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

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	
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	)	
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NOTICE OF PROPOSED RULE MAKING

Adopted: March 2, 2007 **Released: June 15, 2007**

Comment Date: [45 days after date of publication in the Federal Register]
Reply Comment Date: [65 days after date of publication in the Federal Register]

By the Commission: Commissioners Copps and Adelstein issuing separate statements.

I. INTRODUCTION

1. Our leased access and program carriage rules were topics of significant focus in our review of the Adelphia transactions last year. As noted in the *Adelphia Order* and in various Commissioners' statements when we adopted that order, in the context of our review of those transactions, the Commission determined to review the program carriage complaint processes and initiate a notice of proposed rulemaking regarding leased access.[1] In this Notice of Proposed Rulemaking ("*NPRM*") we initiate these reviews.

II. COMMERCIAL LEASED ACCESS RULES

A. Background

2. The commercial leased access ("leased access") requirements are set forth in Section 612 of

[1] *See, e.g., 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*, MB Docket No. 05-192, FCC 06-105, 21 FCC Rcd 8203, 8277 at ¶ 165 (rel. July 21, 2006) ("*Adelphia Order*"); Separate Statements of Commissioners Robert M. McDowell, Michael J. Copps, and Jonathan S. Adelstein. *See also, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket No. 05-255, 21 FCC Rcd 2503, 2507 ¶ 12, 2512-2515 ¶¶ 31-36 (2006). *See also, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 06-189 at ¶¶ 15, 20 (rel. October 20, 2006) and comments filed therein (*e.g.*, The America Channel, Black Television News Network and Center for Creative Voices in Media). Approximately 70 leased access complaints have been filed since our 1997 rule changes.

the Communications Act of 1934, as amended ("Communications Act").[2] The leased access rules require a cable operator to set aside channel capacity for commercial use by video programmers unaffiliated with the operator. The statutory framework for commercial leased access was first established by the Cable Communications Policy Act of 1984.[3]

3. Congress established leased access set-aside requirements in proportion to a system's total activated channel capacity. Cable operators with fewer than 36 channels must set aside channels for commercial use only if required to do so by a franchise agreement in effect as of the enactment of Section 612. Operators with 36 to 54 activated channels must set aside 10 percent of those channels not otherwise required for use or prohibited from use by federal law or regulation. Operators with 55 to 100 activated channels must set aside 15 percent of those channels not otherwise required for use or prohibited from use by federal law or regulation. Cable operators with more than 100 activated channels must designate 15 percent of such channels for commercial use. Cable operators are not required to remove services that were being provided on July 1, 1984 in order to comply with the statute.[4]

4. In the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress broadened Section 612's explicit statutory purpose to include the promotion of "competition in the delivery of diverse sources of video programming," and required the Commission: (a) to "determine the maximum reasonable rates that a cable operator may establish . . . for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use"; (b) to "establish reasonable terms and conditions for such use, including those for billing and collection"; and (c) to "establish procedures for the expedited resolution of disputes concerning rates or carriage . . .".[5] Congress also required that the Commission's rules not adversely affect the operation, financial condition, or market development of the cable system.[6]

5. In implementing the statutory directive to determine maximum reasonable rates for leased access, the Commission adopted a maximum rate formula for full-time carriage on programming tiers based on the "average implicit fee" that other programmers are implicitly charged for carriage to permit the operator to recover its costs and earn a profit.[7] The Commission also adopted a maximum rate for a

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[2] The Commission adopted leased access rules in its *Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 5681 (1993); *Order on Reconsideration of the First Report and Order and Further Notice of Rulemaking*, 11 FCC Rcd 16933 (1996); and *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd 5267 (1997) ("*Second Report and Order*").

[3] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 *et seq.*

[4] Communications Act §§ 612(a), 612(b)(1), 47 U.S.C. §§ 532(a), 532(b)(1).

