

access, or otherwise seek to specify the details of any arrangement so long as a competitor has direct access, consistent with the principles described above. The *Triennial Review Order* established a framework within which state commissions would govern the process for interconnection negotiations and related disputes pursuant to section 252 of the Act, and nothing we do today is designed to disturb that basic role.²⁰³

IV. CONCLUSION

56. In view of the foregoing, we find that that cable wiring located behind sheet rock qualifies as physically inaccessible under our rules for purposes of determining the demarcation point between home wiring and home run wiring. Specifically, we conclude that (1) accessing such wiring causes significant damage or modification to a preexisting structural element, and (2) accessing wiring behind sheet rock generally adds significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring. The Commission's cable inside wiring rules are intended to facilitate competition in video distribution markets. This ruling will foster opportunities for competing MVPDs to provide service in MDUs by clarifying the circumstances under which the existing cable home run wiring in MDUs can be made available to alternative video service providers. Finally, we grant Cox's petition and conclude that state commission decisions denying requesting carriers direct physical access to incumbent LECs' inside wire subloops in multiunit premises pursuant to section 251(c)(3) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition.

V. PROCEDURAL MATTERS

57. *Final Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act (RFA),²⁰⁴ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice*.²⁰⁵ The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Further Notice*, including comments on the IRFA. Pursuant to the RFA, a Final Flexibility Analysis is contained in Appendix C.

58. *Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements subject to the paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burdens for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

(Continued from previous page) _____

subloop. *Id.* at 10; *see also* Verizon May 17 WC Docket No. 01-338 *Ex Parte* Letter at 7 (stating the New York Public Service Commission requires, for example, that a requesting carrier seeking direct connection to a terminal block in multiunit premises must first identify itself to the owning carrier and indicate, in writing that it intends to access directly the owning carrier's subloop facilities); SBC May 25 WC Docket No. 01-338 *Ex Parte* at 2 (stating that such safeguards also could include requirements that a requesting carrier is responsible for ensuring that its technicians complete training in the engineering standards and practices used by the owning carrier.)

²⁰³ *Triennial Review Order*, 18 FCC Rcd at 17198, para. 358. Just as we do not bar states from adopting legitimate network security safeguards, we also reject requests that we set forth safeguards that states should or must adopt. *See* SBC May 25 WC Docket No. 01-338 *Ex Parte* at 2; Letter from Thomas W. Snyder, Corporate Counsel – Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at 4 (filed May 24, 2007); Qwest May 29 WC Docket No. 01-338 *Ex Parte* at 1.

²⁰⁴ *See* 5 U.S.C. § 603.

²⁰⁵ *Further Notice*, 20 FCC Rcd at 1239, App.

59. *Congressional Review Act*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

60. Accordingly, **IT IS ORDERED** that, pursuant to authority found in Sections 1, 4(i), 601, 623, 624, and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 521, 543, 544 and 552, the Commission's amendment of the Note to Section 76.5(mm)(4) of the Commission's rules to include sheet rock as an example of one of the materials that would likely be considered physically inaccessible for purposes of the Commission's cable television inside wiring rules **IS AFFIRMED**.

61. **IT IS FURTHER ORDERED**, that in light of the United States Court of Appeals for the District of Columbia's Circuit's decision in *NCTA v. FCC*, No. 03-1140, 2004 WL 335201, which remanded but did not vacate the decision adopted in *Telecommunications Services Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 18 FCC Rcd 1342 (2003) ("Home Wiring Decision"), the note to 47 C.F.R. § 76.5(mm)(4) adopted in the Home Wiring Decision shall remain in effect.

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

63. **IT IS FURTHER ORDERED**, pursuant to sections 1, 3, 4, 201-205, 251, and 252 of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, that the petition for declaratory ruling filed by Cox in WC Docket No. 01-338 **IS GRANTED** to the extent described by this Order.

