

V. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Act Analysis

48. As required by the Regulatory Flexibility Act of 1980 (“RFA”),¹⁴¹ the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to this NPRM. The IRFA is attached to this NPRM as Appendix C.

B. Paperwork Reduction Act

49. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.¹⁴² In addition, pursuant to the Small Business Paperwork Relief Act of 2002,¹⁴³ we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”¹⁴⁴

C. Ex Parte Rules

50. Permit-But-Disclose. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under section 1.1206(b) of the Commission’s rules.¹⁴⁵ *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.¹⁴⁶ Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

D. Filing Requirements

51. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,¹⁴⁷ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document.¹⁴⁸ Comments may be filed using: (1) the Commission’s Electronic Comment

¹⁴¹ 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. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

¹⁴² Pub. L. No. 104-13.

¹⁴³ Pub. L. No. 107-198.

¹⁴⁴ 44 U.S.C. § 3506(c)(4).

¹⁴⁵ See 47 C.F.R. § 1.1206(b); see also *id.* §§ 1.1202, 1.1203.

¹⁴⁶ See *id.* § 1.1206(b)(2).

¹⁴⁷ See *id.* §§ 1.415, 1.419.

¹⁴⁸ To the extent any filings in response to this NPRM relate to issues pending in MB Docket No. 07-198, where the Commission sought comment on the issue of tying of an MVPD’s rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks, they must also be filed in MB Docket No. 07-198.

Filing System ("ECFS"), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.¹⁴⁹

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

52. **Availability of Documents.** Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

53. **Accessibility Information.** To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

54. **Additional Information.** For additional information on this proceeding, contact Diana Sokolow, Diana.Sokolow@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

55. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 534, this Notice of Proposed Rulemaking IS ADOPTED.

¹⁴⁹ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

56. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "Marlene H. Dortch". The signature is written in a cursive style with a large, stylized initial "M".

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

Comments filed in MB Docket No. 10-71

The Africa Channel
American Cable Association (“ACA”)
The American Public Power Association *et al.* (“APPA Group”)
AT&T Inc.
ATV Broadcast LLC
Belo Corp.
BEVCOMM, Inc. and Cannon Valley Cablevision, Inc.
Bright House Networks, LLC (“BHN”)
Broadcaster Associations (National Association of Broadcasters, ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates)
Broadcast Networks (CBS Corporation; Fox Entertainment Group, Inc. and Fox Television Stations, Inc.; NBC Universal, Inc. and NBC Telemundo License Co.; The Walt Disney Company; and Univision Communications Inc.)
Broadcast Television Licensees (Broadcasting Licenses, Limited Partnership; Eagle Creek Broadcasting of Laredo, LLC; Mountain Licenses, L.P.; Sarkes Tarzian, Inc.; Stainless Broadcasting, L.P.; and WSBS Licensing, Inc.)
Cablevision Systems Corporation
CBS Corporation
Cox Enterprises, Inc.
C-SPAN Networks
Discovery Communications LLC
The Walt Disney Company (“Disney”)
Fox Television Affiliates Association (“Fox Affiliates”)
Free Market Operators (Massillon Cable TV; WaveDivision Holdings, LLC; NPG Cable Inc.; the Comporium Group; and Harron Communications, LP)
Free Press, Parents Television Council, and Consumers Union (“Free Press *et al.*”)
Gray Television, Inc.
Hoak Media, LLC
Institute for Policy Innovation
LIN Television Corporation
Local Broadcasters Coalition (Allbritton Communications Company; Bahakel Communications, Ltd.; Communications Corporation of America; Cordillera Communications, Inc.; Granite Broadcasting Corporation; Local TV, LLC; Malara Broadcast Group, Inc.; McGraw-Hill Broadcasting Company; Media General, Inc.; Meredith Corporation; Midwest Television, Inc.; Smith Media, LLC; White Knight Holdings, Inc.; and WNAC, LLC)
Local Television Broadcasters (Barrington Broadcasting Group, LLC; Bonten Media Group, LLC; Dispatch Broadcast Group; Gannett Co., Inc.; Newport Television LLC; Post-Newsweek Stations, Inc.; Raycom Media, Inc.; and Weigel Broadcasting Company) (“LTB”)
Media Access Project (“MAP”)
Morgan Murphy Media
Named State Broadcasters Associations (“NSBA”)
New Age Media, LLC
Nexstar Broadcasting, Inc.
Office of Advocacy, U.S. Small Business Administration

The Organization for the Promotion and Advancement of Small Telecommunications Companies; the National Telecommunications Cooperative Association; the Independent Telephone and Telecommunications Alliance; the Western Telecommunications Alliance; and the Rural Independent Competitive Alliance (“OPASTCO *et al.*”)

Ovation

Pioneer Communications, CT Communications, and West Kentucky Rural Telephone Cooperative, Inc. (“Pioneer *et al.*”)

Precursor LLC

RCN Telecom Services, Inc.

