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

In the Matter of:	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67
	)	

ORDER ON RECONSIDERATION

Adopted: December 19, 2003 **Released: December 23, 2003**

By the Commission:

I. DISCUSSION

1. In our recent *Second Report and Order and Second Further Notice of Proposed Rulemaking* in this proceeding, we adopted encoding rules that included, *inter alia*, a prohibition on the down resolution of unencrypted broadcast programming and caps on the level of copy protection that may apply to various categories of MVPD programming.[1] The copy protection caps included a prohibition on the imposition of copy restrictions on unencrypted broadcast television.[2] Our stated goal in adopting these encoding rules was to strike a measured balance between the rights of content owners and the home viewing expectations of consumers, while ensuring competitive parity among MVPDs.[3]

2. Following release of the *Second Report and Order and Second Further Notice of Proposed Rulemaking*, a potential conflict between our stated intent and the scope of the rules became apparent. The limitation of the encoding rules for broadcast television programming to "Unencrypted Broadcast Television" could inadvertently be interpreted to create a competitive disparity in so far as certain MVPDs encrypt their broadcast signals while others do not.[4] The resulting imbalance could also negatively impact consumers who would otherwise expect to have the same viewing and recording capabilities for broadcast television programming regardless of

[1] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80 and PP Docket No. 00-67, FCC No. 03-225 at Sections V.C and V.D (rel. Oct. 9, 2003) ("*Digital Cable Compatibility Order and FNPRM*").

[2] *Id* at ¶ 65, Appendix B.

[3] *Id.* at ¶ 43, 47 and 71.

[4] As defined in Section 76.1902(s), Unencrypted Broadcast Television refers to the retransmission of broadcast signals not subject to a commercially-adopted access control method 47 C F R. § 76.1902(s).

distribution platform. To prevent this unintended consequence, by our own motion we revise the definition of Unencrypted Broadcast Television in our encoding rules as set forth in Appendix A hereto.[5]

II. PROCEDURAL MATTERS

3. *Paperwork Reduction Act of 1995 Analysis.* This *Order on Reconsideration* does not contain information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

4. *Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act,[6] the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis ("Supplemental FRFA") relating to this *Order on Reconsideration.* The Supplemental FRFA is set forth in Appendix B.

III. ORDERING CLAUSES

5. **IT IS ORDERED** that pursuant to the authority contained in Sections 1, 4(i) and (j), 303, 403, 405, 601, 624A and 629 of the Communications Act of 1934, 47 U.S.C §§ 151, 154(i) and (j), 303, 403, 405, 521, 544a and 549, that the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A, and shall become effective 30 days after publication in the Federal Register.

6. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Order on Reconsideration*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[5] 47 C F R § 1.108.

[6] *See* 5 U.S.C. § 604

APPENDIX A

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

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

   AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302a, 303, 303a, 307, 308, 309, 312, 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, 531, 571, 572, and 573.

2. Revise paragraph (s) of §76.1902 to read as follows:

   §76.1902 Definitions

   *****

   (s) Unencrypted broadcast television means the retransmission by a covered entity of any service, program, or schedule or group of programs originally broadcast in the clear without use of a commercially-adopted access control method by a terrestrial television broadcast station regardless of whether such covered entity employs an access control method as a part of its retransmission.

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APPENDIX B
SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Further Notice of Proposed Rulemaking* ("*FNPRM*") in this proceeding.[2] The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. Based upon the comments in response to the *FNPRM* and the IRFA, the Commission included a Final Regulatory Flexibility Analysis ("FRFA") in the *Second Report and Order and Second Further Notice of Proposed Rulemaking* ("*Digital Cable Compatibility Order and FNPRM*") in this proceeding.[3] In this *Order on Reconsideration*, the Commission is, on its own motion, amending the rules in a manner that may affect small entities. Accordingly, this Supplemental Regulatory Flexibility Analysis ("Supplemental FRFA") addresses those amendments and conforms to the RFA.[4]

