

APPENDIX C

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 Rule Making (2005 NPRM)* in this proceeding.² The Commission sought written public comment on the proposals in the *2005 NPRM*, including comment on the IRFA. The Commission received one comment on the IRFA, and it is discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Order

2. The purpose of this proceeding was to consider the current status of the Commission's closed captioning rules. The rulemaking that was initiated in 2005 followed up on the Commission's prior assurances, made at the time the closed captioning rules were adopted in 1997, that certain captioning provisions would be reviewed and evaluated at a future date. The 2005 rulemaking sought to determine whether any revisions should be made to enhance the effectiveness of the closed captioning rules.

3. The closed captioning rules that were adopted in 1997 require that all video programming distributors, including over-the-air broadcast television services and all multichannel video programming distributors ("MVPDs") (including cable television, direct-to-home satellite services, wireless cable systems, satellite master antenna television, and open video systems)⁴ increase gradually the amount of captioned programming offered and, generally require that 100 percent of new English language programming be closed captioned as of January 1, 2006, subject to certain exceptions.⁵ New analog programming is defined as analog programs first published or exhibited on or after January 1, 1998.⁶ New digital programming is defined as digital programming first aired after June 30, 2002.⁷ Additionally, these rules established a transition period for captioning of pre-rule programming, and required that 75 percent of all pre-rule nonexempt English language programming delivered to consumers during the first quarter of 2008 and thereafter must be captioned.⁸ Pre-rule analog programming is defined as programs first published or exhibited before January 1, 1998.⁹ Pre-rule digital programming is defined as digital

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

² *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13234, Appendix B – Initial Regulatory Flexibility Analysis.

³ See 5 U.S.C. § 604.

⁴ "Video programming distributor" is defined in 47 C.F.R. § 79.1(a)(2) as any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in section 76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.

⁵ See 47 C.F.R. §§ 79.1(b)(1), (b)(3), (d), (e), (f); see also *Closed Captioning Report and Order*, 13 FCC Rcd at 3292-95, paras. 41-47; *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19978-82, paras. 9-16.

⁶ 47 C.F.R. § 79.1(a)(5).

⁷ *Closed Caption Decoder Requirements for Digital Television Receivers and Converter Boxes, Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, ET Docket No. 99-254, MM Docket No. 95-176, Report and Order, 15 FCC Rcd 16788, 16790-91, para. 5 (July 31, 2000) (*DTV Closed Captioning Order*).

⁸ 47 C.F.R. § 79.1(b)(2)(ii).

⁹ 47 C.F.R. § 79.1(a)(6).

programming first aired before July 1, 2002.¹⁰ The rules also require that, pursuant to an established phase-in schedule, as of January 1, 2010, 100 percent of nonexempt new Spanish language programming be closed captioned,¹¹ and, as of January 1, 2012, and thereafter, 75 percent of nonexempt Spanish language pre-rule programming be closed captioned.¹² The existing rules contain several exemptions, pursuant to which entities or programming that meet the prescribed criteria are exempt from the rules without having to seek Commission approval.¹³ In addition, the existing rules provide a process whereby video programming providers may petition the Commission for an exemption from the rules where it would be an undue burden to require captioning.¹⁴

4. The *2005 Closed Captioning NPRM* sought comment on several aspects of the rules. It also sought comment on a Petition for Rulemaking that was filed by Telecommunications for the Deaf, Inc. and several other consumer advocacy groups. It sought comment on, *inter alia*, the possibility that the existing rule would allow for shorter complaint filing and response times, what those time frames should be, and on the possibility that complainants should be permitted to complain directly to the Commission without complaining to the video programming distributor first. Further, the *2005 Closed Captioning NPRM* sought comment on the possibility that video programming distributors would be required to provide contact information to viewers and to give this information to the Commission for posting on the Commission's website, in order to assist consumers in having their closed captioning concerns addressed more quickly.

5. The *Order* responds to the proposals made in the *2005 Closed Captioning NPRM* and the Comments submitted thereto. Specifically, the *Order* amends the existing closed captioning rules to shorten the complaint processing times and allows complaints to be filed directly with the FCC. The *Order* also adopts a new requirement that video programming distributors make information available on their websites (if they have a website) in bills and in directories to make it easier for closed captioning consumers to contact them with closed captioning concerns and complaints. The *Order* also adds a requirement to the rules to ensure that any staff reachable through the above-noted contact information has the capability to immediately respond to and address consumers' concerns.

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

6. Media Captioning Services (MCS) filed the only comment in this proceeding responding to the IRFA.¹⁵ MCS commented on many issues raised in the *2005 Closed Captioning NPRM*, as well. Specifically, with regard to the issues raised in the *2005 Closed Captioning NPRM*, MCS commented that, in order to encourage high quality captioning, the FCC should promote tax incentives for video programmers who use very small captioning concerns to meet captioning requirements; should utilize the antitrust laws (presumably, to penalize entities that engage in anti competitive behavior resulting in higher

¹⁰ See note 7, *supra*.

