

pattern or trend of sufficiently specific complaints about a given channel or programming, and seeks to be or remain in the safe harbor, it must utilize its equipment to verify actual compliance with the RP by performing a spot check on that channel or programming on a going forward basis¹⁸⁴ within 30 days of receiving notification from the Commission.¹⁸⁵ Although we do not require stations and MVPDs to perform spot checks in response to complaints they receive directly, we encourage them to do so if they become aware of a pattern or trend even absent Commission action. If a Commission inquiry is opened and a station or MVPD can demonstrate that it has already performed a spot check in response to the same pattern or trend that led to the inquiry, no additional spot check will be required. We note that, as ACA explained, a pattern or trend of complaints from viewers of a single station or MVPD about programming that is being transmitted on other stations or MVPDs without triggering complaints on those other stations or MVPDs may be an indication that the problem lies with the station's or MVPD's equipment, rather than with the programming itself.¹⁸⁶

42. *Financial Inability to Perform Spot Checks.* Small MVPDs and stations, as discussed above, are not required to conduct annual spot checks, and will be in the safe harbor for embedded commercials transmitted in all programming they carry, even if that programming is not certified.¹⁸⁷ As with larger stations and MVPDs, however, stations and MVPDs that are treated as "small" for purposes of the CALM Act must have the equipment necessary to pass through programming compliant with the RP, and be able to demonstrate that the equipment has been properly installed, maintained, and utilized. In the context of an enforcement inquiry, small stations and MVPDs must be prepared to certify to the Commission that their own transmission equipment is not at fault for any such pattern or trend. They must also be prepared to conduct spot checks, or contract to have spot checks done, in response to a Commission inquiry triggered by a pattern or trend of complaints. We do not require a station or MVPD to purchase the necessary equipment to conduct spot checks in response to a Commission inquiry; it may borrow or contract for use of the equipment.¹⁸⁸ Stations and MVPDs may seek to delay the effective date of the rules for up to two years through a financial hardship waiver and may seek general waivers (also discussed below) for non-financial reasons, as discussed below.¹⁸⁹

¹⁸⁴ Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(i)(C), § 76.607(a)(3)(i)(C); 47 C.F.R. § 73.682(e)(3)(ii), § 76.607(a)(3)(ii)(A) and (B); 47 C.F.R. § 73.682(e)(3)(iii), § 76.607(a)(3)(ii)).

¹⁸⁵ The rule allows the Enforcement Bureau to specify a time other than 30 days, when appropriate. Appendix A, *Final Rules*, (47 C.F.R. 73.682(e)(3)(iv)(D)(I), 76.607(a)(3)(iv)(D)(I)). A station or MVPD that is in the safe harbor need not verify whether the complained of programming was in compliance, although it may do so if it wishes (and obviate the need for a prospective spot check) by providing the necessary information to demonstrate past compliance. As noted above (*see supra* note 145), a station or MVPD can contract with a third party to perform the spot check if necessary. A spot check performed in response to an FCC inquiry may not be counted toward any annual spot check obligations of a station or MVPD. A station or MVPD that opts not to conduct the prospective spot checks is no longer in the safe harbor and must respond to a Commission enforcement inquiry by demonstrating actual compliance with respect to the complaints referenced in the Letter of Inquiry and provide other information requested therein.

¹⁸⁶ ACA Oral Ex Parte (October 24, 2011).

¹⁸⁷ If they insert commercials, they must comply with the requirements for "Local Insertions" or "Third Party Local Insertions," as appropriate, in order to be deemed in compliance for those commercials. *See supra* paras. 28-29, *infra* para. 45.

¹⁸⁸ For example, based on a staff review of the Commission's online filing system (COALS), we know that smaller operators will often contract for technical analysis of their systems, for instance the performance of signal leakage tests.

¹⁸⁹ *See infra*, paras. 49-58.

(iv) Outcome of Spot Checks

43. Whether performed as part of an annual audit of non-certified programming, or in response to an FCC Letter of Inquiry, spot checks will require further action only if they indicate noncompliance on the part of a programmer with respect to embedded commercials. If the spot check reveals actual compliance with the RP, then the station or MVPD continues to be in the safe harbor and need take no further action (except, where appropriate, to notify the Commission in response to the letter of inquiry).¹⁹⁰ If the spot check indicates noncompliance, however, then the station or MVPD has actual knowledge that the channel or programming does not comply with the RP. Within seven business days, the station or MVPD must inform the Commission and the programmer in question of the noncompliance indicated by the spot check, and direct the programmer's attention to any relevant complaints.¹⁹¹ We note that noncompliance can be the result of deficiencies in the equipment the station or MVPD uses to pass through programming, rather than any problem with the commercials as provided by a programmer. Stations and MVPDs should be mindful of this possibility in their review of the spot check data and check their own equipment as appropriate.¹⁹² The station or MVPD must then re-check the noncompliant commercial programming with a follow-up spot check within 30 days of notifying the Commission and the programmer, and inform both of the result of the re-check.¹⁹³ If the station or MVPD finds no further noncompliance with the RP, then the station or MVPD will continue to be in the safe harbor.¹⁹⁴

44. If, however, the re-check reveals noncompliance with the RP, then the station or MVPD, going forward, is no longer in the safe harbor for that channel or programming.¹⁹⁵ The station's or MVPD's actual knowledge that the commercials in the programming are not compliant with the RP means that station or MVPD is liable for future commercial loudness violations in that programming, notwithstanding any certification or previous spot check of that programming.¹⁹⁶

c. Third Party Local Insertions

45. The rulemaking record evidences that some stations and MVPDs contract with a third party to handle sales of its available commercial time and encode/insert local commercials into program streams, rather than the station or MVPD handling this process itself.¹⁹⁷ For the reasons discussed above, if a station or MVPD does not itself install, utilize and maintain the equipment used to encode the loudness of a commercial either before or at the time of its transmission, it cannot be "deemed in compliance" pursuant to the CALM Act.¹⁹⁸ Furthermore, these third-party local insertions are unlike commercials embedded in nationally distributed programming. Third-party inserters of local commercials provide a service to stations and MVPDs and place their equipment at the station or MVPD's facilities. The third-party inserter sells commercial time to advertisers and shares the payment

¹⁹⁰ Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(D)(II), § 76.607(a)(3)(iv)(D)(II)).

¹⁹¹ Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(E), § 76.607(a)(3)(iv)(E)).

¹⁹² See, *supra* para. 24.

¹⁹³ Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(E), § 76.607(a)(3)(iv)(E)).

¹⁹⁴ Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(E)(I), § 76.607(a)(3)(iv)(E)(I)).

¹⁹⁵ Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(3)(iv)(E)(II), § 76.607(a)(3)(iv)(E)(II)).

¹⁹⁶ In the context of an enforcement action the Commission can consider the specific facts and circumstances of the alleged violation, including any mitigating factors.

