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

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: November 27, 2007 **Released: February 1, 2008**

Comment Date: 30 days after date of publication in the Federal Register
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By the Commission: Chairman Martin and Commissioner Adelstein issuing separate statements; Commissioner Copps approving in part, concurring in part, and issuing a separate statement; Commissioners Tate and McDowell dissenting and issuing separate statements.

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I. INTRODUCTION

1. On June 15, 2007, the Commission released a Notice of Proposed Rulemaking ("NPRM") in this proceeding, seeking comment on its commercial leased access ("leased access")[1] and program carriage[2] complaint procedures.[3] The Commission also sought comment on the implementation of arbitration procedures for resolving leased access and program carriage disputes.[4]

2. In this Report and Order, we modify the Commission's leased access rules. With respect to leased access, we modify the leased access rate formula; adopt customer service obligations that require minimal standards and equal treatment of leased access programmers with other programmers; eliminate the requirement for an independent accountant to review leased access rates; and require annual reporting of leased access statistics. We also adopt expedited time frames for resolution of complaints and improve the discovery process. Finally, we seek comment in a Further Notice of Proposed Rulemaking on whether we should apply our new rate methodology to programmers that predominantly transmit sales presentations or program length commercials.

[1] 47 C.F.R. §§ 76.970 through 76.977.

[2] 47 C.F.R. §§ 76.1300 through 76.1302.

[3] *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage,* Notice of Proposed Rule Making, MB Docket No. 07-42, 22 FCC Rcd 11222 (rel. Jun. 15, 2007) ("*NPRM*"). A summary of the *NPRM* was published in the Federal Register on July 18, 2007. *See* 72 FR 39370 (Jul. 18, 2007). Comment and reply comment deadlines were extended to September 11, 2007 and October 12, 2007, respectively. *See Order Granting Extension of Time for Filing Comments and Reply Comments*, DA 07-3736 (rel. Aug. 24, 2007).

[4] The Commission will address program carriage issues in a separate order. In the *NPRM*, the Commission consolidated issues concerning the Commission's programming diversity rules that were raised in the context of the *Adelphia Order,* the 2005 Video Competition proceeding, informal complaints from the Leased Access Programmers' Association and The America Channel, and through the Commission's formal complaint process. *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., et al*., Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*") and *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, MB Docket No. 05-255, 21 FCC Rcd 2503, 2507 ¶ 12, 2512-2515 ¶¶ 31-36 (2006) ("*Twelfth Annual Report*"). Approximately 70 leased access petitions have been filed since our 1997 rule changes. The majority of leased access complaints allege that the cable company has refused to provide rate information or is charging excessive rates and has refused to carry programming. Other issues concern insurance requirements and technical support. Most recently, the Commission discussed establishing an expedited process for program carriage complaints in lieu of the program carriage arbitration condition contained in the *Adelphia Order. See Comcast Corporation, Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, File No. CSR-7108, FCC 07-172 (rel. Sept. 25, 2007) ("*TAC Order*"); *see also Adelphia Order*, 21 FCC Rcd 8203, 8287 at ¶ 190.

II. COMMERCIAL LEASED ACCESS RULES

A. Background

3. The commercial leased access requirements are set forth in Section 612 of the Communications Act of 1934, as amended ("Communications Act").[5] The statute and corresponding leased access rules require a cable operator to set aside channel capacity for commercial use by unaffiliated video programmers. The statutory framework for commercial leased access was first established by the Cable Communications Policy Act of 1984.[6]

4. Congress established leased access set-aside requirements in proportion to a system's total activated channel capacity. Cable operators with fewer than 36 channels must set aside channels for commercial use only if required to do so by a franchise agreement in effect as of the enactment of Section 612. Operators with 36 to 54 activated channels must set aside 10 percent of those channels not otherwise required for use or prohibited from use by federal law or regulation. Operators with 55 to 100 activated channels must set aside 15 percent of those channels not otherwise required for use or prohibited from use by federal law or regulation. Cable operators with more than 100 activated channels must designate 15 percent of such channels for commercial use. Cable operators are not required to remove services that were being provided on July 1, 1984, in order to comply with the statute.[7]

5. In the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress broadened Section 612's explicit statutory purpose to include the promotion of "competition in the delivery of diverse sources of video programming," in addition to its original aim of bringing about "the widest possible diversity of information sources" for cable subscribers, and required the Commission: (a) to "determine the maximum reasonable rates that a cable operator may establish . . . for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use;" (b) to "establish reasonable terms and conditions for such use, including those for billing and collection;" and (c) to "establish procedures for the expedited resolution of disputes concerning rates or carriage . . ."[8] Congress also required that the Commission's rules not adversely affect the operation, financial condition, or market development of the cable system.[9]

6. In implementing the statutory directive to determine maximum reasonable rates for leased access, the Commission adopted a maximum rate formula for full-time carriage on programming tiers based on the "average implicit fee" that other programmers are implicitly charged for carriage to permit the operator to recover its costs and earn a profit.[10] The Commission also adopted a maximum rate for a la carte services based on the "highest implicit fee" that other a la carte services implicitly pay, and a

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[5] The Commission adopted leased access rules in its *Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 5631 (1993) ("*Rate Order*"); *Order on Reconsideration of the First Report and Order and Further Notice of Rulemaking*, 11 FCC Rcd 16933 (1996) ("*Reconsideration Order*"); and *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd 5267 (1997) ("*Second Report and Order*").

[6] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 *et seq*.

[7] Communications Act §§ 612(a), 612(b)(1) (codified at 47 U.S.C. §§ 532(a), 532(b)(1)).

[8] Communications Act § 612(c)(4)(A)(i), (ii), (iii) (codified at 47 U.S.C. §§ 532(c)(4)(A)(i), (ii), (iii)).

[9] 47 U.S.C. § 532(c)(1).

[10] *Second Report and Order*, 12 FCC Rcd 5267, 5283 (1997).

prorated rate for part-time programming.[11]

7. Cable operators may use any unused channel capacity designated for leased access until an unaffiliated programmer obtains use of the channel capacity pursuant to a written agreement.[12] Cable operators may use up to 33 percent of the channel capacity designated for leased access for qualified minority or educational programming sources, whether or not the source is affiliated with the cable operator.[13] In addition, cable operators may impose reasonable insurance requirements and must provide the minimal level of technical support necessary for users to present their material on cable systems.[14] Cable operators may not unreasonably refuse to cooperate with a leased access user in order to prevent that user from obtaining channel capacity.[15]

B. Scope of the NPRM

8. In the NPRM, the Commission sought comment on the current status of leased access programming, such as whether, which and what type of programmers are using leased access channels; the number of full and part-time leased access channels that cable operators provide and are used; how often cable operators turn down requests for leased access and why; to what extent and for what purposes do cable operators use the channels and does this use contribute to programmers' lack of use; and whether the terms in leased access agreements, such as insurance or termination provisions, are the same or similar to those terms that the cable operator has with its own affiliated or non-affiliated programmers. The Commission also sought comment on the effectiveness of leased access enforcement; the costs and burdens associated with the complaint or other dispute resolution processes, time frames for the process; whether the process is being fully utilized and whether cable operators are complying with existing requirements and time frames.[16]

9. The Commission sought comment on the rate formula for leased access channels; whether the development of digital signal processing and signal compression technologies require changes in the formula;[17] whether changes in technology require flexibility in the delivery format; whether the rules

[11] *See* 47 C.F.R. §§ 76.970 - 76.977. Section 612 is codified at 47 U.S.C § 532. The Commission's rate rules were upheld by the D.C. Circuit Court of Appeals. *See ValueVision, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).

[12] 47 U.S.C. § 532(b)(4).

[13] 47 C.F.R. § 76.977.

[14] 47 C.F.R. § 76.971(d); 47 C.F.R. § 76.971(c).

[15] 47 C.F.R. § 76.971(c).

[16] *NPRM*, 22 FCC Rcd 11222, ¶¶ 7-11.

[17] In calculating a system's capacity for purposes of 47 U.S.C. § 532 (b), "activated channels" includes all commercial and noncommercial broadcast, public, educational, governmental, and leased access channels carried. *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, and Anti-trafficking Provisions*, 8 FCC Rcd 8565, 8588-89 ¶ 54 (1993). The Commission has also defined the term "activated channel" in the digital must carry context. *See Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999, Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, 16 FCC Rcd 2598, 2614-16 ¶¶ 39-41 (2001); *Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516 (2005). Channel capacity can be calculated by taking the total usable activated channel capacity of the system in megahertz and dividing it by three. One third of this capacity is the limit on the amount of system spectrum that a cable operator must make available for commercial broadcast signal carriage purposes.

should allow more flexibility in tier and channel location; whether leased access should apply to video-on-demand ("VOD") or other technologies; and whether any advances in technology or marketplace developments affect the leased access rules, such as interactive electronic programming guides and addressable digital set-top boxes.[18]

C. Discussion

i. Customer Service Standards and Equitable Contract Terms

10. *Background*. In this Order, we adopt uniform customer service standards to address the treatment of leased access programmers and potential leased access programmers by cable system operators. In response to the NPRM, we received numerous comments outlining poor customer service practices and the imposition of unreasonable rates, terms and conditions for leased access by cable system operators. The record shows that poor customer service standards are impeding independent programmers' efforts to lease cable channels on unaffiliated cable systems by dissuading them from pursuing their statutory right to designated commercial leased access channels.[19] For example, Pope Broadcasting Company ("PBC") claims that it has experienced "unethical, illegal and discriminatory practices by a number of cable providers."[20] CaribeVision Holdings, LLC ("CaribeVH") argues for more specific guidelines in the Commission's Rules, other than just references in the rules to "reasonable" and "expeditious" treatment.[21] CaribeVH complains of poor responses to requests for leased access channel information, both in response time and in substance. MAP argues that cable systems refuse to include in electronic program guides the necessary information about leased access channels that would enable viewers to find programming that may be of interest to them.[22] Engle Broadcasting ("Engle") complains that cable operators typically ignore its requests for information regarding rates and available time slots or flat out refuse to give rates claiming there was "no time available."[23]

11. In response, cable operators contend that they respond to requests for leased access in a timely manner and that the rates, terms, and conditions that they offer for leased access are reasonable. NCTA states that leased access generally proceeds smoothly on the local level, with few complaints arising, because cable operators have an obligation to reasonably accommodate leased access users and devote a significant amount of time and energy to that purpose.[24] Time Warner Cable, Inc. ("TWC") argues that the current rules require cable operators to treat leased access programmers the same as other commercial programmers and that reasonableness standard is often decided through comparison with the treatment of non-leased access programmers.[25] Comcast contends that cable operators are responsive to

[18] *NPRM*, 22 FCC Rcd 11222, ¶¶ 7-11.

[19] Community Broadcasters Association, *et al*. *ex parte* letter dated November 16, 2007; CaribeVH Comments at 2, *et seq*.; Engle Comments at 3; iNFO Comments at 1, *et seq*.; LAPA Comments at 3, *et seq*.; MAP Comments at 2; PMI Comments at 2; PBC Comments at 1; RMI Comments at 3; Shop NBC Comments at 6.

[20] *See* PBC Comments at 1.

[21] *See* CaribeVH Comments at 2.

[22] *See* MAP Comments at 11-12.

[23] *See* Engle Comments at 4.

[24] *See* NCTA Comments at 8-9.

[25] *See* TWC Comments at 10; *see, e.g., United Multimedia Productions, Inc. and Hamptons Video Guide, Inc. v. CSC Acquisition-New York, Inc*., Memorandum Order and Opinion, 16 FCC Rcd 5234, ¶ 9 (CSB 2001); *Second Report and Order*, 12 FCC Rcd 5267, ¶¶ 112-115.

requests for leased access information.[26]

12. *Discussion*. As stated above, in order to make the leased access carriage process more efficient, we adopt new customer service standards, in addition to the existing standards. These standards are designed to ensure that leased access programmers are not discouraged from pursuing their statutory right to the designated commercial leased access channels, to facilitate communication of these rights and obligations to potential programmers, and to ensure a smooth process for gaining information about a cable system's available channels. As explained in more detail below, we require cable system operators to maintain a contact name, telephone number and e-mail address on its website, and make available by telephone, a designated person to respond to requests for information about leased access channels.[27] We also require cable system operators to maintain a brief explanation of the leased access statute and regulations on its website.[28] Within three business days of a request for information, a cable system operator shall provide the prospective leased access programmers with the following information: (1) The process for requesting leased access channels;[29] (2) The geographic levels of service that are technically possible;[30] (3) The number and location and time periods available for each leased access channel;[31] (4) Whether the leased access channel is currently being occupied;[32] (5) A complete schedule of the operator's statutory maximum full-time and part-time leased access rates;[33] (6) A comprehensive schedule showing how those rates were calculated;[34] (7) Rates associated with technical and studio costs;[35] (8) Electronic programming guide information;[36] (9) The available methods of programming delivery and the instructions, technical requirements and costs for each method;[37] (10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability;[38] and (11) Information regarding prospective launch dates for the leased access programming.[39] We explain each of these standards in further detail below. In addition to the customer service standards, we adopt penalties for ensuring compliance with these standards.[40] We emphasize that the leased access customer service standards adopted herein are "minimum" standards. We cannot anticipate each and every instance of interaction between cable operators and leased access programmers.