64. **IT IS FURTHER ORDERED**, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Declaratory Ruling **SHALL BE EFFECTIVE** upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters in Docket 01-338

<u>Comments Filed By:</u>	<u>Abbreviation</u>
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
Real Access Alliance	RAA
SBC Communications Inc.	SBC
Sigecom, LLC	Sigecom
The World Company, d/b/a/ Sunflower Broadband	Sunflower
Qwest Communications International Inc.	Qwest

List of Replies

<u>Replies Filed By:</u>	<u>Abbreviation</u>
BellSouth Corporation	BellSouth
Cox Oklahoma Telcom, L.L.C.	Cox
New Jersey Division of Ratepayer Advocate	NJ Ratepayer
SBC Communications Inc.	SBC
Verizon Communications Inc.	Verizon

APPENDIX B**List of Commenters in CS Docket No. 95-184 and MM Docket No. 92-260**

<u>Comments Filed By:</u>	<u>Abbreviation</u>
Independent Multi-Family Communications Council	IMCC
National Cable & Telecommunications Association	NCTA
Real Access Alliance and the Community Association Institute	RAA & CAI
RCN Telecom Services, Inc.	RCN
Verizon	Verizon

List of Replies

<u>Comments Filed By:</u>	<u>Abbreviation</u>
Independent Multi-Family Communications Council	IMCC
National Cable & Telecommunications Association	NCTA
Real Access Alliance and the Community Association Institute	RAA & CAI
RCN Telecom Services, Inc.	RCN

Ex Parte filings

Verizon Declaration of Daniel VanRoekel, Senior Engineer, Outside Plant Engineering (June 22, 2005).

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the “RFA”)²⁰⁶ an Initial Regulatory Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rulemaking* in CS Docket No. 95-184 and MM Docket No. 92-260 (hereinafter referred to as the *Further Notice*).²⁰⁷ The Commission sought written public comment on the possible impact of the proposed policies and rules on small entities in the *Further Notice*, including comments on the IFRA. This Final Regulatory Flexibility Analysis (FRFA) in this *Report and Order (Report and Order)* conforms to the RFA.²⁰⁸

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

2. This *Report and Order* is issued in response to a decision issued by the United States Court of Appeals for the District of Columbia regarding amendment of the Commission’s cable television inside wiring rules.²⁰⁹ In its *First Order on Reconsideration and Second Report and Order* in this proceeding, the Commission modified its rules to provide that home run wiring located behind sheet rock is considered to be physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring in multiple dwelling units (MDUs).²¹⁰ Specifically, the Commission amended the Note to Section 76.5(mm)(4) of the rules to include wiring behind sheet rock as an example, along with wiring located behind brick, metal conduit or cinder blocks, as wiring considered to be “physically inaccessible” as that term is used in Section 76.5(mm)(4) of the rules and the appended Note. The consequence of that conclusion is to move the point at which a competing multichannel video programming distributor (MVPD) can gain access to wiring located behind sheet rock closer to the incumbent cable operator’s junction box, thereby facilitating competition between MVPD providers to serve an MDU. The Court of Appeals found that the Commission offered no reasoned basis for the amendment to add sheet rock as an example of material to be considered as a “preexisting structural element” in defining physical inaccessibility and remanded the case to the Commission for further consideration. The *Further Notice* was issued to seek comment on this matter. This *Report and Order* finds that the record adequately supports our finding 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.

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

²⁰⁶ 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).

²⁰⁷ *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 1233, 1239, Appendix (2004)

²⁰⁸ See 5 U.S.C. § 604.

²⁰⁹ *National Cable & Telecommunications Association v. Federal Communications Commission and United States of America*, No. 03-1140, 2004 WL 335201 (D.C. Cir. Feb. 17, 2004, unpublished).

²¹⁰ *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 18 FCC Rcd 1342 (2003).

3. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.²¹¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²¹² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²¹³ 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).²¹⁴

4. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”²¹⁵ The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having \$13.5 million or less in annual receipts.²¹⁶ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.²¹⁷ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.²¹⁸ Thus, under this size standard, the majority of firms can be considered small.

5. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.²¹⁹ Industry data indicate that,

²¹¹ 5 U.S.C. § 603(b)(3).

²¹² 5 U.S.C. § 601(6).

²¹³ 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.”

²¹⁴ 15 U.S.C. § 632.

²¹⁵ U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

²¹⁶ 13 C.F.R. § 121.201, NAICS code 517510.

²¹⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

²¹⁸ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

²¹⁹ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Red 7393, 7408 (1995).

of 1,076 cable operators nationwide, all but eleven are small under this size standard.²²⁰ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²²¹ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.²²² Thus, under this second size standard, most cable systems are small.

6. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 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."²²³ The Commission has determined that 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 its affiliates, do not exceed \$250 million in the aggregate.²²⁴ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²²⁵ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²²⁶ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

7. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.²²⁷ This definition provides that a small entity is one with \$13.5 million or less in annual receipts.²²⁸ Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four

²²⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²²¹ 47 C.F.R. § 76.901(c).