¹¹ 47 C.F.R. § 79.1(b)(3)(iv).

¹² 47 C.F.R. § 79.1(b)(4)(ii).

¹³ 47 C.F.R. § 79.1(d).

¹⁴ 47 C.F.R. § 79.1(f).

¹⁵ See Comments of Media Captioning Services (MCS) to Marlene H. Dortch, Secretary, FCC, November 9, 2005. As stated, MCS' comments were the only comments we received regarding the regulatory flexibility analysis. Several other commenters raised concerns regarding the impact of the proposals on small entities, but not in the regulatory flexibility context. Some of these commenters would be considered small businesses. In general, these commenters stated that the proposals set forth in the *2005 Closed Captioning NPRM* could result in increased costs and decreased local programming. For example, Hubbard Broadcasting commented that real-time captioning services are "disproportionately burdensome" to smaller broadcasters, and that the suggestions proposed in the *2005 Closed Captioning NPRM* would "vastly increase the costs of local news production." Reply Comments of Hubbard Broadcasting, Inc. at 4-5.

captioning prices); should use the Telecommunications Relay Service fund to compensate very small captioning companies; and should establish a fund from the sale of analog spectrum to compensate very small captioning companies that provide captioning services to video programmers in the DMAs between 26 and 100. MCS also suggested that the Commission require a functional equivalence guideline for real-time captioning and for pre-produced programming. MCS offered specific suggestions for these standards, and MCS also suggested that complaints regarding closed captioning should be directed to the video programming distributor and the FCC, simultaneously.

7. In its comments pertaining to the regulatory flexibility analysis, MCS noted that the IRFA does not include any discussion of the impact that proposed regulations would have on closed captioning companies.¹⁶ MCS noted that SBA considers companies providing real-time captioning services with annual gross receipts of \$6 million or less to be small entities, and considers companies earning \$25 million or less from pre-production business to be small entities.¹⁷ MCS asserted that virtually all companies in the closed captioning industry would be classified as small businesses.¹⁸ MCS stated that the definitions are deficient since an "element of the definition of 'small business' is that the entity would not be dominant in its field of operations."¹⁹ However, according to MCS, three dominant companies in the industry would be classified as small entities based on the annual gross receipts standards noted above.²⁰

8. The Commission appreciates the comments filed by MCS in this regard. We note that video programming distributors (VPDs) are the entities directly responsible for compliance with closed captioning rules, and may only air programming that is not captioned if the programming is not subject to a captioning benchmark or is exempt from the rules pursuant to section 79.1(d) or 79.1(f). Even with regard to programming that is not produced by a video programming distributor, the VPD is responsible for ensuring that the program owner has certified that it or its programming is exempt from the closed captioning rules. Although closed captioning companies play a vital role in the closed captioning regime, they are not the entities that are directly affected by the Commission's requirements that video programming be captioned, because they are not the entities ultimately responsible for compliance with the closed captioning rules. The 2005 IRFA included all multi-channel video programming distributors and broadcasters -- these are the entities that are ultimately responsible for closed captioning. In addition to captioners, program owners and producers that are not the video programming distributors were also omitted from the 2005 IRFA, for the same reason -- they are merely indirectly affected by the rules and are not ultimately responsible for compliance with the rules. However, in order to better inform the public about our actions and to create a more complete record in this FRFA, we are including captioners as entities affected by the modifications adopted in the Order (*see paras. 28-30, infra*).

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

9. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules.²¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization,"

¹⁶ MCS Comments at 19-20 (November 9, 2005).

¹⁷ *Id.*

¹⁸ *Id.* In its comments, MCS referred to Standard Industry Classification (SIC) codes. However, SIC codes were replaced on August 26, 2008, by North American Industry Classification System (NAICS) codes; accordingly, the FCC must use the NAICS codes.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 5 U.S.C § 604(a)(3).

and "small business concern" under section 3 of the Small Business Act.²² Under the Small Business Act, 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 SBA.²³

10. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.²⁴ A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."²⁵ Nationwide, as of 2002, there were approximately 1.6 million small organizations.²⁶ The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."²⁷ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.²⁸ We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."²⁹ Thus, we estimate that most governmental jurisdictions are small.

11. *Wired Telecommunications Carriers.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."³⁰ The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."³¹ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year.³² Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more.³³ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

12. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or

²² 5 U.S.C. § 601(6).

²³ 5 U.S.C. § 632

²⁴ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

²⁵ 5 U.S.C. § 601(4).

²⁶ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

²⁷ 5 U.S.C. § 601(5).

²⁸ U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, page 272, Table 415.

²⁹ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

³⁰ U.S. Census Bureau, 2002 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

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

³² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size: 2002 (Including Legal Form of Organization)," Table 5, NAICS code 517110 (issued Nov. 2005).

³³ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

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.³⁴ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.³⁵ To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.³⁶ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.³⁷ 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.³⁸ Thus, the majority of these firms can be considered small.

13. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.³⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.⁴⁰ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.⁴¹ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have fewer than 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.⁴² Thus, under this second size standard, most cable systems are small. Wired Telecommunications Carriers with fewer than 1500 employees are considered to be small.⁴³

14. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁴⁴ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual

³⁴ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

³⁵ The NAICS Code associated with this size standard is 517110.

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

³⁷ 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).

³⁸ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

³⁹ 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).

⁴⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁴¹ 47 C.F.R. § 76.901(c).

⁴² 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.

⁴³ See 13 C.F.R. 121.201, NAICS code 517110.

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

revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁴⁵ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁴⁶ 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,⁴⁷ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

15. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. As noted, Wired Telecommunications Carriers with fewer than 1500 employees are considered to be small, under the currently applicable SBA classification.⁴⁸ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁴⁹ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁵⁰ 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.⁵¹ Thus, under this size standard, the majority of firms can be considered small.

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. DBS falls under the SBA definition of "Wireless Telecommunications Carriers (except satellite)", which establishes as a small DBS company any DBS company which has less than 1500 employees.⁵² The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁵³ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁵⁴ 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. 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, DirecTV⁵⁵ and EchoStar Communications Corporation ("EchoStar"),⁵⁶ report

⁴⁵ 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).

⁴⁶ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁴⁷ 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).

⁴⁸ NAICS Code 517110.

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

⁵⁰ 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).

⁵¹ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁵² 13 C.F.R. § 121.201, NAICS Code 517210.

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

⁵⁴ 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).

⁵⁵ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; see Annual Assessment of Status of Competition in the Market for the Delivery of Video (continued...)

annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$13.5 million, and thus does not qualify as a small business.⁵⁷ The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.⁵⁸ The Commission does not know of any source which provides this information and, thus, the Commission has no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, the Commission believes 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, the Commission acknowledges 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. *Television Broadcasting.* This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."⁵⁹ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.⁶⁰ The Commission has estimated the number of licensed commercial television stations to be 1,379.⁶¹ In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of \$13 million or less.⁶² We therefore estimate that the majority of commercial television broadcasters are small entities.

18. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁶³ 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. 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 does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

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Programming, Eleventh Annual Report, FCC 05-13, para. 55 (rel. Feb. 4, 2005) ("2005 Cable Competition Report").

⁵⁶ 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.*

⁵⁷ Rainbow DBS, which provides service under the brand name VOOOM, reported an estimated 25,000 subscribers. *Id.*

⁵⁸ Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

⁵⁹ U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting" (partial definition); <http://www.census.gov/naics/2007/def/ND515120.HTM#N515120>.

⁶⁰ 13 C.F.R. § 121.201, NAICS code 515120 (updated for inflation in 2008).

⁶¹ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁶² We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

⁶³ "[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. § 21.103(a)(1).

19. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.⁶⁴ These stations are non-profit, and therefore considered to be small entities.⁶⁵ In addition, there are also 2,295 low power television stations (LPTV).⁶⁶ Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

20. *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.⁶⁷ The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁶⁸ An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁶⁹ The SBA has approved these small business size standards in the context of LMDS auctions.⁷⁰ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses. Because some LMDS services may not have been auctioned, the SBA standard which applies to such services is Wireless Telecommunications Carriers (except satellite), pursuant to which a service is small if it has fewer than 1500 employees.⁷¹

21. *Wireless Telecommunications Carriers (except satellite).*⁷² Wireless Telecommunications Carriers, except satellite, is a NAICS standard which has a size standard of fewer than 1500 employees.⁷³ Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service ("BRS"), formerly Multipoint Distribution Service ("MDS"), and the Educational Broadband Service ("EBS"), formerly Instructional Television Fixed Service ("ITFS"), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. We estimate that the number of wireless cable subscribers is approximately 100,000, as of

⁶⁴ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁶⁵ See generally 5 U.S.C. §§ 601(4), (6).

⁶⁶ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁶⁷ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

⁷¹ The NAICS Code for this SBA classification is 517110.

⁷² NAICS code 517210. Standard for small business is 1500 employees or fewer.

⁷³ NAICS Code 517210.

March 2005. As noted, within the category of Wireless Telecommunications Carriers, except satellite, such firms with fewer than 1500 employees are considered to be small.⁷⁴ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁷⁵ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁷⁶ 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.⁷⁷ The SBA small business size standard for the broad census category of Wireless Telecommunications Carriers, which consists of such entities with fewer than 1,500 employees, appears applicable to MDS and ITFS. Other standards also apply, as described.

22. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In 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. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities. 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 Wireless Telecommunications Carriers (except satellite).⁷⁸ As noted, within the category of Wireless Telecommunications Carriers, such firms with fewer than 1500 employees are considered to be small.⁷⁹ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁸⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁸¹ 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.⁸² 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.

23. 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). 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.

⁷⁴ 13 C.F.R. § 121.201, NAICS Code 517210.

⁷⁵ 13 C.F.R. § 121.201, NAICS Code 517110.

⁷⁶ 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).

⁷⁷ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁷⁸ 13 C.F.R. § 121.201, NAICS Code 517210.

⁷⁹ 13 C.F.R. § 121.201, NAICS Code 517210.