[26] *See* Comcast Reply Comments at 9.

[27] *See* Appendix B (adopting 47 C.F.R. § 76.972(a)(1)).

[28] *See* Appendix B (adopting 47 C.F.R. § 76.972(a)(2)).

[29] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(1)).

[30] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(2)).

[31] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(3)).

[32] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(4)).

[33] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(5)).

[34] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(6)).

[35] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(7)).

[36] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(8)).

[37] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(9)).

[38] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(10)).

[39] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)(11)).

[40] *See* Appendix B (adopting 47 C.F.R. § 76.972(f)).

13. *Maintenance of Contact Information*. We require every cable system operator to maintain, on its website, a contact name, telephone number, and e-mail of an individual designated by the cable system operator to respond to requests for information about leased access channels. One of the more basic elements necessary to permit potential programmers reasonable access to cable systems is ready availability of a contact name, telephone number, and e-mail address of a cable system operator that the programmer can use to reach the appropriate person in the cable system to begin the process for requesting access to the system. Commenters complain about individuals located far from the local community. For example, RMI states that when a new programmer requests information about leased access, they are directed to a person headquartered over 130 miles away.[41] CBA makes a similar complaint.[42] NCTA, on the other hand, offers that leased access generally proceeds smoothly at the local level.[43] While the physical location of a person designated as the leased access contact should not be critical in the relationship between the potential programmer and the cable system operator, the identity of that person and the ease of access to him are critical. Other aspects of the rules we adopt here deal with expeditious and full responses to leased access requests. The fact that the designated person is located some distance away should not affect the timeliness and substance of responses.

14. *Timing for Response*. We amend our Rules to require a cable system operator[44] to respond to a request for information from a leased access programmer within three business days. The identity of a designated person by the cable system operator who the potential programmer can contact is important only if that person replies quickly and fully to the requests of the programmer. CaribeVH complains of poor responses to requests for leased access channel information, both in response time and in substance.[45] Engle complains that the cable operators typically ignore the requests for information regarding rates and available time slots or flat out refuse to give rates claiming there was "no time available."[46] Positive Media, Inc. d/b/a TV Camden ("PMI") states that when it tried to request leased access information from its local cable company, the company responded that it did not know about leased access.[47] Our current Rules provide for a 15 day response by cable system operators to a request by a potential programmer. That response must include information on channel capacity available, the applicable rates, and a sample contract if requested. That response time is unnecessarily long and, as discussed below, the information is inadequate. Cable operators must have leased access channel information available in order to be able to comply with the statute and our Rules. It does not take 15 days to provide a copy of that information to a potential leased access programmer. Three business days to reply to a request for such information is more than adequate. Accordingly, we are amending the response time permitted a cable system operator to three business days. We are also providing a more detailed list of information the operator must provide upon request within that time period. All of the

[41] RMI Comments at 3.

[42] CBA Comments at 3.

[43] NCTA Comments at 8.

[44] We retain the 30-day response period currently provided in Section 76.970(i)(2) of the Commission's Rules for cable systems that have been granted small system special relief. *See* Appendix B (adopting 47 C.F.R. § 76.972(g)). In the *Second Report and Order*, we adopted this longer response period to minimize burdens on small systems while still ensuring that potential leased access programmers receive the required information in a timely fashion. *See Second Report and Order*, 12 FCC Rcd 5267, 5331 at ¶ 130. For these purposes, systems subject to small system relief are systems that either: (i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or (ii) Have been granted special relief. These rules remain unchanged here.

[45] *See* CaribeVH Comments at 2.

[46] *See* Engle Comments at 4.

[47] *See* PMI Comments at 2.

information required to be provided is necessary for a potential leased access programmer to be able to file a *bona fide* request for carriage. There is no reason to delay providing the leased access programmer with the information it needs to take the necessary steps to obtain access.

15. *Process for Requesting Leased Access Channels*. We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the process for requesting leased access channels. One element of the information the cable system operator must make available to the potential programmer within three business days of a request is an explanation of the cable system operator's process for requesting leased access channels. In addition to delayed and inadequate responses, commenters complain that they have to deal with a process and procedures that are difficult to understand and seem to exist only to provide resistance. For example, PMI states that when it tried to request leased access information from its local cable company, the company responded that it could provide no information about leased access.[48] PMI had to file a petition for relief with the Commission to get rates and channel availability. According to PMI, although the Commission requests the local programmer and the cable company to "negotiate" the terms and conditions of any contract for lease access, its experience with the contract negotiation process was that any request by PMI was kept out of the contract and every requirement the cable system made was included. PMI was forced to argue each point, backed with Commission precedent, to support its requests, and the cable system's actions had the effect of delaying and discouraging access to the leased access channels.[49] Accordingly, we are requiring that the cable system operator include an explanation of the operator's process and procedures for requesting leased access channels.

16. *Geographic Levels of Service that Are Technically Possible.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the geographic levels of service that are technically possible. Commenters complain that cable system operators make available only limited levels of service.[50] Typically, the service offered is defined by the size of the headend.[51] CaribeVH points out that with the consolidation of headends, the headend approach is no longer efficient for a leased access programmer to obtain a channel serving the local needs of residents in discrete communities.[52] As a result, "leased access programmers are . . . forced to purchase much larger areas at a much higher cost even if their programming is not relevant to the larger consolidated base."[53] CaribeVH asks the Commission to provide for leased access to local communities, as opposed to large consolidated cable systems.[54] MAP, on the other hand, asserts that the Commission should require cable operators to make rates available on a headend, regional, and national basis with price sheets available in public files and on request.[55] We will not require, at this time, the operator to allow the leased access programmer to serve discrete communities smaller than the area served by a headend if they are not doing the same with other programmers. We acknowledge that with the consolidation of headends, programmers may be forced to purchase larger areas at higher costs than they

[48] *Id*.

[49] *Id* at 3.

[50] CaribeVH Comments at 12.

[51] NCTA Reply Comments at 15 (citing *Roberts v. Houston Division of Time Warner Entertainment Co*., 11 FCC Rcd. 5999, 6005-6007 (CSB 1996)).

[52] CaribeVH Comments at 12.

[53] *Id*. at 12-13.

[54] *See id*. at 13.

[55] *See* MAP Comments at 13, 15.

would prefer. We will monitor developments in this area, and may revisit this issue if circumstances warrant. However, we will require cable system operators to clearly set out in their responses to programmers what geographic and subscriber levels of service they offer.

17. *Number, Location, and Time Periods Available for Each Leased Access Channel*. We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the number, location, and time periods available for each leased access channel. One of the more common complaints raised by commenters was the difficulty they faced in determining just what channels were available, where they were located, and what time periods they were available.[56] Our current Rules provide, simply, that operators explain how much of the operator's leased access capacity is available.[57] CaribVH asks that cable operators be required to provide, in addition, subscriber totals by headend, on each of the different tiers; specific channels availabilities, and a channel lineup; and information to verify leased access rates.[58] MAP asserts that programmers should have the ability to select the tier of their choice and to be secure in their channel placement.[59] Shop NBC believes that the Commission should make clear that certain cable operator practices are *per se* unreasonable, such as locating leased access programmers in channel positions with poor transmission quality or in a collective "cable Siberia," where they cannot easily be located by subscribers.[60] iNFO also requests better channel placement for leased access programmers and points out that its leased access application was denied by Comcast because the market requested could not be segregated from a larger market.[61] iNFO states that as a result of a settlement, and almost thirty months and $28,000 of legal expenses, iNFO eventually gained the rights to a leased access channel.[62] It notes that it was placed where there are no channels close to it.[63] Our current leased access channel placement standards provide that programmers be given access to tiers that have subscriber penetration of more than 50 percent.[64] We will not change that requirement, but we will expand on the current requirement relating to capacity in Section 76.970(i) to require cable system operators to provide, in their replies to requests from programmers, the specific number and location and time periods available for each leased access channel. This greater degree of certainty should assist programmers in their evaluations.

18. *Explanation of Currently Available and Occupied Leased Access Channels.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with an explanation of currently available and occupied leased access channels. Several commenters complain that cable operators give delayed, false, or misleading information as to leased access capacity and availability.[65] NCTA states that it may be difficult to specify which channel is available for use at the time of the request because that information may not be readily available if the

[56] *See* CaribeVH Comments at 3.

[57] 47 C.F.R. § 76.970(i)(1)(i).

[58] CaribeVH Comments at 3.

[59] MAP Comments at 15.

[60] Shop NBC Comments at 16.

[61] *See* iNFO Comments at 1, 2.

[62] *See id*. at 2.

[63] *See id*.

[64] 47 C.F.R. § 76.971(a)(1).

[65] *See* PBC Comments at 1; CaribeVH Comments at 2; Engle Comments at 4; PMI Comments at 2.

lessee is requesting that an operator open up a new channel for leasing.[66] We disagree with NCTA's assertion. Section 612 of the Communications Act imposes specific requirements on cable operators with regard to leased access.[67] It is inherent in these obligations to be able to provide timely and accurate information to prospective leased access programmers. Within three business days of a request by a current or potential leased access programmer, a cable operator shall provide information documenting: (1) the number of channels that the cable operator is required to designate for commercial leased access use pursuant to Section 612(b)(1); (2) the current availability of those channels for leased access programming on a full- or part-time basis; (3) the tier on which each leased access channel is located; (4) the number of customers subscribing to each tier containing leased access channels; (5) whether those channels are currently programmed with non-leased access programming; and (6) how quickly leased access channel capacity can be made available to the prospective leased access programmer. We believe this information is vital to enable leased access programmers to make an informed decision regarding whether to pursue leased access negotiations with a cable operator. Provision of this information will also benefit cable operators by timely informing leased access programmers of current leased access timing and availability, and thereby eliminating leased access requests that cannot be accommodated by existing leased access availability.

19. *Schedule and Calculation of Leased Access Rates.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with a schedule and calculation of its leased access rates. Numerous commenters complain that cable operators failed to provide timely information on leased access rates or on how such rates are calculated.[68] MAP asserts that the Commission should require cable operators to make rates available on a head-end, regional, and national basis with price sheets available in public files and on request.[69] NCTA points out that operators are required to maintain sufficient supporting documentation to justify their rates, including information that shows the calculations of the implicit fees, and this information must be available for demonstration to the Commission.[70] As with information regarding available and occupied leased access channels, we believe Section 612 imposes on cable operators the obligation to provide a timely and accurate explanation of its leased access rates to prospective leased access programmers. Indeed, as conceded by NCTA, this obligation is not new.[71] Rather, we merely amend the time required for providing this information to prospective leased access programmers. Accordingly, within three business days of a request by a current or potential leased access programmer, a cable operator shall provide information documenting the schedule of all leased access rates (full- and part-time) available on the cable system. Cable operators must attach to this schedule a separate calculation detailing how each rate was derived pursuant to the revised rate formula adopted herein.[72] This information will assist leased access programmers in determining whether leased access capacity on a given cable system is economically feasible. In addition, the rate calculations will further assist leased access programmers in determining whether particular cable operators are complying with their leased access obligations.

20. *Explanation of Any Rates Associated with Technical or Studio Costs*. Included in the customer standards we are adopting today is a requirement that a cable operator provide a prospective

[66] NCTA Comments at 12.

[67] 47 U.S.C. § 532.

[68] *See* CaribeVH Comments at 2-3; Engle Comments at 4; PMI Reply Comments at 2; iNFO Comments at 1.

[69] MAP Comments at 13, 15.

[70] NCTA Reply Comments at 9.

[71] *See id*.

[72] *See infra* ¶¶ 35-49 (discussing the revised leased access rate calculation).

leased access programmer, within three business days of a request, with a list of fees for providing technical support or studio assistance to the leased access programmer along with an explanation of such fees and how they were calculated. We note that our Rules require leased access providers to reimburse cable operators "for the *reasonable* cost of any technical support the operators actually provide."[73] Further, our rate calculation includes technical costs common to all programmers so that cable operators may not impose a separate charge for technical support they already provide to non-leased access programmers.[74] Commenters note incidents they assert constitute cable operator overcharging, such as imposing a technical fee of $51.49 to insert a tape into a machine.[75] Although we do not have all of the facts before us regarding this specific allegation, a substantial charge for a minor task is the type of conduct we would find unreasonable. iNFO states that, although it only reached one market zone, it was required to buy modulators for four other zones and that the iNFO channel had a signal quality significantly inferior to other channels.[76] At this time, we will not prescribe an hourly rate for technical support, but instead will monitor the effectiveness of the new customer standards that require that cable operators list up front any technical fees along with an explanation of the fee calculation. If leased access programmers have continued problems with high technical or studio cost, we will consider implementing a more specific solution.