²²² Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

²²³ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²²⁴ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

²²⁵ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²²⁶ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

²²⁷ 13 C.F.R. § 121.201, NAICS code 517510.

²²⁸ *Id.*

currently offer subscription services. Two of these four DBS operators, DIRECTV²²⁹ and EchoStar Communications Corporation (EchoStar),²³⁰ report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$13.5 million, and thus does not qualify as a small business.²³¹ The fourth DBS operator, Dominion Video Satellite, Inc. (Dominion), offers religious (Christian) programming and does not report its annual receipts.²³² The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

8. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating \$13.5 million or less in annual receipts.²³³ Currently, there are approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.²³⁴ Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers.²³⁵ 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 PCOs, we believe that a substantial number of PCO may qualify as small entities.

9. *Home Satellite Dish (HSD) Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all

²²⁹ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; see *2005 Cable Competition Report*, 20 FCC Rcd at 2793, para. 55.

²³⁰ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id.*

²³¹ Rainbow DBS, which provides service under the brand name VOOOM, reported an estimated 25,000 subscribers. *Id.*

²³² Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

²³³ 13 C.F.R. § 121.201. NAICS code 517510.

²³⁴ See *2005 Cable Competition Report*, 20 FCC Rcd at 2816, para. 110. Previously, the Commission reported that IMCC had 250 members; see *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, para. 90 (2004) (*2004 Cable Competition Report*).

²³⁵ See *2005 Cable Competition Report*, 20 FCC Rcd at 2816, para. 110.

such companies generating \$13.5 million or less in revenue annually.²³⁶ HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003 and June 2004, HSD subscribership fell from 502,191 subscribers to 335,766 subscribers, a decline of more than 33 percent.²³⁷ The Commission has no information regarding the annual revenue of the four C-Band distributors.

10. *Wireless Cable Systems.* Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service ("BRS"), formerly Multipoint Distribution Service ("MDS"),²³⁸ and the Educational Broadband Service ("EBS"), formerly Instructional Television Fixed Service ("ITFS"),²³⁹ to transmit video programming and provide broadband services to residential subscribers.²⁴⁰ These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.²⁴¹ We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.²⁴² As described below, the SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5

²³⁶ 13 C.F.F. § 121.201, NAICS code 517510.

²³⁷ See *2005 Cable Competition Report*, 20 FCC Rcd at 2798, para. 64. HSD subscribership declined more than 28 percent between June 2002 and June 2003. See *2004 Cable Competition Report*, 19 FCC Rcd at 1654-55, paras. 73-74.

²³⁸ MDS, also known as Multichannel Multipoint Distribution Service (MMDS), is regulated by Part 21 of the Commission's rules; see 47 C.F.R. Part 21, subpart K; and has been renamed the Broadband Radio Service (BRS); see Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, 19 FCC Rcd 14165 (2004) (*MDS/ITFS Order*).

²³⁹ ITFS systems are regulated by Part 74 of the Commission's rules; see 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS); see *MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

²⁴⁰ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565, para. 131 (2006) (*2006 Cable Competition Report*).

²⁴¹ *Id.*

²⁴² See *Local Multipoint Distribution Service*, 12 FCC Rcd 12545 (1997).

million or less in annual receipts, appears applicable to MDS, ITFS and LMDS.²⁴³ Other standards also apply, as described.

11. The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction,²⁴⁴ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.²⁴⁵ This definition of a small entity in the context of MDS auctions has been approved by the SBA.²⁴⁶ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.²⁴⁷ MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

12. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).²⁴⁸ We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

13. In the 1998 and 1999 LMDS auctions,²⁴⁹ the Commission defined a small business as an entity that has annual average gross revenues of less than \$40 million in the previous three calendar years.²⁵⁰ Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.²⁵¹ These definitions of "small business" and "very small business" in the

²⁴³ 13 C.F.R. § 121.201, NAICS code 517510.

²⁴⁴ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

²⁴⁵ 47 C.F.R. § 21.961(b)(1).

²⁴⁶ See *ITFS Order*, 10 FCC Rcd at 9589.

²⁴⁷ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$13.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

²⁴⁸ In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

²⁴⁹ The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

²⁵⁰ See *LMDS Order*, 12 FCC Rcd at 12545.

²⁵¹ *Id.*

context of the LMDS auctions have been approved by the SBA.²⁵² In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe 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.