Retirement Living TV

Sinclair Broadcast Group, Inc.

Starz Entertainment, LLC

Time Warner Cable Inc.

United States Telecom Association (“US Telecom”)

Univision Communications Inc.

Verizon

Reply Comments filed in MB Docket No. 10-71

The American Public Power Association *et al.* (“APPA Group”)

Broadcaster Associations (National Association of Broadcasters, ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates)

Cablevision Systems Corporation

CBS Corporation

Charter Communications, Inc.

DIRECTV, Inc. and DISH Network L.L.C.

The Walt Disney Company (“Disney”)

Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (“Fox”)

Gray Television, Inc.

HDNet LLC

Insight Communications Company, Inc.

Institute for Policy Innovation

Media Access Project, on behalf of Consumers Union, Free Press, and Parents Television Council (“MAP *et al.*”)

Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications (“Mediacom/Suddenlink”)

The National Football League

National Religious Broadcasters

Precursor LLC

Public Knowledge

Time Warner Cable Inc.

Verizon

In addition, a number of individual consumers filed comments in this proceeding.

APPENDIX B

Proposed Rule Changes

Note: For ease of review, the proposed rule changes are written below with additions in bold underlined text.

The Federal Communications Commission proposes to amend Part 76 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

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, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.65 by revising paragraph (b)(1)(iv) and adding paragraphs (b)(1)(viii)-(x) to read as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

* * * * *

(b) *Good faith negotiation—(1) Standards.* * * *

* * * * *

(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal, **or to provide a bona fide proposal on an important issue;**

* * * * *

(viii) Agreement by a broadcast television station Negotiating Entity to provide a network with which it is affiliated the right to approve the station's retransmission consent agreement with an MVPD;

(ix) Agreement by a broadcast television station Negotiating Entity to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned; and

(x) Refusal by a Negotiating Entity to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement.

* * * * *

3. Amend § 76.1601 to read as follows (Note 1 to § 76.1601 remains unchanged)

§ 76.1601 Deletion or repositioning of broadcast signals.

(a) Effective April 2, 1993, a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

(b) Broadcast television stations and multichannel video programming distributors shall notify affected subscribers of the potential deletion of a broadcaster's signal a minimum of 30 days in advance of a retransmission consent agreement's expiration, unless a renewal or extension agreement has been executed.

APPENDIX C

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

A. Need for, and Objectives of, the Proposed Rule Changes

2. The NPRM seeks comment on a series of proposals, set forth in Paragraph 4 below, to streamline and clarify the Commission’s rules concerning or affecting retransmission consent negotiations. The Commission’s primary objective is to assess whether and how the Commission rules in this arena are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and, to the extent possible, minimize video programming service disruptions to consumers.

3. Since Congress enacted the retransmission consent regime in 1992, there have been significant changes in the video programming marketplace. One such change is the form of compensation sought by broadcasters. Historically, cable operators typically compensated broadcasters for consent to retransmit the broadcasters’ signals through in-kind compensation, which might include, for example, carriage of additional channels of the broadcaster’s programming on the cable system or advertising time.⁴ Today, however, broadcasters are increasingly seeking and receiving monetary compensation from multichannel video programming distributors (“MVPDs”) in exchange for consent to the retransmission of their signals. Another important change concerns the rise of competitive video programming providers. In 1992, the only option for many local broadcast television stations seeking to reach MVPD customers in a particular Designated Market Area (“DMA”) was a single local cable provider. Today, in contrast, many consumers have additional options for receiving programming, including two national direct broadcast satellite (“DBS”) providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet. One result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.⁵

4. Accordingly, we have concluded that it is appropriate for us to reexamine our rules relating to retransmission consent. In the NPRM, we consider revisions to the retransmission consent and

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 See, e.g., *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 503, ¶ 56 (2004).

