

APPENDIX A

I. SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

96. As required by the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. § 603 (“RFA”), Initial Regulatory Flexibility Analyses (“IRFAs”) were incorporated in the Inside Wiring Notice, the Cable Home Wiring Further Notice, and the Inside Wiring Further Notice. The Commission sought written public comments on the proposals in these notices, including comments on the IRFAs. A Final Regulatory Flexibility Analysis (“FRFA”) was incorporated in the *Report and Order*.²⁴¹ The Commission received eight petitions for reconsideration in response to the *Report and Order*. This supplemental FRFA analyzes the modifications adopted in the *First Order on Reconsideration* in response to the petitions for reconsideration and related filings received by the Commission. A FRFA for the *Second Report and Order* is contained in paragraphs 112-134, *supra*.

A. Need for and objectives of the *First Order on Reconsideration*

97. The *First Order on Reconsideration* amends rules governing two procedural mechanisms to clarify ambiguities in the rules adopted in the preceding *Report and Order*. The amended rules provide that (1) in the event of sale, the home **run** wiring be made available to the MDU owner or alternative provider during the 24-hour period prior to actual service termination by the incumbent, and (2) that home run wiring located behind sheet rock is physically inaccessible *for* purposes of determining the demarcation point between home wiring and home **run** wiring. These changes to our rules are intended to allow alternative MVPDs greater access to existing cable wiring in MDU buildings, thereby enhancing competition in the MDU marketplace in accordance with our statutory mandate.

B. Description and Estimate of the Number of Small Entities Impacted

98. 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 rules. The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction” and the same meaning as the term “small business concern” under Section 3 of the Small Business Act.²⁴² Under the Small Business Act, a “small business concern” is one that: (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). The rules we adopt in this Order will affect video service providers and MDU owners.

99. **Small MVPDs:** SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating \$12.5 million or less in revenue **annually**.²⁴³ This category includes, among others, cable operators, direct broadcast satellite (“DBS”) services, home satellite dish (“HSD”) services, multipoint distribution services (“MDS”), multichannel multipoint distribution service (“MMDS”), Instructional Television Fixed Service (“ITFS”), local multipoint distribution service (“LMDS”), satellite master antenna television (“SMATV”) systems

²⁴¹ 13 FCC Rcd 3659.

²⁴² 5 U.S.C. § 601(3).

²⁴³ 13 C.F.R. § 12.201 (NAICS Code 513220). This NAICS Code applies to all services listed in this paragraph.

and open video systems (“OVS”). According to the Bureau of Census, there were 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than \$10 million in revenue.²⁴⁴ We will address each service individually to provide as precise of an estimate of small entities as available data allows.

100. Cable Operator: The Commission has developed, with SBA’s approval, its 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.²⁴⁵ Based on our most recent information, we last estimated that there were 1,439 cable operators that qualified as small cable companies.²⁴⁶ 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 adopted in this Order.

101. The Communications Act of 1934, as amended, 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 one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁴⁷ The Commission has determined that there are 68,500,000 subscribers in the United States.²⁴⁸ Therefore, we found that an operator serving fewer than 685,000 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.” Based on available data, we find that the number of cable operators serving 677,000 subscribers or less totals 1,450.²⁵⁰ 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.

102. Direct Broadcast Satellite Service (“DBS”): Because DBS provides subscription services, DBS falls within the SBA-recognized definition of cable and other program distribution services.²⁵¹ This definition provides that a small entity is one with \$12.5 million or less in annual

²⁴⁴ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, **1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000)**. The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

²⁴⁵ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination 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*, 10 FCC Rcd 7393 (1995).

²⁴⁶ Paul Kagan Associates, Inc. Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995.)

²⁴⁷ 47 U.S.C. § 543(m)(2).

²⁴⁸ See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, 16 FCC Rcd 2225 (2001).

²⁴⁹ 47 C.F.R. § 76.1403(b)

²⁵⁰ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

²⁵¹ 13 C.F.R. § 121.201 (NAICS Code 513220).

receipts.?” There are four licensees of DBS services under Part 100 of the Commission’s Rules. Three of those licenses 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.²⁵³ 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, despite the absence of specific data on this point, that there are entrants in this field that may not yet have generated **\$12.5** million in annual receipts, and therefore may be categorized as a small businesses.

