

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

In the Matter of:)
Telecommunications Services Inside Wiring) CS Docket No. 95-184
Customer Premises Equipment)
In the Matter of:)
Implementation of the Cable Television Consumer) MM Docket No. 92-260
Protection and Competition Act of 1992: Cable)
Home Wiring)

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: September 22, 2004

Released: September 29, 2004

Comments Date: November 15, 2004

Reply Comments Date: December 6, 2004

By the Commission:

I. INTRODUCTION

1. We issue this Further Notice of Proposed Rulemaking in response to a decision issued by the United States Court of Appeals for the District of Columbia Circuit ("Appeals Court decision") regarding amendment of the Commission's cable television inside wiring rules.1 In the First Order on Reconsideration and Second Report and Order in this proceeding ("Reconsideration Order"), the Commission, in part, modified its rules to provide that home run wiring located behind sheet rock is considered to be physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring.2 At issue in the Appeals Court decision is the Commission's amendment of the Note to Section 76.5(mm)(4) of the Commission's rules to indicate that wiring embedded in sheet

1 National Cable & Telecommunications Association v. Federal Communications Commission and United States of America, No. 03-1140, 2004 WL 335201 (D.C. Cir. Feb. 17, 2004, unpublished) ("Appeals Court decision").

2 In the Matter of: Telecommunications Services Inside Wiring, Customer Premises Equipment and In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, 18 FCC Rcd 1342 (2003) ("Reconsideration Order"). Cable home run wiring in a multiple dwelling unit ("MDU") is the wiring that runs from the demarcation point to the point at which the multichannel video programming distributor's ("MVPD") wiring becomes devoted to an individual subscriber or individual loop. See 47 C.F.R. § 76.800(d). In contrast, "cable home wiring" is the internal wiring contained within the premises of a subscriber, which begins at the demarcation point and runs to the subscriber's television set or other customer premises equipment. See 47 C.F.R. § 76.5 (ll).

rock would be considered physically inaccessible.³ Prior to its *Reconsideration Order* and amendment of the Note to Section 76.5(mm)(4), the Commission determined under its definition of “physically inaccessible,” for example, that wiring embedded in brick, metal conduit or cinder blocks would likely be physically inaccessible; wiring simply enclosed within hallway molding would not.⁴ By expanding the Note to Section 76.5(mm)(4) to include sheet rock in its *Reconsideration Order*, the Court of Appeals found that the Commission offered no reasoned basis for the amendment and remanded the case to the Commission for further consideration.⁵

II. DISCUSSION

2. The Commission’s cable television inside wiring rules are intended to facilitate competition in video distribution markets. The rules are designed to foster opportunities for multichannel video programming distributors (“MVPDs”) to provide service in multiple dwelling unit buildings (“MDUs”)⁶ by establishing procedures and describing circumstances under which the existing cable home run wiring would be made available to alternative video service providers.⁷ A critical component of this process involves the MDU demarcation point. Location of the demarcation point is significant because it is the place where competing providers may access home wiring in an MDU building.⁸ The demarcation point for MDU installations is defined as “a point at (or about) twelve inches outside of where the cable wire enters the subscriber’s dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber’s dwelling unit.”⁹ The term “physically inaccessible” describes a location that: (i) “[w]ould require significant modification of, or significant damage to, preexisting structural elements and (ii) [w]ould add significantly to the physical difficulty and/or cost of accessing the subscriber’s home wiring.”¹⁰

3. In the *Appeals Court decision*, the Court asserts that the Commission does not adequately support its conclusion that wiring behind sheet rock is “physically inaccessible” for purposes of the cable television inside wiring rules.¹¹ In the context of examining the Commission’s definition of “physically inaccessible,” the Court states that there is nothing in the *Reconsideration Order* that explains why or how accessing wire behind sheet rock requires “significant modification of, or significant damage to” the sheet rock.¹² The Court contends that the *Reconsideration Order* fails to explain the relative nature of the

³ See *Appeals Court decision* at 1; Note to 47 C.F.R. § 76.5(mm)(4) (2003).