21. *Programming Guide Information.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with all relevant information for obtaining carriage on the program guide(s) provided on the operator's system. Moreover, we expressly require that, if a cable operator does not charge non-leased access programmers for carriage of their program information on a programming guide, the cable operator cannot charge leased access programmers for such service. MAP states that viewers cannot identify whether programming designated "paid programming" on a channel guide is local or ethnic programming or an infomercial.[77] CaribeVH argues for a requirement that cable operators list leased access programming in their printed cable guides and on the electronic guides on the system.[78] NCTA argues that cable operators must be able to differentiate between the program services that they have chosen and leased access channels in the program guide and that it is impossible to include part-time leased access programming in program guides.[79] Comcast states that, like other MVPDs, it relies upon third parties to provide the data content for its electronic program guides and data generally needs to be supplied to these "metadata aggregators" on a timetable that is not consistent with leased access arrangements.[80] Because of the dynamic nature of leased access programming, we believe that it would be impracticable to impose a requirement on cable operators to include all leased access listings in their programming guides. However, we believe that, in situations where time permits and the leased access programming information is submitted as reasonably required by the cable operators, cable operators must ensure that leased access programming information is incorporated in its program guide to the same extent that it does so for non-leased access programmers. In order to accomplish this, cable operators are required to provide potential leased access programmers with all relevant information for obtaining carriage on the program guide(s) provided on the operator's

[73] 47 C.F.R. § 76.971(c) (emphasis added).

[74] *Second Report and Order*, 12 FCC Rcd at 5324, ¶ 114.

[75] *See* RMI Comments at 4.

[76] *See id*.

[77] MAP Comments at 12; *see* iNFO Comments at 2.

[78] CaribeVH Comments at 10.

[79] NCTA Comments at 14.

[80] Comcast Comments at 16.

system.[81] This information shall include the requirements necessary for a leased access programmer to have its programming included in the programming guide(s) that serve the tier of service on which the leased access provider contracts for carriage. At a minimum, the cable operator must provide: (1) the format in which leased access programming information must be provided to the cable operator for inclusion in the appropriate programming guide; (2) the content requirements for such information; (3) the time by which such programming information must be received for inclusion in the programming guide; and (4) the additional cost, if any, related to carriage of the leased access programmer's information on the programming guide. We expressly require that, if a cable operator does not charge non-leased access programmers for carriage of their program information on a programming guide, the cable operator cannot charge leased access programmers for such service.

22. *Methods of Programming Delivery.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with available information regarding all acceptable, standard methods for delivering leased access programming to the cable operator. MAP argues that, although cable systems are now capable of a wide variety of delivery systems that would allow leased access programmers an opportunity to narrowly tailor their coverage to niche audiences, cable operators refuse to allow leased access programmers with access to these technologies.[82] MAP asserts that the additional fees charged by cable operators for services such as tape insertion correspond to no discernible economic variable and should be prohibited.[83] CBA complains of the insistence by cable operators on prohibitively expensive delivery methods and insistence on payment for equipment that the leased access provider does not need, as well as prohibitive technical fees.[84] With regard to cable operators restricting programming delivery technology, NCTA argues that the Commission's has already determined that operators "do not have any responsibility for assisting in the delivery of programming from a programmers' studio or production facility to the headend or input point of the cable system."[85] Comcast replies that the leased access programmers' request that the Commission allow them to deliver their programming to cable operators by any means they choose, including "tape, DVD, [I]nternet, coax, fiber, an unlicensed frequency wireless microwave, IPTV, or any current or new technology," is unrealistic, and would increase cable operators' technical costs.[86]

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[81] We acknowledge that there are various programming guides and services. For example, on many analog tiers of service cable operators provide a dedicated programming guide channel in which current and upcoming programming choices are provided through a continuous on-screen scroll. In addition, on most digital tiers of service, subscribers have available an electronic programming guide which provides extensive program information, search capability and channel navigation functions. The rules we adopt today apply to all programming guides however provided to the subscriber, including printed formats.

[82] *See generally* MAP Comments at 11.

[83] MAP Reply Comments at ii; *see* RMI Comments at 4. For example, RMI contends that one cable operator requires each program to have its own playback deck, and although programmers are not required to lease the deck, they are required to pay a technical fee of $51.49 each time a tape is inserted into the machine in addition to the maximum applicable air time rates for that time slot. RMI was told that this fee is "used to reimburse for staff, equipment usage, and studio costs." According to RMI's estimated calculations, at that rate, it only takes five tape insertions before the equipment investment is completely paid in full. RMI Comments at 4. According to iNFO, one operator required nearly one year of lease payments to secure the lease, and that it was required to buy approximately $25,000 worth of equipment for signal modulation before its channel could be cable-cast. iNFO Comments at 2.

[84] CBA Comments at 3-4.

[85] *See* NCTA Comments at 15-16 (citing *Engle Broadcasting v. Comcast of Southern N.J.*, 16 FCC Rcd. 17650, 17653 (2001)).

[86] Comcast Comments at 18.

23. Because of the variable circumstances experienced by each cable system, we cannot establish a list of acceptable, standard delivery methods for leased access programming applicable to all cable systems. However, we believe that it incumbent upon a cable operator to provide prospective leased access programmers with sufficient information to be able to gauge the relative difficulty and expense of delivering its programming for carriage by the cable operator. A cable operator must make available information to leased access programmers regarding all acceptable, standard methods for delivering leased access programming to the cable operator. For each method of acceptable, standard delivery, the cable operator shall provide detailed instructions for the timing of delivery, the place of delivery, the cable operator employee(s) responsible for receiving delivery of leased access programming, all technical requirements and obligations imposed on the leased access programmer, and the total cost involved with each acceptable, standard delivery method that will be assessed by the cable operator. We clarify, however, that cable operators must give reasonable consideration to any delivery method suggested by a leased access programmer. A leased access programmer that is denied the opportunity to deliver its programming via a reasonable method may file a complaint with the Commission. In such complaint proceeding, the burden of proof shall be on the cable operator to demonstrate that its denial was reasonable given the unique circumstances of its cable system.

24. *Comprehensive Sample Leased Access Carriage Contract.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with a comprehensive sample leased access carriage contract. We also require a cable system operator in its leased access carriage contract to apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers. MAP states that the Commission should require cable operators to include leased access contracts in their public files and to provide annual reports on the use of leased access.[87] PMI supports a standard leased access downloadable form to eliminate useless delay tactics used by cable systems.[88] CaribeVH urges the Commission to set specific requirements such as a one-year minimum contract length for a leased access programmer seeking a 24/7 channel for an extended period.[89] NCTA states that most cable operators typically have standard form contracts that they make available to leased access users within the prescribed 15 day time frame or sooner and delays are due to lessees' proposed changes.[90] Comcast states that there is no basis for the Commission to adopt a standardized leased access contract.[91]

25. We agree with the commenters that propose that cable operators be required to supply a sample leased access agreement to prospective leased access programmers. NCTA admits that most cable operators already maintain such contracts and share them with prospective leased access programmers. We do not intend by this requirement to infringe the freedom of contract of either party and expressly clarify that neither the cable operator nor the prospective leased access programmer need abide by any of the terms and conditions set forth in the sample contract. Instead, we believe that the provision of such agreements by cable operators serve to inform leased access programmers of terms and conditions that are generally acceptable to the cable operator and will be a useful first step in the initiation of leased access negotiations. Accordingly, within three business days of a request by a current or potential leased access programmer, a cable operator shall provide a copy of a sample leased access carriage contract setting forth what the cable operator considers to be the standard terms and conditions for a leased access

[87] MAP Comments at 13.

[88] PMI Comments at 4.

[89] CaribeVH Comments at 6.

[90] NCTA Comments at 11.

[91] Comcast Comments at 19.

carriage agreement.

26. As discussed below, we also require cable system operators to apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers. Leased access programmers complain of leased access contract terms and conditions that are unfair, unreasonable, onerous, and overly burdensome or discriminatory.[92] Specific unreasonable terms and conditions complained about include unfair promotion and marketing practices;[93] system-by-system leasing requirements;[94] insurance and security deposits;[95] discriminatory treatment in comparison with other commercial programmers;[96] unfair treatment of LPTV broadcasters;[97] tier and channel placement issues;[98] VOD platform issues;[99] exclusion from electronic program guides;[100] excessive technical and other fees;[101] and inflexible delivery systems.[102] Commenters ask that we address certain contract issues that arise in negotiations. Rather than dictate specific reasonable terms and conditions, we require that cable system operators apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers.

27. The Commission has stated in the past that the reasonableness of specific terms and conditions will be determined on a case-by-case basis, but set broad guidelines for tier placement and a general standard of reasonableness for contract terms and conditions.[103] Although we conclude that each complaint regarding unreasonable terms and conditions will continue to be reviewed on a case-by-case basis, we set out herein additional guidelines that will help to narrow the range of reasonable practices, terms, and conditions. For example, numerous parties complain about a requirement to carry insurance indemnifying the cable system operator. The Commission has held that requiring a leased access programmer to obtain reasonable liability insurance coverage does not constitute a violation of the leased access regulations.[104] Although the Commission has not adopted specific conditions or limits regarding the amount of coverage or the type of insurance policy that operators may require, the Commission does require that insurance requirements be reasonable in relation to the objective of the requirement.[105] The

[92] CaribeVH Comments at 4; Engle Comments at 4; iNFO Comments at 2; LAPA Comments at 3; MAP Comments at 16; PMI Comments at 3; PBC Comments at 1; RMI Comments at 3, *et seq*.; Shop NBC Comments at 2.

[93] *See* CaribeVH Comments at 9-10.

[94] *See* CaribeVH Comments at 14; Combonate Comments at 1-4; LAPA Comments at 5; MAP Comments at 15; Combonate Reply Comments at 4.

[95] *See* CaribeVH Comments at 8-9; CBA Comments at 4 n.8; Engle Comments at 4; HTV Comments at 3; LAPA Comments at 3; PBC Comments at 1; RMI Comments at 11-12; PBC Reply Comments at 2.

[96] *See* LAPA Comments at 9; PBC Comments at 1.

[97] *See* CBA Comments at 3-5; RMI Comments at 4-14; RMI Reply Comments at 2.

[98] *See* CaribeVH Comments at 7-8; LAPA Comments at 5; ShopNBC Comments at 16-17.

[99] *See* MAP Comments at 11.

[100] *See* CaribeVH Comments at 10; iNFO Comments at 2; MAP Comments at 11-12.

[101] *See* MAP Comments at 2; RMI Comments at 4-6; RMI Reply Comments at 2.

[102] *See* CBA Comments at 3; RMI Comments at 6-10; RMI Reply Comments at 2.

[103] *Rate Order*, 8 FCC Rcd at 5936; *Second Report and Order*, 12 FCC Rcd at 5309.

[104] *See Campbell v. TW Cable – St. Augustine*, CSR 5234-L (CSB 1998).

[105] *See Second Report and Order*, 12 FCC Rcd at 5323

Commission also placed on cable operators the burden of proof in establishing reasonableness.[106] The Commission stated that reasonable insurance requirements are based on the operator's practices with respect to insurance requirements imposed on non-leased access programmers, the likelihood that the nature of the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors.[107] In a recent case, the Media Bureau found that the cable system provided no evidence establishing the reasonableness of its insurance requirement, such as whether the insurance was required of non-leased access programmers, whether the cable system operator had incurred litigation costs in the context for which it need indemnification, or even that the likelihood that the programming at issue would pose a liability risk.[108]

28. We will continue to address complaints about specific contract terms and conditions on a case-by-case basis. We emphasize that in all cases, the Commission will evaluate any complaints pursuant to a reasonableness standard. We also clarify that a cable system operator may not continue to include terms and conditions in new contracts that previously have been held to be unreasonable by the Commission. Not only are our orders binding on the affected parties to a leased access complaint, but unless and until an order is stayed or reversed by the Commission, a cable system operator is under an obligation to follow the Commission's Rules and precedent in setting its practices, terms, and conditions.

29. Because we do not think that every potential leased access programmer should be required to file a complaint to determine if every term in its contract is reasonable, we will require the cable operator to provide, along with its standard leased access contract, an explanation and justification, including a cost breakdown, for any terms and conditions that require the payment or deposit of funds. This includes insurance and deposit requirements, any fees for handling or delivery, and any other technical or equipment fees, such as tape insertion fees. This will allow the leased access programmer to determine whether the cost is reasonable and expedite any review by the Commission. For example, we note that RMI contends that one cable operator charges leased access programmers a fee of $51.49 each time a tape is inserted into a playback deck.[109] We believe that requiring a cable operator to provide an explanation and justification for such a fee will encourage cable operators to impose only reasonable fees or, at least, facilitate the filing of a leased access complaint demonstrating that such a fee is unreasonable.

30. With regard to non-monetary terms and conditions, such as channel and tier placement, targeted programming, access to electronic program guides, VOD, etc., we similarly require the cable operator to provide, along with its standard leased access contract, an explanation and justification of its policy. For example, with regard to the geographic scope of carriage, if a leased access programmer requests to have its programming targeted to a finite group of subscribers based on community location, unless the operator agrees to the request, it must not provide such limited carriage to other programmers or channels. To the extent the cable operator denies the request for limited carriage, the cable operator must provide an explanation as to why it is technically infeasible to provide such carriage. If limited carriage is technically feasible, the cable operator must provide a fee and cost breakdown for such carriage for comparison with similar coverage provided for non-leased access programmers.

