

the programmer in an amount representing the difference between the amount that is required to be paid pursuant to the decision and the amount actually paid under the terms of the expired contract during resolution of the complaint.<sup>268</sup> Conversely, if carriage of the programming has continued uninterrupted during resolution of the complaint, and if the Commission's decision requires a lesser amount to be paid than was required under the terms of the expired contract, the programmer will credit the MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during resolution of the complaint and the amount that is required to be paid pursuant to the Commission's decision.<sup>269</sup>

75. Vertically integrated cable operators contend that the Commission should not adopt a temporary standstill process,<sup>270</sup> claiming that such an option will tilt the balance of negotiating leverage in favor of MVPDs;<sup>271</sup> encourage MVPDs to file program access complaints to guarantee continued access to programming;<sup>272</sup> and impede parties from settling disputes by removing any incentive for the MVPD to negotiate.<sup>273</sup> On balance, we conclude that the benefits of establishing a temporary stay process outweigh these purported harms. We expect parties to deal and negotiate with one another in good faith to come to settlement while the program access complaint is pending at the Commission. Moreover, there is no reason to assume that carriage negotiations and attempts at a settlement during a temporary stay will necessarily be protracted. In this regard, we note that in three previous merger orders, the Commission adopted a standstill requirement in connection with arbitration of program access disputes.<sup>274</sup> Commenters, however, provide no evidence that any of the purported harms actually resulted from the standstill in those cases.<sup>275</sup> Moreover, the standstill requirement imposed in connection with those merger conditions is automatic upon notice of the MVPD's intent to arbitrate,<sup>276</sup> whereas the process we adopt here requires a complainant to seek Commission approval based on the four-criteria test described above.<sup>277</sup> Thus, the Commission will be able to take into account all relevant facts in each case.<sup>278</sup>

<sup>268</sup> See *Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order*, 21 FCC Rcd at 8338, Appendix B, § 3(h); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

<sup>269</sup> See *Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order*, 21 FCC Rcd at 8338, Appendix B, § 3(h).

<sup>270</sup> See Comcast Comments at 16-17; NCTA Comments at 16; Time Warner Comments at 3-6, 12-19; Comcast Reply at 15-18.

<sup>271</sup> See Time Warner Comments at 13; Comcast Reply at 17.

<sup>272</sup> See Comcast Comments at 16; Time Warner Comments at 14; Comcast Reply Comments at 18. Verizon notes that the Commission has authority under Section 628(f) to issue sanctions for filing frivolous complaints, which addresses concerns about an increase in the use of the complaint process. See Verizon Reply at 10; see also *supra* n.195.

<sup>273</sup> See Time Warner Comments at 14.

<sup>274</sup> See *Liberty/DIRECTV Order*, 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order*, 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

<sup>275</sup> See DISH Network Reply at 5 (“[R]eal-world experience under the *News/Hughes* and *Adelphia/Comcast/Time Warner* merger conditions – which included standstill protection for consumers – does not support the view that program access complaints have been filed more often.”).

<sup>276</sup> See *Liberty/DIRECTV Order*, 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order*, 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

<sup>277</sup> See *supra* ¶ 73.

Moreover, because the new carriage terms will be applied retroactively to the expiration of the previous contract, we believe that complainants will not have an incentive to seek a temporary standstill solely to continue the *status quo* or to gain leverage.<sup>279</sup>

#### IV. PROCEDURAL MATTERS

##### A. Final Regulatory Flexibility Analysis

76. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>280</sup> the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *First Report and Order* in MB Docket No. 07-198. The FRFA is set forth in Appendix C.

##### B. Final Paperwork Reduction Act Analysis

77. This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13 (44 U.S.C. 3501-3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the *Federal Register* inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.” In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program access complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix C, *infra*.

(Continued from previous page) \_\_\_\_\_

<sup>278</sup> For example, Time Warner claims that, depending on the terms of the contract, it may be impractical to apply those terms beyond the expiration date of the contract. *See* Time Warner Comments at 15. In addition, Time Warner notes unique concerns regarding a standstill imposed on a contract for a premium network. *See id.* at 16-19 (claiming that an MVPD could argue that it is not required to participate in a joint advertising campaign with the premium network beyond the expiration of an existing agreement, thereby allowing the MVPD to enjoy the benefits of the prior contract without meeting the obligations of the contract). DISH Network states that Time Warner has overstated the complexity of a standstill, because the existing contract terms – including rate, carriage terms, as well as marketing and promotion provisions – would apply during the pendency of the complaint proceeding. *See* DISH Network Reply at 5. To the extent difficulties arise, we believe we will be able to resolve such issues on a case-by-case basis when acting on a petition for a standstill.

