Appendix A

Comments Filed in CS 98-120

A & E Television Networks ("A&E")
Adelphia et. al. (including Arizona Cable Television Ass'n; Insight Comm.; Suburban Cable; MediaCom; PrimeCo; and Telemedia)
America's Health Network et. al. (including Great American Country; Knowledge TV; Outdoor Life; Speedvision; the Golf Channel) ("AHN")
Ameritech New Media ("Ameritech")
Arkansas Broadcasters Ass'n ("ABA")
Armstrong Holdings and Intermountain Cable Inc. ("Armstrong")
Association of America's Public Television Stations, the Public Broadcasting System, and the Corporation for Public Broadcasting ("AAPTS")
Association of Local Television Stations ("ALTV")
Atlanta Interfaith Broadcasters, Inc.
BellSouth Corp. and BellSouth Interactive Media Services ("BellSouth")
Black Entertainment Television ("BET")
Broadcast Group (includes Benedek; Chronicle; Draper; LIN; Midwest; Paxton; Raycom; and Spartan)
Community Broadcasters Association ("CBA")
C-Span Networks
Citizen Comments (38 individual C-Span viewers)
Cable Telecommunications Ass'n ("CATA")
Cablevision Systems Corp.
Capitol Broadcasting
Chris-Craft/United Group
Circuit City Stores
Congressionals (Letters from Congress supporting/opposing DTV Must Carry)
Consumer Electronics Manufacturers Ass'n ("CEMA")
Cordillera Comm.
Corporation for General Trade ("CGT")
Courtroom Television Network
Discovery Networks
Encore Media Group
Entravision Holdings
Gemstar/Starsight
General Instruments ("GI")
Golden Orange Broadcasting
Granite Broadcasting
GTE
Harris Corp.
Home Box Office and Turner Broadcasting System
Home and Garden Television ("HGTV") and TV Food
Hildreth Comments (including Pikes Peak Broadcasting Company; Jasas Corp.; GRK Productions; Morris Network; Palazuelos; Thomas Broadcasting Company; Guenter Marksteiner)
International Broadcasting Network
International Cable Channels Partnership
King World Productions
KSLS, Inc./KHLS, Inc.

Lifetime Entertainment Services ("Lifetime")
Lee Enterprises
Maranatha Broadcasting
Media Institute
MediaOne
Michigan Government Television
Microsoft
Mitsubishi
Morgan Murphy and Cosmo Broadcasting
Motion Picture Association of America ("MPAA")
MSTV (Association for Maximum Service Television)
National Ass'n of Broadcasters ("NAB")
National Ass'n for the Deaf
National Cable Television Ass'n ("NCTA")
National Datacast
NBC
Network Affiliates Station Alliance ("NASA")
New World Paradigm
Ovation, Inc.
Pappas Telecasting
Paxson Comm. Corp.
Pegasus Comm. Corp.
Pellegrin Comments (on behalf of small cable systems)
Pennsylvania Cable Networks
Phillips Electronics North America Corp.
Polar Broadcasting
Retlaw Enterprises
Shwartz, Woods, and Miller Comments (representing 13 public broadcasting entities) ("Shwartz")
Shockley Communications Corp.
Sinclair Broadcast Group
Small Cable Business Ass'n ("SCBA")
Sony Electronics Inc.
State Broadcasters Associations (representing 26 separate associations)
Station Representatives Ass'n
TCI (now AT&T Broadband)
Thompson Consumer Electronics
Time Warner Cable
Trinity Broadcasting Network
United Church of Christ ("UCC") et. al. (including Media Access Project; Benton Foundation; Center for Media Education; and the Civil Rights Forum)
UPN Affiliates Association
Weather Channel
Wireless Communications Association Int'l ("WCA")
Wisdom Network
ZDTV
Zenith Electronics
5C (including Hitachi, Intel, Matsushita, Sony and Toshiba)

Reply Comments filed in CS Docket 98-120

A & E Television Networks
Adelphia et. al.
Ameritech New Media
American Chestnut Television
America's Voice
Armstrong Holdings and Intermountain Cable Inc.
AAPTS
ALTV
BellSouth
BET
Broadcast Group
C-Span Networks
CATA
Cablevision Systems Corp.
California Channel
Carolina Christian Broadcasting
Circuit City Stores
Consumer Electronics Manufacturers Ass'n
Corday Media Group
Council of Organizational Representatives of National Issues Concerning People Who are Deaf or Hard of Hearing
Discovery Networks
Gemstar/Starsight
General Instruments
Golden Orange Broadcasting
GRK Productions Joint Venture
GTE
Home Box Office and Turner Broadcasting System
International Cable Channels Partnership
LeSea Broadcasting
Lifetime
Lincoln Broadcasting Company
Maranatha Broadcasting
Matsushita
Michigan Gov't Television
Microsoft
Mitsubishi
Morgan Murphy and Cosmo Broadcasting
MSTV
NAB
National Association of Telecommunications Officers and Advisors ("NATOA")
NCTA
National Datacast
New World Paradigm
Pappas Telecasting
Paxson Comm. Corp.
Phillips Electronics North America Corp.
Prevue Networks

