¹⁸See Appendix A, 47 C.F.R. § 76.61(a)

¹⁹See Appendix A, 47 C.F.R. § 76.61(b).

²⁰See 47 U.S.C. § 543(l) (definition of effective competition).

²¹47 C.F.R. § 76.911.

²²47 C.F.R. § 76.914.

²³The 1996 Act added 47 U.S.C. § 623(l)(1)(D), LEC effective competition, as one of the definitions of effective competition. This statutory provision was one of several that were effective upon enactment of the 1996 Act. The interim rules are the subject of a Notice of Proposed Rulemaking. See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket 96-85, *Order and Notice of Proposed Rulemaking*, 11 FCC Rcd 5937, 5944 (1996).

²⁴*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1996*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5693-94 (1993). The procedural requirements for petitions for reconsideration of certification are found in 47 C.F.R. § 1.106. This scope of this Order is limited to changes to procedural requirements in Part 76.

²⁵See 47 C.F.R. § 76.914(c).

and sets forth rules providing for referrals to ALJs for all Section 76.7 proceedings. The language for this section was taken from the sections containing the procedures for referrals to ALJs in the course of program access, carriage agreement, and open video system complaint procedures.²⁶ We have made one amendment to these provisions stating that the Commission can refer discrete issues arising out of a proceeding for an adjudicatory hearing before an ALJ.²⁷ This amendment clarifies that the Commission is not limited to referring only entire proceedings for an adjudicatory hearing before an ALJ. We believe that consolidating the procedures for referral to ALJs in one rule section serves the streamlining goals by eliminating several redundant provisions.

12. We believe these changes make the filing of pleadings pursuant to Section 76.7 more accessible to the general public because they are substantially uniform and contain simplified procedures. Going forward, unless the rule in question contains its own specific procedural guidelines,²⁸ a party seeking special relief, waiver of the Commission's rules, resolution of a complaint, determination of effective competition, or resolution of a disputed question relating to Part 76 should file a petition pursuant to, and follow the procedural rules set forth in, Section 76.7.

13. Certain of our current rules contain redundant provisions permitting Commission staff to convene status conferences.²⁹ Section 76.8 has been recast to provide that status conferences may be convened at the discretion of Bureau staff for all Part 76 proceedings. TCI believes that establishing a status conference mechanism would allow Bureau staff to work with the parties involved to better understand the issues raised, obtain admissions of facts in relation to matters that are in controversy, and consider alternatives for a speedy resolution.³⁰ We agree that the use of status conferences, in appropriate circumstances, will clarify issues and expedite resolution of Part 76 proceedings. We hereby amend our rules to allow Bureau staff, in its discretion, to direct the attorneys and/or parties to appear for a status

²⁶See 47 C.F.R. §§ 76.1003(m), 76.1302(m), 76.1513(o).

²⁷See Appendix A, 47 C.F.R. § 76.7(g)(1).

²⁸For instance, this exception applies to program access complaints. In a recent Report and Order, we adopted new procedural rules for program access complaints to ensure the filing deadlines allowed the Commission to comply with the new time limits by which program access complaints should be resolved. Thus, a program access complaint should continue to be filed under its own administrative procedures, and not as a petition for special relief. See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 97-248, *Report and Order*, FCC No. 98-189 (rel. Aug. 10, 1998).

²⁹See e.g., 47 C.F.R. §§ 76.1003(j) (program access adjudications), 76.1302(j) (program carriage adjudications), 76.1513(l) (open video system carriage adjudications).

³⁰TCI Comments at 7.

conference in any proceeding arising under Part 76.³¹ The language of Section 76.8 was taken from existing provisions of Part 76 with status conference procedures.³²

14. NATOA opposes a status conference mechanism for local rate appeals. NATOA argues that the Commission has a limited role in local rate disputes and that a status conference mechanism could infringe on the jurisdiction of a local franchising authority ("LFA").³³ We disagree with NATOA that a status conference would infringe on the jurisdiction of an LFA. While Congress placed jurisdiction to regulate the rates for the basic service tier in the hands of LFAs, Congress placed jurisdiction to resolve appeals of LFA rate orders with the Commission.³⁴ Inherent in such jurisdiction is the authority to implement procedures, such as the status conference mechanism, to fully and fairly resolve local rate appeals. Accordingly, we fail to see how the discretionary use of status conferences will impinge on LFA's jurisdiction to regulate the basic service tier. The use of a status conference is discretionary and would not be used in instances where the Commission believes that to do so would act to the detriment of any party. With respect to NATOA's concern that smaller LFAs may not have the resources to appear at the Commission for a status conference, we note that Section 76.8 retains the stipulation that status conferences may be conducted by telephone, thereby eliminating unreasonable expense to any party.³⁵

15. Like our rules related to status conferences, several current rules contain redundant provisions related to confidentiality. Section 76.9 is hereby revised and sets forth rules providing for confidential treatment of proprietary information. The language for this section was taken from the sections containing the procedures for confidentiality of proprietary information filed in the course of program access, carriage agreement, and open video system complaint procedures.³⁶ We believe that consolidating the disparate confidentiality provisions in one rule section has the dual benefit of eliminating several redundant provisions while protecting legitimate proprietary information submitted in all Part 76 proceedings.

16. Section 76.10 is added to clarify and describe the review process available to parties following a Bureau ruling or an ALJ decision in a matter referred by the Bureau. This includes the procedures for interlocutory review, petitions for reconsideration, and applications for review. The language for this consolidated section allows us to eliminate redundant sections containing the procedures

³¹As we have noted in other contexts, bringing the parties together to discuss matters may lead to amicable settlement of cases, or at the very least, a narrowing of the issues thereby reducing litigation costs as well as allowing the Commission to focus on more prompt resolution of the case. *See Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, *Notice of Proposed RuleMaking*, 11 FCC Rcd 20823, 20847 (1996) (statutory framework for complaints against common carriers).

³²See 47 C.F.R. §§ 76.1003(j), 76.1302(j), 76.1513(l).

³³NATOA Reply at 5.

³⁴47 U.S.C. §§ 543(a)(2)(A) and 543(c)(3).