<sup>279</sup> *See* Verizon Comments at 16 (“This approach would lessen any concern that an aggrieved provider would bring a complaint to freeze the status quo indefinitely, and it would give both sides the incentive to negotiate diligently and in good faith . . .”); Verizon Reply Comments at 10-11 (“[A]ny potential concerns about misuse of the program access complaint procedure could readily be addressed by applying any increase in subscriber fees retroactively to the date of the complaint.”); *see also* DISH Network Comments at 5-6; BSPA Reply Comments at 16; DISH Network Reply Comments at 4.

<sup>280</sup> *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et. seq., 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). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (“CWAAA”).

**C. Congressional Review Act**

78. The Commission will send a copy of this *First Report and Order* in MB Docket No. 07-198 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

**V. ORDERING CLAUSES**

79. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, the *First Report and Order* in MB Docket No. 07-198 **IS ADOPTED**.

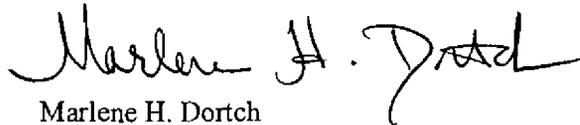
80. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix B.

81. **IT IS FURTHER ORDERED** that the rules adopted herein **WILL BECOME EFFECTIVE** 30 days after the date of publication in the *Federal Register*, except for Sections 76.1001(b)(2), 76.1003(c)(3), and 76.1003(i) which contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA) and **WILL BECOME EFFECTIVE** after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective date.

82. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *First Report and Order* in MB Docket No. 07-198, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

83. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *First Report and Order* in MB Docket No. 07-198 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

## APPENDIX A

## List of Commenters

**Comments filed in MB Docket No. 07-198**

American Cable Association (“ACA”)  
AT&T Inc.  
Broadband Service Providers Association (“BSPA”)  
Cablevision Systems Corp.  
The Coalition for Competitive Access to Content (“CA2C”)  
Comcast Corporation  
Community Broadcasters Association (“CBA”)  
DIRECTV, Inc.  
DISH Network  
Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (“Fox”)  
Liberty Cablevision of Puerto Rico, Ltd.  
McKinnon Group and Virginia Broadcasting Corp.  
National Association of Broadcasters (“NAB”)  
National Cable and Telecommunications Association (“NCTA”)  
National Telecommunications Cooperative Association (“NTCA”)  
NBC Universal, Inc. and NBC Telemundo License Co. (“NBC”)  
The Organization for the Promotion and Advancement of Small Telecommunications Companies;  
The Independent Telephone and Telecommunications Alliance; The Western Telecommunications  
Alliance; and The Rural Independent Competitive Alliance (“OPASTCO *et al*”)  
The Rural Iowa Independent Telephone Association (“RIITA”)  
Small Cable Operators for Change  
Time Warner Inc.  
The United States Telecom Association (“USTelecom”)  
Verizon  
Viacom Inc.  
The Walt Disney Company

**Reply Comments filed in MB Docket No. 07-198**

Advance/Newhouse Communications  
A&E Television Networks  
American Cable Association (“ACA”)  
Broadband Service Providers Association (“BSPA”)  
Cablevision Systems Corp.  
CBS Corporation  
The Coalition for Competitive Access to Content (“CA2C”)  
Comcast Corporation  
Consumers Union and the Consumer Federation of America  
Cox Communications, Inc.  
DIRECTV, Inc.  
Discovery Communications, LLC  
DISH Network  
Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (“Fox”)  
Hearst-Argyle Television, Inc.  
John Staurulakis, Inc.

LIN Television Corporation  
Motion Picture Association of America ("MPAA")  
National Association of Broadcasters ("NAB")  
National Telecommunications Cooperative Association ("NTCA")  
NBC Universal, Inc. and NBC Telemundo License Co. ("NBC")  
Public Utility District No. 1 of Chelan County, Washington  
Time Warner Inc.  
Si TV, Inc.  
TuTv LLC  
Verizon  
Viacom Inc.  
The Walt Disney Company

## APPENDIX B

## Revised Rules

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

## Part 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1000 is amended by revising the first sentence of paragraph (b), revising paragraph (c)(1), and adding paragraphs (l) and (m) to read as follows:

\* \* \* \* \*

(b) *Cognizable interests.* In applying the provisions of this subpart, ownership and other interests in cable operators, satellite cable programming vendors, satellite broadcast programming vendors, or terrestrial cable programming vendors will be attributed to their holders and may subject the interest holders to the rules of this subpart. \* \* \*

\* \* \* \* \*

(c) \* \* \*

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming, or terrestrial cable programming contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

\* \* \* \* \*

(l) *Terrestrial cable programming.* The term “terrestrial cable programming” means video programming which is transmitted terrestrially or by any other means other than satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming or satellite cable programming.

(m) *Terrestrial cable programming vendor.* The term “terrestrial cable programming vendor” means a person engaged in the production, creation, or wholesale distribution for sale of terrestrial cable programming, but does not include a satellite broadcast programming vendor or a satellite cable programming vendor.