Retlaw Enterprises
Sinclair Broadcasting
SCBA
Sony Electronics Inc.
Thompson Consumer Electronics
Time Warner Cable
UCC
Univision Communications, Inc.
Weather Channel
Wireless Communications Association Int'l
Zenith Electronics
5C (including Hitachi, Intel, Matsushita, Sony and Toshiba)

Appendix B

Final Regulatory Flexibility Act Analysis For the Report and Order

1. As required by the Regulatory Flexibility Act ("RFA"),[1] the Commission has prepared this Final Regulatory Flexibility Analysis ("FRFA") of the possible significant economic impact on small entities by the policies and rules found in this *Report and Order*. The *Report and Order* and FRFA (or summaries thereof) will be published in the Federal Register.[2]

2. *Need for, and Objectives of, the Proposed Rule Changes.* The objective of the *Report and Order* is to make certain technical and substantive rule changes that bear on the issue of carriage of digital broadcast signals.

3. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA.* The Small Cable Business Association ("SCBA," now known as the American Cable Association, ACA) filed comments as described in the *Report and Order, supra.* SCBA stated that unregulated analog retransmission consent demands, and tying in particular, threatens small cable operators' financial viability.[3] To remedy the situation, the SCBA urged the Commission to prohibit broadcasters from tying analog carriage to digital carriage.[4]

4. *Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply.* The FRFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[5] The FRFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[6] Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[7] The rules we adopt in this *Report & Order* will affect cable operators and OVS operators.

5. *Small MVPDs.* 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.[8]

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[1]*See* 5 U.S.C. §604. The RFA has been amended by the *Contract With America Advancement Act of 1996*, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). *See* 5 U.S.C. §601 et. seq. Title II of the CWAAA is the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA").

[2]*See id.*

[3]SCBA Comments at 24. SCBA is now known as American Cable Association ("ACA").

[4]*Id.*; *accord* Pellegrin Comments at 6.

[5]5 U.S.C. §604(b).

[6]5 U.S.C. §601(3) and (6).

[7]15 U.S.C. §632.

[8]13 C.F.R. §121.201 (SIC 4841).

This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,758 total cable and other pay television services and 1,423 had less than $11 million in revenue.[9] We address below each service individually to provide a more precise estimate of small entities.

6. *Cable Systems*. The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[10] We last estimated that there were 1439 cable operators that qualified as small cable companies.[11] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Report and Order*.

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."[12] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, 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.[13] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals approximately 1450.[14] 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. *Open Video Systems*. The Commission has certified 31 OVS operators with some now providing service. Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. 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.

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[9]U.S. Department of Commerce, Bureau of the Census, Industry and Enterprise Receipts Size report, Table 2D, SIC 4841 (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

[10]47 C.F.R. §76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Dkt Nos. 92-266 and 93-215, 10 FCC Rcd. 7393 (1995).

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

[12]47 U.S.C. §543(m)(2).

[13]47 C.F.R. §76.1403(b).

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

9. *Program Producers and Distributors*. The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will use the SBA classifications of Motion Picture and Video Tape Production (SIC 7812),[15] Motion Picture and Video Tape Distribution (SIC 7822),[16] and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).[17] These SBA definitions provide that a small entity in the cable television programming industry is an entity with $21.5 million or less in annual receipts for SIC 7812 and SIC 7822, and $5 million or less in annual receipts for SIC 7922.[18] Census Bureau data indicate the following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (SIC 7812), and that 6,987 of these firms had $16.999 million or less in annual receipts and 7,002 of these firms had $24.999 million or less in annual receipts;[19] (b) there were 1,139 firms classified as Motion Picture and Video Tape Distribution (SIC 7822), and 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; and (c) there were 5,671 firms in the United States classified as Theatrical Producers and Services (SIC 7922), and 5627 of these firms had $4.999 million or less in annual receipts.[20]

10. Each of these SIC categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated. Thus, we estimate that our rules may affect approximately 6,987 small entities primarily engaged in the production and distribution of taped cable television programs and 5,627 small producers of live programs that may be affected by the rules adopted in this proceeding.

11. *Television Stations*. The proposed rules and policies 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.[21] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual

[15]"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").

[16]"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.

[17]"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.

[18]13 C.F.R. §121.201.

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

[20]SBA 1992 Census Report, SIC 7922.

[21]13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

programs by television to the public, except cable and other pay television services.[22] Included in this industry are commercial, religious, educational, and other television stations.[23] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[24] Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.[25]

12. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

13. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

14. There were 1,509 television stations operating in the nation in 1992.[26] That number has remained fairly constant as indicated by the approximately 1,616 operating television broadcasting stations in the nation as of September 30, 1999.[27] For 1992, the number of television stations that produced less than

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[22]Economics 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).