⁸⁰ 13 C.F.R. § 121.201, NAICS Code 517110.

⁸¹ 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).

⁸² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

24. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.⁸³ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁸⁴ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁸⁵ 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.⁸⁶ This standard has been replaced by the Wireless Telecommunications Carriers (except satellite) standard, which considers firms with fewer than 1,500 employees to be small.⁸⁷ The Commission has certified approximately 100 OVS operators to serve 75 areas, and some of these are currently providing service.⁸⁸ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that those OVS operators remaining might qualify as small businesses that may be affected by the rules and policies adopted herein.

25. 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 does not exclude any television station from the definition of a small business on this basis and is 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.

26. *Telephone Companies.* 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.⁸⁹ According to Commission data,⁹⁰ 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 that may be affected by our action. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

27. *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

⁸³ See 47 U.S.C. § 573.

⁸⁴ 13 C.F.R. § 121.201, NAICS Code 517110.

⁸⁵ 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).

⁸⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁸⁷ NAICS Code 517210.

⁸⁸ See <http://www.fcc.gov/csb/ovs/csovsr.html> (current as of June 2004). This data was collected when "Cable and Other Program Distribution" was the operative distribution technology.

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

⁹⁰ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

appropriate size standard under NAICS 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.⁹¹ According to Commission data,⁹² 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 that may be affected by our action. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

28. *Closed Captioning Services.* These entities are indirectly affected by our action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, "Teleproduction and Other Postproduction Services" and "Court Reporting and Stenotype Services."

29. The first category of *Teleproduction and Other Postproduction Services* "comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects." The relevant size standard for small businesses in these services is an annual revenue of less than \$29.5 million.⁹³ For this category, Census Bureau data for 2002 show that there were 1,316 firms that operated for the entire year.⁹⁴ Of this total, 1,301 firms had annual receipts of under \$25 million, and 10 firms had receipts of \$25 million to \$49,999,999.⁹⁵ Consequently, we estimate that the majority of *Teleproduction and Other Postproduction Services* firms are small entities that might be affected by our action.

30. The second category of *Court Reporting and Stenotype Services* "comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials." The size standard for small businesses in these services is an annual revenue of less than \$7 million.⁹⁶ For this category, Census Bureau data for 2002 show that there were 2,487 firms that operated for the entire year.⁹⁷ Of this total, 2,461 firms had annual receipts of under \$5 million, and 16 firms had receipts of \$5 million to \$9,999,999.⁹⁸ Consequently, we estimate that the majority of *Court Reporting and Stenotype Services* firms are small entities that might be affected by our action.

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

⁹² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

⁹³ U.S. Census Bureau, 2002 NAICS Definitions, "512191 Teleproduction and Other Postproduction Services"; <http://www.census.gov/epcd/naics02/def/NDEF512.HTM>. The size standard is \$29.5 million.

⁹⁴ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 512191 (issued Nov. 2005).

⁹⁵ *Id.* An additional 5 firms had annual receipts of \$50 million or more.

⁹⁶ U.S. Census Bureau, 2002 NAICS Definitions, "561492 Court Reporting and Stenotype Services"; <http://www.census.gov/epcd/naics02/def/NDEF561.HTM>. The size standard is \$7 million.

⁹⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Administrative and Support and Waste Management and Remediation Services, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 561492 (issued Nov. 2005).

⁹⁸ *Id.* An additional 10 firms had annual receipts of \$10 million or more.

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

31. The *Order* revises the Commission's rules to allow complaints concerning an alleged violation of the closed captioning requirements to be filed with the Commission or with the video programming distributor responsible for delivery and exhibition of the video programming within sixty (60) days of the problem with captioning. The *Order* requires that complaints that are filed first with the Commission will be forwarded to the appropriate video programming distributor, and the video programming distributor must repond in writing to the Commission and the complainant within 30 days of the receipt of the complaint from the Commission. The *Order* also requires that, when a complaint is sent to a video programming distributor regarding programming by a television broadcast station or other programming for which the video programming distributor is exempt from closed captioning responsibility pursuant to section 79.1(e)(9) of the closed captioning rules, the video programming distributor shall forward such complaint within seven (7) days of receipt to the entity responsible for closed captioning of the programming at issue. The *Order* requires that the video programming distributor must also notify the complainant and the Commission that it has forwarded the complaint. The *Order* requires that entities receiving forwarded complaints must respond in writing to the complainant within 30 days of the forwarding date of the complaint. The *Order* requires that, if the complaint is filed first with the video programming distributor, and the video programming distributor fails to respond to it within 30 days or a dispute remains following the initial complaint resolution procedures, a complaint may be filed with the Commission within 30 days after the time allotted for the video programming distributor to respond has ended. The *Order* requires that video programming distributors shall respond to the Commission and the complainant within 30 days of receipt of a complaint from the Commission.