⁵ See NPRM, ¶ 15 (discussing the 2010 retransmission consent disputes between Cablevision Systems Corp. (“Cablevision”) and News Corp., and between Cablevision and Walt Disney Co., both of which resulted in carriage impasses). *But see* Opposition of the National Association of Broadcasters *et al.* at 7; Comments of Hoak Media, LLC at 2; Comments of Sinclair Broadcast Group, Inc. at 9.

related rules that we believe could allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. Accordingly, the NPRM seeks comment on rule changes that would:

- Provide more guidance under the good faith negotiation requirements to the negotiating parties by:
 - Specifying additional examples of *per se* violations in Section 76.65(b)(1) of our rules;⁶ and
 - Further clarifying the totality of the circumstances standard of Section 76.65(b)(2);⁷
- Improve notice to consumers in advance of possible service disruptions by extending the coverage of our notice rules to non-cable MVPDs and broadcasters as well as cable operators, and specifying that, if a renewal or extension agreement has not been executed 30 days in advance of a retransmission consent agreement's expiration, notice of potential deletion of a broadcaster's signal must be given to consumers regardless of whether the signal is ultimately deleted;⁸
- Extend to non-cable MVPDs the prohibition now applicable to cable operators on deleting or repositioning a local commercial television station during ratings "sweeps" periods;⁹ and
- Allow MVPDs to negotiate for alternative access to network programming by eliminating the Commission's network non-duplication and syndicated exclusivity rules.¹⁰

⁶ See NPRM, Section III.A. In Section III.A. of the NPRM, among other things, the Commission seeks comment on (1) whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision; (2) whether it should be a *per se* violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned; (3) whether it should be a *per se* violation for a negotiating entity to refuse to put forth *bona fide* proposals on important issues; (4) whether it should be a *per se* violation for a negotiating entity to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement; (5) what it means to "unreasonably" delay retransmission consent negotiations; and (6) whether a broadcaster's request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market "significantly viewed" station violates Section 76.65(b)(1)(vi) of our rules.

⁷ See *id.*, Section III.B. In Section III.B. of the NPRM, the Commission seeks comment on whether to provide more specificity for the meaning and scope of the "totality of the circumstances" standard of Section 76.65(b)(2) of its rules, in order to define more clearly the instances in which a negotiating entity may violate this standard.

⁸ See *id.*, Section III.C.

⁹ See *id.*, Section III.D.

¹⁰ See *id.*, Section III.E. The network non-duplication rules permit a station with exclusive rights to network programming, as granted by the network, to assert those rights by using notification procedures in the Commission's rules. See 47 C.F.R. §§ 76.92-76.94. The rules, in turn, prohibit the cable system from carrying the network programming as broadcast by any other station within the "geographic zone" to which the contractual rights and rules apply. See 47 C.F.R. § 76.92. Thus, a cable system negotiating retransmission consent with a local network affiliate may face greater pressure to reach agreement by virtue of the cable system's inability to carry another affiliate of the same network if the retransmission consent negotiations fail. Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station. See 47 C.F.R. § 76.101 *et seq.* In the year 2000, the Commission adopted rules implementing provisions of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") that applied the network non-duplication and syndicated exclusivity rules to satellite retransmission of six "nationally distributed superstations." See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and*

(continued....)

We also seek comment on any other revisions or additions to our rules within the scope of our authority¹¹ that would improve the retransmission consent negotiation process and help protect consumers from programming disruptions.¹²

B. Legal Basis

5. The proposed action is authorized pursuant to Sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 534.

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

6. 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.¹³ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁴ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁵ 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.¹⁶ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

7. *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

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Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals, Report and Order, 15 FCC Rcd 21688 (2000).

¹¹ The Commission does not have the power to force broadcasters to consent to MVPD carriage of their signals nor can the Commission order binding arbitration. *See* NPRM, ¶ 18 and n. 54. *See also* Letter from Chairman Julius Genachowski, FCC, to The Honorable John F. Kerry, Chairman, Subcommittee on Communications, Technology, and the Internet, Committee on Commerce, Science, and Transportation, U.S. Senate, at 1 (Oct. 29, 2010) (“[C]urrent law does not give the agency the tools necessary to prevent service disruptions.”).

¹² *See* NPRM, Section III.F.

¹³ 5 U.S.C. § 603(b)(3).

¹⁴ 5 U.S.C. § 601(6).

¹⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 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.” 5 U.S.C. § 601(3).

