

APPENDIX E

Standard Protective Order and Declaration For Use in Section 628 Program Access Proceedings

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

In the Matter of)
) Docket No. _____
[Name of Proceeding])

PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 7.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

2. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 2.c of this Protective

Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that all or part of the information claimed as “Confidential Information” is not entitled to such treatment.

3. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, “CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE.” Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

6. Disclosure. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

a. Subject to Paragraph 7.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 7.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 7.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or any other person's business decisions that are or will be made in light of similar or corresponding information about a competitor.

8. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

9. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

10. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

11. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 12 are not removed.

13. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

14. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

15. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

16. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

17. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

18. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

Attachment A to Standard Protective Order

DECLARATION

In the Matter of)

[Name of Proceeding]) Docket No. _____

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) _____

(printed name) _____

(representing) _____

(title) _____

(employer) _____

(address) _____

(phone) _____

(date) _____

APPENDIX F

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA")¹ the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking* ("NPRM").² Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the document. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").³ In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.⁴

A. Need for, and Objectives of, the Proposed Rules

2. *Overview.* The *NPRM* considers Commission action with respect to seven issues. First, the Commission is considering whether it can establish a procedure that would shorten the term of the five-year extension of the exclusive contract prohibition if, after two years (*i.e.*, October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in a Designated Market Area.⁵ Second, the Commission is contemplating the extension of its program access rules to terrestrially delivered cable-affiliated programmers in order to facilitate competition in the video distribution market.⁶ Third, the Commission is considering whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a Direct Broadcast Satellite ("DBS") provider.⁷ Fourth, the *NPRM* is contemplating whether it may be appropriate for the Commission to preclude the practice of programmers to require multichannel video programming distributors ("MVPDs") to purchase and carry undesired programming in return for the ability to purchase and carry desired programming.⁸ The *NPRM* considers whether to instead require programmers to offer each of their programming services on a stand-alone basis to all MVPDs. Fifth, the *NPRM* contemplates action to address concerns raised by small and rural MVPDs regarding conditions imposed by programmers for access to content.⁹ The *NPRM* also contemplates revising the Commission's program access complaint procedures in two respects.¹⁰ First, the *NPRM* is considering whether to establish a process whereby a program access complainant may seek a temporary stay of any proposed changes to its existing programming contract pending resolution of a complaint.¹¹ Second, the

¹ 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 *See* 5 U.S.C. § 603.

³ *See* 5 U.S.C. § 603(a).

⁴ *See id.*

⁵ *See NPRM* ¶ 114.

⁶ *See id.* ¶ 115-117.

⁷ *See id.* ¶ 118.

⁸ *See id.* ¶¶ 119-132.

⁹ *See id.* ¶ 133.

¹⁰ *See id.* ¶¶ 134-137.

¹¹ *See id.* ¶ 134.

NPRM contemplates revising the Commission's program access complaint procedures by requiring parties to submit to the Commission, when requested, "final offer" proposals as part of the remedy phase of the complaint process.¹² Each of these issues is discussed in further detail below.

3. *Procedure for Shortening Term of Extension of Exclusive Contract Prohibition.* Section 628(c)(2)(D) of the Communications Act prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators unless the Commission determines that such exclusivity is in the public interest.¹³ In MB Docket 07-29, the Commission decided to extend this prohibition for five years, until October 5, 2012. In light of the five-year extension of the exclusivity ban, the *NPRM* considers whether it can establish a procedure that would shorten the term of the extension if, after two years (*i.e.*, October 5, 2009), a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA. The *NPRM* contemplates what this penetration level should be, whether two years or some other time frame is the appropriate period of time, and whether a market-by-market analysis is appropriate as both a legal and policy matter.