103. Home Satellite **Dish** (“HSD”) Service. Because HSD provides subscription services, HSD fails within the SBA-recognized definition of cable and other program distribution services.²⁵⁴ This definition provides that a small entity is one with \$12.5 million or less in annual receipts.²⁵⁵ 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**.²⁵⁶ 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 customers, these are the services most relevant to this discussion.²⁵⁷

104. Multipoint Distribution Service (“MDS), Multichannel Multipoint Distribution Service (“**MMDS**”), Instructional Television Fixed Service (“ITFS”), 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 MDS and ITFS.²⁵⁸ LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.²⁵⁹

²⁵² *Id*

²⁵³ *Id*

²⁵⁴ 13 C.F.R. § 121.201 (NAICS Code 513220).

²⁵⁵ *Id.*

²⁵⁶ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 12 FCC Rcd 4358,4385 (1996) (“Third Annual Report”).

²⁵⁷ *Id.* at 4385.

²⁵⁸ 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, 10 FCC Rcd at 9589, 9593 (1995) (“ITFS Order”).

²⁵⁹ See Local Multipoint Distribution Service 12 FCC Rcd 12545 (1997) (“LMDS Order”).

105. 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?²⁶¹ This definition of a small entity in the context of MDS auctions has been approved by the SBA.²⁶¹ 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 \$12.5 million or less in annual receipts.²⁶² 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 \$12.5 million annually. Therefore, we find that there are approximately 850 small MDS providers as defined by the SBA and the Commission’s auction rules.

106. The SBA definition of small entities for cable and other program distribution services, which includes such companies generating \$12.5 million in annual receipts, seems reasonably applicable to ITFS.²⁶³ 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 small business.²⁶⁴ 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.

107. 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.’@ 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.²⁶⁶ These regulations defining “small entity” in the context of LMDS auctions have been approved by the SBA.²⁶⁷ 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.

²⁶¹ 47 C.F.R. § 21.961(b)(1).

²⁶¹ See *ITFS Order*, 10 FCC Rcd at 9589.

²⁶² 13 C.F.R. § 121.201 (NAICS Code 513220).

²⁶³ *Id.*

²⁶⁴ 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).

²⁶⁵ See *LMDS Order*, 12 FCC Rcd at 12545

²⁶⁶ *Id.*

²⁶⁷ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

108. 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.

109. Satellite Master Antenna Television ("SMATV") Systems. The SBA definition of small entities for cable and other program distribution services includes SMATV services and, thus, small entities are defined as all such companies generating \$12.5 million or less in annual receipts.²⁶⁸ Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December 1995.²⁶⁹ Other estimates indicate that SMATV operators serve approximately 1.5 million residential subscribers as of July 2001.²⁷⁰ 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.

110. Open Video Systems ("OVS"). Because OVS operators provide subscription services, OVS falls within the SBA-recognized definition of cable and other program distribution services. This definition provides that a small entity is one with \$1.25 million or less in annual receipts. The Commission has certified 25 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 service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

111. MDU Operators: The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating \$6 million or less in revenue annually.²⁷¹ According to the Census Bureau, there were 31,584 operators of nonresidential buildings generating less than \$6 million in revenue that were in operation for at least one year at the end of 1997.²⁷² Also according to the Census Bureau, there were 51,275 operators of apartment dwellings generating less than \$6 million in revenue that were in operation for at least one year at the end of 1997.²⁷³ The Census Bureau provides no

²⁶⁸ 13 C.F.R. § 121.201 (NCAIS Code 513220)

²⁶⁹ See *Third Annual Report*, 12 FCC Rcd at 4403-4

²⁷⁰ See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1281 (2001) ("*Eighth Annual Report*").

²⁷¹ 13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514)

²⁷² 1997 Economic Census: Comparative Statistics for the United States; 1987 SIC Basis: Financial, Insurance, and Real Estate Industries, SIC 6512.

²⁷³ 1997 Economic Census: Comparative Statistics for the United States; 1987 SIC Basis: Financial, Insurance, and Real Estate Industries, SIC 6513.

separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

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

112. At this time, we do not expect that the changes to our rules which provide (1) that in the event of sale, the home run wiring be made available to the MDU owner or alternative provider during the 24-hour period prior to actual service termination by the incumbent and (2) that home run wiring located behind sheet rock is physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring will result in additional reporting or recordkeeping requirements for small entities. The rule changes adopted are likely to result in a reduction of any such requirements because they were adopted with the intent of by making the transition of home run wiring a more orderly and predictable procedure and of decreasing barriers to home run wiring for small entities.