[23]*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.

[24]Economics 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).

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

[26]FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

[27]FCC News Release, Broadcast Station Totals as of September 30, 1999 (released November 22, 1999).

$10.0 million in revenue was 1,155 establishments.[28] Thus, the new rules will affect approximately 1,616 television stations; approximately 77%, of those stations are considered small businesses.[29] 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.

15. *Small Manufacturers.* The SBA has developed definitions of small entity for manufacturers of household audio and video equipment (SIC 3651) and for radio and television broadcasting and communications equipment (SIC 3663). In each case, the definition includes all such companies employing 750 or fewer employees. Census Bureau data indicates that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would be classified as small entities.[30]

16. *Electronic Equipment Manufacturers.* The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment. Therefore, we will use the SBA definition of manufacturers of Radio and Television Broadcasting and Communications Equipment.[31] According to the SBA's regulations, a TV equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.[32] The Census Bureau category is very broad, and specific figures are not available as to how many of these firms are exclusive manufacturers of television equipment or how many are independently owned and operated. We conclude that there are approximately 778 small manufacturers of radio and television equipment.

17. *Electronic Household/Consumer Equipment.* The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will use the SBA definition applicable to manufacturers of Household Audio and Visual Equipment. According to the SBA's regulations, a household audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.[33] Census Bureau data indicates that there are 410 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 386 of these firms have fewer than 500 employees and would be classified as small entities.[34] The remaining 24 firms have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA

[28]The 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.

[29]We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1999 total of 1,616 TV stations to arrive at the total number of stations categorized as small businesses.

[30]U.S. Dept. of Commerce, 1992 Census of Transportation, Communications and Utilities, Table 1D, (issued May 1995), SIC category 3663.

[31]This category excludes establishments primarily engaged in the manufacturing of household audio and visual equipment which is categorized as SIC 3651.

[32]13 C.F.R. §121.201, SIC Code 3663.

[33]13 C.F.R. §121.201, SIC Code 3651.

[34]U.S. Small Business Administration 1995 Economic Census Industry and Enterprise Report, Table 3, SIC Code 3651, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

definition. Furthermore, the Census Bureau category is very broad, and specific figures are not available as to how many of these firms are exclusive manufacturers of television equipment for consumers or how many are independently owned and operated. We conclude that there are approximately 386 small manufacturers of television equipment for consumer/household use.

18. *Computer Manufacturers.* The Commission has not developed a definition of small entities applicable to computer manufacturers. Therefore, we will use the SBA definition of Electronic Computers. According to SBA regulations, a computer manufacturer must have 1,000 or fewer employees in order to qualify as a small entity.[35] Census Bureau data indicates that there are 716 firms that manufacture electronic computers and of those, 659 have fewer than 500 employees and qualify as small entities.[36] The remaining 57 firms have 500 or more employees; however, we are unable to determine how many of those have fewer than 1,000 employees and therefore also qualify as small entities under the SBA definition. We conclude that there are approximately 659 small computer manufacturers.

19. *Description of Projected Reporting, Record Keeping and other Compliance Requirements.* There are compliance requirements for cable operators and OVS operators as a result of the *Report and Order*. An attempt has been made to streamline compliance requirements. For example, we have declined to adopt specific channel positioning requirements for digital television signals.

20. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The Small Cable Business Association ("SCBA," now known as the American Cable Association, ACA) filed comments as described in the *Report and Order, supra.* SCBA stated that unregulated analog retransmission consent demands, and tying in particular, threatens small cable operators' financial viability.[37] To remedy the situation, the SCBA urged the Commission to prohibit broadcasters from tying analog carriage to digital carriage.[38]We have deferred imposing a dual analog and digital broadcast signal carriage requirement on cable operators, including small cable operators, as well as OVS operators, at this time. However, we have adopted several retransmission consent policies and digital-only carriage requirements applicable to all cable operators and OVS operators. Due to lack of sufficient evidence on the record, we have decided not to prohibit retransmission consent tying arrangements, as requested by the SCBA. However, we are seeking further comment on this issue in the FNPRM. In the aggregate, we believe that there will be minimal impact on small entities as a result of the *Report and Order*. However, we are mindful of the concerns raised by small entities throughout this proceeding and will carefully scrutinize our policy determinations as we go forward.

[35]13 C.F.R. §121.201, SIC Code 3571.

[36]U.S. Small Business Administration 1995 Economic Census Industry and Enterprise Report, Table 3, SIC Code 3571, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

[37]SCBA Comments at 24. SCBA is now known as American Cable Association ("ACA").

[38]*Id.*; *accord* Pellegrin Comments at 6.

21. *Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals.* None.