3. Section 76.1001 is amended to read as follows:

(a) *Unfair practices generally.* No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable

programming or satellite broadcast programming to subscribers or consumers.

(b) *Unfair practices involving terrestrial cable programming and terrestrial cable programming vendors.*

(1) The phrase “unfair methods of competition or unfair or deceptive acts or practices” as used in paragraph (a) of this section includes, but is not limited to, the following:

(i) Any effort or action by a cable operator that has an attributable interest in a terrestrial cable programming vendor to unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor’s prices, terms, and conditions for the sale of, terrestrial cable programming to any unaffiliated multichannel video programming distributor.

(ii) Discrimination in the prices, terms, or conditions of sale or delivery of terrestrial cable programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors, or their agents or buying groups, by a terrestrial cable programming vendor that is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; except that the phrase does not include the practices set forth in § 76.1002(b)(1)-(3) of this part. The cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors that wholly own or control, or are under common control with, such terrestrial cable programming vendor shall be deemed responsible for such discrimination and any complaint based on such discrimination shall be filed against such cable operator, satellite cable programming vendor, or satellite broadcast programming vendor.

(iii) Exclusive contracts, or any practice, activity, or arrangement tantamount to an exclusive contract, for terrestrial cable programming between a cable operator and a terrestrial cable programming vendor in which a cable operator has an attributable interest.

(2) Any multichannel video programming distributor aggrieved by conduct described in paragraph (b)(1) of this section that it believes constitutes a violation of paragraph (a) of this section may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part, as modified by § 76.1003 of this part, with the following additions or changes:

(i) The defendant shall answer the complaint within forty-five (45) days of service of the complaint, unless otherwise directed by the Commission.

(ii) The complainant shall have the burden of proof that the defendant’s alleged conduct described in paragraph (b)(1) of this section has the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. An answer to such a complaint shall set forth the defendant’s reasons to support a finding that the complainant has not carried this burden.

(iii) A complainant alleging that a terrestrial cable programming vendor has engaged in conduct described in paragraph (b)(1)(ii) of this section shall have the burden of proof that the terrestrial cable programming vendor is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors. An answer to such a complaint shall set forth the defendant’s reasons to support a finding that the complainant has not carried this burden.

4. Section 76.1002 is amended by revising paragraph (b)(2) to read as follows:

\* \* \* \* \*

(b) \* \* \*

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming, satellite broadcast programming, or terrestrial cable programming; \* \* \*

\* \* \* \* \*

5. Section 76.1003 is amended by revising paragraph (c)(3), by revising the first sentence of paragraph (e)(1), by revising paragraph (g)(1)-(2), and by adding paragraph (i) to read as follows:

§ 76.1003 Program access proceedings.

\* \* \* \* \*

(c) \* \* \*

(3) Evidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor;

\* \* \* \* \*

(e) Answer. (1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint.

\* \* \*

\* \* \* \* \*

(g) \* \* \*

(1) The satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) The satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, and such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor; or

\* \* \* \* \*

(i) *Petitions for temporary standstill.* (1) A program access complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the

complaint. In addition to the requirements of § 76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:

- (i) the complainant is likely to prevail on the merits of its complaint;
- (ii) the complainant will suffer irreparable harm absent a stay;
- (iii) grant of a stay will not substantially harm other interested parties; and
- (iv) the public interest favors grant of a stay.

(2) The defendant cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the Commission's decision acting on the complaint will provide for remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous programming contract.

6. Section 76.1004 is amended by revising the last sentence of paragraph (a) to read as follows:

§ 76.1004 Applicability of program access rules to common carriers and affiliates.

(a) \* \* \* For the purposes of this section, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company) or a terrestrial cable programming vendor (or its parent company).

\* \* \* \* \*

## APPENDIX C

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>1</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rulemaking* in MB Docket No. 07-198 (hereinafter referred to as the *NPRM*).<sup>2</sup> The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

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

2. Section 628(a) of the Communications Act establishes that the goals of Section 628 are to increase competition and diversity in the video distribution market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.<sup>4</sup> Section 628(b) of the Act prohibits unfair acts and practices of cable operators that have the purpose or effect of hindering significantly any multichannel video programming distributor (“MVPD”) from providing satellite cable programming or satellite broadcast programming to consumers.<sup>5</sup> Section 628(c)(1) provides the Commission with authority to adopt rules to specify the conduct prohibited by Section 628(b).<sup>6</sup> As required by Section 628(c)(2) of the Act,<sup>7</sup> the Commission adopted rules in 1993 (the “program access rules”) which specifically prohibit: (i) a cable operator from unduly or improperly influencing the decision of its affiliated satellite cable programming vendor to sell, or unduly or improperly influencing the vendor’s prices, terms, and conditions for the sale of, satellite cable programming to any unaffiliated MVPD (the “undue or improper influence” rule);<sup>8</sup> (ii) a cable-affiliated satellite cable programming vendor from discriminating in the prices, terms, and conditions of sale or delivery of satellite cable programming among or between competing MVPDs (the “non-discrimination” rule);<sup>9</sup> and (iii) a cable operator from entering into an exclusive contract for satellite cable programming with a cable-affiliated satellite cable programming vendor, subject to certain exceptions (the “exclusive

<sup>1</sup> 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).