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

113. 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. In the *First Report and Order* we might have chosen to make no changes to our rule that in cases where the incumbent has elected to sell or abandon its home run wire, access to the alternative provider should be made “within 24 hours of actual service termination.”²⁷⁴ We also could have elected to make no effort to clarify our rules as to whether cable wiring behind sheet rock is physically inaccessible.²⁷⁵ We believe that had we chosen either of these alternative positions we would have missed an opportunity to clarify our rules to facilitate MVPD access to existing cable wiring in MDU buildings, and thereby enhance competition in accordance with our statutory mandate.

E. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission’s Proposals. None.

II. FINAL REGULATORY FLEXIBILITY ANALYSIS

114. As required by the Regulatory Flexibility Act of 1980, as amended, an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Second Further Notice of Proposed Rulemaking*. The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA as to the changes made to the Commission’s rules in the *Second Report and Order*.

²⁷⁴ See 47 C.F.R. § 76.804(b)(3).

²⁷⁵ See 47 C.F.R. § 76.5(mm)(4).

A. Need for and Objectives of the Second Report and Order

115. The *Second Report and Order* changes the Commission's rules to provide that cable home wiring and cable home run wiring rules apply to all MVPDs in the same manner that they currently apply to cable operators. The *Second Report and Order* also adopts a limited exemption for small MVPDs from our signal leakage reporting requirements at 47 CFR § 76.1804.

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

116. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

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

117. 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 rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction" and the same meaning as the term "small business concern" under Section 3 of the Small Business Act.²⁷⁶ Under the Small Business Act, a "small business concern" is one that: (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). The rules we adopt in this Order will affect video service providers and MDU owners.

118. **Small MVPDs:** SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating \$12.5 million or less in revenue **annually**.²⁷⁷ This category includes, among others, cable operators, direct broadcast satellite ("DBS) services, home satellite dish ("HSD) services, multipoint distribution services ("MDS"), multichannel multipoint distribution service ("MMDS), Instructional Television Fixed Service ("ITFS"), local multipoint distribution service ("LMDS"), satellite master antenna television ("SMATV") systems and open video systems ("OVS"). According to the Bureau of Census, there were 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than \$10 million in revenue.²⁷⁸ We will address each service individually to provide as precise of an estimate of small entities as available data allows.

119. **Cable Operator:** The Commission has developed, with SBA's approval, its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's

²⁷⁶ 5 U.S.C. § 601(3)

²⁷⁷ 13 C.F.R. § 12.201 (NAICS Code 513220). This NAICS Code applies to all services listed in this paragraph

²⁷⁸ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 80 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

rules, a “small cable company,” is one serving fewer than 400,000 subscribers nationwide.²⁷⁹ Based on our most recent information, we last estimated that there were **1,439** cable operators that qualified as small cable companies?” 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 adopted in this Order.

120. The Communications Act of **1934**, as amended, 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 one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed **\$250,000,000**.”²⁸¹ The Commission has determined that there are 68,500,000 subscribers in the United States?” Therefore, we found that an operator serving fewer than **685,000** 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.²⁸³ Based on available data, we find that the number of cable operators serving 677,000 subscribers or less totals 1,450.²⁸⁴ 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.

121. Direct Broadcast Satellite Service (“DBS”): Because DBS provides subscription services, DBS falls within the SBA-recognized definition of cable and other program distribution services.²⁸⁵ This definition provides that a small entity is one with **\$12.5** million or less in annual receipts.²⁸⁶ There are four licensees of DBS services under Part 100 of the Commission’s Rules. Three of those licenses 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?” 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, despite the absence of specific data on this point, that there are entrants in this field that may not yet have generated \$12.5 million in annual receipts, and therefore may be categorized as a small businesses.

²⁷⁹ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination 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*, 10 FCC Rcd. 7393(1995).

²⁸⁰ Paul Kagan Associates, Inc. Cable TV Investor, February **29, 1996** (based on figures for December **30, 1995**.)

²⁸¹ 47 U.S.C. § 543(m)(2).

²⁸² See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, 16 FCC Rcd **2225** (2001).

²⁸³ 47 C.F.R. § 76.1403(b).