¹⁹⁷ See, e.g., ACA Comments at iv; ACA Ex Parte at 3 (October 26, 2011)

¹⁹⁸ See *supra* para. 23; CALM Act at § 2(c).

with the station or MVPD, thus functioning as the agent of the station or MVPD in that process.¹⁹⁹ The NPRM sought comment on circumstances that might pose practical problems for compliance and means of demonstrating compliance.²⁰⁰ Given that the record presents this situation, which does not fall neatly into one of the situations we have described above (that is, local insertion or embedded commercial), we adopt a hybrid approach for such stations and MVPDs utilizing the same components presented in the NPRM and addressed in the comments.²⁰¹ Specifically, we find that, in order to be in the safe harbor for the commercials inserted by these third parties, the station or MVPD, regardless of size, must acquire a certification from the third party that all commercials it is inserting comply with the RP, and that it is inserting those commercials into the programming transmitted by the station or MVPD such that they comply with the RP.²⁰² Just as with embedded commercials,²⁰³ in response to a FCC Letter of Inquiry, a station or MVPD must have no reason to believe that the certification is false, and perform a spot check of the inserted commercials without providing notice to the third-party inserter to determine, going forward, whether the inserted commercials in fact comply, and take steps to ensure that any discovered noncompliance is remedied.²⁰⁴ This spot check will follow the same format as discussed above for other embedded programming.²⁰⁵ The record supports the conclusion that stations or MVPDs that use third party inserters have the ability to insist on such certifications as part of their business relationships.²⁰⁶

d. Complaints

46. As discussed above, we will rely on consumers to bring any potential noncompliance to our attention. We believe that a consumer-complaint-driven procedure, rather than an audit-driven one, is the most practical means to monitor industry compliance with our rules. In order for us to detect whether a pattern or trend of noncompliance exists and for stations and MVPDs to investigate them, it is essential that consumer complaints be specific in describing the commercials complained of, as well as identifying the station or MVPD and programming network on which the commercials appeared.²⁰⁷ As a general matter, non-specific complaints will not be actionable. In addition, we note that while it may seem to some consumers that a commercial is loud, the commercial may, nevertheless, comply with the RP. As noted above, commercials, like the programming they accompany, include content covering a range of audio levels, some of which may seem loud without violating the RP.²⁰⁸

47. *Filing a Complaint.* Consumers may file a complaint alleging a loud commercial electronically using the Commission's online complaint form (specifically Form 2000e) found at <http://esupport.fcc.gov/complaints.htm>. We have added "loud commercials" as a complaint category.

¹⁹⁹ ACA Ex Parte (October 26, 2011).

²⁰⁰ NPRM at paras. 26-32.

²⁰¹ See *supra* para. 33.

²⁰² Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(5), § 76.607(a)(5)).

²⁰³ See *supra*, para. 41-42.

²⁰⁴ Appendix A, *Final Rules* (47 C.F.R. § 73.682(e)(5)(i), (iii), § 76.607(a)(5)(i), (iii)).

²⁰⁵ See *supra*, para. 38.

²⁰⁶ ACA Ex Parte at 3 (October 26, 2011).

²⁰⁷ We note that a television broadcast station must retain in its local public inspection file a copy of a complaint filed with the Commission about a loud commercial under the Commission's existing rules. See 47 C.F.R. § 73.3526(e)(10) (requiring commercial TV stations to retain in its local public inspection file material relating to a Commission investigation or complaint to the Commission). The rule requires a station to retain the complaint in its public file until it is notified in writing that the complaint may be discarded.

²⁰⁸ See *supra* note 35.

Consumers may also file complaints by fax to 1-866-418-0232 or by letter mailed to Federal Communications Commission, Consumer & Governmental Affairs Bureau, Consumer Inquiries & Complaints Division, 445 12th Street, SW, Washington, DC 20554, although we reiterate the need for detailed information. Consumers who want assistance filing their complaint may contact the Commission's Consumer Call Center by calling 1-888-CALL-FCC (1-888-225-5322) (voice) or 1-888-TELL-FCC (1-888-835-5322) (tty).²⁰⁹ There is no fee for filing a consumer complaint.

48. *Complaint Details.* The only way the Commission will be in a position to detect a pattern or trend of commercial loudness complaints is if consumers include detailed information allowing us to identify the specific distributor, program at issue, and commercial. Therefore, as proposed in the *NPRM*, we will require complaints to contain detailed information, which will enable us to take appropriate action.²¹⁰ Form 2000e is designed to elicit the information that is needed for this purpose.²¹¹ To ensure that the Commission is able to take appropriate action on a complaint, the complaint should clearly indicate that it is a "loud commercial" complaint and include the following information: (1) the complainant's contact information, including name, mailing address, daytime phone number, and e-mail address if available; (2) the name and call sign of the broadcast station or the name and type of the MVPD against whom the complaint is directed; (3) the date and time the loud commercial problem occurred; (4) the channel and/or network involved; (5) the name of the television program during which the commercial was viewed; (6) the name of the commercial's advertiser/sponsor or product involved; and (7) a description of the loudness problem. We will evaluate the individual complaints we receive and track them to determine if there are patterns or trends that suggest a need for enforcement action. If we receive complaints that indicate a pattern or trend affecting multiple MVPDs or stations, we will be conscious of the greater resources available to large entities when determining where to address our initial inquiries.

C. Waivers

49. The CALM Act includes two waiver provisions: a waiver of the effective date for up to two years based on financial hardship²¹² and a reservation of the Commission's general authority to grant a waiver for good cause.²¹³ While our goal is to provide for waivers where appropriate, this objective must be balanced against the interests of consumers in realizing the benefit of the CALM Act without undue delay. Thus, as described below, we establish standards for stations/MVPDs that face true financial hardship to seek waivers, using a streamlined process for small entities and requiring a four-part showing for larger entities. We acknowledge that a waiver for good cause may be warranted in other circumstances, and, per the CVAA, stations and MVPDs may seek waivers of these statutory

²⁰⁹ We also encourage consumers to visit the Consumer & Governmental Affairs Bureau website at <http://www.fcc.gov/cgb/> or to visit our online Consumer Help Center at <http://reboot.fcc.gov/consumers/>.

²¹⁰ *NPRM* at para. 35.

²¹¹ Available at <https://esupport.fcc.gov/ccmsforms/form2000.action>.

²¹² Section 2(b)(2) of the CALM Act provides as follows: "WAIVER.- For any television broadcast station, cable operator, or other multichannel video programming distributor that demonstrates that obtaining the equipment to comply with the regulation adopted pursuant to subsection (a) would result in financial hardship, the Federal Communications Commission may grant a waiver of the effective date set forth in paragraph (1) for 1 year and may renew such waiver for 1 additional year." CALM Act § 2(b)(2).

²¹³ Section 2(b)(3) of the CALM Act provides as follows: "WAIVER AUTHORITY.- Nothing in this section affects the Commission's authority under section 1.3 of its rules (47 C.F.R. 1.3) to waive any rule required by this Act, or the application of any such rule, for good cause shown to a television broadcast station, cable operator, or other multichannel video programming distributor, or to a class of such stations, operators, or distributors." CALM Act § 2(b)(3).

requirements for good cause under Section 1.3 of our rules.²¹⁴ We conclude that the waiver process we adopt is responsive to ACA's concerns that the equipment to monitor programming is expensive and the costs are disproportionately large for MVPDs with small systems.²¹⁵ We also note that we have adopted a safe harbor approach, as discussed above,²¹⁶ that does not require smaller MVPDs to audit programming or negotiate with contractors for certifications, thereby reducing the burden for these entities to demonstrate their compliance.