<sup>2</sup> See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17859-70, ¶¶ 114-138 (2007) (“*NPRM*”).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> 47 U.S.C. § 548(a).

<sup>5</sup> 47 U.S.C. § 548(b) (“it shall be unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers”).

<sup>6</sup> 47 U.S.C. § 548(c)(1).

<sup>7</sup> 47 U.S.C. § 548(c)(2).

<sup>8</sup> See 47 C.F.R. § 76.1002(a).

<sup>9</sup> See 47 C.F.R. § 76.1002(b).

contract prohibition”).<sup>10</sup> The Commission has also adopted procedures for resolving complaints alleging a violation of these program access rules.<sup>11</sup>

3. Consistent with the text of Section 628(c)(2), the Commission’s program access rules currently apply to “satellite cable programming” and “satellite broadcast programming.”<sup>12</sup> The Act and the Commission’s rules define both terms to apply only to programming transmitted or retransmitted by satellite for reception by cable operators.<sup>13</sup> The Commission has previously concluded that terrestrially delivered, cable-affiliated programming (such as programming transmitted to cable operators by fiber) is outside of the direct coverage of Section 628(c)(2) and the Commission’s program access rules under Section 628(c)(2).<sup>14</sup> This is commonly referred to as the “terrestrial loophole,” because it allows cable-affiliated programmers to transmit their programming to cable operators via terrestrial means and thereby avoid application of the program access rules.<sup>15</sup>

4. In the *Order* adopted herein, the Commission establishes rules for the consideration of complaints on a case-by-case basis alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order*, includes exclusive contracts, discrimination, and undue or improper influence).<sup>16</sup> The *Order* discusses the Commission’s statutory authority for adopting rules to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. The Commission concludes

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<sup>10</sup> See 47 C.F.R. § 76.1002(c)-(e).

<sup>11</sup> See 47 C.F.R. § 76.1003.

<sup>12</sup> 47 U.S.C. § 548(c)(2).

<sup>13</sup> The term “satellite cable programming” means “video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers,” except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); see also 47 C.F.R. § 76.1000(h). The term “satellite broadcast programming” means “broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.” 47 U.S.C. § 548(i)(3); see also 47 C.F.R. § 76.1000(f).

<sup>14</sup> See *DIRECTV, Inc. and EchoStar Commc’ns Corp. v. Comcast Corp. et al.*, 15 FCC Rcd 22802, 22807, ¶ 12 (2000), *aff’d sub nom. EchoStar Commc’ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); see also *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Report and Order, 22 FCC Rcd 17791, 17844, ¶ 78 (2007), *appeal pending sub nom. Cablevision Systems Corp. et al v FCC*, No. 07-1425 (D.C. Cir); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, 12158, ¶ 73 (2002) (“2002 Program Access Order”).

<sup>15</sup> See *2002 Program Access Order*, 17 FCC Rcd at 12157, ¶ 71.

<sup>16</sup> The *Order* notes that there may be other acts or practices that are “unfair” under Section 628(b). The *Order*, however, pertains only to exclusive contracts, discrimination, and undue or improper influence involving programming that is both terrestrially delivered and, consistent with Section 628(c)(2), cable-affiliated. The *Order* does not reach any conclusions regarding other acts that may be “unfair” under Section 628(b), nor does it foreclose potential complaints. See *Order* at n.191.

that Section 628(b) grants the Commission authority to address unfair acts involving terrestrially delivered, cable-affiliated programming.<sup>17</sup>

5. The *Order* next establishes the following reasons for Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming: (i) cable operators continue to have an incentive and ability to engage in unfair acts involving their affiliated programming, regardless of whether this programming is satellite-delivered or terrestrially delivered;<sup>18</sup> (ii) the Commission's judgment regarding this incentive and ability is supported by real-world evidence that cable operators have withheld certain terrestrially delivered, cable-affiliated programming from their MVPD competitors;<sup>19</sup> and (iii) there is evidence that this withholding may significantly hinder MVPDs from providing video service in some cases.<sup>20</sup> The *Order* concludes that Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming will facilitate broadband deployment and promote the goals of Section 628 to increase competition and diversity in the video distribution market.<sup>21</sup> The *Order* also concludes that addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.<sup>22</sup>

6. The *Order* next explains that complainants may pursue similar claims involving terrestrially delivered, cable-affiliated programming that they may pursue with respect to satellite-delivered, cable-affiliated programming under the program access rules: exclusive contracts, discrimination, and undue or improper influence.<sup>23</sup> The *Order* also describes four ways in which the rules adopted to address unfair acts involving terrestrially delivered, cable-affiliated programming differ from the program access rules applied to satellite-delivered, cable-affiliated programming: (i) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption when the unfair act involves a terrestrially delivered, cable-affiliated regional sports network) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers;<sup>24</sup> (ii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides only terrestrially delivered programming, the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors;<sup>25</sup> (iii) there is no *per se* prohibition on exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; rather, the Commission will assess such

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<sup>17</sup> See *id.* at Section III.A.