32. The *Order* also adopts provisions requiring that video programming distributors make available contact information for the receipt and handling of immediate closed captioning concerns raised by consumers while they are watching a program, as well as contact information for the receipt and handling of written closed captioning complaints that do not raise immediate issues. The *Order* requires that programming distributors must designate a telephone number, fax number, and e-mail address for purposes of receiving and responding immediately to any closed captioning concerns. Video programming distributors should ensure that any staff reachable through this contact information has the capability to immediately respond to and address consumers' concerns. The *Order* requires that, to the extent that a distributor has personnel available, either on site or remotely, to address any technical problems that may arise, consumers using this dedicated contact information must be able to reach someone, either directly or indirectly, who can address the consumer's captioning concerns. This provision does not require that distributors alter their hours of operation or the hours during which they have staffing available; at the same time, however, the *Order* requires that, where staff is available to address technical issues that may arise during the course of transmitting programming, they also must be knowledgeable about and be able to address closed captioning concerns. The *Order* requires that, in situations where a distributor is not immediately available, any calls or inquiries received, using this dedicated contact information, should be returned or otherwise addressed within 24 hours. The *Order* requires that, in those situations where the captioning problem does not reside with the distributor, the staff person receiving the inquiry should refer the matter appropriately for resolution.

33. As noted, the *Order* requires video programming distributors to make contact information available for the receipt and handling of written closed captioning complaints, and this information shall include the name of a person with primary responsibility for captioning issues and who can ensure compliance with the rules, as well as the person's title or office, telephone number, fax number, postal mailing address, and e-mail address. The *Order* requires that distributors include this information on their websites (if they have a website), in telephone directories, and in billing statements (to the extent the distributor issues billing statements), and that distributors keep this information current and update it within 10 business days for websites, by the next billing cycle for billing statements, and by the next publication of directories.

34. The *Order* requires video programming distributors to file the contact information noted above with the Chief of the Disability Rights Office, Consumer and Governmental Affairs Bureau, or by sending the information to CLOSEDCAPTIONING_POC@fcc.gov. The *Order* requires the Commission staff to prepare a Public Notice advising consumers and other interested parties how to obtain access to the contact information, once it has been compiled and posted on the FCC's website. The *Order* requires that this information also be available by telephone inquiry to the Commission's Consumer Center. Distributors shall notify the Commission each time there is a change in any of this required information within 10 business days.

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

35. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."⁹⁹

36. In amending our closed captioning rules, we believe that we have minimized the effect on small entities while making video programming more accessible to persons with hearing disabilities. These efforts are consistent with the Congressional goal of increasing the availability of captioned programming while preserving the diversity of available programming. For instance, in revising the complaint process, the Commission has decreased the timeframes for filing complaints and responding to complaints. This change in filing time periods reasonably accommodates concerns by viewers that the current complaint process allows too much time to pass before a complaint must be addressed and concerns by distributors that they be allowed sufficient time to address captioning problems. Although the Commission considered retaining the former rule, pursuant to which complaints were filed first with the distributor, the dual approach adopted by the *Order* will enhance the complaint process. In addition, the *Order* contains an optional complaint form (FCC Form 2000-C) to assist consumers in the filing of complaints.¹⁰⁰ The information requested on the form will facilitate a more efficient complaint process for both complainants and distributors.

37. By requiring that video programming distributors provide contact information in bills, directories, on websites (if they have websites) and by sending this information to the Commission for placement on the Commission's website, the *Order* seeks to remedy concerns by consumers who report confusion about whom to contact about closed captioning concerns and dissatisfaction with the responsiveness of the video programming distributors. The *Order* does not require that distributors create websites specifically for the purpose of providing contact information.

38. The *Order* does not require that distributors alter their hours of operation or the hours during which they have staffing available. The *Order* only requires that, where staff is available to address technical issues that may arise during the course of transmitting programming, the staff must be knowledgeable about and be able to address closed captioning concerns. The *Order* also reminds video programming distributors of the importance of making their organizations accessible to persons with hearing disabilities seeking information about the entity's closed captioning or other matters. As such the *Order* expresses the Commission's expectation that all video programming distributors take measures to readily accommodate incoming calls placed through Telecommunications Relay Service (TRS). In situations where a distributor is not immediately available, any calls or inquiries received, using the

⁹⁹ 5 U.S.C. § 603(c)(1)-(4).

¹⁰⁰ *Order* at Appendix B.

dedicated contact information described in the *Order*, should be returned or otherwise addressed within 24 hours.