31. Similarly, with regard to tier placement and channel location, we require the cable operator to provide, along with its standard leased access contract, an explanation and justification of its policy regarding placement of a leased access programmer on a particular channel as well as an explanation and

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[106] *Id*.

[107] *See id*.

[108] *See United Productions v. Mediacom Communications Corporation*, CSR 6336-L, Order, 22 FCC Rcd 1224 (MB 2007).

[109] *See* RMI Comments at 4.

justification for the cable operator's policy for relocating leased access channels. To the extent a request for a particular channel is denied, the cable operator must provide a detailed explanation and justification for its decision.

32. *Launch Date*. We require a cable system operator within three business days of a request to provide a prospective leased access programmer with information regarding prospective launch dates for the leased access programmer. Moreover, we require cable operators to launch leased access programmers within a reasonable amount of time. We consider 35-60 days after the negotiation is finalized to be a reasonable amount of time for launch of a programmer, unless the parties come to a different agreement. We note that this time frame affords cable operators sufficient time to satisfy the requirement, if applicable, to provide subscribers with 30-days written notice in advance of any changes in programming services or channel positions.[110] While CaribeVH urges the Commission to adopt a requirement that a cable operator launch a leased access programmer within 10-60 days after the programmer requests leased access information, we find that this would be unnecessarily disruptive for cable operators because not all leased access programmers that request information agree to the terms for carriage.[111] Requiring the cable operator to launch the leased access programmer within 35-60 days after negotiations are finalized mitigates this concern.

ii. Response to Bona Fide Proposals for Leased Access

33. We adopt Rules to ensure that cable system operators respond to proposals for leased access in a timely manner and do not unreasonably delay negotiations for leased access. As leased access programmers explain, some cable operators have demonstrated an unwillingness to respond to a proposal for leased access or to negotiate with a leased access programmer in a timely manner, thereby impeding access to leased access channel capacity.[112] To address this concern, after the cable system operator provides the information requested above, in order to be considered for carriage on a leased access channel, we require a leased access programmer to submit a proposal for carriage by submitting a written proposal that includes the following information: (1) The desired length of a contract term; (2) The tier, channel and time slot desired; (3) The anticipated commencement date for carriage; (4) The nature of the programming; (5) The geographic and subscriber level of service requested; and (6) Proposed changes to the sample contract.[113] The cable system operator must respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days.[114] This same response deadline will apply until an agreement is reached or negotiations fail.

34. Failure to provide the requested information will result in the issuance of a notice of apparent

[110] *See* 47 C.F.R. §§ 76.1603(b), (c); *see also* NCTA Reply Comments at 12 (noting that cable operators must have sufficient time to provide franchising authorities and customers of changes in channel line-ups).

[111] CaribeVH argues for time limits for launch dates, such as no later than thirty-five (35) days after the execution of a contract in the event there is a thirty (30) day customer notice requirement, and in other cases ten (10) days and no later than sixty (60) days from a bona fide request for information by the leased access programmer. *See* CaribeVH Comments at 12. *But see* NCTA Reply Comments at 12 n.37 (noting that not all potential leased access programmers that request information eventually agree to the terms for carriage, thereby making a launch date within 60 days of a request for information disruptive for cable operators).

[112] *See* CaribeVH Comments at 2; Engle Comments at 4; iNFO Comments at 1; PMI Comments at 2; PBC Comments at 1.

[113] *See* Appendix B (adopting 47 C.F.R. § 76.972(c)).

[114] *See* Appendix B (adopting 47 C.F.R. § 76.972(e)).

liability ("NAL") including a forfeiture in the amount of $500.00 per day.[115] A potential leased access programmer need not file a formal leased access complaint pursuant to Section 76.975 of the Commission's Rules in order to bring a violation of our customer service standards to our attention.[116] Rather, the programmer may notify the Commission either orally or in writing, and where necessary the Commission will submit a Letter of Inquiry ("LOI") to the cable operator to obtain additional information. A cable system which is found to have failed to respond on time with the required information will be issued an NAL. The same process and forfeiture amount will apply for the failure to timely respond to a proposal as for the failure to comply with an information request. We rely on our general enforcement authority under Section 503 of the Communications Act to impose forfeitures in appropriate cases.[117]

iii. Leased Access Rates

a. Maximum Rate for Leasing a Full Channel

35. *Background.* The Commission's current Rules calculate leased access rates for all tiers that have subscriber penetration of more than 50 percent. Upon request, cable operators generally must place leased access programmers on such a tier.[118] To determine the average implicit fee for a full-time channel on a tier with a subscriber penetration over 50 percent, an operator first calculates the total amount it receives in subscriber revenue per month for the programming on all such tiers, and then subtracts the total amount it pays in programming costs per month for such tiers (the "implicit fee calculation"). A weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s) is used to determine how much of the total will be recovered from a particular tier.[119] To calculate the average implicit fee per channel, the implicit fee for the tier is divided by the number of channels on the tier. The final result is the rate per month that the operator may charge the leased access programmer for a full-time channel on that tier. Where the leased access programmer agrees to carriage on a tier with less than 50 percent penetration, the average implicit fee is determined using subscriber revenues and programming costs for only that tier. The implicit fee for full-time channel placement as an a la carte service is based upon the revenue received by the cable operator for non-leased access a la carte channels on its system.

36. In this Order we modify the method for determining the leased access rate for full-time carriage on a tier. We harmonize the rate methodology for carriage on tiers with more than 50% subscriber penetration and carriage on tiers with lower levels of penetration by calculating the leased access rate based upon the characteristics of the tier on which the leased access programming will be placed. Cable operators will calculate a leased access rate for each cable system on a tier-by-tier basis which will adequately compensate the operator for the net revenue that is lost when a leased access programmer displaces an existing program channel on the cable system. In addition, the Order sets a maximum allowable leased access rate of $0.10 per subscriber per month to ensure that leased access remains a viable outlet for programmers. At this time we leave the method for calculating rates for a la carte carriage unchanged.

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[115] Although the Commission's forfeiture guidelines establish a baseline forfeiture of $7,500.00 per day for violation of the leased access rules, we find at this time that a $500.00 per day penalty should be adequate to encourage prompt compliance with the customer services obligations. *See* 47 C.F.R. § 1.80.

[116] *See* 47 C.F.R. § 76.975.

[117] *See* 47 U.S.C. § 503.

[118] 47 C.F.R. § 76.971(a)(1).

[119] 47 C.F.R. § 76.971(e).

37. As an initial matter, we conclude that we will not apply this new rate methodology to programmers that predominantly transmit sales presentations or program length commercials. These programmers often "pay" for carriage -- either directly or through some form of revenue sharing with the cable operator. In our previous Order, we set the leased access rate for a la carte programmers at the "highest implicit fee" partly out of a concern that lower rates would simply lead these programmers to migrate to leased access if it were less expensive than what they are currently "paying" for carriage. Such a migration would not add to the diversity of voices and would potentially financially harm the cable system. Similarly, we do not wish to set the leased access rates at a point at which programmers that predominantly transmit sales presentations or program length commercials simply migrate to leased access because it is less expensive than their current commercial arrangements. We will seek comment in the Further Notice of Proposed Rulemaking on whether leased access is affordable at current rates to programmers that predominantly transmit sales presentations or program length commercials and whether reduced rates would simply cause migration of existing services to leased access.

b. The Marginal Implicit Fee

38. The purposes of Section 612 are "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[120] Because Section 612 also requires that the price, terms and conditions for leased access be "at least sufficient to assure that such use will not adversely affect the operation, financial condition or market development of the cable system,"[121] the Commission is faced with balancing the interests of leased access programmers with those of cable operators. We believe that our method provides a cable operator with a leased access rate that will allow the operator to replace an existing channel from its cable system with a leased access channel without experiencing a loss in net revenue.[122] In addition, since we are required to balance the revenue requirement of cable operators and that of leased access programmers, we will assume that the cable operator will elect to replace a channel which does not generate a significant amount of the total net revenue of the system. We refer to this channel as the marginal channel and use the marginal implicit fee to determine leased access rates. Our method was intended to promote the goals of competition and diversity of programming sources while doing so in a manner consistent with growth and development of cable systems.[123]

39. Based on the wide variance between the actual use of leased access and the goals stated in the law, it appears that the current "average implicit fee" formula for tiered leased access channels yields fees that are higher than the statute mandates, resulting in an underutilization of leased access channels. According to the Commission's most recent annual cable price survey, cable systems on average carry

[120] Communications Act § 612(a), 47 U.S.C. § 532(a).

[121] Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1).

[122] While we do not believe that our method for determining leased access rates will result in cable operators experiencing any loss in net revenue, the relevant statutory provision does not require such a finding. As explained above, Section 612(c)(1) provides that the "prices, terms and conditions" of use must be "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system." We interpret this provision to restrict "prices, terms, and conditions" of leased access use that materially affect the financial health of a cable system. We do not interpret the provision to require that cable operators experience no loss in revenue whatsoever as a result of leased access use. Thus, even if we were to conclude that our method for determining leased access rates would have some impact on cable operators' revenue, we would still adopt this method because we are confident that any impact on operators' revenue would not be of sufficient magnitude to materially affect the financial health of cable systems.

[123] *Second Report and Order*, 12 FCC Rcd at 5272, ¶ 8.

only 0.7 leased access channels.[124] Shop NBC asserts that due to the "average implicit fee" rate formula leased access remains unaffordable to large and small independent programmers alike.[125] WBGN contends that the rate formula has contributed to the failure of the leased access system.[126] Because our Rules are not achieving their intended purpose, we are revisiting decisions made in the *Second Report and Order* establishing the maximum leased access rates in order to make the leased access channels a more viable outlet for programming.[127] Throughout its implementation of Section 612, the Commission has recognized that the Rules adopted would need refinement as specifics regarding how the leased access rules were functioning became available.[128]

40. In the NPRM, we sought comment on the current rate formula and how any proposed changes would better serve Congress's statutory objectives.[129] Some commenters suggest that the Commission depart from the implicit fee approach.[130] Some commenters propose a universal flat rate per subscriber per month.[131] We agree that such an approach offers some appealing aspects in terms of ease of administration and consistency of leased access charges across cable operators. As the Commission expressed in the *Second Report and Order*, however, "the fundamental limitation with a flat rate approach is selecting a rate that is appropriate for all cable systems."[132] Due to the variances in channel line-ups and tier prices of cable systems, in most instances, a flat rate would either over- or undercompensate cable operators. As discussed below, however, we will set a cap on the maximum rate that cable operators may charge in order to prevent the construction of tiers in a manner that makes leased access rates excessively high.

41. We agree with Shop NBC's assertion that the average implicit fee overcompensates cable operators because it reflects the *average* value of a channel to the cable operator instead of the value of the channel replaced.[133] We will make adjustments to the rate calculations that should lower prices by using the marginal implicit fee rather than the average. The result is intended to promote the goals of leased access by providing more affordable opportunities for programmers without creating an artificially low rate.

42. The legislative history provides that the leased access provisions are "aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator

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[124] Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 21 FCC Rcd 15087 at. ¶ 9 (2006) ("2006 Cable Industry Prices Report")

[125] Shop NBC at 4. *See also* Ex parte presentation of Community Broadcasters Association at 2 (Jul. 20, 2007) (claiming the average implicit fee places leased access beyond the reach of most parties).

[126] WBGN at 2.

[127] *See* S. Rep. No. 102-92 at 79 (1991) ("it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers")

[128] *First Report and Order*, 8 FCC Rcd at 5936, ¶ 491. *See also Second Report and Order*, 12 FCC Rcd at 5282, ¶ 31 ("We will, however, continue to monitor the availability of leased access channels and may revisit this issue if it appears that the average implicit fee formula no longer reflects a reasonable rate").

[129] *NPRM,* 22 FCC Rcd 11222, ¶ 8.

[130] *See e.g*., MAP Comments at 13 (proposing actual cost method).

[131] Shop NBC Comments at 9, MAP Comments at 13, Engle Broadcasting at 2.

[132] *Second Report and Order*, 12 FCC Rcd at 5294, ¶ 53.