[5] Communications Act § 612(c)(4)(A)(i), (ii), (iii), 47 U.S.C. § 532(c)(4)(A)(i), (ii), (iii).

[6] 47 U.S.C. § 532(c)(1).

[7] Upon request, cable operators generally must place leased access programmers on a tier that has subscriber penetration of more than 50 percent. 47 C.F.R. § 76.971(a)(1). To determine the average implicit fee for a full-time channel on a tier with a subscriber penetration over 50 percent, an operator first calculates the total amount it receives in subscriber revenue per month for the programming on all such tiers, and then subtracts the total amount it pays in programming costs per month for such tiers (the "total implicit fee calculation"). A weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s) is used to determine how much of the total will be recovered from a particular tier. To calculate the average implicit fee per channel, the implicit fee (continued....)

la carte services based on the "highest implicit fee" that other a la carte services implicitly pay, and a prorated rate for part-time programming.[8] The Commission's rate rules were upheld by the D.C. Circuit Court of Appeals.[9]

6. Cable operators may use any unused channel capacity designated for leased access until an unaffiliated programmer obtains use of the channel capacity pursuant to a written agreement.[10] Cable operators may use up to 33 percent of the channel capacity designated for leased access for qualified minority or educational programming sources, whether or not the source is affiliated with the cable operator.[11] In addition, cable operators may impose reasonable insurance requirements and must provide the minimal level of technical support necessary for users to present their material on cable systems.[12] Cable operators may not unreasonably refuse to cooperate with a leased access user in order to prevent that user from obtaining channel capacity.[13]

B. Issues for Comment

7. As an initial matter, we seek comment on the current status of leased access programming. Do programmers actually use leased access channels? To what extent are they able to use the set-aside channels? How many leased access channels do cable operators provide? Which programmers are using those channels? Are programmers using the channels on a full-time or part-time basis? For what purposes are leased access channels used? Do cable operators turn down requests for leased access? If so, why? To what extent and for what purposes do the cable operators use the channels for themselves? Does the cable operators' option to use the channels contribute to programmers' lack of use of the set-aside channels? Are the terms in leased access agreements the same or similar to those that the cable operator has with its programmers? Do cable operators impose different requirements regarding, for example, insurance or termination provisions? If so, why? We also seek comment on the effectiveness of leased access enforcement. We seek comment specifically on the costs associated with the complaint or other dispute resolution processes, as well as whether there should be a defined time period for cable operators to respond to leased access requests or other aspects of the enforcement process. The Commission's rules allow programmers to file complaints to challenge a cable operator's rates before the Commission.[14] To what extent do programmers make use of this provision to challenge rates that they

(Continued from previous page)
for the tier is divided by the number of channels on the tier. The final result is the maximum rate per month that the operator may charge the leased access programmer for a full-time channel on that tier. Where the leased access programmer agrees to carriage on a tier with less than 50 percent penetration, the average implicit fee is determined using subscriber revenues and programming costs for only that tier. *Second Report and Order*, 12 FCC Rcd 5267, 5283 (1997). *See also*, 47 C.F.R. § 76.970.

[8] *See* 47 C.F.R. §§ 76.970 - 76.977. Section 612 is codified at 47 U.S.C § 532.

[9] *See ValueVision, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).

[10] 47 U.S.C. § 532(b)(4).

[11] 47 C.F.R. § 76.977.

[12] 47 C.F.R. § 76.971 (d); 47 C.F.R. § 76.971 (c).

[13] 47 C.F.R. § 76.971(c).

[14] 47 C.F.R. §76.975(b).

believe violate the Commission's regulations? Is the process too burdensome? Is it effective? Should there be changes to the complaint process, such as an expedited complaint process before the Commission? The Commission's rules also require a cable operator to respond to a programmer's request for rate information within 15 calendar days.[15] Are cable operators responsive to programmer's requests? When they respond, do they include all required information?

8. In addition, we seek comment on the Commission's rate formula for leased access. If a commenter seeks modifications, we seek comment on the specific methodologies that the Commission should consider and how such methodologies would better serve Congress' statutory objectives in a legally sustainable way.