50. *Financial Hardship Waiver.* Section 2(b)(2) of the CALM Act provides that the Commission may grant a one-year waiver of the effective date of the rules implementing the statute to any station or MVPD that shows it would be a "financial hardship" to obtain the necessary equipment to comply with the rules, and may renew such waiver for one additional year.²¹⁷ As we stated in the *NPRM*, the legislative history indicates that Congress intended us to interpret "financial hardship" broadly and, in particular, recognizes "that television broadcast stations in smaller markets and smaller cable systems may face greater challenges budgeting for the purchase of equipment to comply with the bill than television broadcast stations in larger markets or larger cable systems."²¹⁸

51. We adopt the four-part test we proposed in the *NPRM* for larger stations/MVPDs²¹⁹ seeking a waiver on the grounds of financial hardship based on their need to obtain equipment to comply with the loudness requirements in the RP.²²⁰ Specifically, to request a financial hardship waiver pursuant to Section 2(b)(2), the station/MVPD must provide: (1) evidence of its financial condition, such as financial statements;²²¹ (2) a cost estimate for obtaining the necessary equipment to comply with the required regulation; (3) a detailed statement explaining why its financial condition justifies postponing compliance; and (4) an estimate of how long it will take to comply, along with supporting information. Consistent with the legislative history, we do not require waiver applicants to show negative cash flow but, instead, require only that the station or MVPD's assertion of financial hardship be reasonable under the circumstances.²²² We believe this test for a financial hardship waiver appropriately balances

²¹⁴ See 47 C.F.R. § 1.3. The Media Bureau has delegated authority to act on both such waiver requests. See 47 C.F.R. § 0.61(h).

²¹⁵ See ACA Reply at 6, note 25. ACA also argued that smaller MVPDs are unable to effectively negotiate with programmers to ensure they comply with the RP. *Id.* See also, ACA Comments at note 4.

²¹⁶ See, *supra*, paras. 34-37.

²¹⁷ See 47 U.S.C. § 621(b)(2) (codifying CALM Act § 2(b)(2)). See also, *infra*, para. 64 for the effective date of the rules adopted herein.

²¹⁸ See *NPRM*, 26 FCC Rcd at 8302, para. 38. (citing Senate Committee Report to S. 2847 at 4). The legislative history, in particular, states that the Commission "should not require stations or MVPDs to demonstrate that they have negative cash flow or are in receivership for bankruptcy to be eligible for a waiver based on financial hardship." This appears to be a reference to the strict financial hardship standard established in 2008 for DTV station build-out extensions given the short time remaining before the DTV transition deadline. See *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, Report and Order, 23 FCC Rcd 2994, 3031-32, para. 74 (2007) ("*Third DTV Periodic Report and Order*") (requiring a station to either (1) submit proof that they have filed for bankruptcy or that a receiver has been appointed, or (2) submit an audited financial statement for the previous three years showing negative cash flow).

²¹⁹ See, *infra*, paras. 53-54 (defining "small broadcast station" and "small MVPD"). Smaller entities are eligible to seek a waiver under the streamlined waiver process we adopt herein. See, *infra*, para. 52.

²²⁰ See *NPRM*, 26 FCC Rcd at 8300, para. 39.

²²¹ Financial statements should be compiled according to generally accepted accounting practices ("GAAP"). Stations/MVPDs may request confidential treatment for this financial information pursuant to 47 C.F.R. § 0.459.

²²² See *NPRM*, 26 FCC Rcd at 8299-8300, para. 38.

Congress' intent in adopting the Section 2(b)(2) waiver provision and our goal to ensure that the benefits of the CALM Act not be delayed unless financial circumstances truly warrant a waiver.²²³

52. For small stations and MVPDs, we adopt a more streamlined financial hardship waiver approach.²²⁴ We agree with the commenters who argued that smaller stations and MVPDs may find it particularly burdensome to comply with our rules by the effective date.²²⁵ We also agree that, because smaller entities are more likely to face financial hardship in complying with our rules, the process for smaller entities to obtain a waiver should not itself be burdensome. Accordingly, we adopt a streamlined waiver process for smaller entities that face a financial challenge in obtaining the equipment needed to comply with our rules. Specifically, a small station or MVPD (as we define below) that seeks a waiver must file with the Commission a certification that it: (1) meets our definition of small for this purpose, and (2) needs a delay of one year to obtain specified equipment in order to avoid the financial hardship that would be imposed if it were required to obtain the equipment sooner.²²⁶ The station or MVPD is not required to submit any proof of financial condition. Small broadcast stations and small MVPDs may consider the waiver granted when they file this information online and receive an automatic "acknowledgement of request," unless the Media Bureau notifies them of a problem or question concerning the adequacy of the certification.²²⁷

53. The streamlined financial hardship waiver is available to "small broadcast stations" and "small MVPD systems" that request a one-year delay in the effective date based on their need to obtain equipment to comply with the rules adopted to implement the CALM Act, including the RP incorporated by reference.²²⁸ We define a "small broadcast station" for purposes of the streamlined waiver as either a station with no more than \$14.0 million in annual receipts²²⁹ or that is located in television markets 150 to 210.²³⁰ Although we proposed in the *NPRM* to limit small market stations that would be eligible for the streamlined waiver process to those not affiliated with a top-four network (*i.e.*, ABC, CBS, Fox and NBC),²³¹ we are persuaded by NAB that the waiver should be available to all stations in markets 150

²²³ As directed by Section 2(b)(2), stations/MVPDs may request a waiver for one year under our waiver standard. Entities granted a waiver may request a renewal of the waiver for one additional year if they can demonstrate that circumstances continue to prevent them from obtaining the necessary equipment to comply with the CALM Act requirements.

²²⁴ As noted above, the legislative history recognizes that obtaining the necessary equipment to comply with the rules may be a financial hardship for small broadcast stations and small cable/MVPD systems. See Senate Committee Report to S. 2847 at 4.

²²⁵ See Comments of NAB at 9-10, ACA at 31-32, NCTA at 19-20, and OPATSCO-NCTA-WTA at 2. See also Reply Comments of ACA at 13-15 and Letter from Jonathan Friedman, Counsel for Comcast Corporation, to Marlene Dortch, Secretary, FCC, dated October 6, 2011, at 2.

²²⁶ The certifying entity must identify or provide a description of the kind of equipment it intends to obtain; however, it need not specify the model number.

²²⁷ See *infra*, paras. 57-58 (waiver filing deadlines and requirements).

²²⁸ Entities granted a waiver may request a renewal of the waiver for one additional year if they certify that (1) they meet our definition of small, and (2) financial circumstances continue to prevent them from obtaining the necessary and specified equipment to comply with the CALM Act requirements. The filing requirements to request a waiver for a second year are the same as those for the initial waiver request. See, *supra*, paras. 51-52.

²²⁹ This definition is consistent with the SBA's small business definition for a television broadcast station. See also 13 C.F.R. § 121.201, NAICS Code 515120 (2007). NAB proposed that we use this definition as one criterion to identify stations that qualify as "small" for purposes of the waiver. See NAB Comments at 9.

²³⁰ See NAB Comments at 9.

²³¹ See *NPRM*, 26 FCC Rcd at 8301, para. 40.

through 210. We agree with NAB that a station's network affiliation is not necessarily determinative of its financial ability to purchase new equipment, and even stations affiliated with a top-four network in smaller markets may be struggling as advertising revenue in those markets is more limited than in larger markets.²³² For simplicity, we combine the definition of a small station, regardless of the market size, with the definition of a small market station, and treat them both as a "small broadcast station" for purposes of the CALM Act financial waiver.