¹⁶ 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

and infrastructure that they operate are included in this industry.”¹⁷ The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”¹⁸ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.¹⁹

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 above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.²⁰

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.²¹ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²² In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²³ 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.²⁴ Thus, under this standard, most cable systems are small.

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.”²⁵ The Commission has determined that an operator serving fewer than 677,000

¹⁷ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

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

¹⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

²⁰ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

²¹ 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).

²² See BROADCASTING & CABLE YEARBOOK 2006, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); TELEVISION AND CABLE FACTBOOK 2006, at D-805 to D-1857 (Albert Warren ed., 2005).

²³ 47 C.F.R. § 76.901(c).

²⁴ TELEVISION AND CABLE FACTBOOK 2006, at F-2 (Albert Warren ed., 2005) (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

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

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.²⁶ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁷ 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,²⁸ 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. *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, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"²⁹ which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³⁰ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.³¹ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).³² Each currently offers subscription services. DIRECTV³³ and EchoStar³⁴ each report annual revenues that are in excess of the threshold for 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 service provider.

12. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and

²⁶ 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

²⁷ See *BROADCASTING & CABLE YEARBOOK 2006*, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); *TELEVISION AND CABLE FACTBOOK 2006*, at D-805 to D-1857 (Albert Warren ed., 2005).

²⁸ 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).

²⁹ See 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 7, above.

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

³¹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

³² See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) ("*13th Annual Report*"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). See Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

³³ As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. See *13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

³⁴ As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.*

condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"³⁵ which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³⁶ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.³⁷

13. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.³⁸ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.³⁹

14. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).⁴⁰ In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.⁴¹ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA

³⁵ See 13 C.F.R. § 121.201, NAICS code 517110 (2007).

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

³⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

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

³⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

⁴⁰ *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 and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

⁴¹ 47 C.F.R. § 21.961(b)(1).

authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.⁴² After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.⁴³ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.⁴⁴ Auction 86 concluded in 2009 with the sale of 61 licenses.⁴⁵ Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

15. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.⁴⁶ Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution 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."⁴⁷ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.⁴⁸

⁴² 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

⁴³ *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

⁴⁴ *Id.* at 8296.

⁴⁵ *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

⁴⁶ The term "small entity" within 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 EBS licensees.

⁴⁷ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

⁴⁸ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

16. *Fixed Microwave Services.* Microwave services include common carrier,⁴⁹ private-operational fixed,⁵⁰ and broadcast auxiliary radio services.⁵¹ They also include the Local Multipoint Distribution Service (LMDS),⁵² the Digital Electronic Message Service (DEMS),⁵³ and the 24 GHz Service,⁵⁴ where licensees can choose between common carrier and non-common carrier status.⁵⁵ At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.⁵⁶ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁵⁷ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.⁵⁸ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

17. *Open Video Systems.* The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁵⁹ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁶⁰ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”⁶¹ The SBA has developed a small business size standard for this

⁴⁹ See 47 C.F.R. Part 101, Subparts C and I.

⁵⁰ See 47 C.F.R. Part 101, Subparts C and H.

⁵¹ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

⁵² See 47 C.F.R. Part 101, Subpart L.

⁵³ See 47 C.F.R. Part 101, Subpart G.

⁵⁴ See *id.*

⁵⁵ See 47 C.F.R. §§ 101.533, 101.1017.

⁵⁶ 13 C.F.R. § 121.201, NAICS code 517210.

⁵⁷ 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).

⁵⁸ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

⁵⁹ 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

⁶⁰ See 47 U.S.C. § 573.

⁶¹ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

category, which is: all such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.⁶² In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁶³ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.⁶⁴ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

18. *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.”⁶⁵ To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, which supersedes data from the 2002 Census, there were 396 firms that in 2007 were engaged in production of Cable and Other Subscription Programming. Of these, 386 operated with less than 1,000 employees, and 10 operated with more than 1,000 employees. However, as to the latter 10 there is no data available that shows how many operated with more than 1,500 employees. Thus, under this category and associated small business size standard, the majority of firms can be considered small.⁶⁶

19. *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.”⁶⁷ 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.⁶⁸ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

⁶² See http://factfinder.census.gov/servlet/IBOTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

⁶³ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

⁶⁴ See *13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁶⁵ U.S. Census Bureau, 2007 NAICS Definitions, “515210 Cable and Other Subscription Programming”; <http://www.census.gov/naics/2007/def/ND515210.HTM#N515210>.

⁶⁶ See http://factfinder.census.gov/servlet/IBOTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

⁶⁷ 15 U.S.C. § 632.