39. The economic burdens associated with the changes to the closed captioning rules adopted in the *Order* are minimal. The benefits of revising the complaint process, requiring that contact information be available to consumers and requiring that distributors have personnel able to address captioning problems when they are available to address other technical problems outweigh any slight burdens these requirements may impose. Furthermore, there are several provisions of the closed captioning rules that were adopted in 1997 that are intended to address concerns of small businesses. These 1997 provisions are not affected by the *Order*, nor were they addressed in the 2005 NPRM. These provisions are intended to provide relief to small businesses who may find closed captioning to be unduly burdensome, and bear mentioning in this FRFA. For instance, the existing closed captioning rules contain several self-implementing exemptions that factor the costs of captioning and/or the financial status of distributors into a determination of whether the entity is exempt from the captioning requirements. The *Order* does not alter the existing exemption that excuses a video programming provider from spending more than 2 percent of its annual gross revenues received from a channel on closed captioning (section 79.1(d)(11), nor does the *Order* alter the current provision in the rules that exempts video programming providers from closed captioning where the distributor's annual gross revenues for the channel did not exceed \$3 million for the previous calendar year (section 79.1(d)(12)). Both of these previously adopted provisions were intended to address the problems of small video programming providers that are not in a position to devote significant resources toward closed captioning. These exemptions relieve small entities of any burdensome obligation to provide closed captioning without significantly reducing the availability of captioning.

40. In addition, another provision in the current rules allows the Commission to grant exemptions to the rules where a petitioner has shown it would be an undue burden (*i.e.*, significant difficulty or hardship) to close caption (section 79.1(f)). This mechanism allows the Commission to address the impact of these rules on individual entities and modify the rules to accommodate individual circumstances. The procedures in section 79.1(f) were specifically designed to ameliorate the impact of the closed captioning rules in a manner consistent with the objective of increasing the availability of captioned programming.

F. Report to Congress

41. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress and the U.S. Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.¹⁰¹

¹⁰¹ See 5 U.S.C. § 604(b).

APPENDIX D

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking (Notice)*. 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* provided in paragraph 43 of the Item. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

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

2. We initiate this review relating to closed captioning in anticipation of the transition to digital television (DTV) by full power broadcasters, which will occur on February 18, 2009. This rulemaking proceeding proposes several options for the appropriate treatment of digital broadcasters that choose to use their digital allotment to multicast several streams of programming (known as "multicasting"). In light of this new broadcasting environment, the *Notice* proposes several options for determining the closed captioning obligations for multicasting broadcasters. The *Notice* seeks comment on section 79.1(d)(12), which exempts from the closed captioning obligations video programming channels that produced annual gross revenues of less than \$3 million during the previous calendar year.⁴ In order to determine whether each stream of a digital broadcaster's multicast operation must be captioned, the Commission proposes several possible alternatives and the possible outcomes to each alternative.

3. The proposals set forth in the *Notice*, for which comment is sought, contemplate as possible outcomes the following: treat each multicast stream as a separate channel and calculate their revenues separately; treat each multicast stream as a separate channel and calculate their revenues separately, but decrease the revenue threshold for determining whether the non-main programming streams must close caption; treat individual programming streams as one channel, in which case the revenues would be aggregated for purposes of determining if the exemption in Section 79.1(d)(12) applies; or, impose a new non-revenue approach for deciding how much programming must be captioned on multicast streams.

B. Legal Basis

4. The authority for this proposed rulemaking is contained in Sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 613.

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

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ 47 C.F.R. § 79.1(d)(12). ("Channels producing revenues of under \$3,000,000. No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than \$3,000,000 during the previous calendar year other than the obligation to pass through video programming already captioned when received pursuant to paragraph (c) of this section").

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

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules.⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under section 3 of the Small Business Act.⁶ Under the Small Business Act, 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 SBA.⁷

6. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.⁸ A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁹ Nationwide, as of 2002, there were approximately 1.6 million small organizations.¹⁰ The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."¹¹ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.¹² We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."¹³ Thus, we estimate that most governmental jurisdictions are small.

7. *Wired Telecommunications Carriers.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."¹⁴ The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."¹⁵ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year.¹⁶ Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had

⁵ 5 U.S.C. § 604(a)(3).

⁶ 5 U.S.C. § 601(6).

⁷ 5 U.S.C. § 632.

⁸ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

⁹ 5 U.S.C. § 601(4).

¹⁰ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹¹ 5 U.S.C. § 601(5).

¹² U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, page 272, Table 415.

¹³ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

¹⁴ U.S. Census Bureau, 2002 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

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

¹⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size: 2002 (Including Legal Form of Organization)," Table 5, NAICS code 517110 (issued Nov. 2005).

employment of 1,000 employees or more.¹⁷ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

8. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined 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."¹⁸ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.¹⁹ To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.²⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.²¹ 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.²² Thus, the majority of these firms can be considered small.

9. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.²³ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁴ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁵ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.²⁶ Thus, under this second size standard, most cable systems are small. Wired Telecommunications Carriers with fewer than 1500 employees are considered to be small.²⁷

¹⁷ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

¹⁸ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹⁹ The NAICS Code associated with this size standard is 517110.

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

²¹ 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).

²² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

²³ 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).

²⁴ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²⁵ 47 C.F.R. § 76.901(c).

²⁶ 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.

²⁷ See 13 C.F.R. 121.201, NAICS code 517110.

10. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁸ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.³⁰ 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,³¹ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

11. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. As noted, Wired Telecommunications Carriers with fewer than 1500 employees are considered to be small, under the currently applicable SBA classification.³² The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.³³ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.³⁴ 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.³⁵ Thus, under this size standard, the majority of firms can be considered small.