³⁵See 47 C.F.R. § 76.1003(j)(3), Appendix A at 47 C.F.R. § 76.8(c).

³⁶See 47 C.F.R. §§ 76.1003(h) (program access adjudications), 76.1302(h) (program carriage adjudications), 76.1513(j) (open video system carriage adjudications).

for review of decisions made in the course of program access, carriage agreement, and open video system complaint procedures.

17. Although not a change to the Part 76 rules, we agree with commenters' suggestions relating to our public notice format to provide the public with additional information regarding proceedings filed with the Commission.³⁷ We believe that this change will increase general awareness of, and participation in, Part 76 cable proceedings.³⁸ The information provided on the public notices is generated using a database which tracks cable cases. The Commission is currently upgrading to a new computer system which will have the capacity to store and display more information about each filing. The improved public notice format will be implemented once the new case tracking system becomes operational.

18. We adopt a procedural amendment clarifying essentially similar provisions related to the one-year limitations period for filing program access, program carriage and open video system complaints.³⁹ The impetus for this amendment is the Bureau's recent decision dismissing as time-barred a program access complaint on the grounds that the defendant's offer to renegotiate dealt with an allegedly discriminatory contract that had been in effect for more than one year.⁴⁰ In order to avoid such situations in the future, we clarify these provisions to provide that complaints based on allegedly discriminatory offers to the complainant must be unrelated to any existing contract between the complainant and the party making such offer. This amendment is intended to clarify that an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory.

19. In addition to the specific proposals discussed above, we received various suggestions from commenters that we decline to implement because these suggestions do not further our goal of simplifying and streamlining the procedures for Part 76 filings. NCTA suggests that we amend our rules to require that, if a defendant is represented by legal counsel, the complainant should attempt to identify that counsel and serve a complaint on both the defendant and its counsel.⁴¹ NCTA has not presented evidence that there is a problem regarding service which requires amendment of our current rules. We also believe that, in some cases, compliance with NCTA's proposal would lead to delay and expense and could unnecessarily burden small entities. NCTA's expanded service requirement would be particularly troublesome where parties must initiate a proceeding within a statutory or regulatory time limit. As

³⁷Ameritech Reply at 4; TCI Comments at 5.

³⁸TCI suggests that the format for the public notice should be expanded information to include: a) assigned case number; b) type of complaint/petition; c) name of the complainant/petitioner; d) name of the defendant/respondent e) affected communities in which the defendant/respondent operates; f) any relevant code identifying the system (such as the cable system's CUID number); and g) the date on which oppositions or responses are due. TCI Comments at 5.

³⁹See Appendix A, 47 C.F.R. §§ 76.1003(f)(2), 76.1302(e)(2), 76.1513(g)(2).

⁴⁰See *Echostar Communications Corp. v. Fox Liberty Networks, et al.*, DA 98-2153 (rel. Oct. 28, 1998).

⁴¹NCTA Comments at 4.

NATOA notes, LFAs may lack the resources to correctly identify a defendant's counsel.⁴² NCTA also proposes that, in situations where a complaint or petition starts the pleading cycle (*i.e.*, pleading cycle not established by public notice issued by the Commission), service should be required to be made in an expeditious manner followed by regular U.S. mail service.⁴³ We believe NCTA's proposal would add an unnecessary additional requirement to the Part 76 filing process. We recognize NCTA's concern that parties have an adequate opportunity to respond to filings, however, the record in this proceeding does not establish a cognizable problem with the Commission's current service and response procedures necessitating the revisions suggested by NCTA.⁴⁴ We are also cognizant of SCBA's concern regarding the administrative burden such regulation could cause small cable systems.⁴⁵

20. WCA and NCTA sought changes to the pleading cycle contained in Section 76.7.⁴⁶ The current pleading cycle allows 20 days for comment following public notice and 10 days to respond. Each party proposes that the Commission lengthen the pleading cycle.⁴⁷ NCTA argues that lengthening the deadlines will afford adequate time to prepare a response.⁴⁸ We decline to amend the current 20 and 10 day pleading cycle for proceedings commenced under Section 76.7. No evidence was presented by commenters to indicate that the current time periods are not sufficient. This cycle was established by the Commission to conform Section 76.7 to the statutory time limits for resolution of must-carry complaints within the context of the special relief procedures.⁴⁹ We note that petitions for special relief seeking a finding of LEC effective competition have also been filed using the 20 - 10 deadline with satisfactory results. We believe that the current time frames do not impose an inordinate burden on the parties while allowing for widespread applicability of the revised Section 76.7 pleading requirements.⁵⁰

⁴²NATOA Reply at 8.

⁴³NCTA believes expedited delivery could be accomplished by hand delivery, overnight delivery, or fax. NCTA Comments at 4.

⁴⁴Our rules also contain procedures by which a party may file a motion for an extension of time of a filing deadline. *See* 47 C.F.R. § 1.46.

⁴⁵SCBA Comments at 2.

⁴⁶NCTA Comments at 4; WCA Comments at 3.

⁴⁷WCA suggests a pleading cycle of 30 days for oppositions and 10 days for replies for any special relief petition. WCA Comments at 4.

⁴⁸NCTA suggests lengthened deadlines which provide 30 days for oppositions and 20 days to reply unless there is a requirement to expedite the process. NCTA Comments at 3.

⁴⁹*See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket 92-259, Report and Order, 8 FCC Rcd 2965, 2994 (1993).

⁵⁰Extending the pleading cycle could impact the Commission's ability to make a determination regarding must-carry complaints within the statutorily required time period. *See* 47 U.S.C. § 534(d)(3).

21. Commenters suggest that for any pleading placed on public notice, the time for filing a responsive pleading should be based on the public notice date, rather than the date of service.⁵¹ TCI notes that various types of complaints and petitions are placed on public notice even though the filing deadlines for some are based on the date of service, rather than the date of public notice. TCI states that this is confusing and could be simplified by amending our rules to provide that the time period for all Part 76 responses run from the date of the public notice. We find that due to the differing statutory deadlines for many of the proceedings commenced pursuant to Part 76, TCI's suggestion is not feasible. Some of the filings that are put on public notice have time limits by which the Commission must resolve the petition.⁵² We believe that the public interest in maximizing general awareness of the proceedings before the Commission is better served by placing these filings on public notice even though their pleading cycle is not based on the issuance of a public notice. When the new computer system for Part 76 filings is activated, public notices will contain additional information regarding each filing.⁵³ We believe that this additional information may alleviate much of the confusion over the filing deadlines of petitions or complaints placed on public notice.