⁴ See *In the Matter of: Telecommunications Services, Inside Wiring, Customer Premises Equipment and In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 13 FCC Rcd 3659, 3730 (1997) (“*Report and Order*” and “*Second Further Notice*”); Note to 47 C.F.R. § 76.5(mm)(4) (2002).

⁵ See *Appeals Court decision* at 3.

⁶ An MDU is a building or buildings with two or more residences, such as an apartment building, condominium building, or cooperative. See 47 C.F.R. § 76.800.

⁷ See *Reconsideration Order*, 18 FCC Rcd at 1343.

⁸ *Id.* at 1361.

⁹ 47 C.F.R. § 76.5(mm).

¹⁰ 47 C.F.R. § 76.5(mm)(4).

¹¹ See *Appeals Court decision* at 3.

¹² *Id.*, citing *Reconsideration Order*, 18 FCC Rcd at 1362.

“damage” or “modification” involved in accessing wire behind sheet rock.¹³ The Court asserts that the Commission’s conclusion that it considers sheet rock to be more like brick or cinder block, rather than molding, because sheet rock, brick, and cinder block are materials commonly used to form ceilings and hallways, while molding is not, offers no support for modifying the Note to its rule.¹⁴

4. The definition of “physically inaccessible” also requires that accessing wiring at that location would “add significantly to the physical difficulty and/or cost” of accessing the subscriber’s home wiring.¹⁵ The Court found that while the Commission acknowledged that cutting through sheet rock is easier than cutting through brick, metal or cinder block, no support was offered for the conclusion that the lesser physical difficulty and cost are “significant.”¹⁶

5. In the *Reconsideration Order*, the Commission incorporated its response to a Request for Letter Ruling from RCN-BeCoCom, L.L.C. (“*RCN Request for Letter Ruling*”) asking the Commission to address the issue of whether cable wiring behind sheet rock is “physically inaccessible,” such that that the demarcation point should be located not at the twelve inch mark, but rather at the operator’s junction box.¹⁷ Several parties responded to the *RCN Request for Letter Ruling*.¹⁸ Based on these submissions, the Commission incorporated sheet rock as one of the examples of materials to be considered as a “preexisting structural element” in its definition of physical inaccessibility.¹⁹

6. The Court asks that we provide support for our decision in the *Reconsideration Order* to add sheet rock to the list of examples of materials which render cable wiring physically inaccessible because (1) efforts to access such wiring would cause significant damage or modification to a preexisting structural element and (2) the cutting and repairing of sheet rock would add significantly to the physical difficulty and cost of wiring an MDU.²⁰ Our decision regarding what preexisting structural elements should be included for purposes of determining the demarcation point of our inside wiring rules and what

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 47 C.F.R. § 76.5(mm)(4).

¹⁶ *See Appeals Court decision* at 3, citing *Reconsideration Order*, 18 FCC Rcd at 1362.

¹⁷ *See Reconsideration Order*, 18 FCC Rcd at 1362; Letter dated September 23, 1998 from attorney William L. Fishman (Counsel for RCN) to Deborah A. Lathen, Chief, Cable Services Bureau, FCC, CSR-5311 (“*RCN Request for Letter Ruling*”).

¹⁸ Ameritech New Media, Inc. filed comments in CSR-5311 supporting RCN’s request. ICTA also asked that the Commission modify its rules to make wiring physically inaccessible when it is behind plaster, wallboard, sheet rock or molding. *Ex Parte* Letter from William J. Burhop, Executive Director, ICTA to Magalie R. Salas, Secretary, FCC, Docket No. 95-184 (Dec. 13, 2000)(“*ICTA December 13, 2000 Ex Parte*”) at 1. *See also* Cablevision Comments at 3-9; Comcast Comments at 3-10; Joint Opposition of Adelphia and Suburban Cable at 3-6; NCTA Comments at 5-9 filed in CSR-5311 opposing RCN’s request. *See Reconsideration Order*, 18 FCC Rcd at n.116.