12. *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. DBS falls under the SBA definition of “Wireless Telecommunications Carriers (except satellite)”, which establishes as a small DBS company any DBS company which has less than 1500 employees.³⁶ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.³⁷ According to Census Bureau data for

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

²⁹ 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).

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

³¹ 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).

³² NAICS Code 517110.

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

³⁴ 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).

³⁵ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

³⁶ 13 C.F.R. § 121.201, NAICS Code 517210.

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

2002, there were a total of 1,191 firms in this category that operated for the entire year.³⁸ 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. 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, DirecTV³⁹ and EchoStar Communications Corporation ("EchoStar"),⁴⁰ report *annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS*, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$13.5 million, and thus does not qualify as a small business.⁴¹ The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.⁴² The Commission does not know of any source which provides this information and, thus, the Commission has no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, the Commission believes 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, the Commission acknowledges 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.

13. *Television Broadcasting.* This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."⁴³ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.⁴⁴ The Commission has estimated the number of licensed commercial television stations to be 1,379.⁴⁵ In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of \$13 million or less.⁴⁶ We therefore estimate that the majority of commercial television broadcasters are small entities.

³⁸ 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).

³⁹ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; see Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, FCC 05-13, para. 55 (rel. Feb. 4, 2005) ("2005 Cable Competition Report").

⁴⁰ 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.*

⁴¹ Rainbow DBS, which provides service under the brand name VOOOM, reported an estimated 25,000 subscribers. *Id.*

⁴² Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

⁴³ U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting" (partial definition); <http://www.census.gov/naics/2007/def/ND515120.HTM#N515120>.

⁴⁴ 13 C.F.R. § 121.201, NAICS code 515120 (updated for inflation in 2008).

⁴⁵ See FCC News Release, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁴⁶ We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

14. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁴⁷ 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. 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 does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

15. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.⁴⁸ These stations are non-profit, and therefore considered to be small entities.⁴⁹ In addition, there are also 2,295 low power television stations (LPTV).⁵⁰ Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

16. *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.⁵¹ The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁵² An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁵³ The SBA has approved these small business size standards in the context of LMDS auctions.⁵⁴ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses. Because some LMDS services may not have been auctioned, the SBA standard which applies to such services is Wireless Telecommunications Carriers (except satellite), pursuant to which a service is small if it has fewer than 1500 employees.⁵⁵

⁴⁷ "[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. § 21.103(a)(1).

⁴⁸ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁴⁹ See generally 5 U.S.C. §§ 601(4), (6).

⁵⁰ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁵¹ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

⁵⁵ The NAICS Code for this SBA classification is 517110.

17. *Wireless Telecommunications Carriers (except satellite).*⁵⁶ Wireless Telecommunications Carriers, except satellite, is a NAICS standard which has a size standard of fewer than 1500 employees.⁵⁷ Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service ("BRS"), formerly Multipoint Distribution Service ("MDS"), and the Educational Broadband Service ("EBS"), formerly Instructional Television Fixed Service ("ITFS"), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. As noted, within the category of Wireless Telecommunications Carriers, except satellite, such firms with fewer than 1500 employees are considered to be small.⁵⁸ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁵⁹ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁶⁰ 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.⁶¹ The SBA small business size standard for the broad census category of Wireless Telecommunications Carriers, which consists of such entities with fewer than 1,500 employees, appears applicable to MDS and ITFS. Other standards also apply, as described.

18. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In 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. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities. 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 Wireless Telecommunications Carriers (except satellite).⁶² As noted, within the category of Wireless Telecommunications Carriers, such firms with fewer than 1500 employees are considered to be small.⁶³ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁶⁴ According to Census Bureau data for 2002, there were a total of 1,191 firms in this

⁵⁶ NAICS code 517210. Standard for small business is 1500 employees or fewer.

⁵⁷ NAICS Code 517210.

⁵⁸ 13 C.F.R. § 121.201, NAICS Code 517210.

⁵⁹ 13 C.F.R. § 121.201, NAICS Code 517110.

⁶⁰ 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).

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

⁶² 13 C.F.R. § 121.201, NAICS Code 517210.

⁶³ 13 C.F.R. § 121.201, NAICS Code 517210.

⁶⁴ 13 C.F.R. § 121.201, NAICS Code 517110.

category that operated for the entire year.⁶⁵ 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.⁶⁶ 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.

19. 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). 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.

20. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.⁶⁷ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁶⁸ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁶⁹ 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.⁷⁰ This standard has been replaced by the Wireless Telecommunications Carriers (except satellite) standard, which considers firms with fewer than 1,500 employees to be small.⁷¹ The Commission has certified approximately 100 OVS operators to serve 75 areas, and some of these are currently providing service.⁷² Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that those OVS operators remaining might qualify as small businesses that may be affected by the rules and policies adopted herein.

21. 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 does not exclude any television station from the definition of a small business on this basis and is 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.

⁶⁵ 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).

⁶⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁶⁷ See 47 U.S.C. § 573.

⁶⁸ 13 C.F.R. § 121.201, NAICS Code 517110.