4. *Terrestrially Delivered Cable-Affiliated Programming.* Congress enacted the program access provisions contained in Section 628 of the Communications Act of 1934, as amended, as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").¹⁴ The program access provisions are intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing MVPDs to "satellite cable programming" and "satellite broadcast programming."¹⁵ The Commission has previously concluded that terrestrially delivered programming (*i.e.*, programming transmitted or retransmitted by satellite for direct reception by cable operators) is not covered by the definitions of "satellite cable programming" and "satellite broadcast programming."¹⁶ Thus, terrestrially delivered programming is not subject to the program access provisions. The Commission has previously found that cable operators have withheld terrestrially delivered cable-affiliated programming from competitive MVPDs and that this has resulted in a material adverse impact on competition in the video distribution market.¹⁷ To remedy this concern, the *NPRM*

¹² See *id.* ¶¶ 135-137.

¹³ 47 U.S.C. § 548(c)(2)(D).

¹⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

¹⁵ The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); see also 47 C.F.R. § 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. § 548(i)(3); see also C.F.R. § 76.1000(f).

¹⁶ See *DIRECTV, Inc. v. Comcast Corp. et al.*, 15 FCC Rcd 22802, 22807, ¶ 12 (2000); see also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, 12158, ¶ 73 (2002).

¹⁷ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8271, ¶ 149 (2006) ("*Adelphia Order*").

considers whether to extend the program access provisions to all terrestrially delivered cable-affiliated programming pursuant to various provisions of the Communications Act, such as Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), and 706.¹⁸ The Commission also seeks information as to whether cable operators, again with anti-competitive results, are shifting delivery of affiliated programming from satellite delivery to terrestrial delivery and whether such action is intended to evade the program access rules.

5. *Expanding the Exclusive Contract Prohibition to Non-Cable-Affiliated Programming.* The *NPRM* is considering whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider. To the extent that an MVPD meets the definition of a "cable operator" under the Communications Act, the exclusive contract prohibition in Section 628(c)(2)(D) already applies to its affiliated programming.¹⁹ Moreover, Section 628(j) of the Communications Act provides that any provision of Section 628, including the exclusive contract prohibition in Section 628(c)(2)(D), that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming.²⁰ Programming affiliated with other MVPDs, such as DBS providers, is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D). The *NPRM* is considering whether to extend the exclusive contract prohibition to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act.

6. *Tying.* Various MVPDs have raised concerns regarding the practice of some programmers to require MVPDs to purchase and carry undesired programming in return for the right to carry desired programming, referred to as "tying." When presented with a tying arrangement, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. The *NPRM* explains that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases. Given the problems associated with such tying arrangements, the *NPRM* is contemplating whether it may be appropriate for the Commission to preclude them and to instead require each programming service to be offered on a stand-alone basis to all MVPDs. The *NPRM* considers precluding the tying practices of broadcasters, satellite cable programmers, terrestrially delivered cable-affiliated programmers, and programmers that are affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent programmer.

7. *Concerns Raised by Small and Rural MVPDs.* Small and rural MVPDs have raised concerns regarding obstacles they face in trying to obtain access to programming which impede

¹⁸ See 47 U.S.C. § 154(i); 47 U.S.C. § 201(b); 47 U.S.C. § 303(r); 47 U.S.C. § 521(6); 47 U.S.C. § 532(g); 47 U.S.C. § 536(a); 47 U.S.C. § 548(b); 47 U.S.C. § 157 nt.

¹⁹ See Order ¶ 76.

²⁰ See *supra* note 377; see also 47 U.S.C. § 548(j).

competition in the video distribution marketplace. These obstacles include (i) restrictions on the use of shared headends for receiving content; (ii) requiring small and rural MVPDs to enter into mandatory non-disclosure agreements with programmers; (iii) requiring small and rural MVPDs to provide programmers with advertising slots; and (iv) mandating unwarranted security requirements. The *NPRM* contemplates Commission action to address these practices.

