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

2001 OCT 18 P 2: 11

In the Matter of:	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: October 11, 2001 **Released: October 18, 2001**

Comment Date: **December 3, 2001**
Reply Comment Date: **January 7, 2002**

By the Commission:

I. INTRODUCTION

1. We issue this Notice of Proposed Rulemaking ("Notice") in accordance with Section 628(c)(5) of the Communications Act of 1934, as amended ("Communications Act").[1] Section 628(c)(2)(D) generally prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators.[2] Under Section 628(c)(5), the prohibition on exclusive programming contracts contained in Section 628(c)(2)(D) will cease to be effective on October 5, 2002, unless the Commission finds that such prohibition continues to be necessary to preserve competition and diversity in the distribution of video programming. This Notice initiates a proceeding in order to make that determination.

II. BACKGROUND

2. The program access provisions contained in Section 628 of the Communications Act were adopted as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") which was enacted on October 5, 1992.[3] In enacting the program access provisions,

[1] 47 U.S.C. § 548(c)(5).

[2] 47 U.S.C. § 548(c)(2)(D).

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

Congress was concerned that the majority of cable operators enjoyed a monopoly in program distribution at the local level,[4] and concluded that the use of exclusive contracts between vertically integrated programming vendors and cable operators served to inhibit the development of competition among distributors.[5] Congress concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors, such as other cable systems, home satellite dish ("HSD") distributors, direct broadcast satellite ("DBS") providers, satellite master antenna television ("SMATV") systems, and wireless cable operators.[6] In addition, Congress found that increased horizontal concentration of cable operators, combined with extensive vertical integration, created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors.[7] Congress determined that this imbalance of power limited the development of competition and restricted consumer choice.[8]

3. In *Implementation of Sections 12 and 19 of the Cable Television Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order ("*First Report and Order*"), the Commission promulgated regulations implementing the program access provisions of Section 628.[9] The purpose of Section 628 is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.[10] Section 628(b) prohibits cable operators and vertically integrated programming vendors from engaging in unfair acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor ("MVPD") from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[11] Section 628(b) applies only to satellite programming. Section 628(c) instructs the Commission to adopt regulations to prohibit a number of specific practices.[12] For example, Congress absolutely prohibited exclusive contracts between vertically integrated

[4] 1992 Cable Act, § 2(a)(4); House Comm. on Energy and Commerce, House Rep. No. 102-268, 102d Cong., 2d Sess. (1992) ("House Report") at 42.

[5] 1992 Cable Act, § 2(a)(5); Senate Comm. on Commerce, Science, and Transportation, S. Rep. 102-92, 102d Cong., 1st Sess. (1991) ("Senate Report") at 25-26.

[6] *Implementation of Sections 12 and 19 of the Cable Television Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3366 (1993).

[7] *Id.*

[8] *Id.*

[9] *First Report and Order*, 8 FCC Rcd 3359 (1993), *recon.*, 10 FCC Rcd 1902 (1994), *further recon.*, 10 FCC Rcd 3105 (1994). In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822 (1998), the Commission amended the program access rules.

[10] 47 U.S.C. § 548(a).

[11] 47 U.S.C. § 548(b).

[12] 47 U.S.C. § 548(c).

programming vendors and cable operators in areas unserved by cable,[13] and generally prohibited exclusive contracts within areas served by cable.[14] The prohibition with regard to served areas, Section 628(c)(2)(D), states that:

> with respect to distribution to persons in areas served by a cable operator, [the Commission shall] prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines . . . that such contract is in the public interest.[15]

4. Congress recognized, however, in areas served by cable, that some exclusive contracts between vertically integrated programming vendors and cable operators may serve the public interest by providing countervailing benefits to the programming market or to the development of competition among distributors.[16] In determining whether an exclusive contract is in the public interest, Congress instructed the Commission to consider each of the following factors:

> (i) The effect of such exclusive contract on the development of competition in the local and national multichannel video programming distribution markets;
>
> (ii) The effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
>
> (iii) The effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
>
> (iv) The effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
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> (v) The duration of the exclusive contract.[17]

Any party seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a petition for exclusivity to the Commission for approval.[18]

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[13] 47 U.S.C. § 548(c)(2)(C).