54. Consistent with our proposal in the *NPRM*,²³³ we will define a "small MVPD system" eligible for the streamlined waiver process as one with fewer than 15,000 subscribers (as of December 31, 2011) that is not affiliated with a larger operator serving more than 10 percent of all MVPD subscribers.²³⁴ We note that our definition of "small MVPD system" for purposes of the streamlined waiver is different from our definition of smaller MVPDs for purposes of being in the safe harbor.²³⁵ We are using a small MVPD system definition for purposes of the streamlined waiver because we believe that this waiver should be available only to those systems that are most likely to face financial hardships in complying with the RP. We note that stations and MVPDs that want a waiver and do not qualify under the streamlined waiver provision can apply for a waiver under the four-part waiver test described above. We disagree with ACA's proposal to use an MSO-based definition as we did in the "bargaining agent" condition in the Comcast-NBC Universal proceeding, which set the threshold at 1,500,000 subscribers.²³⁶ As discussed above, we have adopted a regulatory scheme that does not require small MVPDs to audit programming and relieves them of the need to negotiate with programmers for contractual certifications.²³⁷ We conclude that, combined, the approach we have taken with respect to MVPD compliance with the Act, the streamlined waiver provisions we are adopting for small MVPD systems, and the four-part waiver test for larger MVPD systems, appropriately address the concerns raised by ACA.

55. We decline to adopt a "blanket" waiver for financial hardship, as proposed by some commenters.²³⁸ We believe a blanket approach, which would automatically grant a waiver to all small entities without requiring an individual showing of financial hardship, would be over-inclusive of stations

²³² See NAB Comments at 9-10.

²³³ See *NPRM*, 26 FCC Rcd at 8301, para. 40.

²³⁴ See NCTA Comments at 19. This definition is consistent with Section 76.901(c) of our rules (defining a "small system" as a cable system serving 15,000 or fewer subscribers). See 47 C.F.R. § 76.901(c). The affiliation exclusion is consistent with our definition of a small MVPD operator in the cable carriage context, which excludes an MVPD system that was affiliated with an MVPD operator serving more than 10 percent of all MVPD subscribers. See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fourth Report and Order, 23 FCC Rcd 13618, para. 2 (2008) (holding that "cable systems that either have 2,500 or fewer subscribers and are not affiliated with a large cable operator serving more than 10 percent of all MVPD customers ... are exempt from the requirement to carry high definition versions of broadcast signals for three years following the [DTV] Transition").

²³⁵ See *supra*, notes 161, 162, and 164.

²³⁶ See ACA Reply Comments at 6, note 25 (citing *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011), Appendix A).

²³⁷ See *supra*, para. 35-37.

²³⁸ See Comments of ACA at 32 (supporting a blanket financial hardship waiver for small MVPDs) and NAB at 9-10 (supporting a blanket waiver for stations that are "small businesses"). See also Comments of NCTA at 19-20 (supporting waiver of the rules for small MVPD systems "as a class") and OPATSCO-NCTA-WTA at 4-5 (supporting a streamlined waiver provision for small MVPDs, MVPDs using older equipment or alternative technologies, and rural LEC-affiliated MVPDs).

and MVPDs that do not actually need the additional time to obtain equipment and would unnecessarily delay the benefits of the CALM Act for their viewers. We also are not persuaded that a blanket approach would be consistent with the statute, which contemplates grant of waivers based on individual showings of financial hardship.²³⁹ The streamlined waiver approach we are implementing is simple and straightforward and is, in fact, less burdensome than the approach suggested by some commenters.²⁴⁰ Moreover, we note that stations and MVPDs seeking to be in the safe harbor are not expected to enter into contracts with program suppliers as we anticipated in the *NPRM*,²⁴¹ but instead can rely on a less burdensome certification and spot check approach, thus mooted the argument that stations/MVPDs need additional time to amend their contracts.²⁴² This certification and spot check procedure should prove less burdensome for all stations and MVPDs and should reduce the number of entities that need to request a waiver. We note that small stations and MVPDs are not required to perform annual spot checks, and therefore would only need equipment to perform a spot check if the FCC initiates an inquiry.²⁴³

56. General Waiver. Section 2(b)(3) of the CALM Act provides that the statute does not affect the Commission's authority to waive any rule required by the CALM Act, or the application of any such rule, for good cause shown with regard to any station/MVPD or class of stations/MVPDs under Section 1.3 of the Commission's rules.²⁴⁴ We will use our general waiver authority, consistent with Section 2(b)(3), for waivers necessitated by unforeseen circumstances as well as for MVPDs that demonstrate they cannot implement the RP because of the technology they use.²⁴⁵ Several commenters noted that some entities might face particular difficulty complying with the RP because of the outdated or alternative

²³⁹ See 47 U.S.C. § 621(b)(2) ("For any television broadcast station, cable operator, or other multichannel video programming distributor that demonstrates that obtaining the equipment to comply with the regulation adopted pursuant to subsection (a) would result in financial hardship, the [FCC] may grant a waiver of the effective date set forth in paragraph (1) for 1 year and may renew such waiver for 1 additional year.").

²⁴⁰ For example, OPATSCO-NCTA-WTA would have required small MVPDs to describe the equipment purchases needed to comply with the RP and an estimate of the costs associated with the purchase, installation, and maintenance of that equipment. See OPATSCO-NCTA-WTA Comments at 4. We also note that, while we do not adopt the blanket financial hardship waiver proposed by ACA, our streamlined waiver approach is less burdensome than the approach ACA recommended as an alternative to a blanket waiver. See ACA Comments at 32 and ACA Reply Comments at 14.

²⁴¹ See *NPRM*, 26 FCC Rcd at 8294-5, para. 23.

²⁴² See, *supra* paras. 30-44. See also Comments of NAB at 9 (noting that it can take up to a year and a half or more for a station to take the steps necessary to comply, including negotiating contracts with third-party programming providers and noting that this process will be particularly burdensome for small businesses and small stations in small markets); Comments of AT&T at 11-13 (noting that it will take up to eight years to add indemnification provisions to all existing contracts assuming they are added to agreements as they come up for renewal).

²⁴³ See, *supra* para. 36. For small MVPD systems, most of the steps they must take to comply with the RP may be taken on their behalf by a third-party programmer providing embedded commercials or third-party contractors providing local insertions. See, *supra* paras. 30-45. Consequently, we expect that small MVPDs will be less likely to need to obtain equipment, and, therefore, less likely to need a waiver to delay the effective date of the rule. In the event they are going to obtain monitoring equipment to conduct spot checks, or equipment to insert local commercials themselves, they may need the additional time afforded by the waiver, and we intend to grant waivers to small MVPDs in these circumstances.

²⁴⁴ See 47 U.S.C. § 621(b)(3) (codifying CALM Act § 2(b)(3)). See 47 C.F.R. § 1.3 (the Commission's rules "may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission" and "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.").

²⁴⁵ See *NPRM*, 26 FCC Rcd at 8301, para. 41.

technology they employ.²⁴⁶ Grant of a waiver under such circumstances would be more likely to be in the public interest if the waiver recipient can demonstrate that it, by some other means, will be able to prevent the transmission of loud commercials, as intended by the CALM Act.