9. Our leased access rules involve calculations based on activated channels and location. Because of the development of digital signal processing and signal compression technologies, the number of video services carried on a cable system may no longer be a simple calculation and may change dynamically over time depending, for instance, on the degree of compression and whether the programming is carried in a standard or high definition digital format.[16] We seek comment on whether and how the digital transition affects channel capacity and channel count for purposes of the calculation of carriage obligations and average rates. With changes in technology, have cable operators updated their terms of access to facilities? For instance, do they allow programmers to submit video to the operator via the Internet?

10. Our existing rules provide that "cable operators shall place leased access programmers that request access to a tier actually used by most subscribers on any tier that has a subscriber penetration of more than 50 percent, unless there are technical or other compelling reasons for denying access to such tiers."[17] Should we change this rule to give leased access programmers the ability to request carriage on a specific tier? For example, would it promote leased access programming in the manner intended by Congress if providers of suitable programming could demand inclusion on a family tier? Alternatively, is there evidence that cable operators seek to place leased access programming on digital tiers or other less popular tiers, when leased access programmers would prefer the basic tier? Also, cable operators are "permitted to make reasonable selections when placing leased access channels at specific channel

[15] 47 C.F.R. §76.970(i)(1).

[16] In calculating a system's capacity for purposes of 47 U.S.C. § 532 (b), "activated channels" includes all commercial and noncommercial broadcast, public, educational, governmental, and leased access channels carried. *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, and Anti-trafficking Provisions*, 8 FCC Rcd 8565, 8588-89 ¶ 54 (1993). The Commission has also defined the term "activated channel" in the digital must carry context. *See Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999, Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, 16 FCC Rcd 2598, 2614-16 ¶¶ 39-41 (2001), *Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516 (2005). (Channel capacity can be calculated by taking the total usable activated channel capacity of the system in megahertz and dividing it by three. One third of this capacity is the limit on the amount of system spectrum that a cable operator must make available for commercial broadcast signal carriage purposes.).

[17] 47 C.F.R. § 76.971(a).

locations."[18] We seek comment on whether cable operators have acted reasonably in this regard and, if not, what specific reform measures should the Commission consider? On which service tier do leased access programs appear, and on which channel within the tier do cable operators place the programming? Finally, should leased access apply to video-on-demand ("VOD") or other technologies that do not fit a traditional "tier"?

11. We seek comment on other ways that advances in technology or marketplace developments should affect our leased access rules. In particular, we seek comment on whether and how the deployment of advanced digital services (*e.g.*, interactive electronic programming guides, addressable digital set-top boxes, VOD), should inform our review. Finally, we seek comment on any other issues that would properly inform our leased access inquiry.

III. PROGRAM CARRIAGE RULES

A. Background

12. Section 616 of the Communications Act directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors ("MVPD") and video programming vendors."[19] The Commission's program carriage rules prohibit a cable operator or other MVPD from requiring "a financial interest in any program service as a condition for carriage" of such service,[20] from coercing a programmer to grant "exclusive" carriage rights,[21] or from engaging in conduct that unreasonably restrains "the ability of an unaffiliated programming vendor to compete fairly" by discriminating against such vendor "on the basis of affiliation or nonaffiliation."[22]

13. In addition to establishing rules governing program carriage, the Commission has established procedures for the review of program carriage complaints and has established appropriate penalties and remedies. These procedures generally provide for resolution of a complaint on the basis of a complaint, answer, and reply.[23] However, the Commission has recognized that the staff may be unable in some cases to resolve carriage agreement complaints on the sole basis of a written record:[24] "resolution of Section 616 complaints necessarily [would] focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred."[25] In such cases, if the staff determines that the complainant has established a *prima facie*

[18] 47 C.F.R. §76.971(2).