[133] Shop NBC Comments at 5.

may elect not to provide that service as part of the program offerings he makes available to subscribers"[134] To promote this legislative purpose the Commission should set the leased access rates as low as possible consistent with the requirement to avoid any negative financial impact on the cable operator. One may assume that the cable operator, faced with a requirement to free up a channel for leased access, would have its own incentives to elect to replace one of the channels with the lowest implicit fee. But even if this is not the case, the discussion above suggests that the Commission should set its rules to encourage such a result. This dictates, at least in principle, the use of the lowest implicit fee, which we refer to as the "marginal implicit fee." And it supports the conclusion that the current "average implicit fee" criterion for tiered channels is higher than warranted by the statute and may be impeding, rather than promoting, the goals of competition and diversity of programming sources. These rules provide cable operators a higher return for lost channel capacity than the value the cable operator would have received if the channel was not used for leased access programming.[135] We will adopt a method which eliminates this excess recovery. This method remains faithful to the statutory requirements while more appropriately balancing the interests of cable operators and leased access programmers.

c. The Cable Operator's Net Revenue from a Cable Channel

43. Cable channels are sold in bundles of channels known as tiers. It is therefore not possible to directly observe the revenue per subscriber a cable operator earns from carrying an individual channel included in a tier. We therefore approximate the revenue earned by those channels on the tier. To do so we assume that the revenue generated by each channel is directly proportional to the per subscriber affiliation fee paid by the cable operator to the programmer. The first step in the calculation is to determine this factor of proportionality which we refer to as the mark-up. To do so, the cable operator will take the total subscriber revenue for the programming tier at issue and divide by the total of the affiliation fees that the cable operator pays to the programmers for the channels on that tier.[136] This calculation will generate the mark-up of channels that are sold on the tier. The gross revenue per subscriber due to carriage of a specific channel on the tier is then simply the per subscriber affiliation fee paid to the programmer for the specific channel multiplied by the mark-up.[137] The net revenue per subscriber earned by the cable operator from the channel is the difference between the gross revenue per subscriber and the per subscriber affiliation fee paid by the cable operator. This value represents the implicit fee for the channel.

d. The Net Revenue of the Marginal Channel

44. The net revenue per subscriber is the reduction in profit a cable operator would experience if it did not carry the channel in question. In our previous method for calculating leased access rates the calculation was based the average net revenue of all channels carried by the cable operator. In our new method, we base the leased access rate on the net revenue of the least profitable channels voluntarily carried by the cable operators on the tier where the leased access programming will be carried. We do so

[134] H.R. 98-934 at 47. *See also* Second Report and Order, 12 FCC Rcd at 5273, ¶ 10.

[135] The "average implicit fee" is calculated based on the average value of all of the channels in a tier instead of the value of the channels most likely to be replaced.

[136] For the purposes of defining the price of a tier and the channels on the tier we adopt the incremental approach in cases where the cost and channels of one tier are implicitly incorporated into larger tiers. For example, when the expanded basic tier incorporates the basic tier, the expanded basic tier price is the retail price of the expanded basic tier less the retail price of the basic tier and the channels on the expanded basic tier are those that are not available on the basic tier. A similar adjustment is required of other tiers which are not sold on an incremental basis.

[137] It is our understanding that some programming contracts specify a single rate for a group, or bundle, of channels. In these cases, for the purposes of determining the per subscriber affiliation fee for one of the bundled channels, the fee in the contract shall be allocated in its entirety to the highest rated network in the bundle.

because this represents an approximation of the minimum net revenue a network must generate in order for the cable operator to consider carrying it on the tier. As mentioned, we examine the net revenue of channels that are voluntarily carried by the cable operator. From this calculation we exclude channels whose carriage is mandated by statute, regulation, or franchise agreement. These mandated channels consist of broadcast stations that are subject to the must-carry rules as well as public, educational, and governmental ("PEG") channels that are carried pursuant to a franchise agreement. In addition, broadcaster's multi-cast channels are also excluded from the marginal channels. Our goal is to base the leased access rate on the net revenue of channels which are subject to free market negotiations over the carriage decision and affiliation fee. It is the net revenue of these types of channels which provides an indication of the net revenue that would be forgone when a cable operator devotes channel capacity to a leased access programmer since the cable operator would be unable to displace a broadcast station or PEG channel.

45. We identify the least profitable, or marginal, channels using the fraction of activated channels that a cable operator is statutorily required to make available for commercial leased access. The leased access rate is the mean value of net revenue earned by the lowest earning channels on the tier, up to the designated leased access fraction of qualifying channels on the tier. For example, in the case of a cable system with 100 activated channels and 40 channels on the expanded basic tier, the mean value of the net revenue of the 6 channels with the lowest net revenue will be the leased access rate for carriage on the expanded basic tier. We use the mean rather than the minimum value because use of the minimum would undercompensate the cable operator if more than one leased access channel was carried because, presumably, all channels other than the minimum earn higher net revenues. Use of the mean ensures that if the cable operator carries the statutory maximum number of leased access channels by displacing the lowest earning channels on its system, the cable operator will be fully compensated for lost revenue.

46. Appendix D of this Order presents an example of the calculation of the leased access rates for a hypothetical cable system.

e. Determining the Maximum Allowable Leased Access Rate

47. We recognize that our tier-based calculation method may lead to inequitable results in situations when a tier carries only a few non-mandated programming networks in combination with a large amount of mandated programming. This may create incentives among cable operators to design programming tiers that are unaffordable for leased access programmers. Such an outcome would contravene our statutory directive. Therefore we institute a maximum allowable rate based upon industry-wide cable operator programming costs and revenues. This will ensure that leased access programmers can reach consumers in all areas of the country. We will permit cable operators to seek a waiver of the maximum allowable rate to ensure no unreasonable financial burden is put on any cable operator. The maximum allowable leased access rate will apply to carriage on any tier in which the operator-specific leased access rate for the tier exceeds the maximum allowable rate.

48. We take several approaches to calculating this maximum rate. For example, we calculate the maximum rate utilizing a methodology based on per-subscriber affiliation fees that compensates systems that must vacate a channel in order to provide capacity to a commercial leased access programmer. We also calculate the maximum allowable leased access rate using a method that follows the one used to calculate the system-specific rates. In both cases, maximum rates for each of the analog and digital tiers are no greater than $0.10 per subscriber per month.[138] Therefore, the maximum leased access rate will not exceed $0.10 per subscriber per month for any cable system.

49. Cable operators may petition the Commission to exceed the maximum allowable leased

[138] The methods are detailed in Appendix D.

access rates. A petition for relief must present specific facts justifying the system's specific leased access rate and provide an alternative rate which equitably balances the revenue requirements of the cable operator with the public interest goals of the leased access statute. Our presumption is that the mean value of the net revenue of the marginal networks, including those currently earning no license fee, provides the most reasonable approximation of the revenue which is forgone when a cable operator carries leased access programming.

f. Effective Date of New Rate Regulations

50. We recognize that the industry should receive an appropriate amount of time to review and to take steps to comply with the new rate regulations set forth above. Section 76.970(j)(3), which contains new or modified information collection requirements that have not been approved by the Office of Management and Budget ("OMB"), is effective upon OMB approval. Section 76.970 is effective 90 days after date of publication in the Federal Register or upon OMB approval of § 76.970(j)(3), whichever is later. Thus, at a minimum, the new rate regulations will not become effective until 90 days after publication in the Federal Register. After OMB approval is received, the Commission will publish a document in the Federal Register announcing the effective date of the rules requiring OMB approval and those whose effective date was delayed pending OMB approval of other rules.

iv. Expedited Process

51. As explained below, we do not change the current pleading cycle for leased access complaints set forth in Section 76.975 of the Commission's Rules, which requires the complaint to be filed with the Commission within 60 days of any alleged violation and the cable operator to submit a response within 30 days from the date of the complaint.[139] The Media Bureau will resolve all leased access complaints within 90 days of the close of the pleading cycle, obtaining additional discovery from the parties as necessary to quickly resolve complaints. Finally, we eliminate the requirement that a complainant alleging that a leased access rate is unreasonable must first receive a determination of the cable operator's maximum permitted rate from an independent accountant.[140]

52. *Background*. Leased access programmers argue that the current complaint process prevents leased access from becoming a genuine outlet for programmers as Congress intended.[141] They argue that leased access complaints can take years to resolve even when they present no new issues of law.[142] They argue further that Commission staff has demonstrated a lack of interest in enforcing existing leased access rules.[143] MAP urges the Commission to adopt a "shot clock" whereby the Commission must act within 90 days or the complaint will be deemed granted.[144] Leased access programmers also urge the Commission to eliminate the independent accountant requirement for resolving leased access rate disputes.[145] They argue that the requirement is costly and results in delays in resolving leased access rate disputes.[146]

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[139] *See* Appendix B (adopting 47 C.F.R. §§ 76.975(d), (g)).

[140] 47 C.F.R. § 76.975(b).

[141] *See* MAP Comments at 4; *see also* CBA Comments at 4; PBC Comments at 2; LAPA Reply Comments at 4; PBC Reply Comments at 1.

[142] *See* CBA Comments at 4; MAP Comments at 3; Engle Reply Comments at 2.

[143] *See* MAP Comments at 3; PBC Reply Comments at 1.

[144] *See* MAP Comments at 17-18.

[145] *See* CaribeVH Comments at 11; PBC Comments at 3.

[146] *See* CaribeVH Comments at 11; PBC Comments at 3.

53. Cable operators argue that the current complaint process is working as intended by encouraging negotiation over litigation.[147] Cable operators claim that very few leased access complaints have been filed with the Commission and that the number of complaints has decreased in recent years.[148] TWC argues that the decrease in leased access disputes is also attributable to a well-understood body of precedent that provides clear guidance regarding the leased access rules.[149] TWC asks the Commission to revise the pleading cycle for leased access complaints by reducing from 30 days to 20 days the time in which a cable operator must respond to a leased access complaint, but to calculate the deadline from the date the Media Bureau issues a public notice announcing the complaint has been filed rather than from the date the complaint was filed.[150] TWC argues that such a change will serve the public interest by: (i) allowing other parties to participate in the complaint process; (ii) integrating the leased access pleading cycle with the generally applicable complaint pleading cycle in Section 76.7; and (iii) avoiding the need for cable operators to respond to informal correspondence filed by leased access programmers with the Commission that may not warrant treatment as a complaint.[151] Cable operators also urge the Commission to retain the independent accountant requirement for resolving leased access rate disputes, arguing that it provides a low cost, streamlined process for obtaining an independent review of rate calculations that protects the highly confidential proprietary data used in calculating these rates.[152]

54. *Discussion*. We retain our existing pleading cycle for resolution of leased access complaints set forth in Section 76.975 of the Commission's Rules, which requires the complaint to be filed with the Commission within 60 days of any alleged violation[153] and the cable operator to submit a response within 30 days from the date of the complaint.[154] We find that our current pleading cycle is not too lengthy, as it is imperative that we receive all the necessary information to resolve the dispute. Although we retain the existing time limits on filing of complaints, we add an exception that the time limit on filing complaints will be suspended if the complainant files a notice with the Commission prior to the expiration of the filing period, stating that it seeks an extension of the filing deadline in order to pursue active negotiations with the cable operator.[155] The cable operator must agree to the extension.

55. The Media Bureau will resolve all leased access complaints within 90 days of the close of the pleading cycle, obtaining additional discovery from the parties as necessary to quickly resolve complaints.[156] We believe that this expedited process will help to resolve leased access disputes quickly and efficiently and create a body of precedent to encourage private negotiations and the settlement of disputes. If the Media Bureau concludes that the complainant is entitled to access a leased access

[147] *See* TWC Comments at 22-23; Comcast Reply Comments at 20; NCTA Reply Comments at 9; Verizon Reply Comments at 9-10.

[148] *See* Comcast Comments at 15, 35; Comcast Reply Comments at 20.

[149] *See* TWC Comments at 22-23.

[150] *See* TWC Comments at 25.

[151] *See* TWC Comments at 25.

[152] *See* Comcast Reply Comments at 21; NCTA Reply Comments at 10.

[153] *See* Appendix B (adopting 47 C.F.R. § 76.975(d)).

[154] *See* Appendix B (adopting 47 C.F.R. § 76.975(g)).

[155] *See* Appendix B (adopting 47 C.F.R. § 76.975(d)).

[156] *See* Appendix B (adopting 47 C.F.R. § 76.975(h)). As part of the remedy phase of the leased access complaint process, the Media Bureau will have discretion to request that the parties file their best and final offer proposals for the prices, terms, or conditions in dispute. The Commission will have the discretion to adopt one of the proposals or choose to fashion its own remedy. *See* Appendix B (adopting 47 C.F.R. § 76.975(h)(4)).

channel, the Media Bureau's resolution of the complaint will include a launch date for the programming.

56. *Elimination of Independent Accountant Requirement*. We eliminate the requirement for a complainant alleging that a leased access rate is unreasonable to first obtain a determination of the cable operator's maximum permitted rate from an independent accountant prior to filing a petition for relief with the Commission.[157] While the Commission adopted the independent accountant requirement as a means to "streamline" the leased access complaint process,[158] the record reflects that this requirement has not worked as intended. CaribeVH notes that it took seven months for it to resolve a leased access rate dispute at a cost of over $50,000 for the accountant and thousands of dollars more in legal fees.[159] Similarly, PBC argues that the process of securing accountants is not financially feasible for most leased access programmers.[160] We conclude that the expense, delay, and uncertainty for leased access programmers resulting from the requirement to obtain a determination from an independent accountant are not what the Commission envisioned in attempting to "streamline" the leased access complaint process.[161] Furthermore, we believe the new rate methodology we have adopted, along with the requirement to provide rate information and an explanation of how rates were calculated, will result in a simpler and transparent process for leased access rates. We also believe the expedited complaint process and expanded discovery we adopt herein provide leased access programmers with a more efficient process for challenging the commercial leased access rates charged by cable operators. While cable operators argue that the use of an independent accountant is important to protect commercially sensitive financial information, the Protective Order we adopt below will sufficiently safeguard such information.

v. Discovery

57. As discussed below, we adopt expanded discovery rules for leased access complaints to improve the quality and efficiency of the Commission's resolution of these complaints. We amend our discovery rules pertaining to leased access complaints to require respondents to attach to their answers copies of any documents that they rely on in their defense;[162] find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute,[163] subject to the protection of confidential material.[164] We emphasize that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with reasonable discovery requests.[165] The respondent shall have the opportunity to object to any request for documents.[166] Such request shall be heard, and determination made, by the Commission.[167]

[157] 47 C.F.R. § 76.975(b).