<sup>18</sup> See *id.* at Section III.B.1.

<sup>19</sup> See *id.* at Section III.B.2.

<sup>20</sup> See *id.* at Section III.B.3.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at Section III.C.

<sup>23</sup> See *id.* at Section III.D.1.

<sup>24</sup> See *id.* at Section III.D.2.

<sup>25</sup> See *id.*

contracts on a case-by-case basis in response to a program access complaint,<sup>26</sup> and (iv) defendants will have 45 days – rather than the usual 20 days -- from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint.<sup>27</sup> The *Order* then discusses how these rules will be applied to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions.<sup>28</sup> Finally, the *Order* establishes procedures for the Commission’s consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.<sup>29</sup>

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

7. In its Comments on the *NPRM*, the National Telecommunications Cooperative Association (“NTCA”) stated that program access rules may have a significant economic impact on a substantial number of small entities, such as small rural MVPDs.<sup>30</sup> NTCA stated further that its proposed amendments to the Commission’s program access rules, which would include extending the program access rules to terrestrially delivered, cable-affiliated programming, would reduce the impact on small rural MVPDs.<sup>31</sup> NTCA also stated that its proposed amendments will “promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market and spur development of new communications technologies.”<sup>32</sup> We conclude that allowing MVPDs to pursue program access claims involving terrestrially delivered, cable-affiliated programming will reduce the impact on small rural MVPDs by promoting competition and diversity in the MVPD market.

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

8. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>33</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>34</sup> In addition, the term “small business” has the

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<sup>26</sup> See *id.* at Section III.D.3.

<sup>27</sup> See *id.* at Section III.D.1.

<sup>28</sup> See *id.* at Section III.E.

<sup>29</sup> See *id.* at Section III.F.

<sup>30</sup> See Comments of National Telecommunications Cooperative Association at 5, 41 (“NTCA Comments”); Reply Comments of National Telecommunications Cooperative Association at 7 (“NTCA Reply”).

<sup>31</sup> See NTCA Comments at 5, 41-42; NTCA Reply at 8.

<sup>32</sup> See NTCA Comments at 5, 42; NTCA Reply at 8.

<sup>33</sup> 5 U.S.C. § 603(b)(3).

<sup>34</sup> 5 U.S.C. § 601(6).

same meaning as the term “small business concern” under the Small Business Act.<sup>35</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).<sup>36</sup>

9. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>37</sup> The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”<sup>38</sup> 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.<sup>39</sup> Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more.<sup>40</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

10. *Wired Telecommunications Carriers -- Cable and Other Program Distribution.* This category includes, among others, cable operators, direct broadcast satellite (“DBS”) services, home satellite dish (“HSD”) services, satellite master antenna television (“SMATV”) systems, and open video systems (“OVS”). The data we have available as a basis for estimating the number of such entities were gathered under a superseded SBA small business size standard formerly titled Cable and Other Program Distribution. The former Cable and Other Program Distribution category is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small.<sup>41</sup> According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous

<sup>35</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>36</sup> 15 U.S.C. § 632.

<sup>37</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>38</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>39</sup> 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 November 2005).

<sup>40</sup> *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.”

<sup>41</sup> *See supra* ¶ 9. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with \$13.5 million or less in annual receipts.

category that operated for the entire year.<sup>42</sup> 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.<sup>43</sup> Thus, we believe that a substantial number of entities included in the former Cable and Other Program Distribution category may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution. With respect to OVS, the Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.<sup>44</sup> Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2006, BSPs served approximately 1.4 million subscribers, representing 1.46 percent of all MVPD households.<sup>45</sup> Among BSPs, however, those operating under the OVS framework are in the minority.<sup>46</sup> The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

11. *Cable System Operators (Rate Regulation Standard)*. The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.<sup>47</sup> As of 2006, 7,916 cable operators qualify as small cable companies under this standard.<sup>48</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>49</sup> Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.<sup>50</sup> Thus, under this standard, most cable systems are small.

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<sup>42</sup> 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).

<sup>43</sup> *Id.* An additional 61 firms had annual receipts of \$25 million or more.

<sup>44</sup> See Current Filings for Certification of Open Video Systems, <http://www.fcc.gov/mb/ovs/csovsccer.html> (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, <http://www.fcc.gov/mb/ovs/csovsarc.html> (last visited July 25, 2007).

<sup>45</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 684, Table B-1 (2009) ("*13<sup>th</sup> Annual Report*").