22. *Report to Congress.* The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[39] In addition, the Commission will send a copy of the *Report and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[40]

[39] *See* 5 U.S.C. §801(a)(1)(A).

[40] *See* 5 U.S.C. §604(b).

Appendix C

Initial Regulatory Flexibility Act Analysis For the Further Notice

1. As required by the Regulatory Flexibility Act ("RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules referenced in this *Further Notice*. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[2] In addition, the IRFA (or summaries thereof) will be published in the Federal Register.[3]

2. *Need for, and Objectives of, the Proposed Rule Changes*. The objective of the *Further Notice* is to gather more information, and build the necessary record, in order to implement a constitutionally sustainable digital broadcast signal carriage policy.

3. *Legal Basis*. The authority for the action proposed in this rulemaking is contained in Sections 1, 4(i) and (j), 309(j), 325, 336, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i) and (j), 309(j), 325, 336, 534, and 535.

4. *Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply*. The IRFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[4] The IRFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[5] Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[6] The rules we are considering in this proceeding generally, will affect cable operators, OVS operators, and television station licensees.

5. *Small MVPDs*. 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.[7] 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 1,758 total cable and other pay

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

[2] *See* 5 U.S.C. §603(a).

[3] *See id.*

[4] 5 U.S.C. §603(b)(3).

[5] 5 U.S.C. §601(3) and (6).

[6] 15 U.S.C. §632.

[7] 13 C.F.R. §121.201 (SIC 4841).

television services and 1,423 had less than $11 million in revenue.[8] We address below each service individually to provide a more precise estimate of small entities.

6. *Cable Systems*. The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[9] We last estimated that there were 1439 cable operators that qualified as small cable companies.[10] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Report and Order*.

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."[11] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, 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.[12] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals approximately 1450.[13] 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. *Open Video Systems*. The Commission has certified 31 OVS operators with some now providing service. Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. 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.

9. *Program Producers and Distributors*. The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will use

[8]U.S. Department of Commerce, Bureau of the Census, Industry and Enterprise Receipts Size report, Table 2D, SIC 4841 (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

[9]47 C.F.R. §76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Dkt Nos. 92-266 and 93-215, 10 FCC Rcd 7393 (1995).

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

[11]47 U.S.C. §543(m)(2).

[12]47 C.F.R. §76.1403(b).

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

the SBA classifications of Motion Picture and Video Tape Production (SIC 7812),[14] Motion Picture and Video Tape Distribution (SIC 7822),[15] and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).[16] These SBA definitions provide that a small entity in the cable television programming industry is an entity with $21.5 million or less in annual receipts for SIC 7812 and SIC 7822, and $5 million or less in annual receipts for SIC 7922.[17] Census Bureau data indicate the following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (SIC 7812), and that 6,987 of these firms had $16.999 million or less in annual receipts and 7,002 of these firms had $24.999 million or less in annual receipts;[18] (b) there were 1,139 firms classified as Motion Picture and Video Tape Distribution (SIC 7822), and 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; and (c) there were 5,671 firms in the United States classified as Theatrical Producers and Services (SIC 7922), and 5627 of these firms had $4.999 million or less in annual receipts.[19]

10. Each of these SIC categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated. Thus, we estimate that our rules may affect approximately 6,987 small entities primarily engaged in the production and distribution of taped cable television programs and 5,627 small producers of live programs that may be affected by the rules adopted in this proceeding.

11. *DBS*: There are four licensees of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees that are operational have annual revenues which may be in excess of the threshold for a small business. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge that there are entrants in this field that may not

[14]"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).

[15]"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.

[16]"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.

[17]13 C.F.R. §121.201.

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

[19]SBA 1992 Census Report, SIC 7922.

yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

12. *HSD*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled.[20] 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 package. 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. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.[21]

13. According to the most recently available information, there are approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers.[22] These program packagers provide subscriptions to approximately 2,314,900 subscribers nationwide.[23] This is an average of about 77,163 subscribers per program package. This is substantially smaller than the 400,000 subscribers used in the commission's definition of a small MSO. Furthermore, because this is an average, it is likely that some program packagers may be substantially smaller.

14. *Television Stations*. The proposed rules and policies 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.[24] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[25] Included in this industry are commercial, religious, educational, and other television stations.[26] Also included are

[20]Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Third Annual Report, CS Docket No. 96-133, 12 FCC Rcd 4358, 4385 (1996)(*"Third Annual Report"*).

[21]*Third Annual Report,* 12 FCC Rcd at 4385.

[22]*Id.*

[23]*Id.*

[24]13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

[25]Economics 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).

[26]*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.

establishments primarily engaged in television broadcasting and which produce taped television program materials.[27] Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.[28]

15. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

16. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

17. There were 1,509 television stations operating in the nation in 1992.[29] That number has remained fairly constant as indicated by the approximately 1,616 operating television broadcasting stations in the nation as of September 30, 1999.[30] For 1992, the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[31] Thus, the new rules will affect approximately 1,616 television stations; approximately 77%, of those stations are considered small businesses.[32] 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.