A. Need for, and Objectives of, the *Order on Reconsideration*. In the *Digital Cable Compatibility Order and FNPRM*, the Commission adopted regulations setting a cable compatibility standard for an integrated, unidirectional digital cable television receiver, as well as for other unidirectional digital cable products. These regulations include, *inter alia*, technical standards, a labeling regime and encoding rules for audiovisual content delivered by multichannel video programming distributors ("MVPD"). The objective of the final rules is to facilitate the DTV transition and ensure parity among MVPDs. However, the encoding rule adopted in the *Digital Cable Compatibility Order and FNPRM* prohibiting MVPDs from encoding unencrypted broadcast television with copy restrictions or to trigger down resolution may be susceptible to different interpretations and could create an imbalance between different MVPDs in so far as certain providers typically encrypt the broadcast television signals that they retransmit whereas others do not or cannot.[5] This *Order on Reconsideration* amends the encoding rules to cover all broadcast television programming that is unencrypted when originally broadcast, regardless of whether or not they are carried in encrypted form by an MVPD.

B. Summary of Significant Issues Raised in Response to the FRFA. No parties have addressed the FRFA in any subsequent filings.

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

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[1] *See* 5 U.S C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 518 (2003) ("*FNPRM*").

[3] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80 and PP Docket NO. 00-67, FCC No. 03-225 (rel. Oct. 9, 2003) ("*Digital Cable Compatibility Order and FNPRM*").

[4] *See* 5 U.S.C. § 604.

[5] *See Digital Cable Compatibility Order and FNPRM* at Appendix B (concerning § 76.1904(a)); *see also* 47 C.F.R 76 630.

rules.[6] The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[7] In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act.[8] 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").[9]

As noted, a FRFA was incorporated into the *Digital Cable Compatibility Order and FNPRM*. In that analysis, the Commission described in detail the various small business entities that may be affected by the final rules. Those entities consist of: television broadcasting stations, cable and other program distribution (which includes, among others, cable operators, direct broadcast satellite services, home satellite dish services, multipoint distribution services, multichannel multipoint distribution service, Instructional Television Fixed Service, local multipoint distribution service, satellite master antenna television systems, and open video systems), electronics equipment manufacturers, and computer manufacturers. In this present *Order on Reconsideration*, the Commission is amending the final rules adopted in the *Digital Cable Compatibility Order and FNPRM* on its own motion. In this Supplemental FRFA, we incorporate by reference the description and estimate of the number of small entities from the FRFA in this proceeding.

D. Description of Projected Reporting, Recordkeeping and other Compliance Requirements. Among the final rules adopted in the *Digital Cable Compatibility Order and FNPRM*, is a prohibition on all MVPDs from encoding unencrypted broadcast television programming to activate copy restrictions or down-resolution. This *Order on Reconsideration* revises this prohibition to encompass all broadcast television programming that is unencrypted when broadcast, regardless of the form in which it is carried by an MVPD.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (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 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.[10]

In the *Digital Cable Compatibility Order and FNPRM*, we concluded that the encoding prohibitions on selectable output controls and the down-resolution of unencrypted broadcast

[6] 5 U.S.C. § 603(b)(3).

[7] 5 U.S.C. § 601(6)

[8] 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."

[9] 15 U.S.C. § 632.

[10] 5 U.S.C. § 603(b).

programming would largely impact upon the DBS industry, which is primarily composed of large entities. Similarly, while we concluded that the caps on copy protection would affect all MVPDs, we believed they would not have a negative impact on small entities. We do not believe that our revision of the encoding rules in this *Order on Reconsideration* changes our earlier conclusions.

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

Report to Congress: The Commission will send a copy of the Order on Reconsideration, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[11] In addition, the Commission will send a copy of the Order on Reconsideration, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order on Reconsideration and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[12]

[11] *See* 5 U.S.C. § 801(a)(1)(A).

[12] *See* 5 U S.C. § 604(b).