²⁸⁴ Paul Kagan Associates, Inc., Cable TV Investor, Feb. **29, 1996** (based on figures for Dec. **30, 1995**).

²⁸⁵ 13 C.F.R. § **121.201** (NAICS Code **513220**).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

122. Home Satellite Dish (“HSD”) Service. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of cable and other program distribution services?” This definition provides that a small entity is one with \$12.5 million or less in annual receipts.²⁸⁹ 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.” 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 customers, these are the services most relevant to this discussion.²⁹¹

123. Multipoint Distribution Service (“MDS), Multichannel Multipoint Distribution Service (“MMDS”), Instructional Television Fixed Service (“ITFS”), 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 MDS and ITFS.²⁹² LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.²⁹³

124. 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?” This definition of a small entity in the context of MDS auctions has been approved by the SBA.²⁹⁵ 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 \$12.5 million or less in annual receipts.²⁹⁶ This definition includes multipoint distribution services, and thus applies to MDS licensees and wireless cable operators that did not participate in the

²⁸⁸ 13 C.F.R. § 121.201 (NAICS Code 513220).

²⁸⁹ *Id.*

²⁹⁰ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 12 FCC Rcd 4358,4385 (1996) (“Third Annual Report”).

²⁹¹ *Id.* at 4385.

²⁹² *Amendment to 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*, 10 FCC Rcd at 9589, 9593 (1995) (“ITFS Order”).

²⁹³ *See Local Multipoint Distribution Service* 12 FCC Rcd 12545 (1997) (“LMDS Order”).

²⁹⁴ 47 C.F.R. § 21.961(b)(1).

²⁹⁵ *See ITFS Order*, 10 FCC Rcd at 9589.

²⁹⁶ 13 C.F.R. § 121.201 (NAICS Code 513220).

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 \$12.5 million annually. Therefore, for purposes of the **IRFA**, we find that there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

125. The **SBA** definition of small entities for cable and other program distribution services, which includes such companies generating \$12.5 million in annual receipts, seems reasonably applicable to **ITFS**.²⁹⁷ 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 small business.²⁹⁸ 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.

126. 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.²⁹⁹ 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." These regulations defining "small entity" in the context of **LMDS** auctions have been approved by the **SBA**.³⁰¹ 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.

127. 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.

128. Satellite Master Antenna Television ("**SMATV**") Systems. The **SBA** definition of small entities for cable and other program distribution services includes **SMATV** services and, thus, small entities are defined as all such companies generating \$12.5 million or less in annual receipts?" Industry sources estimate that approximately 5,200 **SMATV** operators were providing service as of December 1995.³⁰³ Other estimates indicate that **SMATV** operators serve approximately 1.5 million

²⁹⁷ *Id*

²⁹⁸ **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).

²⁹⁹ See *LMDS Order*, 12 FCC Rcd at 12545.

³⁰⁰ *Id*

³⁰¹ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, **SBA** (January 6, 1998).

³⁰² 13 C.F.R. § 121.201 (NCAIS Code 513220).

³⁰³ See *Third Annual Report*, 12 FCC Rcd at 4403-4

residential subscribers as of July 2001.³⁰⁴ 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.

129. Open Video Systems (“OVS”). Because OVS operators provide subscription services, OVS falls within the SBA-recognized definition of cable and other program distribution services. This definition provides that a small entity is one with \$1.25 million or less in annual receipts. The Commission has certified 25 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 service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

130. MDU Operators: The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating \$6 million or less in revenue annually.³⁰⁵ According to the Census Bureau, there were 31,584 operators of nonresidential buildings generating less than \$6 million in revenue that were in operation for at least one year at the end of 1997.³⁰⁶ Also according to the Census Bureau, there were 51,275 operators of apartment dwellings generating less than \$6 million in revenue that were in operation for at least one year at the end of 1997.” The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements for Small Entities.

131. At this time, we do not anticipate that the adoption in the *Second Report and Order* of a limited exemption for small MVPDs from our signal leakage reporting requirements³⁰⁸ will impose any additional reporting or recordkeeping requirements. The exemption is intended to further congressional directives to reduce the regulatory burden on small entities where feasible. The *Second Report and Order* also modifies the Commission’s rules to require that the cable home wiring and cable home run wiring rules should apply to all MVPDs in the same manner that they currently apply to cable

³⁰⁴ See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1281 (2001) (“*Eighth Annual Report*”).