8. *Modification of Program Access Complaint Procedures.* The *NPRM* also contemplates revising the Commission's program access complaint procedures in two respects. First, the *NPRM* contemplates adding an arbitration-type step as part of the Commission's determination of an appropriate remedy for program access violations. The *NPRM* is considering whether, when feasible, the Commission should request, as part of its evaluation of the appropriate remedy to impose for program access violations, that the parties each submit their best "final offer" proposal for the rates, terms or conditions under review. The *NPRM* considers whether the Commission should have the discretion to adopt one of the parties' proposals as the remedy for the program access complaint. Second, the *NPRM* is considering whether to allow complainants to request a stay of any action or proposed action that would change an existing program contract that is the subject of a program access complaint, pending the resolution of the program access complaint. In the *NPRM*, the Commission agrees that the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints. The *NPRM* thus contemplates whether the issuance of temporary stay orders would encourage parties to resolve program access disputes and to make use of the Commission's complaint procedures when needed. The *NPRM* considers whether complainants should be required to formally request such relief from the Commission and establish that they are likely to prevail on the merits of their complaint; will suffer irreparable harm absent a stay; that the balance of harms to the parties favors grant of a stay; and that the public interest favors grant of the stay. The *NPRM* also considers whether, as part of a showing of irreparable harm, complainants may discuss the likelihood that subscribers would switch MVPDs to obtain the programming in dispute for a long enough period to make the strategy profitable to the respondent. The *NPRM* further contemplates whether these stays should be routinely granted when the facts support their issuance and that they will help to encourage settlement negotiations. The *NPRM* considers the nature of the stay, that is, whether both the complainant and the respondent will be subject to the stay order, and required to fulfill their respective obligations under the terms and conditions of the carriage contract in issue, while the stay is in effect. The *NPRM* also contemplates whether complainants will be permitted to drop the programming that is the subject of the program access dispute unless and until a request to dismiss the complaint with prejudice is granted by the Commission. The *NPRM* considers whether the length of the stay should be entirely discretionary. The *NPRM* also considers whether the Commission should include, as part of its final order resolving the complaint or resolving damages, adjustments to its remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous agreement.

9. In the *NPRM*, the Commission seeks comment on the foregoing issues. In particular, the *NPRM* invites comment on issues that may impact small entities, including MVPDs and programmers.

B. Legal Basis

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

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

11. 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.²¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²³ 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”).²⁴

12. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” (2007 NAISC Code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS Code 517110), Cable and Other Program Distribution (2002 NAISC Code 517510), and Internet Service Providers (2002 NAISC Code 518111).²⁵ The 2007 NAISC defines this category as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”²⁶ The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less.²⁷ According to Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) that operated for

²¹ 5 U.S.C. § 603(b)(3).

²² 5 U.S.C. § 601(6).

²³ 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.”

²⁴ 15 U.S.C. § 632.

²⁵ See “2007 NAICS U.S. Matched to 2002 NAICS U.S.” (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

²⁶ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁷ 13 C.F.R. § 121.201 (2002 NAICS code 517110).

the entire year.²⁸ Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) had less than 100 employees.²⁹ Thus, under this size standard, the majority of firms can be considered small.

13. *Cable and Other Program Distribution.* The 2002 NAICS 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.”³⁰ This category includes, among others, cable operators, direct broadcast satellite (“DBS”) services, home satellite dish (“HSD”) services, satellite master antenna television (“SMATV”) systems, and open video systems (“OVS”). 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.³¹ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.³² 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.³³ Thus, under this size standard, the majority of firms can be considered small.

14. *Cable System Operators (Rate Regulation Standard).* 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.³⁴ As of 2006, 7,916 cable operators qualify as small cable companies under this standard.³⁵ In addition,

²⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 2, Employment Size of Establishments for the United States: 2002 (2002 NAISC Code 517110; 2002 NAISC Code 517510; 2002 NAISC Code 518111) (issued November 2005).

²⁹ *Id.*

³⁰ U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>. As discussed above, the 2007 NAICS defines “Wired Telecommunications Carriers” (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See “2007 NAICS U.S. Matched to 2002 NAICS U.S.” (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

³¹ 13 C.F.R. § 121.201 (2002 NAICS code 517510).

³² 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).

³³ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

³⁴ 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 Rcd 7393, 7408 (1995).

³⁵ 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, available at <http://www.ncta.com/ContentView.aspx?contentId=73> (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.³⁶ Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.³⁷ Thus, under this standard, most cable systems are small.