[19] 47 U.S.C. § 536. Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The Commission's cable program carriage rules are set forth at 47 C.F.R. §§ 76.1300-76.1302.

[20] 47 C.F.R. § 76.1301(a).

[21] 47 C.F.R. § 76.1301(b).

[22] 47 C.F.R. § 76.1301(c).

[23] *See* 47 C.F.R. § 76.1302(c), (d), (e).

[24] *Second Report and Order*, 9 FCC Rcd at 2652.

[25] *Id.* at 2648.

case but that "disposition of the complaint would require the resolution of factual disputes or other extensive discovery," the staff is to notify the parties that they have the option of choosing Alternative Dispute Resolution ("ADR") or an adjudicatory hearing before an Administrative Law Judge ("ALJ").[26] In terms of appropriate relief for violations of the program carriage rules, the Commission has stated that the appropriate relief will be determined on a case-by-case basis, and that appropriate remedies and sanctions may include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.[27]

B. Issues for Comment

14. We seek comment on whether and how our processes for resolving carriage disputes should be modified. Currently, our rules provide that any complainant alleging a violation of Section 616(a)(3)'s prohibition on discrimination must demonstrate that the alleged discrimination is "on the basis of affiliation or nonaffiliation" of a vendor, and that "the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly."[28] If, after reviewing the pleadings and supporting documentation filed by the parties, the Commission staff finds that the complainant has established a *prima facie* case under Section 76.1301(c), the staff may direct an ALJ to hold a hearing, issue a recommended decision on the facts underlying the discrimination claim and a recommended remedy, if necessary, and then return the matter to the Commission.[29] We seek comment on these procedures, and, in particular, whether the elements of a *prima facie* case should be clarified.

15. In the *TCR Order*, the Commission established time lines for the resolution of the program carriage complaint in issue.[30] We seek comment on the effectiveness of this mechanism and whether similar changes or additional time limits would improve the existing process. For instance, we seek comment on whether specific time limits on the Commission, cable operators, or others would promote a speedy and just resolution of these disputes.

16. Finally, we seek comment on whether the Commission should adopt rules to address the complaint process itself. On the one hand, we seek comment on whether we should adopt additional rules to protect programmers from potential retaliation if they file a complaint. On the other hand, we seek comment on whether the existing penalties for frivolous program carriage complaints are appropriate or should be modified.

17. Independent programmers assert that many cable operators require them to negotiate for carriage on a system-by-system basis, even while they negotiate national carriage agreements with other

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[26] *Id.* at 2656.

[27] *Id.* at 2653.

[28] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2648 (1993); 47 C.F.R. § 76.1302(c)(3).

[29] 47 C.F.R. § 76.1302; 47 C.F.R. § 76.7(g).

[30] *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation*, MB Docket No. 06-148, FCC 06-111 (rel. July 31, 2006) ("*TCR Order*") at ¶ 13, *et seq.*

programmers. We seek comment on whether the Commission should adopt rules that expressly allow independent programmers to seek nationwide access directly from multiple system cable operators and, if so, how such a process would operate.

18. Finally, we seek comment on any other issues that would properly inform our program carriage inquiry.

IV. ARBITRATION

19. We seek comment on the application of arbitration procedures to resolve leased access and program carriage disputes. Should the Commission establish arbitration procedures specifically for these types of complaints? If so, what procedures should be established? Should such procedures be elective or mandatory, and who should bear the costs of arbitration? What standard of review should the Commission employ in reviewing an arbitration decision if arbitration is required or otherwise used?

V. ADMINISTRATIVE MATTERS

A. *Ex Parte* Rules

20. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

B. Comment Information

21. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

22. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

23. Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries

must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

24. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

C. Additional Information

25. For additional information on this proceeding, please contact Katie Costello, Policy Division, Media Bureau at (202) 418-2233.