57. *Filing Deadline.* Absent extraordinary circumstances, the deadline for filing a waiver request pursuant to either Section 2(b)(2) of the CALM Act or Section 1.3 of the Commission's rules will be 60 days before the effective date of the rules. While we proposed a deadline of 180 days before the effective date in the *NPRM*,²⁴⁷ we agree with NAB that a 60-day deadline is more practical and will still afford the Media Bureau enough time to consider these requests before our rules take effect.²⁴⁸ Requests for waiver renewals must be filed at least 60 days before the waiver expires.

58. *Filing Requirements.* A station or MVPD must file a financial hardship or general waiver request electronically into this docket through the Commission's Electronic Comment Filing System ("ECFS") using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/>. The filing must be clearly designated as a "financial hardship" or "general" waiver request and must clearly reference this proceeding and docket number. Requests for "general" waiver must comply with Section 1.3 of our rules.²⁴⁹ All filers will receive a confirmation online after their waiver has been successfully submitted through ECFS. It is recommended that applicants for a streamlined waiver retain this confirmation for their records. We will not impose a filing fee for waiver requests pursuant to the waiver provisions of the CALM Act.²⁵⁰

IV. CONCLUSION

59. The CALM Act directs us to incorporate by reference into our rules and make mandatory the RP to "make the volume of commercials and regular programming uniform so consumers can control sound levels." To achieve this directive, we incorporate the RP into our rules, establish a consumer-complaint-driven process to identify genuine instances of noncompliance, and specify the means by which all regulated parties may be "deemed in compliance" with our regulations or enter the safe harbor depending on the content involved. These rules implement the statute as Congress intended for the benefit of consumers while limiting the compliance burden on stations and MVPDs.

²⁴⁶ See, e.g., Comments of OPASTCO-NCTA-WTA at 2-5 (stating that it is expensive for MVPDs that provide service via coaxial cable systems or Internet protocol television ("IPTV"), and that often utilize older equipment, to upgrade to comply with the RP).

²⁴⁷ See *NPRM*, 26 FCC Rcd at 8302, para. 43.

²⁴⁸ See NAB Comments at 10-11. The 60 day requirement provides the Media Bureau with adequate time to contact the waiver applicant in the event of a question regarding its certification.

²⁴⁹ See 47 C.F.R. § 1.3.

²⁵⁰ "Financial hardship" or "general" waiver requests filed by cable operators pursuant to CALM Act §§ 2(b)(2) and 2(b)(3) and 47 C.F.R. § 1.3 are not "Cable Special Relief Petitions" under section 76.7 of the Commission's rules, and are therefore not subject to a statutory filing fee. See 47 U.S.C. § 158(g). Section 76.7(a)(1) of the rules provides, *inter alia*, that the Commission may waive "any provision of this part 76" in response to a petition by a cable operator. Requests by cable operators for CALM Act relief pursuant to CALM Act §§ 2(b)(2) and (2)(b)(3) and section 1.3 of the Commission's rules would not involve waiver of any Part 76 provisions, so the general procedures in section 76.7 would be inapplicable.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

60. As required by the Regulatory Flexibility Act of 1980 (“RFA”),²⁵¹ the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this Report and Order. The FRFA is attached to this Report and Order as Appendix C.

B. Final Paperwork Reduction Act of 1995 Analysis

61. We analyzed this Report and Order with respect to the Paperwork Reduction Act of 1995 (“PRA”)²⁵² and it contains new and modified information collection requirements.²⁵³ It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA.²⁵⁴ The Commission, as part of its continuing effort to reduce paperwork burdens, invites OMB, the general public, and other interested parties to comment on the information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002,²⁵⁵ 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.²⁵⁶

C. Additional Information

62. For additional information on this proceeding, contact Evan Baranoff, Evan.Baranoff@fcc.gov, or Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, at (202) 418-2120; or Shabnam Javid, Shabnam.Javid@fcc.gov, of the Media Bureau, Engineering Division, at (202) 418-2672.

²⁵¹ 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”).

²⁵² The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

²⁵³ We propose to modify existing information collection requirements relating to the Commission’s online complaint form (the Form 2000 series). See OMB Control No. 3060-0874. We also propose to create a new information collection requirement to cover the filing of financial hardship and general waiver requests pursuant to Sections 2(b)(2) and 2(b)(3) of the CALM Act.

²⁵⁴ 44 U.S.C. § 3507(d).

²⁵⁵ The Small Business Paperwork Relief Act of 2002 (“SBPRA”), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); see 44 U.S.C. § 3506(c)(4).

²⁵⁶ *NPRM* at para. 48.

VI. ORDERING CLAUSES

63. Accordingly, IT IS ORDERED that pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. No. 111-311, 124 Stat. 3294, and Sections 1, 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and (j), 303(r), and 621, this Report and Order IS ADOPTED.

64. IT IS FURTHER ORDERED that the rules adopted herein WILL BECOME EFFECTIVE December 13, 2012, except for 47 C.F.R. §§ 73.682(e)(2)(ii), (iii), and (iv); (3)(iv); (4); (5)(ii); and (6) and §§ 76.607(a)(2)(ii), (iii), and (iv); (3)(iv); (4); (5)(ii); and (6), which contain new or modified information collection requirements. Those rules will become effective on the date specified in a Commission notice published in the Federal Register announcing their approval under the Paperwork Reduction Act by the Office of Management and Budget, which date shall be no earlier than December 13, 2012.

65. IT IS FURTHER ORDERED that we delegate authority to the Media Bureau to consider waiver requests filed under these rules and pursuant to Sections 2(b)(2) and 2(b)(3) of the CALM Act.

66. IT IS FURTHER ORDERED that, pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission WILL SEND a copy of this Report and Order in a report to Congress and the General Accounting Office.

67. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, WILL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission amends Parts 73 and 76 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

PART 73– Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

2. Amend §73.682 by adding paragraph (e) to read as follows:

§ 73.682 TV transmission standards.

* * * * *

(e) Transmission of commercial advertisements by television broadcast station.

(1) Mandatory compliance with ATSC A/85. Effective December 13, 2012, television broadcast stations must comply with the Advanced Television Systems Committee (ATSC) A/85: “ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television” (July 25, 2011) (“ATSC A/85 RP”) (incorporated by reference, see §73.8000), insofar as it concerns the transmission of commercial advertisements. ATSC A/85 RP is available from ATSC, 1750 K Street, N.W., Suite 1200, Washington, DC 20006, or at the ATSC Web site: <http://www.atsc.org/standards.html>.

(2) Commercials inserted by station. A television broadcast station that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software to comply with ATSC A/85 shall be deemed in compliance with respect to locally inserted commercials, which for the purposes of this provision are commercial advertisements added to a programming stream by a station prior to or at the time of transmission to viewers. In order to be considered to have installed, utilized and maintained the equipment and associated software in a commercially reasonable manner, a television broadcast station must

- (i) install, maintain and utilize equipment to properly measure the loudness of the content and to ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer;
- (ii) provide records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;
- (iii) certify that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and
- (iv) certify that its own transmission equipment is not at fault for any pattern or trend of complaints.