18. *Small Manufacturers*. The SBA has developed definitions of small entity for manufacturers of household audio and video equipment (SIC 3651) and for radio and television broadcasting and communications equipment (SIC 3663). In each case, the definition includes all such

[27]Economics 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).

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

[29]FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

[30]FCC News Release, Broadcast Station Totals as of September 30, 1999 (released November 22, 1999).

[31]The 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.

[32]We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1999 total of 1,616 TV stations to arrive at the total number of stations categorized as small businesses.

companies employing 750 or fewer employees. Census Bureau data indicates that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would be classified as small entities.[33]

19. *Electronic Equipment Manufacturers.* The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment. Therefore, we will use the SBA definition of manufacturers of Radio and Television Broadcasting and Communications Equipment.[34] According to the SBA's regulations, a TV equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.[35] The Census Bureau category is very broad, and specific figures are not available as to how many of these firms are exclusive manufacturers of television equipment or how many are independently owned and operated. We conclude that there are approximately 778 small manufacturers of radio and television equipment.

20. *Electronic Household/Consumer Equipment.* The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will use the SBA definition applicable to manufacturers of Household Audio and Visual Equipment. According to the SBA's regulations, a household audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.[36] Census Bureau data indicates that there are 410 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 386 of these firms have fewer than 500 employees and would be classified as small entities.[37] The remaining 24 firms have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Furthermore, the Census Bureau category is very broad, and specific figures are not available as to how many of these firms are exclusive manufacturers of television equipment for consumers or how many are independently owned and operated. We conclude that there are approximately 386 small manufacturers of television equipment for consumer/household use.

21. *Description of Projected Reporting, Recordkeeping and other Compliance Requirements.* There are compliance requirements for cable operators and OVS operators. An attempt has been made to propose streamlined compliance requirements, especially for small cable operators, in this docket.

22. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or

[33]U.S. Dept. of Commerce, 1992 Census of Transportation, Communications and Utilities, Table 1D, (issued May 1995), SIC category 3663.

[34]This category excludes establishments primarily engaged in the manufacturing of household audio and visual equipment which is categorized as SIC 3651.

[35]13 C.F.R. §121.201, SIC Code 3663.

[36]13 C.F.R. §121.201, SIC Code 3651.

[37]U.S. Small Business Administration 1995 Economic Census Industry and Enterprise Report, Table 3, SIC Code 3651, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. We have proposed streamlined rules for the carriage of digital broadcast signals for small cable operators in this proceeding. We will examine this alternative in more detail in the next phase of this rulemaking.

23. *Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals.* None.

24. *Report to Congress.* The Commission will send a copy of the *Report and Order*, including this IRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[38] In addition, the Commission will send a copy of the *Further Notice*, including IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Further Notice* and IRFA (or summaries thereof) will also be published in the Federal Register.[39]

[38] *See* 5 U.S.C. §801(a)(1)(A).

[39] *See* 5 U.S.C. §604(b).

Appendix D—Rule Changes

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 reads as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 336, 338, 339, 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 76.5 is amended as follows:

(b) Television station; television broadcast station. Any television broadcast station operating on a channel regularly assigned to its community by § 73.606 or 73.622 of this chapter, and any television broadcast station licensed by a foreign government: Provided, however, That a television broadcast station licensed by a foreign government shall not be entitled to assert a claim to carriage, program exclusivity, or retransmission consent authorization pursuant to subpart D or F of this part, but may otherwise be carried if consistent with the rules on any service tier. Further provided that a television broadcast station operating on channels regularly assigned to its community by both Sections 73.606 and 73.622 of this chapter may assert a claim for carriage pursuant to subpart D of this part only for a channel assigned pursuant to 73.606.

*** *** *** *** *** ***

3. Section 76.56 is amended as follows:

(f) Carriage of additional broadcast television signals on such system shall be at the discretion of the cable operator, subject to the retransmission consent rules, § 76.64. A cable system may also carry any ancillary or other transmission contained in the broadcast television signal.

*** *** *** *** *** ***

4. Section 76.57 is amended as follows:

A new subsection (c) is added, as follows, and subsections (c), (d), (e) are renumbered (d), (e), and (f), respectively.

(c) With respect to digital signals of a television station carried in fulfillment of the must-carry obligations, a cable operator shall carry the information necessary to identify and tune to the broadcast television signal.

*** *** *** *** ***

5. Section 76.62 is amended as follows:

Subsection (b) is amended and a new subsection (g) is added, as follows:

(b) Each such television broadcast signal carried shall be carried without material degradation, and, for analog signals, in compliance with technical standards set forth in subpart K of this part.

* * *

(g) With respect to carriage of digital signals, operators are not required to carry ancillary or supplementary transmissions or non-program related video material.