³⁰⁵ 13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514)

³⁰⁶ 1997 Economic Census: Comparative Statistics for the United States; 1987 SIC Basis: Financial, Insurance, and Real Estate Industries, SIC 6512.

³⁰⁷ 1997 Economic Census: Comparative Statistics for the United States; 1987 SIC Basis: Financial, Insurance, and Real Estate Industries, SIC 6513.

³⁰⁸ See para. 83-87.

operators.³⁰⁹ The *Second Report and Order* also requires that all non-cable MVPDs comply with the cable home wiring and cable home run wiring rules in the same manner as cable operators.

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

132. The **RFA** requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): “(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 and reporting requirements under the rule for such 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 such small entities.”³¹⁰

133. The *Second Further Notice* sought comment on whether to 1) limit the length of exclusive contracts between MVPDs and MDUs; (2) subject perpetual contracts to caps or fresh look windows; (3) apply the Commission’s rules regarding the disposition of cable home wiring and subscriber termination rights to non-cable, in addition to cable MVPDs; (4) exempt small MVPDs from the annual signal leakage reporting requirements; and adopt DirecTV’s proposal to establish a “virtual demarcation point” from which alternative providers could share cable wiring.” In the *Second Report and Order* we decline to restrict exclusive contracts for the provision of video services in MDUs. We considered the pros and cons of limiting exclusives noting that some commenters supported restricting exclusive contracts to enable alternative MVPDs to gain a foothold in the market.” Other commenters argued that while exclusive contracts are necessary for at least some period of time to allow MVPDs sufficient time to recoup and justify their investments, their terms should be determined and negotiated between MDU owners and the MVPDs. Ultimately, we concluded that the record does not demonstrate a need for government intervention with marketplace forces and privately negotiated contracts.

134. Similarly, we decline to ban perpetual contracts for the provision of video services in MDUs or subject such contracts to a fresh look window. We are aware that the Commission has already noted that perpetual MDU contracts may discourage or limit an alternative providers’ entry in the MDU market.” We conclude that because it appears that perpetual contracts are neither prevalent nor currently being entered into, such contracts do not represent a significant barrier to competition in the MDU market warranting government imposed restrictions. The record does not demonstrate that banning these contracts would significantly improve the competitive situation.

135. We also conclude that the cable home wiring and cable home run wiring rules should apply to all MVPDs in the same manner that they currently apply to cable operators. We considered that if we allowed our current rules to go unchanged, a subscriber’s ability to terminate existing service and accept alternative service could be contingent on whether the wiring was installed by a cable, as opposed

³⁰⁹ See para. 78-82.

³¹⁰ 5 U.S.C. § 603(c)(1)-(c)(4).

³¹¹ *Second Further Notice*, 13 FCC Rcd at 3778-82, ¶¶ 258-71.

³¹² See para. 63-71.

³¹³ See *Eighth Annual Report*, 17 FCC Rcd at 1250, 1292, ¶¶ 12, 77.

to a non-cable provider. Accordingly, we found that modifying the rule so that it applies uniformly to all MVPDs promotes regulatory parity and enhances competition among MVPDs.

136. We also adopt a limited exemption for small MVPDs from our signal leakage reporting requirements (47 CFR § 76.1804). Section 76.1804(g) of the Commission's rules requires cable operators to file annually with the Commission certain information relating to their use of the aeronautical radio frequency bands. The limited reporting exemption adopted herein applies only to MVPDs with less than 1000 subscribers. We conclude that an exemption is consistent with congressional directives to reduce regulatory burdens on small MVPDs where feasible.

APPENDIX B

Revised rules

[CHANGES MARKED IN BOLD]

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

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 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 by revising the “Note” appended to paragraph (mm)(4) to read as follows:

Sec. 76.5 Definitions

* * * * *

(mm) * * *

(4) * * *

NOTE TO PARAGRAPH (mm)(4): For example, wiring embedded in brick, metal conduit, ~~or~~ cinder blocks, or sheet rock with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not.

3. Section 76.620 is amended by revising subsection (a) to read as follows:

Sec. 76.620 Non-cable multichannel video programming distributors.