[158] *See Second Report and Order*, 12 FCC Rcd at 5319, ¶ 103.

[159] *See* CaribeVH Comments at 11.

[160] *See* PBC Comments at 3; *see also* CaribeVision Comments at 11 ("Unfortunately, most leased access programmers lack the money and time to engage in this process and are therefore left at the mercy of the cable operator.").

[161] *See Second Report and Order*, 12 FCC Rcd at 5319, ¶ 103.

[162] *See* Appendix B (adopting 47 C.F.R. § 76.975(g)).

[163] *See* Appendix B (adopting 47 C.F.R. § 76.975(e)).

[164] *See* Appendix B (adopting 47 C.F.R. § 76.975(f)).

[165] *See* Appendix B (adopting 47 C.F.R. § 76.975(e)).

[166] *See* Appendix B (adopting 47 C.F.R. § 76.975(e)).

[167] *See id.*

The respondent need not produce the disputed discovery material until the Commission has ruled on the discovery request.[168] Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.[169]

58. The Commission's procedures for resolving leased access complaints, including discovery, have tracked closely the procedures for resolving program access complaints. The Commission recently made significant amendments to the program access discovery procedures and we find that there is good cause to make similar amendments to our leased access procedures because they will have the same beneficial effects in this context and will further the statutory directive that the Commission "establish procedures for the expedited resolution of disputes concerning rates or carriage."[170] As a result of our action herein, the discovery process for leased access and program access complaints will be consistent.

59. Cable operators argue that the existing complaint process is working as intended and that no changes to the process, including the discovery rules, are required.[171] Leased access programmers, however, argue that they should be afforded the right to seek discovery on how a cable operator has calculated its leased access rates.[172] Under the current rules, a leased access complainant is entitled, either as part of its complaint or through a motion filed after the respondent's answer is submitted, to request that Commission staff order discovery of any evidence necessary to prove its case.[173] Respondents are also free to request discovery. We believe that expanded discovery will improve the quality and efficiency of the Commission's resolution of leased access complaints. Accordingly, we find that it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission,[174] provided that such documents are in its control and relevant to the dispute. In reaching this finding, we agree that evidence detailing how the cable operator calculated its leased access rate, as well as the availability of certain contracts for carriage of leased access programming, subject to confidential treatment, are essential for determining whether the cable operator has violated the Commission's leased access rules. The Commission's Rules allow the Commission staff to order production of any documents necessary to the resolution of a leased access complaint.[175] The subject discovery may require the production of confidential material, including evidence detailing how the cable operator calculated its leased access rate as well as carriage contracts, subject to our confidentiality rules. While we retain this process for the Commission to order the

[168] *See id*.

[169] *See id*.

[170] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Report and Order*, 22 FCC Rcd 17791, 17851-56, ¶¶ 95-100 (2007) ("*Program Access Order*"); *see also* 47 U.S.C. § 532(c)(4)(A)(iii).

[171] *See* TWC Comments at 22-23; Comcast Reply Comments at 20; NCTA Reply Comments at 9; Verizon Reply Comments at 9-10.

[172] *See* MAP Comments at 17.

[173] *See* 47 C.F.R. §§ 76.7(e), (f).

[174] Indeed, in such circumstances, failure to produce the subject documents would also be a violation of a Commission Order.

[175] *See* 47 C.F.R. §§ 76.7(e), (f).

production of documents and other discovery, we will also allow parties to a leased access complaint to serve requests for discovery directly on opposing parties.[176]

60. Parties to a leased access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. As discussed above, the respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

61. We reiterate that respondents to leased access complaints must produce in a timely manner the contracts and other documentation that are necessary to resolve the complaint, subject to confidential treatment.[177] In order to prevent abuse, the Commission will strictly enforce its default rules against respondents who do not answer complaints thoroughly or do not respond in a timely manner to permissible discovery requests with the necessary documentation attached.[178] Respondents that do not respond in a timely manner to all discovery ordered by the Commission will risk penalties, including having the complaint against them granted by default.[179] Likewise, a complainant that fails to respond promptly to a Commission order regarding discovery will risk having its complaint dismissed with prejudice.[180] Finally, a party that fails to respond promptly to a request for discovery to which it has not raised a proper objection will be subject to these sanctions as well.[181]

62. We understand that this approach requires the submission of confidential and extremely competitively-sensitive information.[182] Accordingly, in order to appropriately safeguard this confidential information we believe it is necessary to utilize the protective order adopted for use in our program access proceedings ("Protective Order"), which we attach hereto as Appendix C.[183] The Protective Order sets out the methodology for producing and protecting pleading or discovery material that is deemed by the submitting party to contain confidential information.[184] The Protective Order states that, once the

[176] *See* Appendix B (adopting 47 C.F.R. § 76.975(e)).

[177] *See* 47 C.F.R. § 76.9.

[178] *See* Appendix B (adopting 47 C.F.R. § 76.975(e)).

[179] *Id.*

[180] *Id*.

[181] *Id*.

[182] *See, e.g.,* 47 C.F.R. § 0.457(d)(iv) (treating as presumptively privileged and confidential "programming contracts between programmers and multichannel video programming distributors"). In this regard, we note that in a recent program access dispute, the Media Bureau expeditiously granted a complainant's request for discovery and issued a protective order to safeguard the highly confidential discovery subject matter. *See EchoStar Satellite L.L.C. v. Home Box Office, Inc*., CSR 7070-P (filed Nov. 15, 2006).

[183] *See* Appendix B (adopting 47 C.F.R. § 76.975(f)); *see also* Appendix C; *Program Access Order,* 22 FCC Rcd at 17894-99, Appendix E.

[184] Confidential information is information submitted to the Commission which the submitting party has determined in good faith: (i) constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and (ii) falls within the terms of Commission Orders designating the items for treatment as confidential information. *See Program Access Order*, 22 FCC Rcd at 17856, ¶ 100 n.463. The Commission may determine that all or part of the (continued….)

authorized representative of the reviewing party has signed the appropriate declaration, the submitting party *shall* provide a copy of the confidential information to authorized representatives upon request. Authorized representatives of reviewing parties are limited to counsel and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services; specified persons, including employees of the reviewing parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in the leased access proceeding, other than persons in a position to use the confidential information for competitive commercial or business purposes; and any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.[185] Confidential information shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with the Protective Order.

63. To ensure that confidential information is not improperly used for competitive business purposes, the Protective Order reflects that any personnel, including in-house counsel, involved in competitive decision-making are prohibited from accessing the confidential information. The Protective Order prohibits access to confidential information by specified persons that are in a position to use the information for competitive commercial or business purposes and any counsel, or other persons, including in-house counsel, that are involved in competitive decision-making are prohibited from access to confidential material. We define competitive decision-making to include any activities, association, or relationship with any person, including the complainant, client, or any authorized representative, that involves rendering advice or participation in *any* or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor.[186]

(Continued from previous page)
information claimed as confidential information is not entitled to such treatment. *See* 47 C.F.R. § 76.9 (general procedures for protecting confidentiality of information).

[185] Before an authorized representative may obtain access to confidential information, he or she must execute a declaration which states that under penalty of perjury he or she has agreed to be bound by the Protective Order. The declaration states that the reviewing party shall not disclose the confidential information to anyone except in accordance with the terms of the Protective Order and that the confidential information shall be used only for purposes of the leased access proceeding. *See* Appendix C.

[186] Our definition of "competitive decision-making" as such is consistent with federal court cases. *See, e.g*., *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984) (noting that the "competitive decision-making" is a shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions ... made in light of similar or corresponding information about a competitor); *see also Brown Bag Software v. Symantec Corp*. 960 F.2d 1465, 1470 (9th Cir. 1992), *cert. denied* 506 U.S. 869 (1992) (defining "competitive decision-making" as advising on decisions about pricing or design made in light of similar or corresponding information about a competitor). This terminology was more recently discussed in *Intervet, Inc. v. Merial Ltd*., 241 F.R.D. 55 (D.D.C. 2007) as follows: "Thus, U.S. Steel would preclude access to information to anyone who was positioned to advise the client as to business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions. *E.g., Brown Bag Software*, 960 F.2d at 1471 (counsel could not be expected to advise client without disclosing what he knew when he saw competitors' trade secrets as to those very topics); *Matsushita Elec. Indus. Co v. United States*, 929 F.2d 1577, 1579-80 (Fed.Cir. 1991) (determination by agency forbidding access was arbitrary when lawyer precluded from access testified that he was not involved in pricing, technical design, selection of vendors, purchasing and marketing strategies); *Volvo Penta of the Americas, Inc. v. Brunswick Corp*., 187 F.R.D. 240, 242 (E.D.Va. 1999) (competitive decision-making involves decisions "that affect contracts, marketing, employment, pricing, product design" and other decisions made in light of similar or corresponding information about a competitor); *Glaxo Inc. v. Genpharm Pharm., Inc*., 796 F.Supp. 872, 876 (E.D.N.C. 1992) (improper to preclude in-house counsel from access to confidential information because he gave no advice to his client about competitive decisions such as pricing, scientific research, sales, or marketing)." *Id*. at 57-58.

64. The Protective Order states that any personnel, including in-house counsel, (i) that are involved in competitive decision-making, (ii) are in a position to use the confidential information for competitive commercial or business purposes, or (iii) whose activities, association, or relationship with the complainant, client, or any authorized representative involve rendering advice or participation in any or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor, are prohibited from accessing the confidential information.[187]

65. A Protective Order constitutes both an Order of the Commission and an agreement between the party executing the declaration and the submitting party. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings. We intend to vigorously enforce any transgressions of the provisions of our protective orders. [188]

vi. Annual Reporting of Leased Access Statistics

66. We adopt an annual reporting requirement for cable operators to submit information pertaining to leased access rates, usage, channel placement, and complaints, among other leased access matters.[189] In the NPRM, we sought comment on various questions regarding the status of commercial leased access, such as the extent to which programmers are making use of commercial leased access channels, whether cable operators have denied requests for commercial leased access, whether cable operators use commercial leased access channels for their own purposes, and the effectiveness of the complaint process.[190] As discussed throughout this Order, commercial leased access programmers state the difficulties they have experienced under the current leased access regime.[191] These claims are supported by the Commission data indicating limited use of commercial leased access.[192]

67. We did not receive a large number of comments containing industry-wide data regarding use of leased access. Comcast claims that thousands of programmers have used commercial leased access channels since 1997, and hundreds of programmers use commercial leased access channels on Comcast's systems today.[193] TWC estimates that approximately ninety percent of leased access programming is produced locally.[194] TWC estimates further that two-thirds of commercial leased access programming is

[187] *See* Appendix C*, Standard Protective Order and Declaration for Use in Section 612 Commercial Leased Access Proceedings.*

[188] *See* Appendix B (adopting 47 C.F.R. § 76.975(f)).

[189] *See* Appendix B (adopting 47 C.F.R. § 76.978(a)).

[190] *See NPRM*, 22 FCC Rcd 11222, ¶ 7. In his Separate Statement, Commissioner Adelstein asked commenters to provide information regarding the rates charged for leased access, whether they are reasonable, how rate variances are justified, the rate formulas effect on anticompetitive practices, its effect on diversity, whether the current rate structure acts as a deterrent, and whether the current methodology is appropriate for digital cable, VOD, and IPTV services. *See* Separate Statement of Commissioner Jonathan S. Adelstein, MB Docket No. 07-42 (Jun. 15, 2007).

[191] *See* CaribeVision Holdings Comments at 2-3, 5; CBA Comments at 1; Combonate Media Group Comments at 2; LSPA Comments at 6; PBC Comments at 1; Reynolds Media Comments at 2-3; Shop NBC Comments at 3-4; Reynolds Media Reply Comments at 1-2.

[192] *See 2006 Video Competition Report*, 21 FCC Rcd 15087 (2006).

[193] *See* Comcast Comments at 6.

[194] *See* TWC Comments at 14-15.

religious, foreign language, or community programming with the remainder consisting of infomercials.[195] NCTA states that it is unaware of any source that contains statistics about usage of commercial leased access, but notes that the Commission in the *2006 Video Competition Report* concluded that the typical cable system carries commercial leased access programming on less than one channel.[196] As described below, to ensure that we have sufficient up-to-date information on the status of leased access programming in the future, we adopt an annual reporting requirement for cable operators.