22. NCTA proposes the adoption of a standardized list that sets forth the filing deadlines for all pleadings filed under Part 76. We do not believe that such a list is necessary in light of the amendments made herein to the Part 76 rules. The changes provide uniform procedures applicable to the proceedings consolidated under Section 76.7. Going forward, most filings will be made pursuant to Section 76.7 and will have uniform procedures.

23. TCI proposes that LFAs be required to provide 10 days notice to cable operators prior to filing a certification to regulate rates.⁵⁴ TCI's proposal is not necessary. As NATOA notes, a cable operator can, at any time, communicate with an LFA.⁵⁵ Moreover, a petition for certification to regulate rates does not become effective until 30 days after filing with the Commission, which gives the cable operator a period to negotiate with the LFA prior to grant of certification.⁵⁶ In addition, LFAs may at any time withdraw certification to regulate basic service tier rates.⁵⁷

⁵¹NCTA Comments at 4; TCI Comments at 3.

⁵²See e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 97-248, *Report and Order*, FCC No. 98-189 ¶ 35 (rel. Aug. 10, 1998) (establishing time limits for the resolution of program access cases).

⁵³See *supra* ¶ 17 discussing improving the public notice format.

⁵⁴TCI Comments at 6.

⁵⁵NATOA Reply at 7.

⁵⁶See 47 C.F.R. § 76.910(e).

⁵⁷See 47 C.F.R. § 76.917.

24. Several commenters propose amendments which require substantive changes to Part 76.⁵⁸ We reject such suggestions because they are beyond the scope of this proceeding.⁵⁹ Similarly, suggestions that allow a petition seeking a finding of effective competition to be granted without an affirmative finding of effective competition by the Commission are contrary to Section 623 of the Communications Act.⁶⁰ Commenters make other suggestions which require a change in procedures to implement, but also require substantive changes in the rules.⁶¹ We cannot resolve these proposals in the context of this proceeding which has not developed a record to evaluate substantive proposals.

IV. REGULATORY FLEXIBILITY ANALYSIS AND PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

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

26. Written comments by the public on the new or modified information collection requirements are due 60 days from date of publication of this Order in the Federal Register. Comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 1-C804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information on the information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

⁵⁸See *e.g.*, SCBA's suggestion that small cable operators should be allowed to request a waiver of filing fees in the pleading itself and not be required to submit payment up front would require a change to a different part of the Commission's rules, 47 C.F.R. § 1.117, and is outside the parameters of Part 76 inquiry. SCBA Comment at 14. SCBA also requests that satellite providers be required to report subscriber data by franchise area in effective competition cases and that we allow cable operators to treat any correspondence asserting must-carry as a must-carry request that triggers response obligations and the complaint deadline. SCBA Comments at 10.

⁵⁹In this proceeding, we sought comment and suggestions on how to streamline the Part 76 procedures. See Notice, 13 FCC Rcd at 10644.

⁶⁰47 U.S.C. § 543(a)(2). See BellSouth Comments at 2 (seeking that overlapping wireless cable and cable system overbuilder not be required to file effective competition petition); TCI Comments at 12 (suggesting that unopposed effective competition petitions deemed approved).

⁶¹See *e.g.*, Ameritech suggestion that the Commission adopt the same changes to the rules for program carriage agreement adjudications as it has with respect to program access adjudications. Ameritech Comments at 2.

V. PROCEDURAL PROVISIONS

27. Effective Date. Upon approval by the Office of Management and Budget ("OMB"), the rules adopted in this Report and Order shall become effective. The Commission will publish a notice in the Federal Register announcing the effective date.

VI. ORDERING CLAUSES

28. IT IS ORDERED that, pursuant to authority found in Section 4(i)-(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i)-(j), the Commission's rules ARE HEREBY AMENDED as set forth in Appendix A.

29. IT IS FURTHER ORDERED that the rules as amended in Appendix A shall become effective in 140 days, upon approval by the Office of Management and Budget, unless the Commission publishes a notice to the contrary.

30. 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 Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act.⁶²

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁶²Pub. L. No. 96-354, 94 Stat.1164, 5 U.S.C. §§ 601 *et seq.* (1981).

APPENDIX A

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

PART 76 -- MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.6 is added to read as follows:

§ 76.6 General pleading requirements.

(a) General pleading requirements. All written submissions, both substantive and procedural, must conform to the following standards:

(1) A pleading must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, should be pleaded fully and with specificity.

(2) Pleadings must contain facts which, if true, are sufficient to warrant a grant of the relief requested.

(3) Facts must be supported by relevant documentation or affidavit.

(4) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Each submission must contain a written verification that the signatory has read the submission and to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose appropriate sanctions.

(5) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority. Opposing authorities must be distinguished. Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(6) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(b) Copies to be Filed. Unless otherwise directed by specific regulation or the Commission, an original and two (2) copies of all pleadings shall be filed in accordance with § 0.401(a) of this chapter, except that petitions requiring fees as set forth at part 1, subpart G of this chapter must be filed in accordance with § 0.401(b) of this chapter.

(c) Frivolous pleadings. It shall be unlawful for any party to file a frivolous pleading with the Commission. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.

3. Section 76.7 is amended by revising paragraphs (a) through (g) and adding paragraphs (h) through (i) as follows:

§ 76.7 General special relief, waiver, enforcement, complaint, show cause, forfeiture, and declaratory ruling procedures.

(a) Initiating Pleadings: In addition to the general pleading requirements, initiating pleadings must adhere to the following requirements:

(1) Petitions. On petition by any interested party, cable television system operator, a multichannel video programming distributor, local franchising authority, or an applicant, permittee, or licensee of a television broadcast or translator station, the Commission may waive any provision of Part 76 of the rules, impose additional or different requirements, issue a ruling on a complaint or disputed question, issue a show cause order, revoke the certification of the local franchising authority, or initiate a forfeiture proceeding. Petitions may be submitted informally by letter.