¹⁹ *See Note to 47 C.F.R. § 76.5(mm)(4) (2003): “For example, wiring embedded in brick, metal conduit, cinder blocks, or sheet rock with limited or without access openings would likely be physically inaccessible”* (emphasis added).

²⁰ *See National Cable & Telecommunications Association v. Federal Communications Commission and United States of America*, No. 03-1140, 2004 WL 335201 (D.C. Cir. Feb. 17, 2004, unpublished); *Reconsideration Order*, 18 FCC Rcd at 1362.

is considered to be an accessible or inaccessible location should be based on practicality.²¹ In response to the Court's direction, we now ask for additional comment on whether accessing inside wiring behind sheet rock (1) will involve significant modification of or damage to preexisting structural elements and (2) will add significantly to the difficulty and cost of wiring an MDU. Commenters should express their views as to whether sheet rock qualifies as an example of a preexisting structural element that is an integral and permanent part of an MDU. Is it likely that many MDU owners and managers would not allow new service providers to cut, open, spackle, sand, and paint or replace wallpaper or other finishings on the common walls and ceilings on each floor of their MDUs in order to install new lines for service? Should the damage to or modification of ceilings and walls by alternative providers accessing inside wiring behind those ceilings and walls be considered significant?

7. We stated in our *Reconsideration Order* that while we acknowledged that cutting through sheet rock is neither as physically difficult nor as costly as boring through brick, metal or cinder block, we were satisfied that it added significantly to the physical difficulty and cost of wiring an MDU.²² While we listed as examples in our original Note to Section 76.5(mm)(4) of our rules various materials that can be considered structural elements capable of concealing a coaxial cable, this list was not meant to be exclusively tailored to only those load-bearing or specific heavy materials and the cost or difficulty that may be associated with accessing wire behind those barriers. We did not offer in our *Reconsideration Order* cost estimates for cutting through brick, metal or cinder block, as opposed to costs associated with cutting through sheet rock, and we now ask for such cost estimates and whether we should consider resistance that may be posed by MDU managers and owners to making such modifications. It would seem that the difficulty and costs associated with cutting through sheet rock are significantly more than the difficulty and costs involved in accessing wiring behind removable wall molding, which we have previously concluded is not physically inaccessible.²³ We seek comment on those costs as well.

8. We seek comment as to whether our conclusions in general as stated in the *Reconsideration Order* with regard to Section 76.5(mm)(4) of the rules and the applicable Note are correct. We also seek comment as to whether there is an additional or more appropriate standard that would support the amendment of our rule in light of the Court's remand. We seek comment as to whether any specific language changes or eliminations should be made to our rule.

III. ADMINISTRATIVE MATTERS

A. INITIAL REGULATORY FLEXIBILITY ANALYSIS

9. As required by the Regulatory Flexibility Act,²⁴ the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *Further Notice of Proposed Rulemaking* ("FNPRM"). The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the FNPRM, and they should have a separate and distinct heading designating them as responses to the IRFA.

²¹ See *RCN Request for Letter Ruling* at 4. We base our analysis herein, in part, on the *RCN Request for Letter Ruling*.

²² See *Reconsideration Order*, 18 FCC Rcd at 1362.

²³ See Note to 47 C.F.R. § 76.5(mm)(4).

²⁴ See 5 U.S.C. § 603.

B. PAPERWORK REDUCTION ACT ANALYSIS

10. This *FNPRM* does not contain proposed information collections subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

C. PROCEDURAL PROVISIONS

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

12. *Comment Information.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before **November 15, 2004** and reply comments on or before **December 6, 2004**. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

13. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. 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, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

14. Parties also must serve either one copy of each filing via e-mail or two paper copies to Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 488-5300 or (800) 378-3160, e-mail fcc@bcpiweb.com, or via its website at <http://www.bcpiweb.com>. In addition, parties should serve one copy of each filing via email or one paper copy to Karen Kosar, Media Bureau, 445 12th Street, S.W., 4-C453, Washington, D.C., 20554. Washington, D.C., 20554.