15. *Cable System Operators (Telecom Act Standard)*. 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."³⁸ There are approximately 65.4 million cable subscribers in the United States today.³⁹ Accordingly, an operator serving fewer than 654,000 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.⁴⁰ Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.⁴¹ 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.⁴² 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.

16. *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.⁴³ This definition provides that a small entity is one with \$13.5 million or less in annual receipts.⁴⁴ Currently, three operators provide DBS

³⁶ 47 C.F.R. § 76.901(c).

³⁷ 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.

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

³⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 and 2617, Table B-1 (2006) ("12th Annual Report").

⁴⁰ 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).

⁴¹ 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs - NCTA.com, available at <http://www.ncta.com/ContentView.aspx?contentId=73> (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

⁴² 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).

⁴³ 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/m07-n02.xls>).

⁴⁴ 13 C.F.R. § 121.201 (2002 NAICS code 517510).

service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).⁴⁵ All three currently offer subscription services. Two of these three DBS operators, DIRECTV⁴⁶ and EchoStar Communications Corporation ("EchoStar"),⁴⁷ report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels.⁴⁸ Dominion does not report its annual revenues. 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 recognize 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.

17. *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.⁴⁹ Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.⁵⁰ 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 one million subscribers.⁵¹ 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.

18. *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

⁴⁵ See 12th Annual Report, 21 FCC Rcd at 2538-39, ¶ 70 and 2620, Table B-3.

⁴⁶ DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 15.72 million subscribers nationwide as of June 2005. See 12th Annual Report, 21 FCC Rcd at 2620, Table B-3.

⁴⁷ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and one of the four largest MVPDs, serving an estimated 12.27 million subscribers nationwide. *Id.*

⁴⁸ See *id.* at 2540, ¶ 73.

⁴⁹ 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁵⁰ See 12th Annual Report, 21 FCC Rcd at 2564-65, ¶ 130. 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, ¶ 90 (2004) ("10th Annual Report").

⁵¹ See 12th Annual Report, 21 FCC Rcd at 2564-65, ¶ 130.

all such companies generating \$13.5 million or less in revenue annually.⁵² 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 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent.⁵³ The Commission has no information regarding the annual revenue of the four C-Band distributors.

19. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).⁵⁴ MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)).⁵⁵ We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$13.5 million in annual receipts, appears applicable to MDS and ITFS.⁵⁶

20. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, 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.⁵⁷ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁵⁸ In the MDS auction, 67 bidders won 493 licenses.⁵⁹ Of the 67 auction winners, 61 claimed

⁵² 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁵³ See *12th Annual Report*, 21 FCC Rcd at 2617, Table B-1. HSD subscribership declined more than 33 percent between June 2003 and June 2004. See *id.*

⁵⁴ *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*, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004).

⁵⁵ See *id.*

⁵⁶ As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁵⁷ 47 C.F.R. § 21.961(b)(1) (2002).

⁵⁸ *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, Report and Order*, 10 FCC Rcd 9589 (1995).

⁵⁹ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

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.⁶⁰ 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, which includes all such entities that do not generate revenue in excess of \$13.5 million annually.⁶¹ 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.

21. 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).⁶² 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.

22. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁶³ The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$13.5 million in annual receipts, appears applicable to LMDS.⁶⁴ The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions,⁶⁵ 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.⁶⁶ 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

⁶⁰ 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 (2007 NAICS code 517910).

⁶¹ 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁶² 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.

⁶³ See *Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

⁶⁴ As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁶⁵ The Commission has held two LMDS auctions: Auction No. 17 and Auction No. 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).

⁶⁶ See *LMDS Order*, 12 FCC Rcd at 12545.

calendar years.⁶⁷ These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.⁶⁸ 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.

23. *Open Video Systems (“OVS”).* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁶⁹ OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with \$ 13.5 million or less in annual receipts.⁷⁰ The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.⁷¹ Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.⁷² Among BSPs, however, those operating under the OVS framework are in the minority.⁷³ As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers.⁷⁴ 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.

24. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for

⁶⁷ *Id.*

⁶⁸ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

⁶⁹ See 47 U.S.C. § 573.