<sup>46</sup> OPASTCO reports that fewer than 3 percent of its members provide service under OVS certification. See *id.* at 607, ¶ 135 n.473.

<sup>47</sup> 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).

<sup>48</sup> 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, available at <http://www.ncta.com/ContentView.aspx?contentId=73> (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

<sup>49</sup> 47 C.F.R. § 76.901(c).

<sup>50</sup> 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.

12. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>51</sup> There are approximately 65.3 million cable subscribers in the United States today.<sup>52</sup> Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>53</sup> Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.<sup>54</sup> 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.<sup>55</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

13. *Wired Telecommunications Carriers - 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 is now included in the category of Wired Telecommunications Carriers.<sup>56</sup> The majority of services in this category can be considered small under both the current SBA size standard definition and the superseded size standard definition, *i.e.*, Cable and Other Program Distribution.<sup>57</sup> Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. (“Dominion”) (marketed as Sky Angel).<sup>58</sup> All three currently offer subscription services. Two of these three DBS operators, DIRECTV<sup>59</sup> and EchoStar

<sup>51</sup> 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>52</sup> *See* 13<sup>th</sup> Annual Report, 24 FCC Rcd at 684, Table B-1.

<sup>53</sup> 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).

<sup>54</sup> 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc’ns News eds., 2006); Top 25 MSOs – NCTA.com, available at <http://www.ncta.com/ContentView.aspx?contentId=73> (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

<sup>55</sup> 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. § 76.901(f).

<sup>56</sup> *See* NAICS code 517110. The size standard for that definition is 1,500 employees.

<sup>57</sup> *See supra* ¶ 9. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with \$13.5 million or less in annual receipts.

<sup>58</sup> *See* 13<sup>th</sup> Annual Report, 24 FCC Rcd at 580, ¶ 74.

<sup>59</sup> DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See id.* at 687, Table B-3.

Communications Corporation (“EchoStar”),<sup>60</sup> report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion’s Sky Angel service, serves fewer than 500,000 subscribers.<sup>61</sup> Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee.

14. *Wired Telecommunications Carriers - Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. PCOs are now included in the category of Wired Telecommunications Carriers.<sup>62</sup> The majority of services in this category can be considered small under both the current SBA size standard definition and the superseded size standard definition, *i.e.*, Cable and Other Program Distribution.<sup>63</sup> The Independent Multi-Family Communications Council (“IMCC”), the trade association that represents PCOs, indicates that PCOs serve about 1 to 2 percent of the MVPD marketplace.<sup>64</sup> Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 900,000 subscribers.<sup>65</sup> Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution.

15. *Wired Telecommunications Carriers -- Home Satellite Dish (“HSD”) Service.* HSD is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small.<sup>66</sup> HSD or the large dish segment of the satellite industry is the original

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<sup>60</sup> DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.*

<sup>61</sup> *See id.* at 581, ¶ 76.

<sup>62</sup> *See* NAICS code 517110. The size standard for that definition is 1,500 employees.

<sup>63</sup> *See supra* ¶ 9. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with \$13.5 million or less in annual receipts.

<sup>64</sup> *See 13<sup>th</sup> Annual Report*, 24 FCC Rcd at 609, ¶ 140. Previously, the Commission reported that IMCC had 250 members. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004).

<sup>65</sup> *See 13<sup>th</sup> Annual Report*, 24 FCC Rcd at 684, Table B-1.

<sup>66</sup> *See supra* ¶ 9. The data we use herein to estimate the number of HSD services is based on a superseded SBA-recognized definition. Because HSD provides subscription services, HSD fell within the SBA-recognized definition of Cable and Other Program Distribution, which has been superseded by the category of Wired Telecommunications Carriers. The definition of Cable and Other Program Distribution provided that a small entity was one with \$13.5 million or less in annual receipts. 13 C.F.R. § 121.201 (2002 NAICS code 517510).

satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2005 and June 2006, HSD subscribership fell from 206,538 subscribers to 111,478 subscribers.<sup>67</sup> The Commission has no information regarding the annual revenue of the four C-Band distributors.

16. *Wireless Telecommunications Carriers (except Satellite) -- Broadband Radio Service and Educational Broadband Service.* Since 2007, the Census Bureau has placed wireless firms, including those providing wireless video service, within the new category of Wireless Telecommunications Carriers (except Satellite).<sup>68</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>69</sup> The Broadband Radio Service (BRS) is composed of Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).<sup>70</sup> MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)).<sup>71</sup> We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005.<sup>72</sup>

17. *Broadband Radio Service and Educational Broadband Service – Auction Data.* The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>73</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>74</sup> In the

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<sup>67</sup> See 13<sup>th</sup> Annual Report, 24 FCC Rcd at 684, Table B-1.

<sup>68</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

<sup>69</sup> 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>70</sup> *Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004).