15. *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. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bcline@fcc.gov. These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room, CY-B402, Washington, D.C., 20554, telephone (202) 488-5300 or (800) 378-3160, e-mail fcc@bcpiweb.com, or via its website <http://www.bcpiweb.com>. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

16. The Media Bureau contact for this proceeding is Karen Kosar at (202) 418-1053, or Karen.Kosar@fcc.gov.

IV. ORDERING CLAUSES

17. **IT IS ORDERED** that, pursuant to Sections 1, 4(i), 601, 623, 624, and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 521, 543, 544 and 552 **COMMENT IS HEREBY SOUGHT** on the analysis, questions, discussions and statement of issues in this Further Notice of Proposed Rulemaking.

18. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),²⁵ the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on small entities by the policies and rules addressed in the Further Notice of Proposed Rulemaking (“FNPRM”). Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM provided above in paragraph 12. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²⁶ In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.²⁷

A. Need for and Objectives of the Further Notice of Proposed Rulemaking

This Further Notice of Proposed Rulemaking is initiated in response to a decision issued by the United States Court of Appeals for the District of Columbia regarding amendment of the Commission’s cable television inside wiring rules.²⁸ In its First Order on Reconsideration and Second Report and Order in this proceeding, the Commission modified its rules to provide that home run wiring located behind sheet rock is considered to be physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring in multiple dwelling units (“MDUs”).²⁹ Specifically, the Commission amended the Note to Section 76.5(mm)(4) of the rules to include wiring behind sheet rock as an example, along with wiring located behind brick, metal conduit or cinder blocks, as wiring considered to be “physically inaccessible” as that term is used in Section 76.5(mm)(4) of the rules and the appended Note. The consequence of that conclusion is to move the point at which a competing multichannel video programming distributor (“MVPD”) can gain access to wiring located behind sheet rock closer to the incumbent cable operator’s junction box, thereby facilitating competition between MVPD providers to serve an MDU. The Court of Appeals found that the Commission offered no reasoned basis for the amendment to add sheet rock as an example of material to be considered as a “preexisting structural element” in defining physical inaccessibility and remanded the case to the Commission for further consideration.

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

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 and policies, if adopted.³⁰ The RFA generally

²⁵ 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, Stat. 857 (1996).

²⁶ See 5 U.S.C. § 603(a).

²⁷ See *id.*

²⁸ *National Cable & Telecommunications Association v. Federal Communications Commission and United States of America*, No. 03-1140, 2004 WL 335201 (D.C. Cir. Feb. 17, 2004, unpublished).

²⁹ *In the Matter of: Telecommunications Services Inside Wiring, Customer Premises Equipment and In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 18 FCC Rcd 1342 (2003).

³⁰ 5 U.S.C. § 603(b)(3).

defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.³² 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.³³

Cable and Other Program Distribution. This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed a small business size standard for this census category, which includes all such companies generating \$12.5 million or less in revenue annually.³⁴ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.³⁵ Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies involved herein.

Cable System Operators (Rate Regulation Standard). The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission’s rules, a “small cable company” is one serving fewer than 400,000 subscribers nationwide.³⁶ The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.³⁷ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies involved herein.

Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed

³¹ 5 U.S.C. § 601(6).

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

³³ 15 U.S.C. § 632.

³⁴ 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

³⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 513220 (issued October 2000).

³⁶ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995), 60 FR 10534 (February 27, 1995).

³⁷ Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

\$250,000,000.”³⁸ The Commission has determined that there are 67,700,000 subscribers in the United States.³⁹ Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁴⁰ Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.⁴¹ The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁴² and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

Cable Television Relay Service. This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has defined a small business size standard for Cable and other Program Distribution, consisting of all such companies having annual receipts of no more than \$12.5 million.⁴³ According to Census Bureau data for 1997, there were 1,311 firms in the industry category Cable and Other Program Distribution, total, that operated for the entire year.⁴⁴ Of this total, 1,180 firms had annual receipts of \$10 million or less, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million.⁴⁵ Thus, under this standard, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies involved herein.