(a) Sections **76.605(a)(12)**, 76.610, 76.611, 76.612, 76.614, 76.1804(a) through (f), 76.616, and 76.617 shall apply to all non-cable MVPDs. However, non-cable MVPD systems that are substantially built as of January 1, 1998 shall not be subject to these sections until January 1, 2003. “Substantially built” shall be defined as having 75 percent if the distribution plant completed. As of January 1, 2003, **§76.1804(g)** shall apply to all non-cable MVPDs **servicing 1000** or more subscribers or **1000** or more units.

4. Section 76.802 is amended by revising subsection (l) to read as follows:

Sec. 76.802 Disposition of cable home wiring.

* * * * *

(l) The provisions of § 76.802 **[except for § 76.802(a)(1),]** shall apply to all MVPDs in the same manner that they apply to cable operators.

5. Section 76.804 is amended by revising paragraph (b)(3) to read as follows:

Sec. 76.804 Disposition of home run wiring.

* * * * *

(b) * * *

(3) When an MVPD that is currently providing service to a subscriber is notified either orally or in writing that that subscriber wishes to terminate service and that another service provider intends to use the existing home run wire to provide service to that particular subscriber, a provider that has elected to remove its home run wiring pursuant to paragraph (b)(1) or (b)(2) of this section will have seven days to remove its home run wiring and restore the building consistent with state law. If the subscriber has requested service termination more than seven days in the future, the seven-day removal period shall begin on the date of actual service termination (and, in any event, shall end no later than seven days after the requested date of termination). If the provider has elected to abandon or sell the wiring pursuant to paragraph (b)(1) or (b)(2) of this section, the abandonment or sale will become effective upon actual service termination or upon the requested date of termination, whichever occurs first. For purposes of abandonment, passive devices, including splitters, shall be considered part of the home run wiring. The incumbent provider may remove its amplifiers or other active devices used in the wiring if an equivalent replacement can easily be reattached. In addition, an incumbent provider removing any active elements shall comply with the notice requirements and other rules regarding the removal of home run wiring. If the incumbent provider intends to terminate service prior to the end of the seven-day period, the incumbent shall inform the party requesting service termination, at the time of such request, of the date on which service will be terminated. The incumbent provider shall make the home run wiring accessible to the alternative provider within ~~twenty-four (24 hours of)~~ **the 24-hour period prior to** actual service termination.

6. Section 76.806 is amended by adding a new subsection (d) to read as follows:

Section 76.806 Pre-termination access to cable home wiring.

* * * * *

(d) Section 76.806 shall apply to all MVPDs.

APPENDIX C**Petitions for Reconsideration of the *Report and Order* were filed by:**

Ameritech New Media

Consumer Electronics Manufacturers Association (CEMA)

DIRECTV, Inc.

Media Access Project and Consumer Federation of America (MAP/CFA)

National Cable Television Association (NCTA)

Time Warner Cable

North Carolina Cable Telecommunications Association

Wireless Cable Association

Responses/Oppositions to the Petitions for Reconsideration were filed by:

Ameritech New Media

Bell Atlantic

Building Owners and Managers Association Int. (BOMA)

DIRECTV, Inc.

GTE Service Corporation

National Cable Television Association

OpTel, Inc.

RCN Telecom Services, Inc.

Time Warner Cable

Wireless Cable Association (WCA)

APPENDIX D

Comments **to** the *Second Further Notice of Proposed Rulemaking* were filed by:

Ameritech New Media

Bell Atlantic

Building Owners and Managers Association, International (BOMA)

Cable Telecommunications Association

CableVision Communications, Inc.; Comcast Cable & Tele-Media Corporation **of** Delaware

Community Associations Institute (CAI)

Cox Communications

DIRECTV

GTE Service Corporation

Independent Cable and Telecommunications Association (ICTA, now known as the Independent Multi-Family Communications Council)

Media Access Project and Consumer Federation of America (MAP/CFA)

MCI Telecommunications

National Cable Television Association (NCTA)

Optel, Inc.

RCN Telcom Services, Inc.

Summit Communications

Tele-Communications, **Inc.** (TCI)

Reply Comments to the *Second Further Notice ~~&~~ Proposed Rulemaking* were filed by:

Ameritech New Media

Adelphia Cable Communications

CableVision Communications, Inc.

Charter Communications, *et al.*

DIRECTV

GTE Service Corporation

Independent Cable and Telecommunications Association (ICTA)

Media Access Project and Consumer Federation of America (MAP/CFA)

National Cable Television Association

OpTel, Inc.