(3) Embedded commercials – safe harbor. With respect to embedded commercials, which, for the purposes of this provision, are those commercial advertisements placed into the programming stream by a third party (i.e., programmer) and passed through by the station to viewers, a television broadcast station

must certify that its own transmission equipment is not at fault for any pattern or trend of complaints, and may demonstrate compliance with the ATSC A/85 RP through one of the following methods:

(i) relying on a network's or other programmer's certification of compliance with the ATSC A/85 RP with respect to commercial programming, provided that:

(A) the certification is widely available by website or other means to any television broadcast station, cable operator, or multichannel video programming distributor that transmits that programming; and

(B) the television broadcast station has no reason to believe that the certification is false; and

(C) the television broadcast station performs a spot check, as defined in 73.682(e)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

(ii) if transmitting any programming that is not certified as described in 73.682(e)(3)(i), a television broadcast station that had more than \$14,000,000 in annual receipts for the calendar year 2011 must perform annual spot checks, as defined in 73.682(e)(3)(iv)(A), (B), (C), and (E), of all the non-certified commercial programming it receives from a network or other programmer and perform a spot check, as defined in 73.682(e)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming;

(iii) a television broadcast station that had \$14,000,000 or less in annual receipts for the year 2011 need not perform annual spot checks but must perform a spot check, as defined in 73.682(e)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

(iv) For purposes of this section, a "spot check" of embedded commercials requires monitoring 24 uninterrupted hours of programming with an audio loudness meter employing the measurement technique specified in the ATSC A/85 RP, and reviewing the records from that monitoring to detect any commercials transmitted in violation of the RP. The television broadcast station must not inform the network or programmer of the spot check prior to performing it.

(A) Spot-checking must be conducted after the signal has passed through the television broadcast station's processing equipment (e.g., at the output of a television receiver). If a problem is found, the television broadcast station must determine the source of the noncompliance.

(B) To be considered valid, the television broadcast station must demonstrate appropriate maintenance records for the audio loudness meter.

(C) With reference to the annual "safe harbor" spot check in 73.682(e)(3)(ii):

(I) To be considered valid, the television broadcast station must demonstrate, at the time of any enforcement inquiry, that appropriate spot checks had been ongoing.

(II) If there is no single 24 hour period in which all programmers of a given program stream are represented, an annual spot check may consist of a series of loudness measurements over the course of a 7 day period, totaling no fewer than 24 hours, that measure at least one program, in its entirety, provided by each non-certified programmer that supplies programming for that program stream.

(III) If annual spot checks are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for existing programming.

(IV) Non-certified program streams must be spot-checked annually using the approach described in this section. If annual spot checks of the program stream

are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that program stream.

(V) Even after the two year period for annual spot checks, if a spot check shows noncompliance on a non-certified program stream, the station must once again perform annual spot checks of that program stream to be in the safe harbor for that programming. If these renewed annual spot checks are performed for two consecutive years without finding additional evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that program stream.

(D) With reference to the spot checks in response to an enforcement inquiry pursuant to 73.682(e)(3)(i)(C), (ii), or (iii):

(I) If notified of a pattern or trend of complaints, the television broadcast station must perform the 24-hour spot check of the program stream at issue within 30 days or as otherwise specified by the Enforcement Bureau; and

(II) If the spot check reveals actual compliance, the television broadcast station must notify the Commission in its response to the enforcement inquiry.

(E) If any spot check shows noncompliance with the ATSC A/85 RP, the television station must notify the Commission and the network or programmer within 7 days, direct the programmer's attention to any relevant complaints, and must perform a follow-up spot check within 30 days of providing such notice. The station must notify the Commission and the network or programmer of the results of the follow-up spot check. Notice to the Federal Communications Commission must be provided to the Chief, Investigations and Hearings Division, Enforcement Bureau, or as otherwise directed in a Letter of Inquiry to which the station is responding.

(I) If the follow-up spot check shows compliance with the ATSC A/85 RP, the station remains in the safe harbor for that program stream.

(II) If the follow-up spot check shows noncompliance with the ATSC A/85 RP, the station will not be in the safe harbor with respect to commercials contained in the program stream for which the spot check showed noncompliance until a subsequent spot check shows that the program stream is in compliance.

(4) Use of a real-time processor. A television broadcast station that installs, maintains and utilizes a real-time processor in a commercially reasonable manner will be deemed in compliance with A/85 with regard to any commercial advertisements on which it uses such a processor, so long as it also:

(i) provides records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;

(ii) certifies that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and

(iii) certifies that its own transmission equipment is not at fault for any pattern or trend of complaints.

(5) Commercials locally inserted by a station's agent – safe harbor. With respect to commercials locally inserted, which for the purposes of this provision are commercial advertisements added to a programming stream for the television broadcast station by a third party after it has been received from the programmer but prior to or at the time of transmission to viewers, a station may demonstrate compliance with the ATSC A/85 RP by relying on the third party local inserter's certification of compliance with the ATSC A/85 RP, provided that:

(i) the television broadcast station has no reason to believe that the certification is false;

- (ii) the television broadcast station certifies that its own transmission equipment is not at fault for any pattern or trend of complaints; and
- (iii) the television broadcast station performs a spot check, as defined in 73.682(e)(3)(iv)(A), (B), (D), and (E), on the programming at issue in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials inserted by that third party.

(6) Instead of demonstrating compliance pursuant to subparagraphs (e)(2) through (5) above, a station may demonstrate compliance with subparagraph (e)(1) above in response to an enforcement inquiry prompted by a pattern or trend of complaints by demonstrating actual compliance with ATSC A/85 with regard to the commercial advertisements that are the subject of the inquiry, and certifying that its own transmission equipment is not at fault for any such pattern or trend of complaints.

Note: For additional information regarding this requirement see Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, [Insert Fed Reg cite].

3. Amend §73.8000 by revising paragraph (b)(3) to read as follows:

§ 73.8000 Incorporation by reference.

(b)*****

(3) ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011), IBR approved for §73.682.

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. Part 76, Subpart K, is revised by adding new Section 76.607 to read as follows:

§ 76.607 Transmission of commercial advertisements.

(a) Transmission of commercial advertisements by cable operator or other multichannel video programming distributor

(1) Mandatory compliance with ATSC A/85. Effective December 13, 2012, cable operators and other multichannel video programming distributors (MVPDs), as defined in 47 U.S.C. § 522, must comply with the Advanced Television Systems Committee (ATSC) A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011) ("ATSC A/85 RP") (incorporated by reference, see §76.602), insofar as it concerns the transmission of commercial

advertisements. ATSC A/85 RP is available from ATSC, 1750 K Street, N.W., Suite 1200, Washington, DC 20006, or at the ATSC Web site: <http://www.atsc.org/standards.html>.

(2) Commercials inserted by cable operator or other MVPD. A cable operator or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software to comply with ATSC A/85 shall be deemed in compliance with respect to locally inserted commercials, which for the purposes of this provision are commercial advertisements added to a programming stream by a cable operator or other MVPD prior to or at the time of transmission to viewers. In order to be considered to have installed, utilized and maintained the equipment and associated software in a commercially reasonable manner, a cable operator or other MVPD must:

- (i) install, maintain and utilize equipment to properly measure the loudness of the content and to ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer;
- (ii) provide records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;
- (iii) certify that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and
- (iv) certify that its own transmission equipment is not at fault for any pattern or trend of complaints.