⁶⁹ 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).

⁷⁰ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁷¹ NAICS Code 517210.

⁷² See <http://www.fcc.gov/csb/ovs/csovsccr.html> (current as of June 2004). This data was collected when "Cable and Other Program Distribution" was the operative distribution technology.

22. *Telephone Companies.* 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.⁷³ According to Commission data,⁷⁴ 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 that may be affected by our action. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

23. *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 NCAIS 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.⁷⁵ According to Commission data,⁷⁶ 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 that may be affected by our action. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

24. *Closed Captioning Services.* These entities are indirectly affected by our action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, "Teleproduction and Other Postproduction Services" and "Court Reporting and Stenotype Services."

25. The first category of *Teleproduction and Other Postproduction Services* "comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects." The relevant size standard for small businesses in these services is an annual revenue of less than \$29.5 million.⁷⁷ For this category, Census Bureau data for 2002 show that there were 1,316 firms that operated for the entire year.⁷⁸ Of this total, 1,301 firms had annual receipts of under \$25 million, and 10 firms had receipts of \$25 million to \$49,999,999.⁷⁹ Consequently, we estimate that the majority of *Teleproduction and Other Postproduction Services* firms are small entities that might be affected by our action.

26. The second category of *Court Reporting and Stenotype Services* "comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials." The size standard for small businesses in

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

⁷⁴ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

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

⁷⁶ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

⁷⁷ U.S. Census Bureau, 2002 NAICS Definitions, "512191 Teleproduction and Other Postproduction Services"; <http://www.census.gov/epcd/naics02/def/NDEF512.HTM>. The size standard is \$29.5 million.

⁷⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 512191 (issued Nov. 2005).

⁷⁹ *Id.* An additional 5 firms had annual receipts of \$50 million or more.

these services is an annual revenue of less than \$7 million.⁸⁰ For this category, Census Bureau data for 2002 show that there were 2,487 firms that operated for the entire year.⁸¹ Of this total, 2,461 firms had annual receipts of under \$5 million, and 16 firms had receipts of \$5 million to \$9,999,999.⁸² Consequently, we estimate that the majority of *Court Reporting and Stenotype Services* firms are small entities that might be affected by our action.

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

27. We do not anticipate that the proposals contained in the *Notice* will impose additional reporting, recordkeeping or compliance requirements.

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

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁸³

29. How the Commission resolves the question of how to treat digital multicast streams for purposes of the closed captioning rules is important, for purposes of section 79.1(d)(12), which exempts from the closed captioning obligations video programming channels that produced annual gross revenues of less than \$3 million during the previous calendar year. By its very nature, current section 79.1(d)(12) decreases the closed captioning burden on entities whose annual gross revenues for the previous year were less than \$3 million. With regard to the proposal to treat each of the multicast streams individually, the *Notice* suggests that this likely will result in less captioned programming being available, and seeks comment on this assumption. Although this decision may decrease burdens on small businesses, it may mean that individuals who rely on closed captioning are burdened. At the same time, however, if the majority of programming aired on secondary multicast streams is already captioned, it is possible that the percentage of available captioning will not be greatly affected, given that programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, pursuant to the existing pass through rule, which is unaffected by the *Notice*. We note that, under our rules, programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, regardless of the multicast stream on which the programming airs.⁸⁴ Another alternative being considered by the Commission would retain the concept that each stream of multicast programming is separate, but the revenue threshold for determining whether one of the non-main programming streams

⁸⁰ U.S. Census Bureau, 2002 NAICS Definitions, "561492 Court Reporting and Stenotype Services"; <http://www.census.gov/epcd/naics02/def/NDEF561.HTM>. The size standard is \$7 million.

⁸¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Administrative and Support and Waste Management and Remediation Services, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 561492 (issued Nov. 2005).

⁸² *Id.* An additional 10 firms had annual receipts of \$10 million or more.

⁸³ 5 U.S.C. § 603(b).

⁸⁴ See 47 C.F.R. § 79.1(c).

is exempt would be less than \$3 million. Given the general nature of the programming on such channels, the Commission seeks comment on whether a smaller figure may be appropriate.

30. In the alternative, if the Commission adopts the proposal to aggregate the revenues of all multicast streams, digital broadcasters would be exempt from the Commission's captioning requirements under section 79.1(d)(12) only if their overall operations, taking into account all activities on all "streams," received less than \$3 million in revenues. However, the *Notice* notes that this conclusion might affect program diversity, the airing of locally-originated programming, or the airing of other kinds of programming that may afford little or no economic return. The Commission further seeks comment on whether it also may result in an increase in the number of petitions for exemption from the closed captioning requirements based on the undue burden standard in the Commission's current rules.⁸⁵

31. The last alternative the *Notice* considers is the establishment of a captioning requirement that is not dependant on revenues but relies on some other criteria, such as a formula that considers the number of programming streams being offered (or some other variable) in order to determine captioning obligations.

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

None.

⁸⁵ See 47 C.F.R. § 79.1(f).