D. Initial Paperwork Reduction Act Analysis

26. This *Notice of Proposed Rulemaking* ("*NPRM*") contains proposed modifications to information collection requirements subject to the Paperwork Reduction Act of 1995. As part of our continuing effort to reduce paperwork burdens, we invite OMB, the general public, and other Federal agencies to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days after publication of this *Notice of Proposed Rule Making* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden on small business concerns with fewer than 25 employees." In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 Twelfth Street, S.W., Room 1-C823, Washington, DC 20554, or via the Internet to Cathy.Williams@fcc.gov and to Kristy L. LaLonde, OMB Desk Officer, 10234 NEOB, 725 17th Street, NW, Washington, DC 20503 or via the Internet to Kristy L. LaLonde@omb.eop.gov, or via fax at 202-395-5167.

E. Initial Regulatory Flexibility Analysis

27. As required by the Regulatory Flexibility Act,[31] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *NPRM*. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *NPRM*, and they should have a separate and distinct heading designating them as responses to the IRFA.

[31] *See* 5 U.S.C. § 603.

VI. ORDERING CLAUSES

28. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 4(i), 303, 612 and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 532 and 536, **NOTICE IS HEREBY GIVEN** of the proposals described in this Notice of Proposed Rulemaking.

29. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

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 of the policies and rules proposed in this *Notice of Proposed Rulemaking* ("*Notice*") on a substantial number of small entities.[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 on the Notice indicated on the first page of this document. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.[4]

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

2. The focus of the leased access and program carriage provisions contained in Sections 612 and 616 of the Communications Act of 1934, as amended, adopted as part of the Cable Television Consumer Protection and Competition Act of 1992, was to promote competition and diversity in the video programming marketplace and prevent cable systems, other MVPDs and affiliated programmers from preventing fair competition in video programming distribution through various practices. This proceeding requests comments on proposed changes to the Commission's rules to further enhance the Congressional objectives and respond to complaints that the rules are ineffective. Ultimately, these policies and rules are geared to the benefit of independent programmers, many of which may be small entities.

B. Legal Basis

3. The authority for the action proposed in the rulemaking is contained in Section 4(i), 303, 612 and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 532 and 536.

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

4. 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.[5] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small

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[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] 5 U.S.C. § 603(b)(3).

organization," and "small governmental jurisdiction."[6] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[7] 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").[8]

5. *Cable and Other Program Distribution.* The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating $12.5 million or less in revenue annually.[9] This category includes, among others, cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, subscription television services and open video systems. According to Census Bureau data for 1997, there were 1,311 firms in this category, total, that had operated for the entire year.[10] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. We note, however, that the rules at issue in this Notice only apply at this time to cable operators, and not other MVPD providers.[11]

6. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[12] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[13] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to

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[6] 5 U.S.C. § 601(6).

[7] 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."

[8] 15 U.S.C. § 632.

[9] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517510.

[10] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[11] The *Order* under review in this proceeding includes a Further Notice of Proposed Rulemaking and IRFA to determine whether the definition of "commercial matter", a matter at issue in the proceeding, should apply to Direct Broadcast Satellite service providers. *See Order* at 22967 and Appendix D.

[12] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

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

be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

7. *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."[14] The Commission has determined that there are 67,700,000 subscribers in the United States.[15] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[16] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[17] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[18] and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

8. *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.[19] This definition provides that a small entity is one with $12.5 million or less in annual receipts.[20] Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DIRECTV[21] and EchoStar Communications Corporation ("EchoStar"),[22] report annual revenues that are in excess of the threshold

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[14] 47 U.S.C. § 543(m)(2).

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

[16] 47 C.F.R. § 76.901(f).

[17] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

[18] 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).

[19] 13 C.F.R. § 121.201, NAICS code 517510.

[20] *Id.*

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

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

for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of $12.5 million, and thus does not qualify as a small business.[23] The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.[24] The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated $12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

9. *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 $12.5 million or less in annual receipts.[25] Currently, there are approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[26] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers.[27] 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 PCOs qualify as small entities.

10. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in revenue annually.[28] 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,

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[23] Rainbow DBS, which provides service under the brand name VOOM, reported an estimated 25,000 subscribers. *Id.*

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

[25] 13 C.F.R. § 121.201, NAICS code 517510.

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

[27] *See 2005 Cable Competition Report*, 20 FCC Rcd at 2816, ¶¶ 110.

[28] 13 C.F.F. § 121.201, NAICS code 517510.

which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003 and June 2004, HSD subscribership fell from 502,191 subscribers to 335,766 subscribers, a decline of more than 33 percent.[29] The Commission has no information regarding the annual revenue of the four C-Band distributors.

11. *Wireless Cable Systems.* Wireless cable systems use the Multipoint Distribution Service ("MDS")[30] and Instructional Television Fixed Service ("ITFS")[31] frequencies in the 2 GHz band to transmit video programming and provide broadband services to subscribers. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[32] As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $12.5 million in annual receipts, appears applicable to MDS, ITFS and LMDS. In addition, the Commission has defined small MDS and LMDS entities in the context of Commission license auctions.

12. In the 1996 MDS auction,[33] 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.[34] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[35] In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain

[29] *See 2005 Cable Competition Report*, 20 FCC Rcd at 2798, ¶ 64. HSD subscribership declined more than 28 percent between June 2002 and June 2003. *See 2004 Cable Competition Report*, 19 FCC Rcd at 1654-55, ¶¶ 73-4.

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

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

[32] *See* Local Multipoint Distribution Service, 12 FCC Rcd 12545 (1997) ("*LMDS Order*").

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

[34] 47 C.F.R. § 21.961(b)(1).

[35] *See ITFS Order*, 10 FCC Rcd at 9589.

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.[36] MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $12.5 million annually. Therefore, we estimate that there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

13. While SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.[37] There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

14. In the 1998 and 1999 LMDS auctions,[38] 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.[39] Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years.[40] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[41] 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.

15. *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,[42] OVS falls within the SBA-recognized definition of Cable and Other Program

[36] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of $12.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

[37] 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.

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

[39] *See LMDS Order,* 12 FCC Rcd at 12545.

[40] *Id.*

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

[42] *See* 47 U.S.C. § 573.

Distribution Services, which provides that a small entity is one with $12.5 million or less in annual receipts.[43] The Commission has certified 25 OVS operators with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services.[44] As of June 2003, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.[45] Among BSPs, however, those operating under the OVS framework are in the minority, with approximately eight percent operating with an OVS certification.[46] Serving approximately 460,000 of these subscribers, Affiliates of Residential Communications Network, Inc. ("RCN") is currently the largest BSP and 11th largest MVPD.[47] 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.

16. *Program Producers and Distributors.* The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will use the SBA classifications of Motion Picture and Video Tape Production (NAICS Code 51211),[48] Motion Picture and Video Tape Distribution (NAICS Code 42199),[49] and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71132, 51229, 53249).[50] These SBA definitions provide that a small entity in the cable television programming industry is an entity with $21.5 million or less in annual receipts for NAICS Codes 56131, 51211, 42199, and 51212, and $5 million or less in annual receipts for NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71131, 71132, 51229, and 53249.[51] Census Bureau data indicate the

[43] 13 C.F.R. § 121.201, NAICS code 517510.

[44] *See 2005 Cable Competition Report*, 20 FCC Rcd at 2802, ¶ 71.

[45] *See 2004 Cable Competition Report*, 19 FCC Rcd at 1659-60, ¶¶ 80-1.

[46] *See 2005 Cable Competition Report*, 20 FCC Rcd at 2802, ¶ 71.

[47] *Id.* WideOpenWest is the second largest BSP and 15th largest MVPD, with cable systems serving about 288,000 subscribers as of September 2003. The third largest BSP is Knology, which currently serves approximately 174,957 subscribers as of June 2004; *see 2005 Cable Competition Report*, 20 FCC Rcd at 2802, ¶ 71.