[14] 47 U.S.C. § 548(c)(2)(D).

[15] 47 U.S.C. § 548(c)(2)(D); 47 C.F.R. § 76.1002(c)(2).

[16] 47 U.S.C. § 548(c)(2)(4).

[17] 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4); *see e.g., New England Cable News*, 9 FCC Rcd 3231 (1994) (finding public interest factors favored limited 7 year period of exclusivity for startup regional news programmer); *Time Warner Cable*, 9 FCC Rcd 3221 (1994) (finding public interest factors did not favor requested 15 year exclusivity request related to established national programmer, Court TV).

[18] *See* 47 C.F.R. § 76.1002(c)(5).

5. The prohibition contained in Section 628(c)(2)(D) sunsets on October 5, 2002 unless the Commission determines that the prohibition continues to be necessary. Section 628(c)(5) of the Communications Act provides that:

> The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[19]

The restrictions on exclusive contracts for this ten-year period were intended to foster development of emerging competitors to cable, allowing a transition to a competitive market for the distribution of programming.[20]

III. DISCUSSION AND NOTICE OF PROPOSED RULEMAKING

6. There are a variety of possible exclusive dealing arrangements. This proceeding is concerned with the type of arrangement in which a seller provides access to a good or service to one buyer or a group of buyers to the exclusion of other interested buyers.[21] By its nature, exclusivity forecloses other buyers from obtaining the relevant good or service for the term of the agreement.[22] Such exclusive dealing arrangements may serve legitimate business interests or they may be used to foreclose competitive entry or to stifle competitive development. Exclusive agreements may have an anti-competitive impact when competitors are foreclosed from such a large percentage of the market that they cannot compete effectively.[23] In the multichannel video programming marketplace, the anti-competitive potential of exclusive arrangements may be compounded to the extent that vertical integration exists between cable operators and programming producers.[24]

7. Congress intended the program access rules to address a competitive imbalance involving access to programming between incumbent cable operators and new entrants. Congress enacted the prohibition on exclusivity in Section 628(c)(2)(D) as one measure to address this imbalance. In so doing, however, Congress envisioned a time in which that remedial measure would be unnecessary. Thus, in Section 628(c)(5), Congress directed the Commission to reexamine the need for Section 628(c)(2)(D) after ten years. To this end, we seek comment on the following issues.

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[19] 47 U.S.C. § 548(c)(5); *see also* 47 C.F.R. § 76.1002(c)(6). The prohibition on exclusive contracts shall cease to be effective on October 5, 2002 unless the Commission determines otherwise.

[20] *See First Report and Order*, 8 FCC Rcd at 3376, 3378; *see also Time Warner Cable*, 9 FCC Rcd at 3225 and *New England Cable News* at 3234.

[21] ABA Antitrust Section, Antitrust Law Developments (3d. ed. 1993) at 196.

[22] *Id.*

[23] *See, e.g., U.S. Healthcare v. Healthsource*, 986 F.2d at 589, 595 (1st Cir. 1993). There is an extensive line of case law and economic analysis concerning the permissibility of exclusive dealing arrangements in the motion picture entertainment field. *See, e.g., U.S. v. Paramount*, 334 U.S. 131 (1948); *U.S. v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres v. U.S.*, 334 U.S. 110 (1948).

[24] *See First Report and Order*, 8 FCC Rcd at 3366.