⁶⁸ 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).

20. *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.⁶⁹ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.⁷⁰

21. *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.⁷¹ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.⁷² Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

22. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts.⁷³ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”⁷⁴ The Commission has estimated the number of licensed commercial television stations to be 1,392.⁷⁵ According to Commission staff review of the BIA/Kelsey, MAPro Television Database (“BIA”) as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations⁷⁶ (or about 74 percent) have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations

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

⁷⁰ See http://factfinder.census.gov/servlet/IBOTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

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

⁷² See http://factfinder.census.gov/servlet/IBOTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

⁷³ See 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

⁷⁴ *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

⁷⁵ See News Release, “Broadcast Station Totals as of December 31, 2009,” 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) (“*Broadcast Station Totals*”); also available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf.

⁷⁶ We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 75; however, we are using BIA's estimate for purposes of this revenue comparison.

to be 390.⁷⁷ We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁷⁸ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

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

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

24. Certain proposed rule changes discussed in the NPRM would affect reporting, recordkeeping or other compliance requirements. Specifically, a potential rule change would (1) revise the Commission’s notice rules to specify that, if a renewal or extension agreement has not been executed 30 days in advance of a retransmission consent agreement’s expiration, notice of potential deletion of a broadcaster’s signal must be given to consumers regardless of whether the signal is ultimately deleted; and (2) extend the coverage of this notice rule to non-cable MVPDs and broadcasters.

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

25. 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.⁷⁹

26. As discussed in the NPRM, our goal in this proceeding is to take appropriate action, within our existing authority, to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services. The specific changes on which we seek comment, set forth in Paragraph 4 above, are intended to allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. The improved successful completion of retransmission consent negotiations would benefit both broadcasters and MVPDs, including those that are smaller entities, as well as MVPD subscribers. Thus, the proposed rules would benefit smaller entities as well as larger entities. For this reason, an analysis of alternatives to the proposed rules is unnecessary. Further, we note that in its discussion of whether there are any additional actions or practices that should be deemed to constitute *per se* violations of a negotiating entity’s duty to negotiate retransmission consent agreements in good faith, the

⁷⁷ See *Broadcast Station Totals*, *supra*, note 75.

⁷⁸ “[Business concerns] are affiliates of each other “when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

⁷⁹ 5 U.S.C. § 603(c)(1)-(c)(4)

Commission specifically references a proposal to permit small and mid-size MVPDs to “pool their resources, appoint an agent, and negotiate as a group.”⁸⁰ Such a proposal would provide particular benefit to small entities. The NPRM further considers the impact of retransmission consent on small entities by asking whether small and new entrant MVPDs are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so, whether this is fair.⁸¹

27. We invite comment on whether there are any alternatives we should consider to our proposed modifications to rules that apply to or affect retransmission consent negotiations that would minimize any adverse impact on small businesses, but which maintain the benefits of our proposals.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

28. None.

⁸⁰ See NPRM, ¶ 29 (quoting Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies *et al.* at 6).

⁸¹ See *id.*

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

I am pleased that the Commission is undertaking, for the first time in more than a decade, an evaluation of its retransmission consent rules.

Retransmission consent negotiations have become more contentious recently, and consumers have gotten caught in the middle. Last fall, millions of cable subscribers lost access to baseball playoff and World Series games, and many other viewers have been blindsided by less publicized disputes. Even as we vote this item, there's a looming retransmission consent impasse between a nationwide satellite TV provider and a large broadcast group with major network affiliates.

Consumers have real and completely understandable concerns. There are also legitimate issues on the different sides of the business table.

Broadcasters provide valuable content to pay television providers and point to a statutory framework that recognizes broadcasters' right to seek compensation for carriage. Broadcasters also compete with cable and satellite networks with two revenue streams, but face similar programming costs and the challenges of audience fragmentation -- challenges exacerbated by today's difficult economic environment.

Cable and satellite operators too face a tough economic environment, and are correct that the marketplace has changed significantly since the retransmission framework was first adopted by Congress almost 20 years ago.

It's time to take a fresh look and explore whether there are measures we can take to allow the market-based process contemplated by the retransmission consent laws to operate more smoothly, and serve consumers and the marketplace.

The current statutory framework limits the Commission's tools to respond to retransmission consent impasses. For example, the statute doesn't give the Commission the authority to order interim carriage of broadcast programming or mandatory arbitration. The jury is still out on whether those measures are necessary or desirable, but if they are, it will require statutory change, and we will serve as a resource to Congress.