(3) Embedded commercials – safe harbor. With respect to embedded commercials, which, for the purposes of this provision, are those commercial advertisements placed into the programming stream by a third party (i.e., programmer) and passed through by the cable operator or other MVPD to viewers, a cable operator or other MVPD must certify that its own transmission equipment is not at fault for any pattern or trend of complaints, and may demonstrate compliance with the ATSC A/85 RP through one of the following methods:

- (i) relying on a network's or other programmer's certification of compliance with the ATSC A/85 RP with respect to commercial programming, provided that:
 - (A) the certification is widely available by website or other means to any television broadcast station, cable operator, or multichannel video programming distributor that transmits that programming; and
 - (B) the cable operator or other MVPD has no reason to believe that the certification is false; and
 - (C) the cable operator or other MVPD performs a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on the programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming;
- (ii) if transmitting any programming that is not certified as described in 76.607(a)(3)(i):
 - (A) a cable operator or other MVPD that had 10,000,000 subscribers or more as of December 31, 2011 must perform annual spot checks, as defined in 76.607(a)(3)(iv)(A), (B), (C), and (E), of all the non-certified commercial programming it receives from a network or other programmer that is carried by any system operated by the cable operator or other MVPD, and perform a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming; and
 - (B) a cable operator or other MVPD that had fewer than 10,000,000 but more than 400,000 subscribers as of December 31, 2011, must perform annual spot checks, as

defined in 76.607(a)(3)(iv)(A), (B), (C), and (E), of a randomly chosen 50 percent of the non-certified commercial programming it receives from a network or other programmer that is carried by any system operated by the cable operator or other MVPD, and perform a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming; or

(iii) a cable operator or other MVPD that had fewer than 400,000 subscribers as of December 31, 2011, need not perform annual spot checks but must perform a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

(iv) For the purposes of this section, a “spot check” of embedded commercials requires monitoring 24 uninterrupted hours of programming with an audio loudness meter compliant with the ATSC A/85 RP’s measurement technique, and reviewing the records from that monitoring to detect any commercials transmitted in violation of the RP. The cable operator or other MVPD must not inform the network or programmer of the spot check prior to performing it.

(A) Spot-checking must be conducted after the signal has passed through the cable operator or other MVPD’s processing equipment (*e.g.*, at the output of a set-top box). If a problem is found, the cable operator or other MVPD must determine the source of the noncompliance.

(B) To be considered valid, the cable operator or other MVPD must demonstrate appropriate maintenance records for the audio loudness meter.

(C) With reference to the annual “safe harbor” spot check in 76.607(a)(3)(ii):

(I) To be considered valid, the cable operator or other MVPD must demonstrate, at the time of any enforcement inquiry, that appropriate spot checks had been ongoing.

(II) If there is no single 24 hour period in which all programmers of a given channel are represented, an annual spot check could consist of a series of loudness measurements over the course of a 7 day period, totaling no fewer than 24 hours, that measure at least one program, in its entirety, provided by each non-certified programmer that supplies programming for that channel.

(III) If annual spot checks are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for existing programming.

(IV) Newly-added (or newly de-certified) non-certified channels must be spot-checked annually using the approach described in this section. If annual spot checks of the channel are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that channel.

(V) Even after the two year period, if a spot check shows noncompliance on a non-certified channel, the cable operator or other MVPD must once again perform annual spot checks of that channel to be in the safe harbor for that programming. If these renewed annual spot checks are performed for two consecutive years without finding additional evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that channel.

(D) With reference to the spot checks in response to an enforcement inquiry pursuant to 76.607(a)(3)(i)(C), (ii), or (iii):

(I) If notified of a pattern or trend of complaints, the cable operator or other MVPD must perform the 24-hour spot check of the channel or programming at issue within 30 days or as otherwise specified by the Enforcement Bureau; and

(II) If the spot check reveals actual compliance, the cable operator or other MVPD must notify the Commission in its response to the enforcement inquiry.

(E) If any spot check shows noncompliance with the ATSC A/85 RP, the cable operator or other MVPD must notify the Commission and the network or programmer within 7 days, direct the programmer's attention to any relevant complaints, and must perform a follow-up spot check within 30 days of providing such notice. The cable operator or other MVPD must notify the Commission and the network or programmer of the results of the follow-up spot check. Notice to the Federal Communications Commission must be provided to the Chief, Investigations and Hearings Division, Enforcement Bureau, or as otherwise directed in a Letter of Inquiry to which the cable operator or other MVPD is responding.

(I) If the follow-up spot check shows compliance with the ATSC A/85 RP, the cable operator or other MVPD remains in the safe harbor for that channel or programming.

(II) If the follow-up spot check shows noncompliance with the ATSC A/85 RP, the cable operator or other MVPD will not be in the safe harbor with respect to commercials contained in programming for which the spot check showed noncompliance until a subsequent spot check shows that the programming is in compliance.

(4) Use of a real-time processor. A cable operator or other MVPD that installs, maintains and utilizes a real-time processor in a commercially reasonable manner will be deemed in compliance with A/85 with regard to any commercial advertisements on which it uses such a processor, so long as it also:

- (i) provides records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;
- (ii) certifies that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and
- (iii) certifies that its own transmission equipment is not at fault for any pattern or trend of complaints.

(5) Commercials locally inserted by a cable operator or other MVPD's agent – safe harbor. With respect to commercials locally inserted, which for the purposes of this provision are commercial advertisements added to a programming stream for the cable operator or other MVPD by a third party after it has been received from the programmer but prior to or at the time of transmission to viewers, a cable operator or other MVPD may demonstrate compliance with the ATSC A/85 RP by relying on the third party local inserter's certification of compliance with the ATSC A/85 RP, provided that:

- (i) the cable operator or other MVPD has no reason to believe that the certification is false;
- (ii) the cable operator or other MVPD certifies that its own transmission equipment is not at fault for any pattern or trend of complaints; and
- (iii) the cable operator or other MVPD performs a spot check, as defined in 76.607(a)(3)(iv)(A), (B), (D), and (E), on the programming at issue in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials inserted by that third party.

(6) Instead of demonstrating compliance pursuant to subparagraphs (a)(2) through (5) above, a cable operator or other MVPD may demonstrate compliance with subparagraph (a)(1) above in response to an enforcement inquiry prompted by a pattern or trend of complaints by demonstrating actual compliance with ATSC A/85 with regard to the commercial advertisements that are the subject of the inquiry, and certifying that its own transmission equipment is not at fault for any such pattern or trend of complaints.

Note: For additional information regarding this requirement see Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, [Insert Fed Reg cite].

3. Amend §76.602 by adding paragraph (b)(10) to read as follows:

§ 76.602 Incorporation by reference.

(b)*****

(10) ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (July 25, 2011), IBR approved for §76.607.

APPENDIX B

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)¹ an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rule Making* in this proceeding.² The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.³

A. Need for, and Objectives of, the Report and Order

2. This Report and Order (“R&O”) adopts rules to implement the Commercial Advertisement Loudness Mitigation (CALM) Act.⁴ Among other things, the CALM Act directs the Commission to incorporate into its rules by reference and make mandatory a technical standard developed by an industry standard-setting body that is designed to prevent television commercial advertisements from being transmitted at louder volumes than the program material they accompany.⁵ Specifically, the CALM Act requires the Commission to incorporate by reference the ATSC A/85 Recommended Practice (“the RP” or “RP”)⁶ and make it mandatory “insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor.”⁷ This R&O incorporates the RP by reference, and, pursuant to the statute, makes stations and MVPDs fully responsible for all commercial advertisements they transmit.