(2) Complaints. Complaints shall conform to the relevant rule section under which the complaint is being filed.

(3) Certificate of Service. Petitions and Complaints shall be accompanied by a certificate of service on any cable television system operator, franchising authority, station licensee, permittee, or applicant, or other interested person who is likely to be directly affected if the relief requested is granted.

(4) Statement of Relief Requested. (A) The petition or complaint shall state the relief requested. It shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.

(B) The petition or complaint shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(C) A petition or complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the petition or complaint. A request for the return of an initiating document will be regarded as a request for dismissal.

(5) Failure to Prosecute. Failure to prosecute petition or complaint, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice if it occurs prior to the adoption date of any final action taken by the Commission with respect to the initiating pleading.

(b) Responsive Pleadings: In addition to the general pleading requirements, responsive pleadings must adhere to the following requirements:

(1) Comments/Oppositions to Petitions. Unless otherwise directed by the Commission, interested persons may submit comments or oppositions within twenty (20) days after the date of public notice of the filing of such petition. Comments or oppositions shall be served on the petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied on.

(2) Answers to Complaints. (A) Unless otherwise directed by the Commission, any party who is served with a complaint shall file an answer in accordance with the following, and the relevant rule section under which the complaint is being filed.

(B) The answer shall be filed within 20 days of service of the complaint, unless another period is set forth in the relevant rule section.

(C) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. Collateral or

immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any party against whom a complaint is filed failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(D) The answer shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the defendant expressly admits. When the defendant intends to controvert all averments, the defendant may do so by general denial.

(E) Averments in a complaint are deemed to be admitted when not denied in the answer.

(c) Reply. In addition to the general pleading requirements, reply comments and replies must adhere to the following requirements:

(1) The petitioner or complainant may file a reply to a responsive pleading which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied on. Unless expressly permitted by the Commission, reply comments and replies to an answer shall not contain new matters.

(2) Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein.

(3) Unless otherwise directed by the Commission or the relevant rule section, comments and replies to answers must be filed within ten (10) days after submission of the responsive pleading.

(d) Motions. Except as provided in § 76.7, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(e) Additional Procedures and Written Submissions. (1) The Commission may specify other procedures, such as oral argument or evidentiary hearing directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party pending the hearing and the nature of any such temporary relief.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the requirements set forth in the Communications Act and in this part, as well as affidavits and exhibits.

(3) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(A) These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(B) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff. Such briefs shall not exceed fifty (50) pages.

(C) Reply briefs may be submitted by either party within twenty (20) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.

(f) Discovery.

(1) The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories, depositions or document production.

(2) The Commission staff may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, document production or depositions. The Commission staff may hold a status conference with the parties, pursuant to section 76.8, to determine the scope of discovery, or direct the parties regarding the scope of discovery. If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff may advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (g) of this section.

(g) Referral to administrative law judge.

(1) After reviewing the pleadings, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any proceeding or discrete issues arising out of any proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Cable Services Bureau Chief, the Cable Services Bureau Chief shall not be deemed to be a party to a proceeding designated for a hearing before an administrative law judge pursuant to this paragraph.

(h) System Community Units Outside the Contiguous States. On a finding that the public interest so requires, the Commission may determine that a system community unit operating or proposing to operate in a community located outside of the 48 contiguous states shall comply with provisions of subparts D, F, and G of this part in addition to the provisions thereof otherwise applicable.

(i) Commission Ruling. The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute, issue an order to show cause, or initiate a forfeiture proceeding.

Note 1: After issuance of an order to show cause, the rules of procedure in Title 47, Part 1, Subpart A, §§ 1.91-1.95 shall apply.

Note 2: Nothing in this Section is intended to prevent the Commission from initiating show cause or forfeiture proceedings on its own motion; Provided, however, that show cause proceedings and forfeiture proceedings pursuant to § 1.80(g) of the rules will not be initiated by such motion until the affected parties are given an opportunity to respond to the Commission's charges.

Note 3: Forfeiture proceedings are generally nonhearing matters conducted pursuant to the provisions of § 1.80(f) of the rules (Notice of Apparent Liability). Petitioners who contend that the alternative hearing procedures of § 1.80(g) of the rules should be followed in a particular case must support this contention with a specific showing of the facts and considerations relied on.

Note 4: To the extent a conflict is perceived between the general pleading requirements of § 76.7 and the procedural requirements of a specific section, the procedural requirements of the specific section should be followed.

4. Section 76.8 is amended by revising paragraphs (a) and (b) and adding paragraphs (c) through (e) to read as follows:

§ 76.8 Status conference.

(a) In any proceeding subject to the Part 76 rules, the Commission staff may in its discretion direct the attorneys and/or the parties to appear for a conference to consider:

- (1) Simplification or narrowing of the issues;
- (2) The necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions;
- (3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;
- (4) Settlement of the matters in controversy by agreement of the parties;
- (5) The necessity for and extent of discovery, including objections to interrogatories or requests for written documents;
- (6) The need and schedule for filing briefs, and the date for any further conferences; and
- (7) Such other matters that may aid in the disposition of the proceeding.

(b) Any party may request that a conference be held at any time after an initiating document has been filed.

(c) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(d) The failure of any attorney or party, following advance notice with an opportunity to be present, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

(e) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of matters relevant to the conduct of the proceeding including, *inter alia*, procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to take affirmative action not subject to deadlines established by another provision of this subpart, such action will be required within ten (10) days from the date of the written memorialization unless otherwise directed by the staff.

5. Section 76.9 is amended by revising paragraphs (a) and (b) and adding paragraphs (c) through (f) to read as follows:

§ 76.9 Confidentiality of proprietary information.

(a) Any materials filed in the course of a proceeding under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in FOIA.

(b) Submissions containing information claimed to be proprietary under this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the opposing parties.