8. We seek comment on whether Section 628(c)(2)(D) of the Communications Act should be retained or whether the provision should cease to be effective pursuant to the sunset provision contained in Section 628(c)(5).[25] We ask whether the prohibition against exclusive contracts has been effective during the period of its existence as a deterrent to anticompetitive behavior and whether it has a continuing role in preventing such behavior. Although Congress and the Commission have recognized the benefits of exclusivity in certain circumstances, the 1992 Cable Act placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that may impede that entry.[26] In this regard, we note that in 1992, cable operators served 95.5% of all MVPD subscribers.[27] Currently, cable operators serve 80% of MVPD subscribers.[28] We ask what effect Section 628(c)(2)(D) has had on the development of competition generally in local and national markets and on competition from alternate technologies. We seek comment on the general state of competition among MVPD operators and, in particular, on the extent to which DBS operators impose effective competition on cable operators and the extent to which the exclusivity provision impacts this. We also seek comment on whether distortions in the marketplace may have developed because of the exclusivity prohibition. In this regard, we seek comment on whether more affiliations between cable operators and programmers would have developed in the absence of the exclusivity prohibition, or whether the prohibition had any other negative impact on the development of new cable programming networks. We seek comment on any other specific developments that have occurred over the last decade in the marketplace for multichannel video programming that might render the assumptions underlying Section 628(c)(2)(D) no longer valid. In the alternative, we seek comment on developments over the last decade that impart continuing relevance to the prohibition on exclusivity. We request that commenters provide specific information on all programming services (both vertically integrated and non-vertically integrated, both satellite and terrestrially delivered) which are currently sold on an exclusive basis, as well as the number of subscribers subject to those exclusive arrangements.

9. The nearly ten-year period during which Section 628(c)(2)(D) has been in effect has been a period of consolidation and clustering in the cable industry. We seek comment on what impact exclusivity has had on trends within the industry. We seek comment on the degree, if any, that clustering and the continuing consolidation within the communications industry should inform our decision with regard to the sunset of the exclusivity prohibition. In this regard, we note that the Commission recently has initiated a proceeding to resolve the remand of our horizontal ownership rules by the United States Court of Appeals for the District of Columbia Circuit.[29] That proceeding will directly address the effect

[25] We also note that in the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Notice of Inquiry, CS Docket No. 01-129, FCC 01-191 (rel. June 25, 2001), the Commission sought comment on the sunset of Section 628(c)(2)(D). We received comments on this issue from Carolina Broadband, Comcast Corporation, DirecTV, Inc., EchoStar Satellite Corporation, the National Cable & Telecommunications Association ("NCTA"), the National Rural Telecommunications Cooperative ("NRTC"), RCN Corporation, the Satellite Broadcasting and Communications Association ("SBCA"), and the Wireless Communications Association International ("WCA"). To the extent they address the subject matter of our inquiry herein, we incorporate these comments into the record of this proceeding.

[26] *See First Report and Order,* 8 FCC Rcd at 3384.

[27] *See Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005 at Appendix C, Table C-1 (2001).

[28] *Id.*

[29] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996: The Commission's Cable*

(continued....)

of consolidation and vertical integration on the market for video programming production and packaging. We seek comment on the impact, if any, that this pending proceeding should have on our decision regarding the possible sunset of Section 628(c)(2)(D).

10. We also seek comment on the potential beneficial effects of exclusivity in the multichannel video programming marketplace. We seek comment on whether and how exclusivity has been significant in the development, promotion and launch of new programming services. We note that DIRECTV's exclusive arrangement with the National Football League to make available to subscribers a substantial package of NFL games each Sunday has been credited with attracting significant numbers of subscribers to DIRECTV's service. We ask how important exclusivity has been to the launch of local origination programming that may have a more limited geographic appeal. We seek comment on whether exclusivity has acted as an investment incentive, such that without the incentive the programming service would not be launched or become viable. We also ask whether a continued prohibition on exclusivity will chill future investments in new programming. In addition, we seek comment on whether the existing public interest waiver provision set forth in Section 628(c)(4) would sufficiently protect instances of beneficial exclusivity should the Commission retain the prohibition on exclusivity.

11. We seek comment on what impact the prohibition on exclusivity has had on diversity in programming. We ask if the prohibition on exclusivity has helped to increase diversity by providing additional news, public affairs, informational and children's programming. In the alternative, we seek comment on whether the restriction in Section 628(c)(2)(D) has impeded programming diversity. We generally seek comment on how diversity of programming will be affected if the prohibition on exclusivity sunsets.