68. *Discussion*. We adopt an annual reporting requirement for cable operators pertaining to leased access rates, usage, channel placement, and complaints, among other leased access matters.[197] We find that gathering up-to-date information and statistics on an annual basis pertaining to leased access is critical to our efforts to track trends in commercial leased access rates and usage as well as to monitor any efforts by cable operators to impede use of commercial leased access channels. This information will allow us to determine whether further modifications to the commercial leased access rules we adopt herein are needed based on a more concrete factual setting. The Annual Report will require each cable system to provide the following information:[198]

- List the number of commercial leased access channels provided by the cable system.
- List the channel number and tier applicable to each commercial leased access channel.
- Provide the rates the cable system charges for full-time and part-time leased access on each leased access channel.
- Provide the calculated maximum commercial leased access rate and actual rates.
- List programmers using each commercial leased access channel and state whether each programmer is using the channel on a full-time or part-time basis.
- List number of requests received for information pertaining to commercial leased access and the number of *bona fide* proposals received for commercial leased access.
- Describe whether you have denied any requests for commercial leased access and, if so, explain the basis for the denial.
- Describe whether a complaint has been filed against the cable system with the Commission or with a Federal district court regarding a commercial leased access dispute.
- Describe whether any entity has sought arbitration with the cable system regarding a commercial leased access dispute.
- Describe the extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes.
- Describe the extent to which the cable system impose different rates, terms, or conditions on commercial leased access programmers (such as with respect to security deposits, insurance, or termination provisions). Explain any differences.
- List and describe any instances of the cable system requiring an existing programmer to move

[195] *See id*. Comcast reports that approximately half of the leased access time on its systems is used for infomercials or home shopping. *See* Comcast Reply Comments at 4.

[196] *See* NCTA Comments at 3 n.5 (citing *2006 Video Competition Report*, 21 FCC Rcd 15087 (2006)).

[197] *See* Appendix B (adopting 47 C.F.R. § 76.978(a)).

[198] Section 623(k) of the Communications Act requires the Commission to publish annually a statistical report on average rates for basic cable service, cable programming service, and equipment. To implement this requirement, the Media Bureau directs certain randomly selected cable operators to respond to a Cable Price Survey Questionnaire. *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992,* Order, 21 FCC Rcd 1375 (MB 2006). We note that some of the questions listed in the leased access annual report may be similar to those appearing on the Cable Price Survey Questionnaire. We believe that requiring all cable systems to respond to questions pertaining to leased access is critical to ensure we have comprehensive data on leased access usage and trends.

to another channel or tier.

69. Each cable system must submit this report with the Commission by April 30th of each year. The report will request information for the preceding year.[199] We anticipate that any burdens associated with this annual reporting requirement will be limited, as the information requested should be readily available to cable operators.

70. We provide leased access programmers and other interested parties with an opportunity to file comments on a voluntary basis with the Commission responding to the cable operators' annual leased access reports.[200] These comments should be filed by May 15th of each year. We invite commercial leased access programmers to provide information such as the following in these comments:

- List the number of commercial leased access channels leased on each cable system. Indicate the channel number and tier applicable to each commercial leased access channel.
- Describe whether a cable operator has denied any request for commercial leased access and, if so, explain the basis for the denial.
- Describe whether cable operators have responded to requests for information pertaining to leased access within three business days, as required by the Commission's rules.[201]
- Describe whether the programmer has filed any complaints with the Commission or a Federal district court against a cable operator regarding a commercial leased access dispute.
- Describe whether the programmer has sought arbitration with a cable operator regarding a commercial leased access dispute.
- Describe any difficulties the programmer has faced in trying to obtain access to a commercial leased access channel.

III. CONSTITUTIONAL ISSUES

71. The revisions to the leased access rules we adopt herein withstand constitutional scrutiny.[202]

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[199] For example, the report due on April 30, 2008, will pertain to information for the period from January 1, 2007 through December 31, 2007.

[200] *See* Appendix B (adopting 47 C.F.R. § 76.978(b)).

[201] *See* Appendix B (adopting 47 C.F.R. § 76.972(b)).

[202] We also reject Comcast's argument that the *NPRM* failed to provide the specificity required under the Administrative Procedure Act ("APA") and that the Commission must issue another notice before adopting final rules. *See* Comcast Comments at 14 n.34; Comcast Reply Comments at 39-41. Section 553(b) and (c) of the APA requires agencies to give public notice of a proposed rule making that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and to give interested parties an opportunity to submit comments on the proposal. *See* 5 U.S.C. §§ 553(b), (c). The notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved." *See Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotations omitted). In particular, the APA's notice requirements are satisfied where the final rule is a "logical outgrowth" of the actions proposed. *See Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990). The questions raised in the *NPRM*, as well as the concerns mentioned in the *Adelphia Order* which resulted in the *NPRM*, regarding the adequacy of the current leased access regimes, including the complaint process, were sufficient to put interested parties on notice that the Commission was considering how to revise the leased access rules to effectuate the intent of Congress. *See NPRM,* 22 FCC Rcd 11222, ¶ 1 (*citing Adelphia Order*, 21 FCC Rcd 8203, 8277, ¶ 165; 8367 (Statement of Commissioner Copps); 8371 (Statement of Commissioner Adelstein)); *see also Adelphia Order*, 21 FCC Rcd at ¶¶ 99, 109, 114, 165, 190-91, 298. Because parties could have anticipated that the rules ultimately adopted herein were possible, it is a "logical outgrowth" of the original proposal, and adequate (continued….)

While the leased access provision of the 1992 Cable Act has survived a facial First Amendment challenge,[203] Time Warner argues that changes in marketplace conditions call into question the validity of that decision.[204] Time Warner argues that, to the extent the goal of the leased access is to promote diversity of speech, the rules are content-based and thus subject to strict scrutiny, which requires a "compelling" government interest and "narrow tailoring."[205] Moreover, Time Warner argues that whatever justification existed for the leased access provisions at the time they were adopted no longer exists today.[206] In response, MAP argues that because the courts have already upheld the leased access provision of the 1992 Cable Act as withstanding intermediate scrutiny, any revisions to the regulation of leased access rates is subject to only rational basis scrutiny.[207]

72. The D.C. Circuit had already decided that the leased access provision of the 1992 Cable Act is not content-based.[208] The leased access provision does not favor or disfavor speech on the basis of the ideas contained therein; rather, it regulates speech based on affiliation with a cable operator.[209] The court held in *Time Warner* that the provisions of the Cable Act that regulate speech based on affiliation with a cable operator are subject to intermediate scrutiny and are constitutional if the government's interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim.[210] The *Time Warner* court found that there is a substantial government interest in promoting diversity and competition in the video programming marketplace.[211] Despite Time Warner's claim to the contrary, we find that this substantial government interest remains today. While MVPDs note the Commission's statement in *Program Access Order* that the percentage of all programming networks that are affiliated with cable operators has decreased since 1992,[212] the Commission went on to state that this decrease was not sufficient to conclude that restrictions on cable-affiliated programming should be lifted because competition and diversity in the video distribution market has not yet reached the level which Congress intended in passing the 1992 Cable Act.[213] While MVPDs argue that there are more outlets today for independent programmers, such as the Internet,[214] they fail to demonstrate that these alternative outlets can be considered sufficient to conclude that Congress's goals of

(Continued from previous page)
notice was provided under the APA. *See Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) (discussing APA notice requirements and the "logical outgrowth" test).

[203] *See Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) ("*Time Warner*").

[204] *See* Time Warner Comments at 11.

[205] *See* Time Warner Comments at 12.

[206] *See* Time Warner Comments at 11-12; *see also* Comcast Comments at 6-12; Comcast Reply Comments at 2-6.

[207] *See* MAP Reply Comments at 3 (*citing Valuevision*, 149 F.3d 1204).

[208] *See Time Warner*, 93 F.3d at 969.

[209] *See id*.

[210] *See id*.

[211] *See id*. (stating that after *Turner,* "promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming" must be treated as important governmental objectives unrelated to the suppression of speech (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994))).

[212] *See* Time Warner Reply Comments at 2 (citing *Program Access Order*, 22 FCC Rcd 17791, 17838, ¶ 66); *see also* Verizon Reply Comments at 3.

[213] *See Program Access Order*, 22 FCC Rcd 17791, 17810, ¶ 29, and 17837-38, ¶ 65.

[214] *See* Comcast Comments at 10-12; Time Warner Comments at 10.

promoting competition and diversity in passing the leased access provisions of the 1992 Cable Act have been achieved. The rules we adopt today simply implement the statutory requirements enacted by Congress.

73. We also reject Time Warner's claim that the leased access rules deprive cable operators of the value of their property (*i.e.*, channel capacity) without just compensation in violation of the Fifth Amendment.[215] The Fifth Amendment "takings" clause requires "just compensation" for a government "taking" of private property.[216] Moreover, the leased access provision of the 1992 Cable Act, as well as our rules implementing that provision, provide just compensation to cable operators for use of their channel capacity. While Time Warner argues further that there must be an "essential nexus" between the taking and a legitimate state interest as well as a "rough proportionality" between the taking and the magnitude of the government objective,[217] we conclude that leased access rules satisfy these requirements. As the D.C. Circuit previously held, there is a substantial government interest in promoting competition and diversity in the video programming marketplace, and the provisions of the 1992 Cable Act regulating cable-affiliated programming are narrowly tailored to achieve those goals.[218] Thus, there is no "taking" within the meaning of the Fifth Amendment.

IV. FURTHER NOTICE OF PROPOSED RULE MAKING

74. As noted, for the time being, we have decided not to apply new rate methodology and the maximum allowable leased access rate to programmers that predominantly transmit sales presentations or program length commercials. These direct sales programmers often "pay" for carriage -- either directly or through some form of revenue sharing with the cable operator.

75. Similarly, we are concerned about setting the leased access rates at a point at which programmers that predominantly transmit sales presentations or program length commercials simply migrate to leased access because it is less expensive than their current commercial arrangements. Accordingly, we seek comment regarding the use of leased access by programmers that predominantly transmit sales presentations and program length commercials. Specifically, is leased access affordable to these programmers at current rates? Will applying the modified rate formula discussed previously in this *Report and Order* cause migration of existing services to leased access? What would be the effect of such a migration? Is a separate category for direct sales programmers appropriate? We note that in our initial adoption of the leased access rules to implement the 1992 Cable Act, the rates were established for three programming categories; programming for which a per-event or per channel charge is made, programming in which more than fifty per cent of the capacity is used to sell products directly to customers, and all other programming.[219] These programming categories were intended to reflect the different economies faced by the different types of programmers.

V. PROCEDURAL MATTERS

A. Filing Requirements

76. *Ex Parte Rules*. The *Further Notice of Proposed Rulemaking* ("*FNPRM*") in this proceeding will be treated as "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section

[215] *See* Time Warner Comments at 13 n.51.

[216] *See U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones).

[217] *See* Time Warner Comments at 13 n.51 (*citing Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994)).

[218] *See Time Warner Entertainment Co. L.P.,* 93 F.3d at 969-71, 978-79.

[219] *Rate Order*, 8 FCC Rcd at 5949.

1.1206(b) of the Commission's Rules.[220] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[221] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

77. *Comments and Reply Comments*. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[222] interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[223]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers 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, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 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.

[220] *See* 47 C.F.R. § 1.1206(b), as revised.

[221] *See id.* § 1.1206(b)(2).

[222] 47 C.F.R. §§ 1.415, 1.419.

[223] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

78. People with Disabilities: 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 & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

79. *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 bill.cline@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; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at fcc@bcpiweb.com; or via their website at 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).

80. *Information*. For additional information on this proceeding, contact Katie Costello, Katie.Costello@fcc.gov of the Media Bureau, Policy Division, (202) 418-2120.

B. Initial and Final Regulatory Flexibility Analysis

81. *Initial Regulatory Flexibility Analysis ("IRFA")*. The Regulatory Flexibility Act of 1980, as amended ("RFA"),[224] requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[225] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[226] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[227] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[228] As required by the RFA,[229] 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 the *FNPRM*. The IRFA is set forth in Appendix F.

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

[225] 5 U.S.C. § 605(b).

[226] *Id*. § 601(6).

[227] *Id*. § 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." *Id*. § 601(3).

[228] 15 U.S.C. § 632.

[229] *See* 5 U.S.C. § 603.

82. *Final Regulatory Flexibility Analysis ("FRFA")*. As required by the RFA,[230] the Commission has prepared an FRFA relating to the *Report and Order*. The FRFA is set forth in Appendix E.

C. Paperwork Reduction Act Analysis

83. *Initial Paperwork Reduction Act Analysis*. The *FNPRM* has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[231] and contains no proposed new or modified information collection requirements. 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.[232]

84. *Final Paperwork Reduction Act Analysis*. The *Report and Order* contains both new and modified information collection requirements subject to the PRA. It will be submitted to the OMB for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. Comments should address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and we find that these requirements will benefit many companies with fewer than 25 employees by facilitating the use of leased access channels and by promoting the fair and expeditious resolution of leased access complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix E, *infra*.