(c) Except as provided in paragraph (d) of this section, materials marked as proprietary may be disclosed solely to the following persons, only for use in the proceeding, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the proceeding and any support personnel employed by such attorneys;

(ii) Officers or employees of the parties in the proceeding who are named by another party as being directly involved in the proceeding;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section.

(d) The Commission will entertain, subject to a proper showing, a party's request to further restrict access to proprietary information as specified by the party. The other parties will have an opportunity to respond to such requests.

(e) The persons designated in paragraphs (c) and (d) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense of the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(f) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (c) and (d) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(g) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

6. Section 76.10 added to read as follows:

§ 76.10 Review.

(a) Interlocutory review.

(1) Except as provided below, no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff or administrative law judge.

(2) Rulings listed in this paragraph are reviewable as a matter of right. An application for review of such ruling may not be deferred and raised as an exception to a decision on the merits.

(A) If the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding, such person, as a matter of right, may file an application for review of that ruling.

(B) If the staff's ruling requires production of documents or other written evidence, over objection based on a claim of privilege, the ruling on the claim of privilege is reviewable as a matter of right.

(C) If the staff's ruling denies a motion to disqualify a staff person from participating in the proceeding, the ruling is reviewable as a matter of right.

(b) Petitions for reconsideration. Petitions for reconsideration of interlocutory actions by the Commission's staff or by an administrative law judge will not be entertained. Petitions for reconsideration

of a decision on the merits made by the Commission's staff should be filed in accordance with §§ 1.104-1.106 of this chapter.

(c) Application for review.

(1) Any party to a Part 76 proceeding aggrieved by any decision on the merits issued by the staff pursuant to delegated authority may file an application for review by the Commission in accordance with § 1.115 of this chapter.

(2) Any party to a Part 76 proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with § 1.276(a) and §§ 1.277(a)-(c) of this chapter, except that in proceedings brought pursuant to §§ 76.1003, 76.1302, and 76.1513, unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.

7. Section 76.61 is amended by revising paragraphs (a)(3), (a)(4) and (b), and adding (a)(5) as follows:

§ 76.61 Disputes concerning carriage.

* * * * *

(a) * * *

(3) A local commercial television station or qualified low power television station that is denied carriage or channel positioning or repositioning in accordance with the must-carry rules by a cable operator may file a complaint with the Commission in accordance with the procedures set forth in § 76.7. In addition to the requirements of § 76.7, such complaint shall specifically:

(A) allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

(B) be accompanied by the notice from the complainant to the cable television system operator, and the cable television system operator's response, if any. If no timely response was received, the complaint shall so state.

(C) establish the complaint is being filed within the sixty-day deadline stated in paragraph 5 of this section.

(4) If the Commission determines that a cable operator has failed to meet its must-carry obligations, the Commission shall order that, within 45 days of such order or such other time period as the Commission may specify, the cable operator reposition the complaining station or, in the case of an obligation to carry a station, commence or resume carriage of the station and continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the must-carry requirements, it shall dismiss the complaint.

(5) No must-carry complaint filed pursuant to § 76.61(a) will be accepted by the Commission if filed more than sixty (60) days after --

(A) The denial by a cable television system operator of request for carriage or channel position contained in the notice required by § 76.61(a)(1), or

(B) The failure to respond to such notice within the time period allowed by § 76.61(a)(2).

(b) Complaints regarding carriage of qualified local NCE television stations.

(1) Whenever a qualified local NCE television station believes that a cable operator has failed to comply with the signal carriage or channel positioning requirements, pursuant to §§ 76.56-76.57, the station may

file a complaint with the Commission in accordance with the procedures set forth in § 76.7. In addition to the requirements of § 76.7, such complaint shall specifically:

(A) allege the manner in which such cable operator has failed to comply with such requirements and state the basis for such allegations.

(B) be accompanied by any relevant correspondence between the complainant and the cable television system operator.

(2) If the Commission determines that a cable operator has failed to meet its must-carry obligations, the Commission shall order that, within 45 days of such order or such other period as the Commission may specify, the cable operator reposition the complaining station or, in the case of an obligation to carry a station, commence or resume carriage of the station and continue such carriage for a period of time the Commission deems appropriate for the specific case under consideration. If the Commission determines that the cable operator has fully met the must-carry requirements, it shall dismiss the complaint.

(3) With respect to must-carry complaints filed pursuant to § 76.61(b), such complaints may be filed at any time the complainant believes that the cable television system operator has failed to comply with the applicable provisions of subpart D of this part.

8. Section 76.914 is amended by revising paragraph c to read as follows:

§ 76.914 Revocation of certification.

* * * * *

(c) A cable operator may file a petition for special relief pursuant to § 76.7 seeking revocation of a franchising authority's certification.

* * * * *

9. Section 76.1003 is amended by revising paragraphs (a) through (g) and deleting paragraphs (h) through (s) to read as follows:

§ 76.1003 Program access proceedings.

Any multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in Section 76.7 of the rules with the following additions or changes:

(a) Prefiling notice required. Any aggrieved multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant cable operator, and/or the potential defendant satellite cable programming vendor or satellite broadcast programming vendor, that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1001 or 76.1002. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(b) Contents of complaint. In addition to the requirements of § 76.7, a program access complaint shall contain:

(1) The type of multichannel video programming distributor that describes complainant, the address and telephone number of the complainant, whether the defendant is a cable operator, satellite broadcast programming vendor or satellite cable programming vendor (describing each defendant), and the address and telephone number of each defendant;

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the program access requirements;

(3) Evidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming or satellite broadcast programming vendor;

(4) In complaints alleging discrimination, documentary evidence such as a rate card or a programming contract that demonstrates a differential in price, terms or conditions between complainant and a competing multichannel video programming distributor or, if no programming contract or rate card is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exists, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further specific comparative information;

(5) If a programming contract or a rate card is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein;

(6) In complaints alleging exclusivity violations:

(A) The identity of both the programmer and cable operator who are parties to the alleged prohibited agreement,

(B) Evidence that complainant can or does serve the area specified in the complaint, and

(C) Evidence that the complainant has requested to purchase the relevant programming and has been refused or unanswered;

(7) In complaints alleging a violation of § 76.1001, evidence demonstrating that the behavior complained of has harmed complainant.