[48] Establishments primarily engaged in the production of theatrical and nontheatrical motion pictures and video tapes for exhibition or sale, including educational, industrial, and religious films. Included in the industry are establishments engaged in both production and distribution. Such producers of live radio and television programs are classified in NAICS Code 51211.

[49] Such establishments primarily engaged in the distribution (rental or sale) of theatrical and nontheatrical motion picture films or in the distribution of video tapes and disks, except to the general public. Motion pictures and video tape distribution are classified in NAICS Codes 42199 and 51212.

[50] Such establishments primarily engaged in providing live theatrical presentations, such as road companies and summer theaters, including producers of live television programs. Such producers of live theatrical presentation are classified in NAICS Codes 56131, 71111, 71141, 561599, 71151, 71112, 71131, 51229, and 53249.

[51] 13 C.F.R. § 121.201.

following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (NAICS Code 51211), and that 6,987 of these firms had $16.999 million or less in annual receipts and 7,002 of these firms had $24.999 million or less in annual receipts;[52] (b) there were 1,139 firms classified as Motion Picture and Video Tape Distribution (NAICS Codes 42199 and 51212), and 1007 of these firms had $16.999 million or less in annual receipts and 1013 of these firms had $24.999 million or less in annual receipts; and (c) there were 5,671 firms in the United States classified as Theatrical Producers and Services (NAICS Codes 56131, 71111, 71141, 561599, 71151, 51229, and 53249), and 5627 of these firms had $4.999 million or less in annual receipts.[53]

17. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated. Thus, we estimate that our rules may affect approximately 6,987 small entities primarily engaged in the production and distribution of taped cable television programs and 5,627 small producers of live programs that may be affected by the rules adopted in this proceeding.

18. 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."[54] 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.[55]

19. *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.[56] According to Commission data,[57] 1,303 carriers have reported that they are engaged in the provision of incumbent

[52] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC 7812, (U.S. Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration) ("SBA 1992 Census Report"). Because the Census data do not include a category for $21.5 million, we have reported the closest increment below and above the $21.5 million threshold. There is a difference of 15 firms between the $16,999 and $24,999 million annual receipt categories. It is possible that these 15 firms could have annual receipts of $21.5 million or less and would therefore be classified as small businesses.

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

[54] 15 U.S.C. § 632.

[55] 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).

[56] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[57] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (June 2005) ("Trends in Telephone Service"). This source uses data that are current as of October 1, 2004.

local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[58]

20. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[59] According to Commission data,[60] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 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 that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[61]

21. *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."[62] 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

[58] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27, 891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[59] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[60] "Trends in Telephone Service" at Table 5.3.

[61] *See supra* note 35.

[62] U.S. Census Bureau, 2002 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/epcd/naics02/def/NDEF221.HTM.

for the preceding fiscal year did not exceed 4 million megawatt hours."[63] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[64] 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.

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

22. The *NPRM* seeks comment on a range of potential changes to existing reporting, recordkeeping or other compliance requirements. Regarding the Commission's rules implementing Section 612 of the Communications Act, the *NPRM* seeks comment on all aspects of the commercial leased access rules, as well as dispute resolution procedures. Similarly, regarding the Commission's rules implementing Section 616 of the Communications Act, the *NPRM* seeks comment on whether and how the Commission's dispute resolution and other rules should be modified.

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

23. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The *NPRM* seeks comment on the Commission's rules implementing Sections 612 and 616 of the Communications Act, as amended. While most of the leased access and program carriage complaints have been filed against large entities or affiliates of large entities, some small entities may be affected by any rule changes. Therefore, this *NPRM* invites comment on issues that may impact some small entities. In addition, this *NPRM* seeks comment on whether the Commission's rules and their enforcement are successful in promoting competition and diversity in the video programming marketplace and preventing cable systems and other MVPDs from preventing fair competition in video programming distribution through various practices. Those policies and rules are designed to promote and protect the interests of independent programmers in the video distribution marketplace and many of the programmers will qualify as small entities. In the event that the Commission modifies its rules in this proceeding, it will explain the steps that it has taken to minimize significant impacts on small entities and the significant alternatives that it has considered.