⁷⁰ 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines “Wired Telecommunications Carriers” (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See “2007 NAICS U.S. Matched to 2002 NAICS U.S.” (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁷¹ See Current Filings for Certification of Open Video Systems, <http://www.fcc.gov/mb/ovs/csovsccr.html> (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, <http://www.fcc.gov/mb/ovs/csovsarc.html> (last visited July 25, 2007).

⁷² See 12th Annual Report, 21 FCC Rcd at 2617, Table B-1.

⁷³ OPASTCO reports that less than 8 percent of its members provide service under OVS certification. See *id.* at 2548-49, ¶ 88 n.336.

⁷⁴ See *id.* at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,500 subscribers as of June 2005. See *id.* The third largest BSP is Knology, which was serving approximately 179,800 subscribers as of June 2005. See *id.*

transmission to viewers.”⁷⁵ The SBA has developed a small business size standard for firms within this category, which is all firms with \$13.5 million or less in annual receipts.⁷⁶ According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.⁷⁷ Of this total, 217 firms had annual receipts of under \$10 million and 13 firms had annual receipts of \$10 million to \$24,999,999.⁷⁸ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

25. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”⁷⁹ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.⁸⁰ We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

26. *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.⁸¹ According to Commission data,⁸² 1,307 carriers have reported that they are engaged in the provision of incumbent 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.

27. *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

⁷⁵ U.S. Census Bureau, 2007 NAICS Definitions, “515210 Cable and Other Subscription Programming”; <http://www.census.gov/naics/2007/def/ND515210.HTM#N515210>.

⁷⁶ 13 C.F.R. § 121.201 (NAICS code 515210).

⁷⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

⁷⁸ *Id.* An additional 40 firms had annual receipts of \$25 million or more.

⁷⁹ 15 U.S.C. § 632.

⁸⁰ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

⁸¹ 13 C.F.R. § 121.201 (2007 NAICS code 517110).

⁸² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (February 2007) (“Trends in Telephone Service”). This source uses data that are current as of October 20, 2005.

standard, such a business is small if it has 1,500 or fewer employees.⁸³ According to Commission data,⁸⁴ 859 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.

28. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: “This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”⁸⁵ The SBA has developed a small business size standard for firms in this category: “A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.”⁸⁶ According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.⁸⁷ Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

29. *Television Broadcasting.* The SBA defines a television broadcast station as a small business if such station has no more than \$13.0 million in annual receipts.⁸⁸ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”⁸⁹ The

⁸³ 13 C.F.R. § 121.201 (2007 NAICS code 517110).

⁸⁴ See Trends in Telephone Service at Table 5.3.

⁸⁵ U.S. Census Bureau, 2007 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution”; <http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211>.

⁸⁶ 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

⁸⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122) (issued November 2005).

⁸⁸ See 13 C.F.R. § 121.201 (2007 NAICS Code 515120).

⁸⁹ U.S. Census Bureau, 2007 NAICS Definitions, “515120 Television Broadcasting”; <http://www.census.gov/naics/2007/def/ND515120.HTM#N515120>. This category description provides further that “these establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” *Id.* Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, 2007 NAICS code 512110 (<http://www.census.gov/naics/2007/def/ND512110.HTM#N512110>); Motion Picture and Video Distribution, 2007 NAICS Code 512120 (<http://www.census.gov/naics/2007/def/>) (continued....)

Commission has estimated the number of licensed commercial television stations to be 1,376.⁹⁰ According to Commission staff review of the BIA Financial Network, MAPro Television Database (“BIA”) on March 30, 2007, approximately 986 of an estimated 1,374 commercial television stations⁹¹ (or approximately 72 percent) have revenues of \$13.5 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁹² must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission has estimated the number of licensed NCE television stations to be 380.⁹³ The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

30. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

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

31. The rules ultimately adopted as a result of this *NPRM* may contain new or modified information collections. We anticipate that none of the changes would result in an increase to the reporting and recordkeeping requirements of small entities. We invite small entities to comment in response to the *NPRM*.