(8) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (a) of this section has been made.

(c) Damages requests. (1) In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim in accordance with the requirements of subpart (3) of this section.

(2) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded if the complaint complies fully with the requirement of subpart (3) of this section where the defendant knew, or should have known that it was engaging in conduct violative of Section 628.

(3) In all cases in which recovery of damages is sought, the complainant shall include within, or as an attachment to, the complaint, either:

(A) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(B) An explanation of:

(i) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(ii) The reason such information is unavailable to the complaining party;

(iii) The factual basis the complainant has for believing that such evidence of damages exists; and

(iv) A detailed outline of the methodology that would be used to create a computation of damages when such evidence is available.

(d) Answer.

(1) Any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint, unless otherwise directed by the Commission.

(2) An answer to an exclusivity complaint shall provide the defendant's reasons for refusing to sell the subject programming to the complainant. In addition, the defendant may submit its programming contracts covering the area specified in the complaint with its answer to refute allegations concerning the existence of an impermissible exclusive contract. If there are no contracts governing the specified area, the defendant shall so certify in its answer. Any contracts submitted pursuant to this provision may be protected as proprietary pursuant to § 76.9.

(3) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification set forth in § 76.1002(b) relied upon in support of the differential.

(A) When responding to allegations concerning price discrimination, except in cases in which the alleged price differential is de minimis (less than or equal to five cents per subscriber or five percent, whichever is greater), the defendant shall provide documentary evidence to support any argument that the magnitude of the differential is not discriminatory.

(B) In cases involving a price differential of less than or equal to five cents per subscriber or five percent, whichever is greater, the answer shall identify the differential as de minimis and state that the defendant is therefore not required to justify the magnitude of the differential.

(C) If the defendant believes that the complainant and its competitor are not sufficiently similar, the answer shall set forth the reasons supporting this conclusion, and the defendant may submit an alternative contract for comparison with a similarly situated multichannel video programming distributor that uses the same distribution technology as the competitor selected for comparison by the complainant. The answer shall state the defendant's reasons for any differential between the prices, terms and conditions between the complainant and such similarly situated distributor, and shall specify the particular justifications in § 76.1002(b) relied upon in support of the differential. The defendant shall also provide with its answer written documentary evidence to support its justification of the magnitude of any price differential between the complainant and such similarly situated distributor that is not de minimis.

(4) An answer to a complaint alleging an unreasonable refusal to sell programming shall state the defendant's reasons for refusing to sell to the complainant, or for refusing to sell to the complainant on the same terms and conditions as complainant's competitor, and shall specify why the defendant's actions are not discriminatory.

(e) Reply. Within fifteen (15) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(f) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The satellite cable programming or satellite broadcast programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) The satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, and such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming or satellite broadcast programming vendor; or

(3) The complainant has notified a cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor that it intends to file a complaint with the Commission based on a request to purchase or negotiate to purchase satellite cable programming or satellite broadcast programming, or has made a request to amend an existing contract pertaining to such programming pursuant to § 76.1002(f) that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

(g) Remedies for violations -- (1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, (i) the imposition of damages, and/or (ii) the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) Additional sanctions. The remedies provided in paragraph (g)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(3) Imposition of Damages. (i) Bifurcation. In all cases in which damages are requested, the Commission may bifurcate the program access violation determination from any damage adjudication.

(ii) Burden of Proof. The burden of proof regarding damages rests with the complainant, who must demonstrate with specificity the damages arising from the program access violation. Requests for damages that grossly overstate the amount of damages may result in a Commission determination that the complainant failed to satisfy its burden of proof to demonstrate with specificity the damages arising from the program access violation.

(iii) Damages Adjudication. (A) The Commission may, in its discretion, end adjudication of damages with a written order determining the sufficiency of the damages computation submitted in accordance with subpart (c)(3)(A) or the damages computation methodology submitted in accordance with subpart (c)(3)(B)(iv), modifying such computation or methodology, or requiring the complainant to resubmit such computation or methodology. (1) Where the Commission issues a written order approving or modifying a damages computation submitted in accordance with subpart (c)(3)(A), the defendant shall recompense the complainant as directed therein.

(2) Where the Commission issues a written order approving or modifying a damages computation methodology submitted in accordance with subpart (c)(3)(B)(iv), the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated methodology.

(B) Within thirty days of the issuance of a subpart (c)(3)(B)(iv) damages methodology order, the parties shall submit jointly to the Commission either:

(1) A statement detailing the parties' agreement as to the amount of damages;

(2) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(3) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(C) (1) In cases in which the parties cannot resolve the amount of damages within a reasonable time period, the Commission retains the right to determine the actual amount of damages on its own, or through the procedures described in subpart (g)(3)(iii)(C)(2) of this section.

(2) Issues concerning the amount of damages may be designated by the Chief, Cable Services Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge.

(D) Interest on the amount of damages awarded will accrue from either the date indicated in the Commission's written order issued pursuant to subpart (g)(3)(iii)(A)(1) or the date agreed upon by the parties as a result of their negotiations pursuant to subpart (g)(3)(iii)(A)(2). Interest shall be computed at applicable rates published by the Internal Revenue Service for tax refunds.

10. Section 76.1302 is amended by revising paragraphs (a) through (f) and deleting paragraphs (g) through (s) to read as follows:

§ 76.1302 Carriage agreement proceedings.

Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in Section 76.7 of the rules with the following additions or changes:

(a) Prefiling notice required. Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(b) Contents of complaint. In addition to the requirements of § 76.7, a carriage agreement complaint shall contain:

(1) The type of multichannel video programming distributor that describes complainant, the address and telephone number of the complainant, and the address and telephone number of each defendant;

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

(3) For complaints alleging a violation of § 76.1301(c), evidence that supports complainant's claim that the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly.

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (a) of this section has been made.

(c) Answer.

(1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall address the relief requested in the complaint, including legal and documentary support, for such response, and may include an alternative relief proposal without any prejudice to any denials or defenses raised.