********** ***

6. Section 76.64 is amended as follows:

§ 76.64 Retransmission consent.

* * *

(f) Commercial television stations are required to make elections between retransmission consent and must-carry status according to the following schedule:

* * *

(4)New television stations and stations that return their analog spectrum allocation and broadcast in digital only shall make their initial election any time between 60 days prior to commencing broadcast and 30 days after commencing broadcast or commencing broadcasting in digital only; such initial election shall take effect 90 days after it is made.

* * *

(k) Retransmission consent agreements between a broadcast station and a multichannel video programming distributor shall be in writing and shall specify the extent of the consent being granted, whether for the entire signal or any portion of the signal. This rule applies for either the analog or the digital signal of a television station.

*** *** *** *** *** ***

7. Section 76.922(f) is amended as follows:

§ 76.922(f) External Costs

New sub-section is added.

(vii) Headend equipment costs necessary for the carriage of digital broadcast signals.

*** *** *** *** *** ***

8. Section 76.922(j) is amended as follows:

§ 76.922 Rates for the basic service tier and cable programming services tiers.

(j) Network upgrade rate increase.

(1) Cable operators that undertake significant network upgrades requiring added capital investment may justify an increase in rates for regulated services by demonstrating that the capital investment will benefit subscribers, including providing television broadcast programming in a digital format.

*** *** *** *** *** ***

9. Section 76.964 is amended as follows:

§76.964 Written Notification of Changes in Rates and Services.

(a) In addition to the requirement of §76.309(c)(3)(i)(B) regarding advance notification to customers of any changes in rates, programming services or channel positions, cable systems shall give 30 days written notice to both subscribers and local franchising authorities before implementing and rate or service change. Such notice shall state the precise amount of any rate change and briefly explain in readily understandable fashion the cause of the rate change (e.g., inflation, change in external costs or the addition/deletion of channels). When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified. For purposes of the carriage of digital broadcast signals, the operator need only identify for subscribers, the television signal added and not whether that signal may be multiplexed during certain dayparts.

STATEMENT OF COMMISSIONER SUSAN NESS APPROVING IN PART AND DISSENTING IN PART

Re: ***Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96, 00-2***

After a long wait, we finally are addressing some of the issues involving the carriage of digital broadcast signals on cable. I would have hoped that this digital must carry proceeding would provide finality and clarity for industry participants who need sufficient lead-time to develop business plans. Unfortunately, it does not. While I support the majority of decisions in this Order, along with the Further Notice to establish a better record on the effect of a dual carriage requirement, I dissent to the tentative conclusion regarding dual carriage. I also write separately to emphasize the importance of our Further Notice regarding "program related" material in the digital context.

I. DUAL CARRIAGE

I support the Further Notice to collect additional information regarding cable operators' system capacity, the status of digital retransmission negotiations, and the practical effects of a dual carriage requirement. I dissent, however, from the Majority's "tentative conclusion" on a matter of law, which in effect states that industry has failed to meet its constitutional burden.[1]

First, drawing such a tentative conclusion is gratuitous. The item concedes that the record is insufficient to accurately discern the impact on cable operators' speech posed by a dual carriage requirement. Indeed, the Commission now asks for the very information -- including cable system channel capacity -- that I have been asking the Commission to collect for over two years. This information is significant especially in light of the upgrades being executed by the major MSOs, many pursuant to Social Contracts with this agency. Such system capacity information is solely at the disposal of cable operators. We also request important data on the status and scope of digital retransmission consent agreements. To what extent are cable operators voluntarily carrying digital broadcasts? The Majority should not form an opinion, even a tentative one, without first considering such fundamental data.

Second, the tentative conclusion addresses only one aspect of the intermediate scrutiny test. Specifically, the intermediate scrutiny standard established under *U.S. v. O'Brien*, as applied in the *Turner* decisions, requires that a content-neutral law affecting speech further a substantial or important government interest.[2] As the item points out, that interest in the must carry context boils down to (1) the preservation of free over-the-air television; (2) the promotion of the widespread dissemination of information from many sources; and (3) the promotion of fair competition.[3] Would a dual carriage requirement further that substantial government interest? The item is silent on this point. Such willingness to put the ball in industry's court while punting on the subject of our own legal burden is

[1] Para. 3.

[2] Para. 114, *citing U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

[3] Para. 113, *citing Turner Broadcasting System, Inc. v. U.S.*, 512 U.S. 622, 662 (1997) (*Turner II*). It is important to note that the deference the Supreme Court afforded Congress in *Turner II* might not extend to this Agency. Therefore, we cannot be assured that, even if we assemble a voluminous record, the *Turner II* decision would sustain a dual carriage decision, especially given the relatively scant legislative history concerning digital broadcasting.

emblematic, I believe, of the Commission's need to develop a clearer, more visionary picture of its own role in the digital transition, regardless of what we ultimately decide on the question of dual carriage.