14. *Open Video Systems ("OVS")*. In 1996, Congress established the open video system ("OVS") framework, one of four statutorily recognized options for the provision of video programming services by local exchange carriers ("LECs").²⁵³ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁵⁴ OVS falls within the SBA small business size standard of Cable and Other Program Distribution Services, which consists of such entities having \$13.5 million or less in annual receipts.²⁵⁵ The Commission has certified 25 OVS operators, with some now providing service. Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.²⁵⁶ As of June, 2005, BSPs served approximately 1.4 million subscribers, representing 1.5 percent of all MVPD households.²⁵⁷ Affiliates of Residential Communications Network, Inc. ("RCN"), which serves about 371,000 subscribers as of June, 2005, is currently the largest BSP and 14th largest MVPD.²⁵⁸ RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

15. *Incumbent Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁵⁹ According to Commission data,²⁶⁰ 1,307 carriers have reported that they are engaged in the provision of incumbent

²⁵² See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

²⁵³ 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2549, para. 88 (2006) (*2006 Cable Competition Report*).

²⁵⁴ See 47 U.S.C. § 573.

²⁵⁵ 13 C.F.R. § 121.201, NAICS code 517510.

²⁵⁶ See *2006 Cable Competition Report*, 20 FCC Rcd at 2549, para. 88. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

²⁵⁷ See *id.* at 2507, para. 14.

²⁵⁸ See *2006 Cable Competition Report*, 20 FCC Rcd at 2549, para. 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,000 subscribers as of June, 2005. The third largest BSP is Knology, serving approximately 170,800 subscribers as of June, 2005. *Id.*

²⁵⁹ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

²⁶⁰ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (Feb. 2007) (*Trends in Telephone Service*). This source uses data that are current as of October 20, 2005.

local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

16. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁶¹ According to Commission data,²⁶² 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

17. *MDU Operators.* Under the Commission's Rules, an MDU is a residential "multiple dwelling unit building (e.g., an apartment building, condominium building or cooperative)." 47 C.F.R. § 76.800(a). The Census Bureau has created two broad Economic Census categories that appear pertinent. The first category, Lessors of Residential Buildings and Dwellings, is described as follows: "This industry comprises establishments primarily engaged in acting as lessors of buildings used as residences or dwellings, such as single-family homes, apartment buildings, and town homes. Included in this industry are owner-lessors and establishments renting real estate and then acting as lessors in subleasing it to others. The establishments in this industry may manage the property themselves or have another establishment manage it for them."²⁶³ The SBA has developed a small business size standard for Lessors of Residential Buildings and Dwellings, which is: all such firms having \$6.5 million or less in annual receipts.²⁶⁴ According to Census Bureau data for 2002, there were 44,165 firms in this category that operated for the entire year.²⁶⁵ Of this total, 43,031 firms had annual sales of under \$5 million, and 671 firms had sales of \$5 million or more but less than \$10 million.²⁶⁶ Thus, the majority of firms in this category can be considered small.

18. The second category is that of Residential Property Managers, which "comprises establishments primarily engaged in managing residential real estate for others."²⁶⁷ The SBA has

²⁶¹ 13 C.F.R. § 121.201, NAICS code 517110.

²⁶² "Trends in Telephone Service" at Table 5.3.

²⁶³ U.S. Census Bureau, 2002 NAICS Definitions, "531110 Lessors of Residential Buildings and Dwellings"; <http://www.census.gov/epcd/naics02/def/ND531110.HTM#N531110>.

²⁶⁴ 13 C.F.R. § 121.201, NAICS code 531110.

²⁶⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Real Estate and Rental and Leasing, Table 4. Revenue Size of Firms for the United States: 2002, NAICS code 531110 (issued November 2005).

²⁶⁶ *Id.* An additional 463 firms had annual sales of \$10 million or more.

²⁶⁷ U.S. Census Bureau, 2002 NAICS Definitions, "531311 Residential Property Managers"; <http://www.census.gov/epcd/naics02/def/ND531311.HTM#N531311>.

developed a small business size standard for Residential Property Managers, which is: all such firms having \$2 million or less in annual receipts.²⁶⁸ According to Census Bureau data for 2002, there were 19,359 firms in this category that operated for the entire year.²⁶⁹ Of this total, 16,057 firms had annual sales of under \$1 million, and 2,141 firms had sales of \$1 million or more but less than \$2.5 million.²⁷⁰ Thus, the majority of firms in this category can be considered small.