(d) Reply. Within twenty (20) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(e) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or

(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or

(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

(f) Remedies for violations -- (1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless any order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff, or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

(2) Additional sanctions. The remedies provided in paragraph (f)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

11. Section 76.1513 is amended by revising paragraphs (a) and (d) through (h) and deleting paragraphs (i) through (s) to read as follows:

§ 76.1513 Open video dispute resolution.

(a) Complaints. Any party aggrieved by conduct that it believes constitute a violation of the regulations set forth in this part or in Section 653 of the Communications Act (47 U.S.C. 573) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The Commission shall resolve any such dispute within 180 days after the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in Section 76.7 of the rules with the following additions or changes:

* * * * *

(d) Contents of complaint. In addition to the requirements of § 76.7, an open video system complaint shall contain:

(1) The type of entity that describes complainant (e.g., individual, private association, partnership, or corporation), the address and telephone number of the complainant, and the address and telephone number of each defendant;

(2) If discrimination in rates, terms, and conditions of carriage is alleged, documentary evidence shall be submitted such as a preliminary carriage rate estimate or a programming contract that demonstrates a

differential in price, terms or conditions between complainant and a competing video programming provider or, if no programming contract or preliminary carriage rate estimate is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exists, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further specific comparative information;

Note to paragraph (d)(2): Upon request by a complainant, the preliminary carriage rate estimate shall include a calculation of the average of the carriage rates paid by the unaffiliated video programming providers receiving carriage from the open video system operator, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.

(3) If a programming contract or a preliminary carriage rate estimate is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein.

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (c) of this section has been made.

(e) Answer.

(1) Any open video system operator upon which a complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification relied upon in support of the differential. Any documents or contracts submitted pursuant to this paragraph may be protected as proprietary pursuant to § 76.9.

(f) Reply. Within twenty (20) days after service of an answer, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(g) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs

(1) The open video system operator enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this part; or

(2) The open video system operator offers to carry programming for the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this part, and such offer to carry programming is unrelated to any existing contract between the complainant and the open video system operator; or

(3) The complainant has notified an open video system operator that it intends to file a complaint with the Commission based on a request for such operator to carry the complainant's programming on its open video system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this part.

(h) Remedies for violations -- (1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the requiring carriage, awarding damages to any person denied carriage, or any combination of such sanctions. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) Additional sanctions. The remedies provided in paragraph (h)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

Appendix B

FINAL REGULATORY FLEXIBILITY ANALYSIS

A. Background

1. As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the Notice of Proposed Rule Making ("NPRM") in this proceeding.² The Commission sought written public comment on the possible impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") in this *Report and Order* ("Order") conforms to the RFA.³

B. Need for Action and Objectives of the Rules

2. Section 11 of the 1996 Telecommunications Act requires the Commission to conduct a biennial review of regulations that apply to operations and activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be no longer in the public interest.⁴ Although Section 11 does not specifically refer to cable operators, the Commission has determined that the first biennial review presents an excellent opportunity for a thorough examination of all of the Commission's regulations.

C. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

3. One comment was filed specifically in response to the IRFA.⁵ SCBA disagrees with the conclusion in the IRFA that the number of small cable businesses affected by the Commission's rules has declined since 1995.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules here adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small

¹See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

²See *1998 Biennial Regulatory Review -- Part 76 - Cable Television Service Pleading and Complaint Rules*, CS Docket No. 98-54, *Notice of Proposed Rulemaking*, 13 FCC Rcd 10644 (1998) ("NPRM").

³See 5 U.S.C. § 604.

⁴47 U.S.C. § 161; News Release, Nov. 18, 1997.

⁵Small Cable Business Association Comments ("SCBA").

organization," and "small governmental jurisdiction."⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁷ Under the Small Business Act, a small business concern is one which: (a) is independently owned and operated; (b) is not dominant in its field of operation; and (c) satisfies any additional criteria established by the SBA.⁸ The rules we adopt in this Report and Order will affect cable systems, multipoint multichannel distribution systems, direct broadcast satellites, home satellite dish manufacturers, open video systems, satellite master antenna television, local multipoint distribution systems, program producers and distributors, and television stations. Below, we set forth the general SBA and FCC cable small size standards, and then address each service individually to provide a more precise estimate of small entities. We also describe program producers and distributors.

5. *SBA Definitions for Cable and Other Pay Television Services:* 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.⁹ 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 Census Bureau data from 1992, there were approximately 1,758 total cable and other pay television services and 1,423 had less than \$11 million in revenue.¹⁰

6. *Additional Cable System Definitions:* In addition, 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 no more than 400,000 subscribers nationwide.¹¹ Based on recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.¹² 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

⁶5 U.S.C. § 601(6).

⁷5 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 such definitions in the Federal Register."

⁸*Small Business Act*, 15 U.S.C. § 632.

⁹13 C.F.R. § 121.201 (SIC 4841).

¹⁰U.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).

¹¹47 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).

¹²Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

conclude 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."¹³ The Commission has determined that there are 61,700,000 cable 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.¹⁴ Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.¹⁵ 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 its 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.¹⁶ This definition of a small entity in the context of MMDS auctions has been approved by the SBA.¹⁷

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. In the *NPRM* we concluded that no DBS operator qualifies as a small entity. Since the publication of the *NPRM*, more information has become available. In light of the

¹³47 U.S.C. § 543(m)(2).

¹⁴47 C.F.R. § 76.1403(b) (SIC 4833).

¹⁵Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹⁶47 C.F.R. § 21.961(b)(1).

¹⁷See *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).

1997 gross revenue figures for the various DBS operators, we restate our conclusion 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 500 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 350 channels are scrambled and approximately 150 are unscrambled.¹⁸ 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 non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing.¹⁹

12. According to the most recently available information, there are approximately 20 to 25 program packagers nationwide offering packages of scrambled programming to retail consumers.²⁰ These program packagers provide subscriptions to approximately 2,184,470 subscribers nationwide.²¹ 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").

13. *Satellite Master Antenna Television ("SMATVs")*: Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.²² Other estimates indicate that SMATV operators serve approximately 1.162 million residential subscribers as of June 30, 1997.²³ The ten largest SMATV operators together pass 848,450 units.²⁴ 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.