3. Commission enforcement actions will be based on a pattern or trend of complaints.⁸ Stations and MVPDs may demonstrate actual compliance in response to such an inquiry by providing records of the audio levels of the complained-of programming.⁹ However, the statute recognizes, and the rulemaking record confirms, that such demonstrations can be impractical and difficult.¹⁰ Therefore, the R&O provides two methods by which entities may more easily demonstrate ongoing compliance. First, with respect to locally inserted commercials, stations and MVPDs may demonstrate that they install, utilize, and maintain, in a commercially reasonable manner, equipment and software to comply with the

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

² *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*; MB Docket No. 11-93, Notice of Proposed Rulemaking, 26 FCC Rcd 8281 (2010) (“*NPRM*”).

³ See 5 U.S.C. § 604.

⁴ The Commercial Advertisement Loudness Mitigation (“CALM”) Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621).

⁵ See CALM Act § 2(a); *Senate Committee Report to S. 2847* at 1; *House Committee Report to H.R. 1084* at 1.

⁶ See ATSC A/85: “ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,” (May 25, 2011) (“RP” or “the RP”). To obtain a copy of the RP, visit the ATSC website: http://www.atsc.org/cms/standards/a_85-2011a.pdf.

⁷ See CALM Act § 2(a).

⁸ R&O at para. 41.

⁹ R&O at para. 22.

¹⁰ R&O at note 114.

RP.¹¹ Second, for embedded commercials, the R&O provides an alternative “safe harbor” approach. Under this approach, stations and MVPDs can rely on widely-available certifications, or annual spot checks of non-certified programming by large entities, to enter the safe harbor,¹² and can remain there by conducting a spot check of programming containing commercials that are the subject of a pattern or trend of complaints, and thereby demonstrate ongoing compliance.¹³ If any spot check demonstrates noncompliance, the station or MVPD must re-check the noncompliant commercial programming with a follow-up spot check. If the re-check reveals noncompliance with the RP, then the station or MVPD, going forward, is no longer in the safe harbor for that channel or programming.¹⁴

4. Based on statutory provisions, the R&O also provides for financial hardship waivers which will allow all stations or MVPDs, large or small, to delay the effective date of the rules. This waiver is easier for smaller stations and MVPD systems to obtain. The R&O also provides for general waivers for unforeseen circumstances, as well as for stations or MVPDs that demonstrate they cannot strictly implement the RP because of the technology they use and propose to use an alternative approach to achieving the same goals.¹⁵ The CALM Act requires the Commission to adopt these rules on or before December 15, 2011,¹⁶ and they will take effect one year after adoption.¹⁷

B. Legal Basis

5. The authority for the action taken in this rulemaking is contained in the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. No. 111-311, 124 Stat. 3294, and Sections 1, 2(a), 4(i) and (j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and (j), 303 and 621.

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

6. No comments were filed in response to the IRFA.

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

7. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules if adopted.¹⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²⁰ A “small

¹¹ R&O at paras. 28-29.

¹² This process is simplified further for smaller entities. R&O at paras. 35, 36.

¹³ R&O at paras. 30-40.

¹⁴ R&O at paras. 43-44.

¹⁵ R&O at paras. 49-58.

¹⁶ See CALM Act § 2(a).

¹⁷ See CALM Act § 2(b)(1).

¹⁸ 5 U.S.C. § 603(b)(3).

¹⁹ 5 U.S.C. § 601(b).

²⁰ 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

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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).²¹ The rule changes proposed herein will directly affect small television broadcast stations and small MVPD systems, which include cable operators and satellite video providers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

8. 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.”²² The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”²³ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that 3,188 firms operated in 2007 as Wired Telecommunications Carriers. 3,144 had 1,000 or fewer employees, while 44 operated with more than 1,000 employees.²⁴

9. Wireless Telecommunications Carriers (except Satellite). Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.²⁵ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”²⁶ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.²⁷ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.²⁸ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees.

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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.”

²¹ 15 U.S.C. § 632.

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

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

²⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

²⁵ U.S. Census Bureau, 2007 NAICS Definitions, 517210 Wireless Telecommunications Categories (Except Satellite), <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

²⁶ U.S. Census Bureau, 2002 NAICS Definitions, 517211 Paging, <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

²⁷ 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).

²⁸ 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&-

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Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (“PCS”), and Specialized Mobile Radio (“SMR”) Telephony services.²⁹ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.³⁰ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

10. 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.³¹ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”³² The Commission has estimated the number of licensed commercial television stations to be 1,390.³³ According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations³⁴ in the United States 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 to be 391.³⁵ We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations³⁶ 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.

11. 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

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ds_name=EC0751SSSZ5&-_lang=en.

²⁹ See *Trends in Telephone Service*, at table 5.3.

³⁰ *Id.*

³¹ See 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

³² *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.

³³ See News Release, “Broadcast Station Totals as of December 31, 2010,” 2011 WL 484756 (F.C.C.) (dated Feb. 11, 2011) (“*Broadcast Station Totals*”); also available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf.

³⁴ We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 33; however, we are using BIA’s estimate for purposes of this revenue comparison.

³⁵ See *Broadcast Station Totals*, *supra*, note 33.

³⁶ “[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).

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.

12. Direct Broadcast Satellite (“DBS”) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”³⁷ 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.³⁸ To gauge small business prevalence for the DBS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.³⁹ 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).⁴⁰ Each currently offers subscription services. DIRECTV⁴¹ and EchoStar⁴² 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.

13. Fixed Microwave Services. Microwave services include common carrier,⁴³ private-operational fixed,⁴⁴ and broadcast auxiliary radio services.⁴⁵ At present, there are approximately 31,549

³⁷ 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.

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

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

⁴⁰ 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).

⁴¹ 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.

⁴² 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.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving “Sky Angel” service from DISH Network. See *id.* at 581, ¶ 76.

⁴³ 47 C.F.R. Part 101 *et seq.* (formerly, part 21 of the Commission’s Rules) for common carrier fixed microwave services (except MDS).

⁴⁴ Persons eligible under Parts 80 and 90 of the Commission’s rules can use Private-Operational Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

⁴⁵ Auxiliary Microwave Service is governed by Part 74 and Part 78 of Title 47 of the Commission’s Rules. Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary

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common carrier fixed licensees and 89,633 private and public safety operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. Microwave services include common carrier,⁴⁶ private-operational fixed,⁴⁷ and broadcast auxiliary radio services.⁴⁸ They also include the Local Multipoint Distribution Service (LMDS),⁴⁹ the Digital Electronic Message Service (DEMS),⁵⁰ and the 24 GHz Service,⁵¹ where licensees can choose between common carrier and non-common carrier status.⁵² The Commission has not yet defined a small business with respect to microwave services. For purposes of the FRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons is considered small.⁵³ 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.⁵⁴ 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. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

14. Cable and Other Program Distribution. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."⁵⁵ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.⁵⁶ According to Census Bureau data for 2007, there were a total of 955 firms in the

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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 TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

⁴⁶ See 47 C.F.R. Part 101, Subparts C and I.

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

⁴⁸ 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.

⁴⁹ See 47 C.F.R. Part 101, Subpart L.

⁵⁰ See 47 C.F.R. Part 101, Subpart G.

⁵¹ See *id.*

⁵² See 47 C.F.R. §§ 101.533, 101.1017.

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

⁵⁴ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTtable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

⁵⁵ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

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