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

19. The retention of the word “sheet rock” to the Note to Section 76.5(mm)(4) of the Commission’s rules will not impose any additional reporting or recordkeeping requirements. With regard to other compliance requirements, we note as indicated above, that the *Report and Order* is initiated in response to a decision issued by the United States Court of Appeals for the District of Columbia regarding amendment of the Commission’s cable television inside wiring rules. The Court seeks support for the Commission’s decision to add wiring behind sheet rock as an example of wiring considered to be “physically inaccessible” as that term is defined by Section 76.5(mm)(4) of the Commission’s rules and the appended Note. As stated, the consequence of the Commission’s underlying decision is to move the point at which a competing video provider can gain access to wiring located behind sheet rock closer to the incumbent cable operator’s junction box, thereby facilitating competition between video providers to serve an MDU. This poses no negative impact on smaller entities. This decision may save competing video providers, including small entity providers, some costs in accessing wiring, as we have described *supra*.²⁷¹

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

20. 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.²⁷²

21. We believe that this *Report and Order* will have a positive impact on small entities. This determination will foster opportunities for competing MVPDs to provide service in MDUs by providing the needed support for amendment of our rules addressing circumstances under which the existing cable home run wiring in MDUs could be made available to alternative video service providers. This determination will also be helpful to small MDUs that compete for tenants because they will be able to provide the potential to offer multiple MVPD service to building subscribers. In addition, the interior of

²⁶⁸ 13 C.F.R. § 121.201, NAICS code 531311.

²⁶⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Real Estate and Rental and Leasing, Table 4, Revenue Size of Firms for the United States: 2002, NAICS code 531311 (issued November 2005).

²⁷⁰ *Id.* An additional 1,161 firms had annual sales of \$2.5 million or more.

²⁷¹ *See Order*, paras. 45-46.

²⁷² *See* 5 U.S.C. § 603.

the building structures will not be subject to damage because of access to home run wiring at the junction box. The alternative of determining otherwise on this issue would not be helpful to small entities.

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

22. None.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: Telecommunications Services Inside Wiring Customer Premises Equipment, CS Docket No. 95-184, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260, Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop, WC Docket No. 01-338, Report and Order and Declaratory Ruling

Today we take action to ensure that the pro-competitive, deregulatory goals of the 1996 Act are realized by removing economic and operational barriers to infrastructure investment in the communications market. Competition is ultimately the best protector of the consumer's interest. It is the best method of delivering the benefits of choice, innovation, and affordability to American consumers.

Consistent with my commitment to fostering a competitive marketplace and consumer choice, I have and will continue to encourage new entrants trying to break into both the voice and video markets. Today we take an important step to facilitate competition in both markets by addressing the ability of new competitors to use the internal wiring of both incumbent telephone and cable operators in a consistent fashion.

Specifically, we are granting Cox's petition for declaratory ruling regarding the scope of access to incumbent telephone companies' inside wire in apartment buildings. This decision allows a new entrant competing to provide telephone service to gain access to inside wiring, thereby facilitating competition between telephone providers to serve customers who live in apartment buildings.

Similarly, the Order also finds that a new entrant competing to provide cable service can gain access to inside cable wiring that is "physically inaccessible." This ruling thereby facilitates competition between cable providers to serve customers who live in apartment buildings.

The action we take today seeks to foster competition across different platforms and is competitively and technologically neutral. Importantly, we are seeking to support all new entrants and do not favor one technology or industry over another. Moreover, we achieve regulatory parity by applying a consistent regulatory framework across platforms. This Order demonstrates the Commission's commitment to ensure that all consumers—including those living in apartment buildings—benefit from competition in the provision of voice and video services.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Telecommunications Services Inside Wiring Customer Premises Equipment*, CS Docket No. 95-184, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, *Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, WC Docket No. 01-338, Report and Order and Declaratory Ruling

This item brings together two sets of inside wiring rules in the multi-tenant environment – the rules that apply to common carriers under Title II, and the rules that apply to cable operators under Title VI. But while the lineage of the rules is different, the underlying goal is very much the same – to bring the fruits of phone and cable competition to consumers who live and work in multi-unit buildings. The clarification of our inside wiring rules on both the telephone and cable sides address the legal and practical bottlenecks that may currently stand in the way of fledgling competition. I see no reason why Americans who happen to live or work in multi-unit buildings should have a narrower range of choices when it comes to phone, video and broadband services than Americans who live in single-family homes.