12. The program access requirements of Section 628 have at their heart the objective of making available programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive programming distributors.[30] In this regard, we note that Section 628(c)(5) permits the sunset only of the exclusivity prohibition of Section 628(c)(2)(D) while preserving the overall structure of program access and Section 628. We ask how the remaining program access provisions will function should the exclusivity prohibition sunset and we seek comment on whether the statute will continue to serve the purpose for which it was intended.

13. Section 628(c)(2)(C) of the Communications Act prohibits all "practices, understandings, arrangements and activities, including exclusive contracts" that prevent an MVPD from obtaining vertically integrated programming "for distribution to persons in areas ***not*** served by a cable operator as of the date of enactment" of the 1992 Cable Act (October 5, 1992).[31] Section 628(c)(2)(C) is not subject to potential sunset. By contrast, the prohibition on exclusive arrangements of Section 628(c)(2)(D) applies to "areas served by a cable operator" and is subject to the sunset provision of Section 628(c)(5).[32] We seek comment on the relationship between Section 628(c)(2)(D) and Section 628(c)(2)(C). What impact, if any, would the sunset of Section 628(c)(2)(D) have on the prohibition set forth in Section

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(...continued from previous page)
Horizontal and Vertical Ownership Limits and Attribution Rules, Further Notice of Proposed Rulemaking, FCC 01-263 (rel. Sept. 21, 2001); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

[30] *First Report and Order*, 8 FCC Rcd at 3365.

[31] 47 U.S.C. § 548(c)(2)(C); *see* 47 C.F.R. § 76.1002(c)(1) (emphasis added).

[32] 47 U.S.C. § 548(c)(2)(D); *see* 47 C.F.R. § 76.1002(c)(2).

628(c)(2)(C)? Specifically, if the prohibition in Section 628(c)(2)(D) were to sunset, would the prohibition in Section 628(c)(2)(C) continue to bar exclusive agreements in areas that were not served by a cable operator before October 5, 1992, but in which cable service has commenced in the intervening period? Would such areas be regarded as "areas served by a cable operator" under Section 628(c)(2)(D), or would such areas continue to be regarded as unserved under Section 628(c)(2)(C)? We also seek comment as to how many areas are actually affected by the prohibition contained in Section 628(c)(2)(C). We also ask what impact has the prohibition contained in Section 628(c)(2)(C) had on increasing the availability of satellite cable programming and satellite broadcast programming to persons in rural areas?[33]

14. We also seek comment on whether the Commission should consider an approach that narrows the scope of, rather than completely eliminates, the exclusivity restriction. The Commission has recognized that certain programming services may be more essential than others to the viability and success of competing program distributors.[34] Given the proliferation of new programming and competing programming services, we seek comment on the extent to which this assumption still holds true. To the extent the assumption remains valid, we seek comment on whether, and in what manner, the prohibition on exclusivity could be limited to cover only essential programming services. To what extent would tailoring the rules based on the success or popularity of particular services raise First Amendment concerns? We also seek comment on any other potential alternative approaches. For example, should the limitation of exclusivity be tied to the specific geographic or competitive circumstances of the area in question? Should the exclusivity restriction continue to be applied when the programming service in question is vertically integrated with cable television systems in some locations but is not vertically integrated with those in the area where exclusivity might be sought? Should the restriction continue in areas in which the level of MVPD competition reaches a certain level? In the latter example, we seek comment on whether the prohibition should be lifted as to all MVPD competitors or solely for MVPDs of sufficient competitive presence. We seek comment on the statutory basis for any of these approaches and what standards and analysis the Commission could use to define and implement any such approach.