RCN Telecom Services, Inc.

Tele-Communications, Inc. (TCI)

Time Warner

United States Satellite Broadcasting Co. (USSB)

UTC, the Telecommunications Assoc. (UTC)

Wireless Cable Association International, Inc. (WCA)

Surreply Comments to the *Second Notice of Proposed Rulemaking* were tiled by:

Ameritech New Media

Building Owners and Managers Assoc. Int. (BOMA)

Cox Communications

GTE Service Corporation

Independent Cable and Telecommunications Association (ICTA)

Charter communications, et. *al.*

Optel, Inc.

Wireless Cable Association, International (WCA)

Ex Parte Filings by:

Astrovision Technologies

Broadband Service Providers Association

Building Owners and Managers Association International (BOMA)

Carolina Broadband

Charter Communications

Choice Media Group

Community Associations Institute

Direct Digital Communications

Fore Property Company

Grande Communications

Independent Cable & Telecommunications Association (ICTA)

Independent Multi-Family Communications Alliance (IMCC)

Institute of Real Estate Management (IREM)

InteliCable Group, LLC

National Apartment Association (NAAA)

National Multi-Housing Council (NMHC)

OpTel, Inc.

Real Access Alliance

Satellite Broadcasting and Communications Association (SBCA)

Star Com Satellite Technologies, LLC

Sunrise Lakes Condo

Telecommunications Research & Action Center

United Homeowners Association

Winstar Communications

Wireless Cable Association International (WCA)

Worldgate Condominium Unit Owners Association

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: In the Matter of Telecommunications Services, Inside Wiring and Customer Premises Equipment, and In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, CS Docket No. 95-184, MM Docket No. 92-260

This proceeding involves thorny issues, and it may be that we've taken so long to resolve it because there are compelling arguments on both sides and no easy answers. Despite threats of litigation by cable operators when the rules were adopted, the industry has refrained from actively pursuing legal challenge, which has given us time to see how the rules work in practice.

Some argue that the "home run" wiring disposition procedures affirmed in this Order will deprive renters of the benefits of the competitive video programming marketplace, simply because they do not own their homes. I, for one, would welcome the ability to treat renters and homeowners more alike than we presently do. Cable provision is not generally a competitive environment, and it would benefit both cable and consumers if it were more competitive. Nevertheless, the Commission is, at present, constrained in what it can do by significant legal considerations, including landowners' property rights.

Under the circumstances, I believe the order strikes a rational balance. I therefore support the decision.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN
APPROVING IN PART, DISSENTING IN PART**

Re: *Telecommunications Services, Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, CS Docket No. 95-184, MM Docket No. 92-260*

Although I understand the importance of the concerns we address in this Order, I am not persuaded that we have the statutory authority to regulate “home run” wiring.

This Order relies on three statutory provisions for jurisdiction: Sections 4(i), 303(r), and 623 of the Communications Act of 1934. Sections 4(i) and 303(r) confer broad, general authority. Section 4(i) permits the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, ~~as~~ may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). Similarly, Section 303(r) authorizes the Commission “from time to time, as public convenience, interest, or necessity requires” to “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.” 47 U.S.C. § 303(r). I question whether these general provisions authorize the Commission to regulate the disposition of that part of a cable wire that runs from the demarcation point in a multiple dwelling unit to the point at which the wiring becomes devoted to an individual subscriber. Moreover, the interpretation of these provisions in this item offers no limitation on our authority, and thus I am not sure what this interpretation would not allow us to do. I am not as comfortable interpreting these provisions so broadly.’

The Order also relies on Section 623, which instructs the Commission to ensure that basic cable rates are reasonable. Primary responsibility for these rates lies with the local franchise authorities, which set the local rates consistent with FCC rules. We ensure rates are reasonable by accepting cable operators’ appeals of local rate orders. Again, I am not sure that we can rely on this provision as a basis for regulating the disposition of home run wiring inside an MDU.

Accordingly, I dissent in part from this Order.

¹ My reluctance to use our general rulemaking authority to regulate wiring within a MDU is also due to the fact that Congress addressed this general *issue* in Title VI, expressly instructing the Commission to regulate the cable wiring *inside* a customer’s premises. *See* 47 U.S.C. § 544(i). That Congress did not similarly authorize **us** to proscribe rules regulating cable wiring *outside* the customer’s premises is notable.