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

24. None.

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[63] 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1.

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

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage (MB Docket No. 07-42)

This rulemaking is about independent programming and ensuring that independent programmers have a fair shot at carriage on cable and other multi-channel distribution platforms. In particular, it focuses two key provisions of Title VI: commercial leased access requirements that apply to cable operators under Section 612, and program carriage rules that apply to cable operators and other pay television services under Section 616.

We must meet these statutory directives, not only because it's our duty, but because these independent programmers provide the diversity of voices that is so central to the proper functioning of our media and, ultimately, to our democracy itself. If our rules aren't giving independent programmers the carriage opportunities to which they're entitled, we'd better fix them – and fast. For instance, we have received very few program carriage complaints over the years. Is that because independent programmers are not facing unfair or discriminatory practices, or is it because our processes fail to provide timely and adequate relief and thus discourage the filing of otherwise legitimate claims? I note, in this regard, that the Commission seeks comment on the application of arbitration procedures or internal time lines for the resolution of program carriage or leased access complaints.

I thank the Chairman and my colleagues for initiating this rulemaking and look forward to bringing it to resolution as quickly as possible.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage (MB Docket No. 07-42)

Today the Commission is launching this *Notice of Proposed Rule Making* to determine whether the current commercial leased access regime is working or needs improvement, or whether "leased access" – as implemented by the Commission and the cable industry – amounts to "least access." To answer these questions, this *Notice* seeks comment specifically on the Commission's complaint and dispute resolution process, the rate formula, channel placement, elective or mandatory arbitration, and the impact of advanced digital services, such as video-on-demand, on commercial leasing.

There is a strong interest and demand among independent programmers across this country for leasing opportunities, and Congress gave the Commission authority to ensure that such opportunities remain available and viable. The Commission has a statutory obligation to use commercial leased access as a means "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are available to the public from cable system in a manner consistent with growth and development of cable system." 47 U.S.C. § 532(a). But Commission rules and practices have made it prohibitively expensive and unnecessarily burdensome for most independent programmers to obtain and maintain leased access.

For instance, while the Commission has developed a rate structure that allows cable operators to gain full compensation for all potential costs or risks associated with providing leased access to independent programmers, some cable operators may not be offering independent programmers a reasonable, justifiable rate for access.[1] And, while there will always be good faith disputes between cable operators and programmers, the Commission does not have mechanisms in place to ensure prompt resolution of complaints. It should not take the Media Bureau nearly two years to respond to a programmer's leased access complaint.[2]

I am thankful to Chairman Martin and my colleagues for agreeing to launch this leased access proceeding and to take it to a final order within a reasonable period of time. Commercial leased access, as envisioned by Congress in 1984 and then broadened in 1992, has the potential to increase the diversity of programming available to cable subscribers. I strongly encourage commenters to offer real solutions that could help us achieve that congressional objective.

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[1] It would be helpful to the Commission for commenters to submit comments in response to the following questions: What rates do the cable operators charge for full-time and part-time leased access? What are the average maximum leased access rates? How do cable operators justify any variances in rates? Are the rates reasonable in light of the fact that cable operators have larger channel capacity than they did in 1997, and thus perhaps there is less scarcity? Has the rate formula decreased anticompetitive practices? Has the rate formula increased use of leased access channels which promote diversity? Do the current rates established by cable operators under the Commission's regulations deter non-affiliated programmers who otherwise would seek access? Is the method for calculating the maximum rate appropriate for digital cable, VOD, and IPTV?

[2] *See United Production v. Mediacom Communications Corp., Order*, Media Bureau, CSR 6336-L (adopted January 26, 2007, DA 07-273). The Petition for Commercial Leased Access was filed on February 25, 2005.