15. If Section 628(c)(2)(D) is retained, we seek comment on future procedures necessarily related to the retention of Section 628(c)(2)(D). We seek comment on whether the provision should be retained in perpetuity or for a fixed period of years. If retained for a fixed period of years, what is the appropriate period? We note that on January 1, 2006, the existing prohibition on exclusive retransmission consent agreements between television broadcast stations and MVPDs expires.[35] We seek comment on whether the provision, if retained pursuant to this proceeding, should automatically sunset at the end of that further period, or whether the Commission should undertake the same analysis required by Section 628(c)(5) to determine at that time the continuing value of and need for Section 628(c)(2)(D). We also seek comment on whether Section 628(c)(2)(D) should be eliminated depending on certain triggering events, such as a significant change in market conditions. Finally, we seek comment on any other issues appropriate to our inquiry in accordance with Section 628(c)(5).

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[33] *See* 47 U.S.C. § 548(a).

[34] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5027 (1990).

[35] 47 U.S.C. § 325(b)(3)(C)(2).

IV. ADMINISTRATIVE MATTERS

A. INITIAL REGULATORY FLEXIBILITY ACT STATEMENT

16. The initial regulatory flexibility analysis is attached to this Notice as Appendix A.

B. INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

17. This NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from date of publication of this NPRM 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.

C. PROCEDURAL PROVISIONS

18. *Comments and Reply Comments.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules,[36] interested parties may file comments on or before December 3, 2001 and reply comments on or before January 7, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[37] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

19. Written comments by the public on the proposed and/or modified information collections are due December 3, 2001. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before [60 days after date of publication in the Federal Register]. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov.

[36] 47 C.F.R. §§ 1.415 and 1.419.

[37] *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 Fed. Reg. 24121 (1998).

20. Parties who choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. If more than one docket or rulemaking number appears in the caption of this proceeding commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554. The Cable Services Bureau contact for this proceeding is Karen A. Kosar at (202) 418-7200, TTY (202) 418-7172, or at kkosar@fcc.gov.

21. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, CY-A257, Washington, DC 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, TTY (202) 418-2555, or bcline@fcc.gov. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat.

22. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or bmillin@fcc.gov.

23. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.[38] Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[39] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules.

V. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 4(i), 303 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303 and 548, **NOTICE IS HEREBY GIVEN** of the proposals described in this Notice of Proposed Rulemaking.

25. **IT IS FURTHER ORDERED** that the Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[38] 47 C.F.R. § 1.1206(b).

[39] *See* 47 C.F.R. § 1.1206(b)(2).

Appendix A

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended, ("RFA"),[40] 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 *Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to this IRFA and must be filed by the deadlines for comments in the *Notice* provided in para. 18. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[41] In addition, the IRFA (or summaries thereof) will be published in the Federal Register.[42]

A. Need for, and Objectives of, the Proposed Regulatory Approaches

2. The purpose of Section 628 of the Communications Act is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies. Specifically, this proceeding involves Section 628(c)(2)(D), which prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators unless the Commission determines that such exclusivity is in the public interest. The exclusivity prohibition set forth in Section 628(c)(2)(D) ceases to be effective after a 10-year period ending October 5, 2002. Section 628(c)(5) of the Communications Act requires that restrictions on exclusive contracts, within areas served by cable, are to sunset unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. Pursuant to this statutory mandate and by this Notice of Proposed Rulemaking, we seek comment on whether Section 628(c)(2)(D) should be retained or eliminated.

B. Legal Basis

3. The authority for the action proposed in this rulemaking is contained in Section 4(i), 303 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303 and 548.

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[40] *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").

[41] *See* 5 U.S.C. §603(a).

[42] *Id.*

C. Description and Estimate of the Number of Small Entities to Which the Proposed 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 will be affected by the proposed rules.[43] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction.[44] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[45] 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").[46]

5. 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.[47] 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.[48] 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.[49] We last estimated that there were 1,439 cable operators that qualified as small cable companies.[50] 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 1,439 small entity cable system operators that may be affected by the decisions and rules proposed in this *Notice*.

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

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[43] 5 U.S.C. §603(b)(3).

[44] 5 U.S.C. §601(6).