The Notice we issue today asks whether there are changes within the Commission's existing authority that can improve the process for companies negotiating commercial deals, while protecting consumers from the uncertainty and disruption they experience when negotiations break down.

No one should interpret our initiation of this proceeding as a signal -- or an excuse -- to drag their feet on reaching retransmission consent agreements. Foot dragging or any bad-faith conduct won't be tolerated under our existing rules or any new rules we adopt in this proceeding.

I'd like to thank Bill Lake and the Media Bureau, as well as Rick Kaplan and Marilyn Sonn, for their excellent work in this important area.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

Retransmission Consent is a curious animal. Intended originally in 1992 largely to protect consumers by ensuring them cable access to their local TV stations, the issue morphed over the years into a fight between well-financed special interests to see who could best game the rules to their own advantage. The FCC—intended first and foremost to be a consumer protection agency—has maintained it has inadequate authority to do much about it and has settled on statutory ambiguities to vacate the field and let the big guys fight it out. These Retransmission Consent disputes are painful for everyone involved, to be sure, but they are most acutely painful for consumers who can be denied access to programming like the World Series or the Academy Awards while broadcast and cable fight it out for the spoils. When there is a blackout, we hear from the public and Members of Congress clearly and in great numbers, looking for relief. And guess who ends up paying the bill when the dispute is finally settled? We, the people.

In 1992, when the Cable Act passed Congress, it was clear that the Retransmission Consent provisions were concerned more with protecting small broadcasters and cable companies than enriching media giants who, at that time, were less powerful and consolidated than they are today. While there are some small players left—who get consistently rolled given their lack of leverage under the current rules—the norm now is big money against big money, with the consumer getting pummeled between two Sumo wrestlers. Ransom notes in the largest newspapers, fear inducing videos before children's programming, and nasty advertisements everywhere issue from both sides of the battlefield.

Today we take a step in the right direction to confront this very difficult situation. We need to know what we can and cannot do under the present statute and if we can do more than we have been doing. Arguably we have been too timid in approaching the statute. Maybe so, maybe no. So parties should weigh in on the legal analysis contained in today's Notice of Proposed Rulemaking. In the absence of action by Congress to clarify the parameters, the FCC has to take a hard and detailed look at how best to handle these Retransmission Consent impasses and, most importantly, at the harms caused to consumers. So, I am pleased we try to look at issues, such as Early Termination Fees, that influence the ability of consumers to change providers—assuming an alternative provider is even available—to avoid blackouts.

There are lots of good questions that are raised in this item. What authority does the Commission have under the "good faith" mandate of the Cable Act? Indeed, what does "good faith" mean in the dog-eat-dog world of big media? We inquire about the impact of stations that are not commonly owned, the LMAs and JSAs, that I have previously raised as problematic, and we ask whether it should be a *per se* violation if a party with one of those agreements is negotiating on another station's behalf without being commonly owned. We raise the question of networks negotiating on behalf of the affiliates and how that impacts the negotiation. We have offered up questions on the notification requirements and if there is a way to better inform consumers about the possibility of a disruption. Early notification could help, but improperly done it might merely serve as "a further front" in the Retransmission wars. We have raised questions on the network non-duplication and syndicated exclusivity rules and how these syndex rules impact the negotiations. I am pleased that we also ask how the elimination of those rules would ultimately affect localism. It's an important question. I look forward to the parties' response to all of these questions. And I want especially to emphasize the input of all other interested stakeholders—and that surely means consumers and the organizations representing them.

The Cable Act also requires us to consider the impact Retransmission Consent has on basic

service tier rates. So it is important that we examine in this proceeding how these disputes and consent agreements ultimately affect the cable bills of consumers. I also happen to think we should go a step beyond and explore ways to inform consumers just how much—in dollars and cents—they are paying every month to finance these Retransmission Consent agreements. A little ray of sunshine on what consumers have to pay might actually enhance the Retrans process quite considerably.

My thanks to the Chairman for bringing this item to us and to the Bureau for all the hard work that went into it.

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

When new competitive developments begin to affect negotiations in an existing marketplace, it is not surprising if friction among players results. Change means that participants can no longer rely on the old "settled business expectations" to remain settled – and the communications marketplace of the early 21st Century is certainly nothing if not dynamic. It is against this backdrop that we launch this Notice of Proposed Rulemaking.