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

32. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (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

(Continued from previous page) _____
ND512120.HTM#N512120); Teleproduction and Other Post-Production Services, 2007 NAICS Code 512191 (<http://www.census.gov/naics/2007/def/ND512191.HTM#N512191>); and Other Motion Picture and Video Industries, 2007 NAICS Code 512199 (<http://www.census.gov/naics/2007/def/ND512199.HTM#N512199>).

⁹⁰ See News Release, “Broadcast Station Totals as of December 31, 2006,” 2007 WL 221575 (dated Jan. 26, 2007) (“*Broadcast Station Totals*”); also available at <http://www.fcc.gov/mb/>.

⁹¹ We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra* note 81; however, we are using BIA’s estimate for purposes of this revenue comparison.

⁹² “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

⁹³ See *Broadcast Station Totals*, *supra* note 81.

than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁹⁴ First, regarding the establishment of a procedure that would shorten the five-year term of the extension of the exclusive contract prohibition, the Commission may choose to establish such a procedure or, in the alternative, it may not choose to do so. Second, regarding the extension of the program access rules to terrestrially delivered cable-affiliated programmers, the Commission may choose to extend these rules to terrestrially delivered cable-affiliated programmers or, in the alternative, it may choose not to extend these rules to such programmers. Third, regarding expansion of the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, the Commission may choose to extend the exclusive contract prohibition to apply to such non-cable-affiliated programming or, in the alternative, it may choose not to extend the exclusive contract prohibition to such programming. Fourth, regarding the practice of programmers to engage in tying of desired with undesired programming, the Commission may choose to preclude all such tying arrangements or, in the alternative, it may choose not to preclude any such arrangements or, in the alternative, it may choose to preclude only certain tying arrangements. Fifth, with respect to concerns raised by small and rural MVPDs regarding conditions imposed by programmers for access to content, the Commission may choose to take action to address some or all of these concerns or, in the alternative, it may choose not to take action to address these concerns. Sixth, regarding the establishment of a process whereby a program access complainant may seek a temporary stay of any proposed changes to its existing programming contract pending resolution of the complaint, the Commission may establish such a process or, in the alternative, it may choose not to establish such a process. Seventh, regarding the requirement that parties submit to the Commission, when requested, "final offer" proposals as part of the remedy phase of the complaint process, the Commission may adopt such a requirement or, in the alternative, it may choose not to adopt such a requirement. We invite comment on the options the Commission is considering, or alternatives thereto as referenced above, and on any other alternatives commenters may wish to propose for the purpose of minimizing significant economic impact on smaller entities.

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

None.

⁹⁴ 5 U.S.C. § 603(c).

APPENDIX G

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rulemaking* in MB Docket No. 07-29 (hereinafter referred to as the *Notice*).² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The comments received are discussed below. This present Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.³

A. Need for, and Objectives of, the Rules Adopted

2. *Background.* Congress enacted the program access provisions contained in Section 628 of the Communications Act of 1934, as amended, as part of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Act”). Section 628 is intended to encourage entry into the multichannel video programming distribution (“MVPD”) market by existing or potential competitors to traditional cable operators by requiring cable operators to make available to MVPDs the programming necessary for them to become viable competitors.⁴ Specifically, this proceeding involves (i) Section 628(c)(2)(D), which prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators unless the Commission determines that such exclusivity is in the public interest;⁵ and (ii) the Commission’s procedures for resolving program access disputes under Section 628.

3. *Extension of Exclusive Contract Prohibition.* Section 628(c)(5) of the Communications Act directed that the exclusive contract prohibition in Section 628(c)(2)(D) would cease to be effective on October 5, 2002, unless the Commission found in a proceeding conducted between October 2001 and October 2002 that the prohibition “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.”⁶ In October 2001, the Commission issued a *Notice of Proposed Rulemaking* seeking comment on whether the exclusive contract prohibition continued to be “necessary” pursuant to the criteria set forth in Section 628(c)(5).⁷ In June 2002, the Commission issued a decision concluding that the exclusive contract prohibition continued to be “necessary” pursuant to

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

² See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252 (2007) (the “*Notice*”).