<sup>71</sup> See *id.*

<sup>72</sup> Previously, wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution. 13 C.F.R. § 121.201 (2002 NAICS code 517510). The definition of Cable and Other Program Distribution provided that a small entity is one with \$13.5 million or less in annual receipts. See *id.*

<sup>73</sup> 47 C.F.R. § 21.961(b)(1) (2002).

<sup>74</sup> *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order*, 10 FCC Rcd 9589 (1995).

MDS auction, 67 bidders won 493 licenses.<sup>75</sup> 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.<sup>76</sup>

18. *Broadband Radio Service and Educational Broadband Service – Licenses Not Received Via Auction.* MDS (now BRS) licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall within the new category of Wireless Telecommunications Carriers (except Satellite).<sup>77</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>78</sup> Previously, wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution.<sup>79</sup> The definition of Cable and Other Program Distribution provided that a small entity is one with \$13.5 million or less in annual receipts.<sup>80</sup> 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 under the now superseded SBA small business size standard for Cable and Other Program Distribution.

19. *Educational Broadband Service.* Educational institutions are included in the analysis above as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).<sup>81</sup> 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. *Wireless Telecommunications Carriers (except Satellite) -- 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.<sup>82</sup> Since 2007, the Census Bureau has placed wireless firms, including those providing wireless video service, within the new

<sup>75</sup> MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

<sup>76</sup> Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934. 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$13.5 million or less). See 13 C.F.R. § 121.201 (2007 NAICS code 517910).

<sup>77</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

<sup>78</sup> 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>79</sup> 13 C.F.R. § 121.201 (2002 NAICS code 517510).

<sup>80</sup> See *id.*

<sup>81</sup> In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

<sup>82</sup> See *Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997) ("LMDS Order").

category of Wireless Telecommunications Carriers (except Satellite).<sup>83</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>84</sup> Previously, LMDS providing wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution.<sup>85</sup> The definition of Cable and Other Program Distribution provided that a small entity is one with \$13.5 million or less in annual receipts.<sup>86</sup>

21. *Wireless Telecommunications Carriers (except Satellite) -- Local Multipoint Distribution Service (Auctions)*. The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions,<sup>87</sup> 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.<sup>88</sup> Moreover, the Commission added an additional classification for a “very small business,” which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.<sup>89</sup> These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.<sup>90</sup> In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the Commission’s auction rules and the now superseded SBA small business size standard for Cable and Other Program Distribution.

22. *Cable and Other Subscription Programming*. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”<sup>91</sup> The SBA has developed a small business size standard for firms within this category, which is all firms with \$15 million or less in annual receipts.<sup>92</sup> According to Census Bureau

<sup>83</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

<sup>84</sup> 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>85</sup> 13 C.F.R. § 121.201 (2002 NAICS code 517510).

<sup>86</sup> *See id.*

<sup>87</sup> The Commission has held two LMDS auctions: Auction No. 17 and Auction No. 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998 (104 bidders won 864 licenses). Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999 (40 bidders won 161 licenses).

<sup>88</sup> *See LMDS Order*, 12 FCC Rcd at 12545.

<sup>89</sup> *Id.*

<sup>90</sup> *See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).*

<sup>91</sup> U.S. Census Bureau, 2007 NAICS Definitions, “515210 Cable and Other Subscription Programming”; <http://www.census.gov/naics/2007/def/ND515210.HTM#N515210>.

<sup>92</sup> 13 C.F.R. § 121.201 (NAICS code 515210).

data for 2002, there were 270 firms in this category that operated for the entire year.<sup>93</sup> Of this total, 217 firms had annual receipts of under \$10 million and 13 firms had annual receipts of \$10 million to \$24,999,999.<sup>94</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

23. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”<sup>95</sup> The SBA has developed a small business size standard for firms within this category, which is all firms with \$29.5 million or less in annual receipts.<sup>96</sup> According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year.<sup>97</sup> Of this total, 7,685 firms had annual receipts of under \$24,999,999 and 45 firms had annual receipts of between \$25,000,000 and \$49,999,999.<sup>98</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

24. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.”<sup>99</sup> The SBA has developed a small business size standard for firms within this category, which is all firms with \$29.5 million or less in annual receipts.<sup>100</sup> According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year.<sup>101</sup> Of this total, 365 firms had annual receipts of under \$24,999,999 and 7 firms had annual receipts of between \$25,000,000 and \$49,999,999.<sup>102</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available

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<sup>93</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

<sup>94</sup> *Id.* An additional 40 firms had annual receipts of \$25 million or more.

<sup>95</sup> See U.S. Census Bureau, 2007 NAICS Definitions, “512110 Motion Picture and Video Production”; <http://www.census.gov/naics/2007/def/NDEF512.HTM#N512110>.

<sup>96</sup> 13 C.F.R. § 121.201 (NAICS code 512110).

<sup>97</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51211) (issued November 2005).

<sup>98</sup> *Id.*

<sup>99</sup> See U.S. Census Bureau, 2007 NAICS Definitions, “512120 Motion Picture and Video Distribution”; <http://www.census.gov/naics/2007/def/NDEF512.HTM#N512120>.