Congress, through the Cable Consumer Protection and Competition Act of 1992, gave the Commission a limited role in overseeing some elements of otherwise private negotiations between TV broadcasters and multichannel video programming distributors ("MVPDs") over the terms of MVPD carriage of local television signals. Now incorporated into the Communications Act, Section 325 provides us with guidance in determining whether, or if, any changes to our retransmission consent rules might be warranted. The statute explicitly directs us to act only to preserve "good faith" in the bargaining process, and does not require any particular outcome. In other words, regardless of any changes in the competitive landscape, the law does not mandate that broadcasters and MVPDs always reach a carriage deal – even though, in the vast majority of cases, agreements are reached in a quiet and timely manner. To the contrary, Section 325 states that television signals may not be carried without the "express" consent of the broadcaster. For this reason, I agree with the conclusion discussed in the Notice that the Commission lacks authority to mandate interim carriage. Similarly, the legal analysis in the Notice makes a strong case that Section 325 and the Administrative Dispute Resolution Act prevent the Commission from ordering parties in a retrans dispute into binding arbitration. The statute also plainly states that merely asking for more money does not constitute bad faith.

That said, the Act does authorize the Commission to consider adjustments to our good faith rules if the facts support revisions, and I look forward to reviewing comments on the many concepts the Notice tees up under that rubric. Moreover, Section 325 does not affect our ability to consider the continuing need for regulations that long predate the statutory retrans scheme, such as the network nonduplication and syndicated exclusivity rules. In addition, there may be other separate and distinct regulations that have some bearing on retrans negotiations today, such as tier placement. I welcome the education on these questions that I expect many commenters will be eager to provide.

Finally, I want to raise a cautionary flag for all participants in this marketplace, whether they comment in the rulemaking or not. I am somewhat concerned that the mere opening of this proceeding may disrupt – however unintentionally – the momentum behind ongoing negotiations for new or renewed retrans agreements this year. If I am able to convey only one message today on this topic, it's this: No party should assume that the Commission will act in a particular way, or at a particular time, in this docket. So those of you who are working on retrans deals in 2011 and beyond should stay seated, and engaged, at the bargaining table, and reach a deal on your own. Don't use the mere existence of this Notice as an excuse to stop negotiating and reaching deals. Please don't expect the government to resolve any disputes for you.

I thank the staffs of the Media Bureau and the Office of General Counsel for their work on the Notice.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

The combination of two words can stir passions. Flight and delayed. Redskins and Cowboys. Pop and Quiz. Net and Neutrality. Retransmission and consent. In the worlds of broadcasting and cable, the last two words can get people yelling just as much as the joining of government and shutdown. While retransmission consent disputes that result in disruptions are few and far between, when they do happen, people get angry. And with good reason.

When consumers subscribe to and pay for a service, that service is expected: uninterrupted, reliable, and on demand. People have come to expect that delivered service, no matter what entity is providing the programming. And tempers rise when screens go dark. We can all relate to those levels of frustration.

While many have been frustrated at one time or another about the inability to watch television because of a power outage or a quick-passing storm, imagine being unable to enjoy the service you have subscribed to for longer periods of time. I for one hope to never hear about another retransmission consent dispute, but I won't hold my breath. The interruption that ensued following last October's impasse between Fox and Cablevision reverberated not only throughout the Northeast corridor, but the august corridors inside the Rayburn Building, The Hart Building, The Capitol, and the FCC. People were angry, and who could fault them?

When a TV screen goes dark, people blame not only the companies, but the government as well. During blackouts, we hear from a number of aggrieved individuals, who desperately want their favorite show to again grace their screen. But the law here is clear: the Commission holds limited authority via limited methods.

However, I am pleased that we are proactively recognizing that further examination into the existing retransmission consent regime is needed and that further comment is essential. Through the NPRM we consider today, points of view are sought on various ways to utilize and reinforce the authority that we do have in weighing-in on retransmission consent disputes. In seeking input on a variety of revisions to the existing rules, we hope to give companies a clearer perspective on how to operate and negotiate in good faith, and what we expect of them in doing so. Refusing to negotiate, using delay tactics, and crying wolf via inflammatory notices are actions that should never take place, and I'm confident that the proposed language in this item will serve to improve the current guidelines.