Local Multipoint Distribution Service. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁴⁶ The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous

³⁸ 47 U.S.C. § 543(m)(2).

³⁹ See FCC Announces New Subscriber Count for the Definition of Small Cable Operator, *Public Notice*, DA 01-158 (released January 24, 2001).

⁴⁰ 47 C.F.R. § 76.901(f).

⁴¹ See FCC Announces New Subscriber Count for the Definition of Small Cable Operator, *Public Notice*, DA 01-158 (released January 24, 2001).

⁴² 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 Section 76.901(f) of the Commission’s rules. See 47 C.F.R. 909(b).

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

⁴⁴ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4 (issued October 2000).

⁴⁵ *Id.*

⁴⁶ See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

calendar years.⁴⁷ An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁴⁸ The SBA has approved these small business size standards in the context of LMDS auctions.⁴⁹ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).⁵⁰ In connection with the 1996 MDS auction, the Commission defined “small business” as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.⁵¹ The SBA has approved of this standard.⁵² The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).⁵³ Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.⁵⁴

In addition, and as noted *supra*, the SBA has developed a small business size standard for Cable and Other Program Distribution,⁵⁵ which includes all such companies generating \$12.5 million or less in annual receipts.⁵⁶ According to Census Bureau data for 1997, there were a total of 1,311 firms in this

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

⁵⁰ 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, *Report and Order*, 10 FCC Rcd 9589, 9593, para. 7 (1995) (MDS Auction R&O).

⁵¹ 47 C.F.R. § 21.961(b)(1).

⁵² See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of \$40 million size standard for MDS auction).

⁵³ Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. See MDS Auction R&O, 10 FCC Rcd at 9608, para. 34.

⁵⁴ 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 for “other telecommunications” (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

⁵⁵ 13 C.F.R. § 121.201, NAICS code 517510.

⁵⁶ *Id.*

category, total, that had operated for the entire year.⁵⁷ Of this total, 1,180 firms had annual receipts of under \$10 million, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million.⁵⁸ Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.⁵⁹ There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

Open Video Services. Open Video Service (OVS) systems provide subscription services.⁶⁰ The SBA has created a small business size standard for Cable and Other Program Distribution.⁶¹ This standard provides that a small entity is one with \$12.5 million or less in annual receipts. The Commission has certified approximately 100 OVS operators to serve 75 areas, and some of these are currently providing service.⁶² Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that those OVS operators remaining might qualify as small businesses that may be affected by the rules and policies proposed herein.

C. Description of Projected Recording, Recordkeeping, and Other Compliance Requirements.

The retention or deletion of the word “sheet rock” to the Note to Section 76.5(mm)(4) of the Commission’s rules would not impose any additional reporting or recordkeeping requirements. With regard to other compliance requirements, we note as indicated above, that the FNPRM is initiated in response to a decision issued by the United States Court of Appeals for the District of Columbia regarding amendment of the Commission’s cable television inside wiring rules. The Court seeks support for the Commission’s decision to add wiring behind sheet rock as an example of wiring considered to be “physically inaccessible” as that term is defined by Section 76.5(mm)(4) of the Commission’s rules and the appended Note. As stated, the consequence of the Commission’s underlying decision is to move the point at which a competing video provider can gain access to wiring located behind sheet rock closer to the incumbent cable operator’s junction box, thereby facilitating competition between video providers to serve an MDU.

⁵⁷ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4 (issued October 2000).

⁵⁸ *Id.*

⁵⁹ The term “small entity” under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

⁶⁰ See 47 U.S.C. § 573.

⁶¹ 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

⁶² See <http://www.fcc.gov/csb/ovs/csovscer.html> (current as of June 2004).

No alternatives to our proposal herein are mentioned because we do not anticipate a negative impact on smaller entities. However, we welcome comment on modifications of the Commission's conclusions if based on evidence of potential differential impact.

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

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: (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.

E. Federal Rules which Duplicate, Overlap, or Conflict with the Commission's Rules and Policies herein. None.