<sup>100</sup> 13 C.F.R. § 121.201 (NAICS code 512120).

<sup>101</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51212) (issued November 2005).

<sup>102</sup> *Id.*

regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

25. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>103</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>104</sup> We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

26. *Incumbent Local Exchange Carriers (“LECs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>105</sup> According to Commission data,<sup>106</sup> 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

27. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>107</sup> According to Commission data,<sup>108</sup> 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are “Other Local Service Providers.” Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service,

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<sup>103</sup> 15 U.S.C. § 632.

<sup>104</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>105</sup> 13 C.F.R. § 121.201 (2007 NAICS code 517110).

<sup>106</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (February 2007) (“Trends in Telephone Service”). This source uses data that are current as of October 20, 2005.

<sup>107</sup> 13 C.F.R. § 121.201 (2007 NAICS code 517110).

<sup>108</sup> See Trends in Telephone Service at Table 5.3.

competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

28. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: “This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”<sup>109</sup> The SBA has developed a small business size standard for firms in this category: “A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.”<sup>110</sup> According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.<sup>111</sup> Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

#### **D. Description of Reporting, Recordkeeping and Other Compliance Requirements**

29. The rules adopted in the *Order* will impose additional reporting, recordkeeping, and compliance requirements on MVPDs, cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors. The *Order* allows MVPDs to file complaints with the Commission alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in an unfair act involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order*, includes exclusive contracts, discrimination, and undue or improper influence). The complaint proceeding will be subject to the same procedures set forth in Sections 76.7 and 76.1003 of the Commission’s rules that apply to program access complaints involving satellite-delivered, cable-affiliated programming,<sup>112</sup> except that (i) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption when the unfair act involves a terrestrially delivered, cable-affiliated regional sports network) that the defendant’s activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers;<sup>113</sup> (ii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides only terrestrially delivered programming,

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<sup>109</sup> U.S. Census Bureau, 2007 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution”; <http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211>.

<sup>110</sup> 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

<sup>111</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122) (issued November 2005).

<sup>112</sup> See 47 C.F.R. §§ 76.7, 76.1003.

<sup>113</sup> See *id.* at Section III.D.2.

the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors;<sup>114</sup> and (iii) defendants will have 45 days -- rather than the usual 20 days -- from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint.<sup>115</sup> In addition, these rules provide for pre-filing notices, discovery, remedies, potential defenses, and the required contents of and deadlines for filing the complaint, answer, and reply.<sup>116</sup> The *Order* also establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.<sup>117</sup>

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

30. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>118</sup> The *NPRM* invited comment on issues that had the potential to have significant economic impact on some small entities.<sup>119</sup>

31. As discussed in Section A, the decision to establish rules to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis, and to establish procedures for the Commission's consideration of requests for a temporary standstill, will facilitate competition in the video distribution market and promote broadband deployment. The decision therefore confers benefits upon various MVPDs, including those that are smaller entities. Thus, the decision benefits smaller entities as well as larger entities. In general, because the decision confers these benefits on smaller entities, a discussion of alternatives to the adopted rules is of secondary importance. We note that the Commission found a lack of record evidence to reach a general conclusion that unfair acts involving this programming will significantly hinder an MVPD from providing video services in every case.<sup>120</sup> A case-by-case approach is less burdensome than declining to consider complaints alleging that a cable operator has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming, because small MVPDs would lack relief in such situations. Moreover, while the *Order* provides illustrative examples of evidence a complainant may provide, such as a regression analysis or market

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<sup>114</sup> *See id.*

<sup>115</sup> *See id.* at Section III.D.1.

<sup>116</sup> *See* 47 C.F.R. §§ 76.7, 76.1003.

<sup>117</sup> *See Order* at Section III.F.

<sup>118</sup> 5 U.S.C. § 603(c).

<sup>119</sup> *See NPRM*, 22 FCC Rcd at 11871-72, ¶ 144 and 17900-14, App. F.

<sup>120</sup> *See Order* at Section III.B.3.a.

survey, it also recognizes that not all potential complainants will have the resources to provide this type of evidence.<sup>121</sup> In addition, a case-by-case approach is consistent with the First Amendment.<sup>122</sup>

**F. Report to Congress**

32. The Commission will send a copy of the *First Report and Order* in MB Docket No. 07-198, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>123</sup> In addition, the Commission will send a copy of the *First Report and Order* in MB Docket No. 07-198, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *First Report and Order* in MB Docket No. 07-198 and FRFA (or summaries thereof) will also be published in the *Federal Register*.<sup>124</sup>

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<sup>121</sup> See Order at ¶ 56.

<sup>122</sup> See *id.* at Section III.C.

<sup>123</sup> See 5 U.S.C. § 80I(a)(1)(A).

<sup>124</sup> See 5 U.S.C. § 604(b).