Our good faith framework, including the seven objective standards, is well thought-out and properly directed, and additions to it will only serve to bolster its impact and keep companies mindful of their tactics during negotiations. Through this item, we take worthwhile steps in this regard, seeking feedback on the effects of network veto power over retransmission consent agreements, clarifying what constitutes an unreasonable delay in coming to the negotiation table, and the value and purpose of the most favored nation designation. I truly feel that all of this will allow us to further shape our good faith requirements and assist both MVPDs and broadcasters in knowing what methods we find acceptable – or, more to the point, which ones we feel are unacceptable.

Whenever we discuss retransmission consent, our good faith applications thereto, and actions toward improving negotiations between parties, I want us to do so with an eye toward preventing disruptions of any kind, be they two minutes or two weeks. As the item so eloquently states, “in light of the changing marketplace, our proposals in this NPRM are intended to update the good faith rules and

remedies in order to better utilize the good faith requirement as a consumer protection tool.”

However, while the public is not being served when channels go dark due to monetary stand-offs, under current authority given to us by Congress we may not intervene outside of or further than the aforementioned good faith considerations. When it first applied retransmission consent to MVPDs in 1992, Congress stated that its intention was “to establish a marketplace for the disposition of the rights to retransmit broadcast signals”, and not to “dictate the outcome of the ensuing marketplace negotiations”. With this understanding in place, we know our boundaries, as they currently exist.

I mention that language to not only affirm that I understand what we can and cannot do, but to also make clear that if change is to be made, and further action from the FCC during retransmission consent disputes is desired, then our statutory authority must be addressed not in this hearing room, but farther up Independence Avenue. If Congress chooses to overhaul the retransmission consent and related rules that we use to address retransmission consent battles, then we will react accordingly. Short of that, we will do the best, with what we have.

The item seeks comment on a variety of considerations, and I urge all interested parties to seize this opportunity to better inform us. If companies and individuals have thoughts and counsel on where our authority begins and ends, what it does and does not do, and how it can be used, I look forward to hearing from you.

**STATEMENT OF
COMMISSIONER MEREDITH ATTWELL BAKER**

Re: *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

Over the last 20 years, local television broadcasters have been engaged in market-based negotiations with MVPDs over the right to retransmit local broadcast signals. I am pleased that these negotiations have been largely unencumbered by government micromanagement, and the results speak for themselves—the vast majority of retransmission consent negotiations are resolved privately, without government intervention, and without the loss of broadcast signals to MVPD subscribers.

Congress recognized the effectiveness of the private marketplace when it gave the Commission an extremely limited role in monitoring the retransmission consent market. In the 1992 Cable Act, Congress directed the Commission to monitor retransmission consent negotiations between broadcasters and MVPDs in order “to establish a marketplace for the disposition of the rights to retransmit broadcast signals.” Several years later, Congress provided further guidance, directing the Commission to ensure that the parties in a retransmission consent negotiation were proceeding in good faith. Congress, however, has never deviated from its directive that the Commission avoid “dictat[ing] the outcome of . . . marketplace negotiations” for retransmission consent.

Obviously the marketplace has changed significantly since the passage of the Cable Act. We have seen the number of programming networks increase exponentially, from an average of 281 in 2000 to an average of 565 in 2006. The means for viewing these channels have changed as well. When the Cable Act was passed, consumers had virtually no choice in video provider; today, most consumers have several choices for how they receive video programming. As the market has changed, we have seen the development of a generally understood market rate for cable channels such as TNT and ESPN, and I expect that eventually we will see market-based negotiations result in a generally understood market rate for ABC, CBS, Fox and NBC.

Against this backdrop of a clear statutory directive and a rapidly evolving marketplace, we initiate this proceeding to consider revisions to our existing rules governing retransmission consent. I am pleased that this item recognizes our limited statutory authority in this area, and instead of pursuing avenues that exceed that authority, the NPRM focuses on what we can do: revisit what constitutes “bad faith” in retransmission consent negotiations to provide more regulatory certainty and facilitate private negotiations. In addition, I am pleased that as part of this review we are taking a fresh look at some old regulations on our books and inquiring as to whether those regulations remain necessary. In keeping with the President’s recent executive order, we should be working to remove outdated regulations that stifle job creation and make our economy less competitive.

As we proceed with this rulemaking, I hope that we remain mindful that any steps we decide to take in this proceeding should be limited, should be focused on furtherance of the Congressional directive to facilitate marketplace negotiations, and should concentrate on the protection of consumers.