But while the underlying policies are important, I want to stress that they are not before us today. That is, the basic rules themselves are not at issue. Rather, this item deals with narrow implementation questions. On the phone side, the issue is the logistics of physically transferring the wiring from one provider to another. On the cable side, the issue is even narrower – whether wiring behind sheet rock is “physically inaccessible” under the specific standard set forth in our rules. In each case, today’s Order interprets our rules in a way that promotes competition and more choices for phone, internet and video customers. I am pleased to support it.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Telecommunications Services Inside Wiring Customer Premises Equipment*, CS Docket No. 95-184, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, *Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, WC Docket No. 01-338, Report and Order and Declaratory Ruling

We often hear about the challenges of providing “last mile” connections for competitive video, voice, and broadband services, but for residents of multi-tenant buildings (referred to as MDUs) another significant challenge is often that of the last 100 feet. I support this Order which clarifies the Commission’s rules for inside wiring used to serve MDUs because it should reduce the barriers of those last 100 feet and promote choice for customers of these buildings, including renters, homeowners, and small businesses.

Consumers are starved for more choice in video, telecommunications, and broadband services. Competition in these markets is critical as a means to constrain prices. I’ve often said that this Commission should do what it can within the scope of the law to facilitate increased competition because it benefits American consumers, promotes deployment of broadband networks and services, and enhances the free exchange of ideas in our democratic society. Americans living in MDUs – which often contain a disproportionate number of persons with disabilities, seniors, minorities and low income citizens – deserve to benefit from a choice of providers, too. Similarly, these citizens, like their counterparts in single unit dwellings, stand to benefit greatly from the expanded educational, career, and health opportunities that are available through broadband. Although this Order addresses two distinct legal frameworks – one for inside wiring owned by incumbent telephone companies, the other for inside wiring owned by cable system operators – the effect of both decisions is to advance the ability of new entrants to access multi-tenant buildings to provide competitive voice, video, and broadband offerings.

Even as we take these worthwhile steps, I must highlight my concern that our consumer notice rules for the use of cable inside wiring may be in need of an overhaul. Under our current rules, consumers or alternative cable providers have the option to purchase cable home wiring when the customer terminates its cable service. These rules, as written, contemplate a scenario in which only one service – a video service – could be provided over any given cable wire, and only one provider would seek to use that wire. However, technological innovations and cross-platform competition are now allowing multiple services to be provided over that same wire. Commenters have observed that, unless consumers only purchase bundles of services from either their cable or telephone company, customers may need to make decisions about which provider is entitled to use the existing wire, and which provider must install new inside wire. Just as many customer have been “slammed” by misleading long distance providers, it is easy to imagine customers being misled or confused by providers seeking to use inside wiring to provide their services. We should make revisiting our consumer notice rules a priority, so that customers do not find themselves charged expensive installation fees or unnecessarily locked into bundles.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: Telecommunications Services Inside Wiring Customer Premises Equipment, CS Docket No. 95-184, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260, Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop, WC Docket No. 01-338, Report and Order and Declaratory Ruling

To help create an environment where investment, innovation and competition can flourish, it is imperative that government treat like services alike, preferably with a light regulatory touch. Today's order is a pro-competitive, deregulatory decision and is our latest effort to achieve regulatory parity between incumbent telephone companies, incumbent cable companies and new entrants into the voice, video and data markets.

Today's action takes necessary steps to assure that new entrants seeking to compete with incumbent cable and telecommunications providers in multiple dwelling units (MDUs) and multi-unit premises have appropriate access to inside wiring.

In this Order, we conclude that wiring installed by incumbent video providers behind sheetrock is physically inaccessible under our rules for determining the demarcation point between home wiring and home run wiring. Our ruling will help spur competition among video distributors in MDUs by making existing cable wiring available to alternative providers at a point that is not physically difficult and costly to reach.

Similarly, by granting the Cox Oklahoma Telcom petition for declaratory ruling, we make certain that competitors have the right of direct access to incumbent local exchange carriers' unbundled inside wire subloops at the terminal block to a multi-unit premise. At the same time, all parties bear a responsibility to make sure their actions do not harm their competitors' facilities in multi-unit premises. Such anti-competitive and tortuous behavior will not be tolerated.

As I have said before, as regulators we need to make sure that competition for all services, and across all platforms does not stop, literally at the doorstep of multi-unit buildings across the country. I thank both the Media and Wireline Competition Bureaus for their work and I support this Order.