³ See 5 U.S.C. § 604. We note that, because our action with respect to the exclusive contract prohibition in Section 628(c)(2)(D) retains the status quo in this context, we could have certified our action under the RFA. See generally 5 U.S.C. § 605.

⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁵ 47 U.S.C. § 548(c)(2)(D).

⁶ 47 U.S.C. § 548(c)(5).

⁷ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 16 FCC Rcd 19074 (2001).

these criteria and therefore extended the prohibition for five years (*i.e.*, through October 5, 2007).⁸ The Commission also provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition, it would conduct another review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.⁹ We issued the *Notice* in February 2007 to initiate this review.¹⁰

4. The *Order* herein adopted retains for five years (until October 5, 2012) the prohibition on exclusive contracts for satellite cable programming and satellite broadcast programming between vertically integrated programming vendors and cable operators as set forth in Section 628(c)(2)(D) of the Communications Act and Section 76.1002(c)(2) of the Commission's rules.

5. In the *Order*, we analyze the changes that have occurred in the video programming and distribution markets since 2002 when we last decided that the exclusive contract prohibition continued to be necessary to preserve and protect competition. While the markets for both programming and distribution reflect some pro-competitive trends since 2002, we conclude that these developments are not sufficient to allow us to decide that the exclusive contract prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming. We then assess whether vertically integrated programmers today retain both the ability and incentive to favor their affiliated cable operators over nonaffiliated MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected. We conclude that vertically integrated programmers retain this ability and incentive. Thus, we find that the exclusive contract prohibition is necessary to preserve and protect competition and diversity in the distribution of video programming. We therefore extend the exclusive contract prohibition for five years subject to review during the last year of this extension period.

6. In the *Order*, we also reject proposals presented by some commenters to narrow the exclusive contract prohibition based on the status of the programming, the cable operator, or the competitive MVPD. We find that narrowing the prohibition in this manner is not supported by the Communications Act and would not promote competition. We also reject proposals presented by some commenters to expand the exclusive contract prohibition to non-cable-affiliated programming and unaffiliated programming. We find that expanding the prohibition is not supported by the Communications Act and that there is no record evidence to support such an expansion of the prohibition. We also considered the possibility of allowing the exclusive contract prohibition to sunset. Because we conclude that the exclusive contract prohibition is necessary to preserve and protect competition and diversity in the video distribution market, we decide not to allow the exclusive contract prohibition to sunset. The decision to retain the exclusive contract prohibition will facilitate competition in the video distribution market, thereby benefiting various competitive MVPDs including those that are smaller entities. Therefore, we conclude that our decision to retain the exclusive contract prohibition set forth in Section 628(c)(2)(D) benefits smaller entities as well as larger entities.

⁸ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124 (2002) (“2002 Extension Order”); see also 47 C.F.R. § 76.1002(c)(6).

⁹ See *2002 Extension Order*, 17 FCC Rcd at 12161, ¶ 80.

¹⁰ See *Notice*, 22 FCC Rcd 4252 (2007).

7. *Modification of Program Access Complaint Procedures.* The Commission's rules provide that any MVPD aggrieved by conduct that it believes constitutes a violation of Section 628 and the Commission's program access rules may file a complaint at the Commission.¹¹ In the *Notice*, we considered whether and how our procedures for resolving program access disputes under Section 628 should be modified.¹² Among other things, we considered (i) whether specific time limits on the Commission, the parties, or others would promote a speedy and just resolution of these disputes; (ii) whether our rules governing discovery and protection of confidential information are adequate; and (iii) whether the Commission should adopt alternative procedures or remedies such as mandatory standstill agreements and arbitration.¹³

8. In the *Order*, to facilitate the resolution of program access complaints, we modify our procedures for resolving such complaints by (i) codifying the requirements that a respondent in a program access complaint proceeding who expressly relies upon a document in asserting a defense must include the document as part of its answer; (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; (iii) codifying the Commission's authority to issue default orders granting a complaint if the respondent fails to comply with discovery requests; and (iv) allowing parties to a program access complaint proceeding to voluntarily engage in alternative dispute resolution, including commercial arbitration, during which time Commission action on the complaint will be suspended. We also retain our goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases.