¹⁸ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, *Fourth Annual Report ("1997 Report")*, 13 FCC Rcd 1034 at ¶ 68 (1997).

¹⁹ *Id.* at ¶ 69.

²⁰ *Id.* at ¶ 68.

²¹ *Id.* at ¶ 69.

²² *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 96-133, *Third Annual Report ("1996 Report")*, 12 FCC Rcd 4358 at ¶ 81 (1996).

²³ *1997 Report*, 13 FCC Rcd at ¶ 84.

²⁴ *Id.* at Appendix D, Table D-1.

14. *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 approved definition for cable and other pay services that qualify as a small business is defined in paragraphs 5-6, *supra*. A small radiotelephone entity is one with 1500 employees or fewer.²⁵ However, for the purposes of this *Report and Order*, we include only an estimate of LMDS video service providers.

15. An auction for licenses to operate LMDS systems was recently completed by the Commission. The vast majority of the LMDS license auction winners were small businesses under the SBA's definition of cable and pay television (SIC 4841).²⁶ In the *Second R&O*,²⁷ we adopted a small business definition for entities bidding for LMDS licenses as an entity that, together with affiliates and controlling principles, has average gross revenues not exceeding \$40 million for each of the three preceding years. We have not yet received approval by the SBA for this definition.

16. There is only one company, CellularVision, that is currently providing LMDS video services. In the *IRFA*, we assumed that CellularVision was a small business under both the SBA definition and our auction rules. No commenters addressed the tentative conclusions we reached in the *NPRM*. 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.

17. *Open Video System ("OVS")*: The Commission has certified 15 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.²⁸ Bell Atlantic subsequently purchased the division of Futurevision which had been the only operating program package provider on the Dover system, and has begun offering programming on this system using these resources.²⁹ 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.³⁰ Bell Atlantic and Metropolitan Fiber Systems have sufficient revenues to assure us that they do not qualify as small

²⁵13 C.F.R. § 121.201.

²⁶See Appendix B (D), *supra*, for an estimate of the number of entities under SIC 4841.

²⁷*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*, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 62 FR 23148 (1997) ("*Second R&O*").

²⁸*Bell Atlantic-New Jersey, Inc. (Certification to Operate an Open Video System)*, 11 FCC Rcd 13249 (CSB 1996) ("*Bell Atlantic OVS Certification*").

²⁹Bell Atlantic, *Bell Atlantic Now Offering Video Services in Dover Township New Jersey* (news release), Nov. 1, 1996.

³⁰See *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).

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.

18. *Program Producers and Distributors:* The Commission has not developed a definition of small entities applicable to producers or distributors of television programs.³¹ Therefore, we will utilize the SBA classifications of Motion Picture and Video Tape Production (SIC 7812),³² Motion Picture and Video Tape Distribution (SIC 7822),³³ and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).³⁴ 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 annual receipts for SIC 7922.³⁵ 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;³⁶ (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;³⁷ and (3) there were

³¹The term "television programs" is used in this context to include all video programming outlets, e.g., cable, DBS.

³²"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).

³³"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.

³⁴"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.

³⁵13 C.F.R. § 121.201.

³⁶U.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.

³⁷SBA 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.

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.³⁸

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. *Television Stations*: The rules will apply to television broadcasting licensees, and potential licensees of television service. The Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.³⁹ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.⁴⁰ Included in this industry are commercial, religious, educational, and other television stations.⁴¹ Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.⁴² Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.⁴³ There were 1,509 television stations operating in the nation in 1992.⁴⁴ That number has remained fairly constant as indicated by the approximately 1,579 operating full power television broadcasting stations in the nation as of May 31, 1998.⁴⁵ In addition, as of October 31, 1997, there were

³⁸SBA 1992 Census Report, SIC 7922.

³⁹13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

⁴⁰Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

⁴¹*Id.* See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as:

Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

⁴²Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

⁴³*Id.* SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

⁴⁴FCC News Release No. 31327, Jan. 13, 1993.

⁴⁵See *Broadcast Station Totals As Of May 31, 1998*, FCC News Release, June 19, 1998.

1,880 LPTV stations that may also be affected by our rules.⁴⁶ For 1992⁴⁷ the number of television stations that produced less than \$10.0 million in revenue was 1,155 establishments.⁴⁸

21. Thus, the rules will affect many of the approximately 1,579 television stations; approximately 1,200 of those stations are considered small businesses.⁴⁹ These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

22. In addition to owners of operating television stations, any entity who seeks or desires to obtain a television broadcast license may be affected by the rules contained in this item. The number of entities that may seek to obtain a television broadcast license is unknown.

E. Description of Reporting, Recordkeeping and Other Compliance Requirements

23. This analysis examines the costs and administrative burdens associated with our rules and requirements. The rules we adopt do not add additional compliance requirements, except in that a party involved in a non-rulemaking Part 76 proceeding may be required to participate in a status conference. The Commission believes, however, that this requirement would not necessitate significant additional costs or skills beyond those already utilized in the ordinary course of business. The Commission believes that this requirement will be beneficial to participants. The status conference is a useful mechanism for achieving a swift conclusion to disputes. The rules provide that such conferences may be conducted over the telephone, thereby eliminating the need for parties to incur travel expenses to attend the conference.

F. Steps Taken to Minimize Significant Economic Impact On Small Entities and Significant Alternatives Considered

24. We believe that our rules, implemented to streamline the pleading requirements associated with Part 76 filings, make the amended Part 76 easier to use than the current rules. Several rules have been shortened or eliminated in order to make the Part 76 rules more concise. Additionally, where possible, the procedural requirements for Part 76 filings have been standardized

⁴⁶Given the nature of LPTV stations, we will presume that all LPTVs qualify as small entities.

⁴⁷Census for Communications' establishments are performed every five years ending with a "2" or "7". See Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce.

⁴⁸The amount of \$10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

⁴⁹We use the 77 percent figure of TV stations operating at less than \$10 million for 1992 and apply it to the 1998 total of 1579 TV stations to arrive at 1,200 stations categorized as small businesses.

G. *Report to Congress*

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