The government has a substantial interest in facilitating a successful digital transition for the American public. As all communications media go digital, broadcasting must follow suit or find its place in the history books along with the Passenger Pigeon. A successful digital transition thus would ensure that the public has access to free, over-the-air broadcasting in the digital age and beyond. A successful digital transition also would serve the government's interest in promoting viewpoint diversity by providing a greater variety of independent programming sources.

Finally, there is no need to state a "tentative conclusion" at this time. The item states that the statute "neither compels dual carriage; nor prohibits it" and that "in order to weigh the constitutional questions inherent in a statutory construction that would permit dual carriage, we believe it is appropriate and necessary to more fully develop the record in this regard."[4] I agree. I therefore believe that it is unnecessary, and ill-timed, for the government to weigh in with a premature assessment of the constitutionality of dual carriage before we have collected and analyzed the evidence that would address this question. Moreover, such a determination might prejudice the outcome of any ongoing market-based carriage discussions. I also seriously question whether a federal court would entertain review of such a tentative conclusion, since it is not a final agency action. Accordingly, I would have issued the Further Notice without drawing a tentative conclusion on the issue of the burden to cable operators posed by a dual carriage requirement.

I caution parties not to view my dissent as addressing, pro or con, the merits of a dual carriage requirement. I have great sympathy for the many independent cable networks whose efforts to obtain carriage may be adversely affected by broadcast digital carriage. My preference, therefore, has been and will continue to be the fostering of market-based solutions. In that vein, over the past few years, I repeatedly have urged broadcasters and cable operators at gatherings I attend, both public and private, to negotiate in good faith on carriage of digital broadcasts during this transition period. I also have argued that as the carriage capacity of cable systems expands, with upgrades and the addition of digital capabilities, the burden of carrying broadcast programming diminishes accordingly.

II. PRIMARY VIDEO

I reluctantly conclude that the best reading of the statutory term, "primary video," refers to one programming stream. I believe that this interpretation is the most easily defensible, but it is by no means the only reasonable one.

A single-stream interpretation of "primary video" could have the odd result of requiring broadcasters and cable operators to continuously examine broadcasters' content to determine whether the signal is primary video, program related, or something else. For example, if a broadcaster in a tri-state area offers a main news program, and then breaks away to three video streams to cover local news in each state, would the entire news program be primary video, would the breakout streams be program related, or neither? A cable operator would have to draw these conclusions. In contrast, a definition of "primary video" that includes all free, non-subscription video programming streams would be easier to administer.

[4] Para. 113.

Ironically, a single stream interpretation of primary video results in cable operators using less, not more, spectrum for broadcast must-carry at the end of the digital transition than they do today. Each analog signal requires 6 MHz of spectrum on the cable system. By contrast, with digital compression, and if broadcasters offer multiple program streams, it is possible that the "primary video" will require 2 MHz or less of capacity, not six.

Of course, retransmission consent agreements might resolve these issues. For example, the cable operator might agree voluntarily to carry the entire free, over-the-air video programming signal. Absent a must-carry requirement, a broadcaster might be more willing to enter into retransmission consent arrangements to carry a portion of the digital signal in addition to the full analog signal during the transition period.

While I support the decision to limit the definition of primary video to one digital programming stream based on the current state of the record, I would entertain on reconsideration new or refined support for a statutory construction that justifies the carriage of multiplexed free video programming. Although the statute mandates that the primary video be carried, and expressly excludes mandatory carriage of ancillary and supplementary services, is there discretion under the statute for the Commission to find it in the public interest (and not unduly burdensome) for the cable operator to carry a station's multiplexed free video channels? While the statute does not preclude carriage of multiplexed programming streams, it is hard to find legislative support for a more expansive mandatory carriage requirement.

Finally, I am particularly concerned about public broadcasters. As reflected in the record, and cited briefly in the item,[5] public broadcasters have developed innovative digital strategies that rely heavily on multicasting. These include "a 24-hour children's programming channel; an educational channel devoted to instructional video and adult education; a channel focused on local legislative and public interest issues; and the award-winning national programming schedule distributed by PBS."[6] To what extent does our construction of the "primary video" term allow for such multicasting, especially given the apparently broader definition of "program related" for noncommercial, educational broadcasters?[7]

III. CONCLUSION

Given the complexity and importance of these issues, the Commission must proceed carefully and expeditiously. I intend to continue working with broadcasters, cable operators, content producers, and consumer electronics manufacturers, along with my colleagues on the Commission, to facilitate a transition to digital broadcasting that works for the American people.

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[5] Para. 112, n. 4.

[6] *Letter from the Association of America's Public Television Stations*, January 18, 2001.

[7] See Para. 112 (*citing* sections 614(b)(3)(A) and 615(g)(1) of the Act).