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

9. In its Comments on the IRFA, the Office of Advocacy of the United States Small Business Administration ("SBA Office of Advocacy") claims that the Commission's IRFA in this proceeding was inadequate because it allegedly (i) did not contain a complete economic analysis of the impact of a decision to allow the exclusive contract prohibition to sunset on the small entities listed in the IRFA; (ii) failed to consider alternatives to allowing the prohibition to sunset that will achieve the Commission's goals while minimizing burdens on small entities; and (iii) failed to collect data on the impact of a sunset of the prohibition on small businesses that offer video programming to customers, such as sports bars, small entities in the hospitality industry, and certain housing developments.¹⁴ The SBA Office of Advocacy argues that without access to video content demanded by subscribers, small providers of video services will not be able to compete in the MVPD market.¹⁵ Accordingly, the SBA Office of Advocacy urges a three-year extension of the exclusive contract prohibition.¹⁶ Although not filed specifically in response to the IRFA, comments were filed in response to the *Notice* by small competitive MVPDs and small cable operators that urged the Commission to retain the exclusive contract

¹¹ 47 C.F.R. §§ 76.7 and 76.1003.

¹² See *Notice*, 22 FCC Rcd at 4259-4260, ¶¶ 13-16.

¹³ See *id.*

¹⁴ See SBA Office of Advocacy Comments at 4-7.

¹⁵ See *id.* at 4.

¹⁶ See *id.* at 6.

prohibition and to revise the procedures for resolving program access complaints. These commenters argued that they will be unable to viably compete in the video distribution market if denied access to vertically integrated programming. Moreover, they argued that the current program access complaint process is costly and time-consuming such that it makes it impracticable for small carriers to pursue filing a program access complaint. Our response to all such comments is contained in paragraph 31 *infra*.

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

10. 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.¹⁷ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁸ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁹ 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”).²⁰

11. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” (2007 NAISC Code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS Code 517110), Cable and Other Program Distribution (2002 NAISC Code 517510), and Internet Service Providers (2002 NAISC Code 518111).²¹ The 2007 NAISC defines this category as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”²² The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less.²³ According to

¹⁷ 5 U.S.C. § 603(b)(3).

¹⁸ 5 U.S.C. § 601(6).

¹⁹ 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.”

²⁰ 15 U.S.C. § 632.

²¹ See “2007 NAICS U.S. Matched to 2002 NAICS U.S.” (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

²² U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²³ 13 C.F.R. § 121.201 (2002 NAICS code 517110).

Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) that operated for the entire year.²⁴ Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) had less than 100 employees.²⁵ Thus, under this size standard, the majority of firms can be considered small.

12. *Cable and Other Program Distribution.* The 2002 NAICS 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.”²⁶ This category includes, among others, cable operators, direct broadcast satellite (“DBS”) services, home satellite dish (“HSD”) services, satellite master antenna television (“SMATV”) systems, and open video systems (“OVS”). 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.²⁷ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.²⁸ 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.²⁹ Thus, under this size standard, the majority of firms can be considered small.

13. *Cable System Operators (Rate Regulation Standard).* 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.³⁰ As of 2006, 7,916 cable operators qualify as small cable companies under this standard.³¹ In addition,

²⁴ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 2, Employment Size of Establishments for the United States: 2002 (2002 NAISC Code 517110; 2002 NAISC Code 517510; 2002 NAISC Code 518111) (issued November 2005).

²⁵ *Id.*

²⁶ U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>. As discussed above, the 2007 NAICS defines “Wired Telecommunications Carriers” (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See “2007 NAICS U.S. Matched to 2002 NAICS U.S.” (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

²⁷ 13 C.F.R. § 121.201 (2002 NAICS code 517510).

²⁸ 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).

²⁹ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

³⁰ 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 Rcd 7393, 7408 (1995).

³¹ 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, available at <http://www.ncta.com/ContentView.aspx?contentId=73> (last visited September 6, 2007). We arrived at (continued....)