[45] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). 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 Small Business Administration 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."

[46] 15 U.S.C. §632.

[47] 13 C.F.R. §121.201 (SIC 4841).

[48] *See 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).

[49] 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 Doc. Nos. 92-266 and 93-215, 10 FCC Rcd 7393 (1995).

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

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."[51] The Commission has determined that there are 67,700,000 subscribers in the United States.[52] Therefore, an operator serving fewer than 677,000 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.[53] Based on available data, we find that the number of cable operators serving 677,000 subscribers or less totals approximately 1450.[54] 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:* Because OVS operators provide subscription services,[55] OVS falls within the SBA-recognized definition of "Cable and Other Pay Television Services."[56] This definition provides that a small entity is one with $11 million or less in annual receipts.[57] The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of those are currently providing service.[58] 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.[59]

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 (NAICS Code 51211),[60] Motion Picture and Video Tape Distribution (NAICS Code 42199),[61] and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (NAICS Codes 56131, 71111, 71141, 561599,

[51] 47 U.S.C. §543(m)(2).

[52] *See FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* Public Notice DA 01-158 (January 24, 2001).

[53] 47 C.F.R. §76.1403(b).

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

[55] *See* 47 U.S.C. § 573.

[56] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[57] *Id.*

[58] *See* http://www.fcc.gov/csb/ovs/csovscer.html.

[59] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[60] 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. Such producers of live radio and television programs are classified in NAICS Code 51211.

[61] Such 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. Motion pictures and video tape distribution are classified in NAICS Codes 42199 and 51212.

71151, 71112, 71132, 51229, 53249).[62] 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 NAICS Codes 51211, 42199 and 51212, and $5 million or less in annual receipts for NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 51229, and 53249.[63] Census Bureau data indicate the following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (NAICS Code 51211), 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;[64] (b) there were 1,139 firms classified as Motion Picture and Video Tape Distribution (NAICS Codes 42199 and 51212), 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 (NAICS Codes 56131, 71111, 71141, 561599, 71151, 71121, 51229, and 53249), and 5627 of these firms had $4.999 million or less in annual receipts.[65]

10. Each of these NAICS categories are very broad and include 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. *Direct Broadcast Satellite Service ("DBS")*: Because DBS provides subscription services, DBS falls within the SBA-recognized definition of "Cable and Other Pay Television Services."[66] This definition provides that a small entity is one with $11 million or less in annual receipts.[67] 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 that may be in excess of the threshold for a small business.[68] 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 yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

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[62] Such establishments primarily engaged in providing live theatrical presentations, such as road companies and summer theaters, including producers of live television programs. Such producers of live theatrical presentation are classified in NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71132, 51229, and 53249.

[63] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[64] 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.

[65] NAICS Codes 56131, 71111, 71141, 561599, 71151, 71121, 51229, and 53249.

[66] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[67] *Id.*

[68] *Id.*

12. *Home Satellite Dish Service ("HSD")*: Because HSD provides subscription services, HSD falls within the SBA-recognized definition of "Cable and Other Pay Television Services."[69] This definition provides that a small entity is one with $11 million or less in annual receipts.[70] 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.[71] 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.[72]

13. According to the most recently available information, there are approximately four program packagers nationwide offering packages of scrambled programming to retail consumers.[73] These program packagers provide subscriptions to approximately 1,476,700 subscribers nationwide.[74] This is an average of about 370,000 subscribers per program package. This is 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. *Multipoint Distribution Service ("MDS"), Multichannel Multipoint Distribution Service ("MMDS") and Local Multipoint Distribution Service ("LMDS"):* MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS").[75] LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[76]

15. In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues of less than $40 million in the previous three calendar years.[77] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[78]

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[69] 13 C.F.F. § 121.201, NAICS Codes 51321 and 51322.

[70] *Id.*

[71] 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*").

[72] *Id.* at 4385.

[73] *Id.*

[74] *See Seventh Annual Report,* 16 FCC Rcd at 6110 Table C-1 (2001).