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

RE: IN THE MATTER OF CARRIAGE OF DIGITAL TELEVISION BROADCAST SIGNALS *(CS Docket No. 98-129); Amendments to Part 76 of the Commission's Rules: Implementation of the Satellite Home Viewer Improvement Act of 1999; Local Broadcast Signal Carriage Issues (CS Docket No. 00-96); Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals (CS Docket No. 00-2)* FCC No. 01-22

I am pleased to support this item which I believe provides the clarity that the cable and broadcast sectors have been anxiously awaiting from the Commission. While this order does not put to rest all of the fundamental issues integral to the transition to a digital world, we have, I believe, eliminated some uncertainties in our posture. As such, the order enhances our development of policy as we go forward to decide the larger, more constitutionally complex issues.

I write separately, however, to address our decision on primary video and its effect on those broadcasters that plan to multicast, particularly public broadcasters. I believe our decision is compelled by the language of the statute, leaving us little choice but to interpret it faithfully. Regrettably, this may make it more difficult for digital broadcasters to obtain cable carriage, though I sincerely hope cable operators will negotiate fairly in an effort to accommodate creative broadcast offerings, particularly the good works of public broadcasters who have a unique public mission, and to help facilitate the transition to digital television. If the Commission's construction of this statute should negatively impact the development of digital television, recourse to Congress for redress may be warranted, given that the statute clearly did not contemplate must carry in a digital world.

In a related context, I question the interpretation of Section 615(g)(1) suggested in the FNPRM as to "program related" content of noncommercial educational programming that is required to be carried by cable operators. As have others, I struggled with an appropriate interpretation of the statute. Public broadcasters indicated in comments on the record their plans to multicast a range of programming streams delivering a variety of content for different audiences. Inasmuch as these programming streams represent separate, distinct and multiple transmissions, I am unable to defensibly conclude that they are entitled to must carry as "program related" content. To do so would not comport with what I derive to be the congressional directive: that a broadcaster must select only one programming stream as primary and a cable operator is required to provide mandatory carriage to only one such designated stream. This is a question of statutory interpretation, and I might accept a more flexible definition if it were a discretionary policy judgement.

Finally, I urge continued flexibility on the part of broadcasters and cable operators to bring these issues to a successful outcome. I am pleased that we can bring to closure in this item those matters that we truly suppose to be clear. We can all advance to the decisions we will be called to make another day.

Dissenting Statement of Commissioner Gloria Tristani

In the Matter of the Carriage of Digital Television Broadcast Signals and Related Matters

CS Docket Nos. 98-120; 00-96; 00-2.

The transition from analog television to digital television poses fundamental policy questions. Two issues are not open to question. First, Congress has determined the public interest obligations of broadcasters prevailing in the analog era will carry over to the digital era.[1] Second, this Commission must continue to ensure cable communications systems "are responsive to the needs and interest of the local community" and "are encouraged to provide the widest possible diversity of information sources and services to the public."[2] Yet the majority today disposes of the question of the meaning of "primary video" in the must-carry context without reference to these explicit statutory purposes. In fact, there is no mention of the public interest in this section of the Order at all. By prematurely deciding that Congress intended to foreclose even public non-commercial stations from using their digital spectrum to broadcast several channels of programming with mandatory carriage on local cable systems, the Commission harms every American.[3]

While I do not question the majority's authority to settle on some definition of the term "primary video," doing so without substantial discussion of other applicable sections of the Communications Act or related case-law determinations is untenable. As the Supreme Court noted in Turner Broadcasting System Inc., v. FCC, 520 U.S. 180, 189 (1994), must-carry provisions serve "three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." As a result, our deliberation should have explicitly considered these key concerns.

Moreover, the Communications Act subjects that portion of the broadcast signal that is not "primary video" but nonetheless is "program related" to the same must-carry requirements. Despite this requirement the majority determined to put off a decision on the meaning of the term "program related."[4] Leaving aside the wisdom of defining only one of two key terms, I fear today's attempt to state a bright-line definition of "primary video" while leaving the related definition of "program related" video open, will work more mischief than it avoids. As a result, this Commission may soon face a torrent of content-related disputes that we are ill-equipped to resolve.

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[1] 47 U.S.C. §336(d)("Nothing in this section shall be construed as relieving a television broadcast station from its obligation to serve the public interest, convenience, and necessity.")

[2] 47 U.S.C. §521(2) and (4)

[3] Order at pgs. 24-28 (construing 47 U.S.C. §614(b)(3)(requiring cable operators to carry the "primary video" signal of a broadcast station.)

[4] Order at pg. 28

One final point bears mentioning. Despite the length of time this docket has been open, I believe we would have benefited from a more deliberative approach than rushing the Order out the door at the end of this administration. The affected parties and the staff did their best to present and consider the merits of these issues, but the press of business rendered the effort insufficient. I hope in any future proceedings that reflective deliberation rather than student-like cramming characterizes our processes. For the foregoing reasons, I respectfully dissent.