[75] *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. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd at 9589, 9593 ¶ 7 (1995).

[76] *See Local Multipoint Distribution Service,* Second Report and Order, 12 FCC Rcd 12545 (1997).

[77] 47 C.F.R. § 21.961(b)(1).

The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, which includes all such companies generating $11 million or less in annual receipts.[79] This definition includes multipoint distribution services, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $11 million annually. Therefore, for purposes of the IRFA, we find there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

16 The SBA definition of small entities for pay television services, which includes such companies generating $11 million in annual receipts, appears applicable to ITFS.[80] There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business.[81] However, we do not collect annual revenue data for ITFS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

17. Additionally, the auction of the 1,030 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[82] An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding calendar years.[83] These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.[84] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

(...continued from previous page)

[78] *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

[79] 13 C.F.R. § 121.201, NAICS Codes 52321 and 52322.

[80] 13 C.F.R. § 121.201.

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

[82] *See Local Multipoint Distribution Service,* Second Report and Order, 12 FCC Rcd 12545 (1997).

[83] *Id.*

[84] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

18. In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

19. *Satellite Master Antenna Television ("SMATV") Systems.* The SBA definition of small entities for "Cable and Other Pay Television Services" specifically includes SMATV services and, thus, small entities are defined as all such companies generating $11 million or less in annual receipts.[85] Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December 1995.[86] Other estimates indicate that SMATV operators serve approximately 1.5 million residential subscribers as of June 2000.[87] The best available estimates indicate that the largest SMATV operators serve between 15,000 and 55,000 subscribers each. Most SMATV operators serve approximately 3,000-4,000 customers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

D. Description of Projected Reporting, Recordkeeping and other Compliance Requirements

20. The *Notice* seeks comment on the sunset of Section 628(c)(2)(D) of the Communications Act. The *Notice* does not propose any specific reporting, recordkeeping or other compliance requirements.

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

21. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, 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 NPRM seeks comment on whether Section 628(c)(2)(D) should cease to be effective, pursuant to the sunset provision in Section 628(c)(5), or whether Section 628(c)(2)(D) should be retained. Thus, the NPRM invites comments on a number of issues that may significantly impact small entities. Specifically, the NPRM seeks comment in para. 8 on the effect, if any, Section 628(c)(2)D) has had on competition in local and national markets. The NPRM also seeks comment in para. 9 on the degree to which, if at all, clustering and the continuing consolidation within the communications industry should inform the Commission's decision on the possible sunset of the exclusivity prohibition. In para. 10, the NPRM seeks comment on the effects of exclusivity in the multichannel video programming marketplace. In para. 11, the NPRM seeks comment on the impact the prohibition on exclusivity has had on diversity of programming. In para. 12, the NPRM seeks comment on how the program access provisions would

[85] 13 C.F.R. § 121.201.

[86] *See Third Annual Report*, 12 FCC Rcd at 4403-4.

[87] *See Seventh Annual Report*, 16 FCC Rcd at 6048.

function should the exclusivity prohibition sunset. In para.13, the NPRM seeks comment relationship of Section 628(c)(2)(D) and Section 628(c)(2)(C) of the Act, which affects areas not served by a cable operator. In para. 14, the NPRM seeks comment on how the proliferation of new programming services impacts assumptions with regard to exclusivity. If Section 628(c)(2)(D) is retained, the NPRM seeks comment in para. 15 on future procedures necessarily related to the retention of Section 628(c)(2)(D).

F. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals

22. There are no federal rules that specifically duplicate, overlap or conflict with the Commission's inquiry with regard to Section 628(c)(2)(D).

G. Report to Congress

23. The Commission will send a copy of the *Notice*, including this IRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[88] In addition, the Commission will send a copy of the *Notice*, including IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Notice* and IRFA (or summaries thereof) will also be published in the Federal Register.[89]

[88] *See* 5 U.S.C. §801(a)(1)(A).

[89] *See* 5 U.S.C. §604(b).