D. Congressional Review Act

85. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

86. Effective Date. Sections 76.975(h)(1), (2) and (3) and (i) are effective 30 days after date of publication in the Federal Register. Sections 76.970(j)(3), 76.972(a), (b), (c), (d), (e), and (g); 76.975(d), (e), (g) and (h)(4); and 76.978, which contain new or modified information collection requirements that have not been approved by the Office of Management and Budget ("OMB"), are effective upon OMB approval. Section 76.970 is effective 90 days after date of publication in the Federal Register or upon OMB approval of § 76.970(j)(3), whichever is later. The effective date of Sections 76.972(f) and 76.975 (b), (c) and (f), which do not require OMB approval, is delayed until OMB approval of the

[230] *See* 5 U.S.C. § 604.

[231] 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.).

[232] 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).

aforementioned rule sections. After OMB approval is received, the Commission will publish a document in the Federal Register announcing the effective date of the rules requiring OMB approval and those whose effective date was delayed pending OMB approval of other rules.

VI. ORDERING CLAUSES

87. Accordingly, **IT IS ORDERED**, pursuant to the authority found in Sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532, this *Report and Order and Further Notice of Proposed Rulemaking* **IS ADOPTED**.

88. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532, the Commission's Rules **ARE HEREBY AMENDED** as set forth in Appendix B.

89. **IT IS FURTHER ORDERED** that, Sections 76.975(h)(1),(2) and (3) and (i) are effective 30 days after date of publication in the Federal Register. Sections 76.970(j)(3), 76.972(a), (b), (c), (d), (e), and (g); 76.975(d), (e), (g) and (h)(4); and 76.978, which contain new or modified information collection requirements that have not been approved by the Office of Management and Budget ("OMB"), are effective upon OMB approval. Section 76.970 is effective 90 days after date of publication in the Federal Register or upon OMB approval of § 76.970(j)(3), whichever is later. The effective date of Sections 76.972(f) and 76.975(b), (c) and (f) is delayed until OMB approval of the aforementioned rule sections. After OMB approval is received, the Commission will publish a document in the Federal Register announcing the effective date of the rules requiring OMB approval and those whose effective date was delayed pending OMB approval of other rules.

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

91. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

Comments filed in MB Docket No. 07-42

Black Television News Channel
Bruno Goodworth Network, Inc
CaribeVision Holdings LLC
Charles Stogner
Combonate Media Group
Comcast Corporation
Community Broadcasters Association
Duane J. Polich
Engle Broadcasting
Ideal Living Media
iNFO Channel Group
Media Access Project
National Cable & Telecommunications Association
NFL Enterprises LLC
Pope Broadcasting Company, Inc
Positive Media, Inc d/b/a TV Camden
Reynolds Media Inc
SHOP NBC
StogMedia
The America Channel
Time Warner Cable Inc.

Reply Comments filed in MB Docket No. 07-42

Black Television News Channel
CaribeVision Holdings LLC
Combonate Media Group
Comcast Corporation
Crown Media Holdings, Inc/The Hallmark Channel
Engle Broadcasting
HDNet
HTV Corporation
Leased Access Programmers Association
Media Access Project
National Cable & Telecommunications Association
NFL Enterprises LLC
Pope Broadcasting Company, Inc
Positive Media, Inc d/b/a TV Camden
Reynolds Media Inc.
Time Warner Cable Inc.
Verizon
WealthTV

APPENDIX B

Revised Rules

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

Part 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

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

2. Amend section 76.970 to revise paragraph (d), revise the first sentence of paragraph (e), revise paragraph (i) and add new paragraph (j) to read as follows:

§ 76.970 Commercial leased access rates.

* * * * *

(d) The maximum commercial leased access rate that a cable operator may charge to programmers that predominantly transmit sales presentations or program length commercials for full-time channel placement on a tier exceeding a subscriber penetration of 50 percent is the average implicit fee for full-time channel placement on all such tier(s).

(e) The average implicit fee identified in paragraph (d) of this section for a full-time channel on a tier with a subscriber penetration over 50 percent shall be calculated by first calculating the total amount the operator receives in subscriber revenue per month for the programming on all such tier(s), and then subtracting the total amount it pays in programming costs per month for such tier(s) (the "total implicit fee calculation").
* * *

* * * * *

(i) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement, except to programmers that predominantly transmit sales presentations or program length commercials, is the lower of the marginal implicit fee for a full-time channel placement on the tier where the leased access programming will be placed or $0.10 per subscriber per month.

(j) (1) (i)The marginal implicit fee identified in paragraph (i) of this section for a full-time channel shall be calculated by first determining the mark-up of the tier where the leased access programming will be placed. The mark-up is calculated by determining the total amount the operator receives in subscriber revenue per month for the tier, and dividing by the total amount it pays in affiliation fees for the channels located on the tier. The resulting figure is the mark-up. In cases where the cost and channels of one tier are implicitly incorporated into a larger tier, the larger tier price is equal to the larger tier price minus the smaller tier price and the channels on the larger tier are those that are not available on the smaller tier. (ii) The monthly gross subscriber revenue per channel is obtained by multiplying the monthly per subscriber affiliation fee for each channel by the mark-up for the tier. The net subscriber revenue per channel per month for each channel is the difference between the monthly gross subscriber revenue per channel and the monthly per subscriber affiliation fee paid for that channel by the cable operator. This value represents the implicit fee for the individual channel. (iii) To determine the marginal channels on the tier for systems with 55 or more activated channels, multiply the number of non-mandated channels on the tier by 0.15 and round to the nearest number. To determine the marginal channels on the tier for systems with 54 or less activated

channels, multiply the number of non-mandated channels on the tier by 0.10 and round to the nearest number. That is the number of marginal channels. Next identify the channels with the lowest implicit fee until that number is reached. These are the marginal channels. (iv) Finally, calculate the marginal implicit fee by taking the mean of the implicit fees of the marginal channels by summing the implicit fees of the marginal channels and dividing by the number of marginal channels. The result is the marginal implicit fee.

(2) The affiliation fees for channels used in determining the marginal implicit fee are the contractual license fee or retransmission consent fee representing the compensation per subscriber per month paid to the programmer for the right to carry the programming. It excludes fees for services other than the provision of channel capacity, such as marketing, and excludes revenues. The affiliation fees for channels used in determining the marginal implicit fee shall reflect the prevailing affiliation fees offered in the marketplace to third parties. If a prevailing affiliation fee does not exist, the affiliation fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The marginal implicit fee calculation shall be based on affiliation fees in contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(3) Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

(4) Cable operators are permitted to negotiate rates below the maximum permitted rates.

3. Add new section 76.972 to read as follows:

§ 76.972 Customer service standards.

(a) (1) A cable system operator shall maintain a contact name, telephone number and e-mail address on its website and available by telephone of a designated person to respond to requests for information about leased access channels.

(2) A cable system operator shall maintain a brief explanation of the leased access statute and regulations on its website.

(b) Cable system operators shall provide prospective leased access programmers with the following information within three business days of the date on which a request for leased access information is made:

(1) The cable system operator’s process for requesting leased access channels;

(2) The geographic and subscriber levels of service that are technically possible;

(3) The number and location and time periods available for each leased access channel;

(4) Whether the leased access channel is currently being occupied;

(5) A complete schedule of the operator’s statutory maximum full-time and part-time leased access rates;

(6) A comprehensive schedule showing how those rates were calculated;

(7) Rates associated with technical and studio costs;

(8) Whether inclusion in an electronic programming guide is available;

(9) The available methods of programming delivery and the instructions, technical requirements and costs for each method;

(10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability; and

(11) Information regarding prospective launch dates for the leased access programmer.

(c) A *bona fide* proposal, as used in this section, is defined as a proposal from a potential leased access programmer that includes the following information:

(1) The desired length of a contract term;

(2) The tier, channel and time slot desired;

(3) The anticipated commencement date for carriage;

(4) The nature of the programming;

(5) The geographic and subscriber level of service requested; and

(6) Proposed changes to the sample contract.

(d) All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator.

(e) A cable system operator must respond to a *bona fide* proposal within 10 days after receipt.

(f) A cable system operator will be subject to a forfeiture for each day it fails to comply with Sections 76.972(a) or 76.972(e).

(g) (1) Operators of systems subject to small system relief shall provide the information required in paragraph (b) of this section within 30 calendar days of a *bona fide* request from a prospective leased access programmer. For these purposes, systems subject to small system relief are systems that either:

(i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or

(ii) Have been granted special relief.

(2) *Bona fide* requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information:

(i) The desired length of a contract term;

(ii) The time slot desired;

(iii) The anticipated commencement date for carriage; and

(iv) The nature of the programming.

4. Section 76.975 is amended to revise paragraphs (b) through (h) and to redesignate old paragraph (h) as new paragraph (i) to read as follows:

§ 76.975 Commercial leased access dispute resolution.

* * *

(b) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of Title VI of the Communications Act, or our implementing regulations, §§ 76.970, 76.971, and 76.972 may file a petition for relief with the Commission.

(c) A petition must contain a concise statement of the facts constituting a violation of the statute or the Commission's Rules, the specific statute(s) or rule(s) violated, and certify that the petition was served on the cable operator.

(d) The petition must be filed within 60 days of the alleged violation. The time limit on filing complaints will be suspended if the complainant files a notice with the Commission prior to the expiration of the filing period, stating that it seeks an extension of the filing deadline in order to pursue active negotiations with the cable operator, and the cable operator agrees to the extension.

(e) *Discovery*. In addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a leased access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

(f) *Protective Orders*. In addition to the procedures contained in § 76.9 of this part related to the protection of confidential material, the Commission may issue orders to protect the confidentiality of proprietary information required to be produced for resolution of leased access complaints. A protective order constitutes both an order of the Commission and an agreement between the party executing the protective order declaration and the party submitting the protected material. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.

(g) The cable operator or other respondent will have 30 days from the filing of the petition to file a response. To the extent that a cable operator expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after a response is submitted, the staff

finds a *prima facie* violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

(h)(1) The Media Bureau will resolve a leased access complaint within 90 days of the close of the pleading cycle.

(2) The Media Bureau, after consideration of the pleadings, may grant the relief requested, in whole or in part, including, but not limited to ordering refunds, injunctive measures, or forfeitures pursuant 47 U.S.C. 503, denying the petition, or issuing a ruling on the petition or dispute.

(3) To be afforded relief, the petitioner must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions in 47 U.S.C. 532 or §§ 76.970, 76.971, or 76.972, or otherwise acted unreasonably or in bad faith in failing or refusing to make capacity available or to charge lawful rates for such capacity to an unaffiliated leased access programmer.

(4) As part of the remedy phase of the leased access complaint process, the Media Bureau will have discretion to request that the parties file their best and final offer for the prices, terms, or conditions in dispute. The Commission will have the discretion to adopt one of the proposals or choose to fashion its own remedy.

5. Section 76.978 is added to read as follows:

§ 76.978 Leased Access Annual Reporting Requirement

(a) Each cable system shall submit a Leased Access Annual Report with the Commission on a calendar year basis, no later than April 30th following the close of each calendar year, which provides the following information for the calendar year:

(1) The number of commercial leased access channels provided by the cable system.

(2) The channel number and tier applicable to each commercial leased access channel.

(3) The rates the cable system charges for full-time and part-time leased access on each leased access channel.

(4) The cable system's calculated maximum commercial leased access rate and actual rates.

(5) The programmers using each commercial leased access channel and whether each programmer is using the channel on a full-time or part-time basis.

(6) The number of requests received for information pertaining to commercial leased access and the number of bona fide proposals received for commercial leased access.

(7) Whether the cable system has denied any requests for commercial leased access and, if so, with an explanation of the basis for the denial.

(8) Whether a complaint has been filed against the cable system with the Commission or a Federal district court regarding a commercial leased access dispute.

(9) Whether any entity has sought arbitration with the cable system regarding a commercial leased access dispute.

(10) The extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes.

(11) The extent to which the cable system impose different rates, terms, or conditions on commercial leased access programmers (such as with respect to security deposits, insurance, or termination provisions) with an explanation of any differences.

(12) A list and description of any instances of the cable system requiring an existing programmer to move to another channel or tier.

(b) Leased access programmers and other interested parties may file comments with the Commission in response to the Leased Access Annual Reports by May 15th.

APPENDIX C

Standard Protective Order and Declaration for Use in Section 612 Commercial Leased Access Proceedings

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

In the Matter of	)	
	)	Docket No. _____
[Name of Proceeding]	)	

PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 7.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

3. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 2.c of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that

all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

4. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

5. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

7. Disclosure. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 8 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

8. Authorized Representatives shall be limited to:

a. Subject to Paragraph 8.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 8.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 8.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. Disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or any other person's

business decisions that are or will be made in light of similar or corresponding information about a competitor.

9. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

10. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

11. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

12. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

13. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: “Confidential Information included pursuant to Protective Order, [cite proceeding];” and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 13 are not removed.

14. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

15. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 10 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

16. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

17. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

18. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

19. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

Attachment A to Section 612 Protective Order

DECLARATION

In the Matter of)

[Name of Proceeding]) Docket No._____

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) _____

(printed name) _____

(representing) _____

(title) _____

(employer) _____

(address) _____

(phone) _____

(date) _____

APPENDIX D

Example Calculation of the Leased Access Rate

I. Example of the Marginal Implicit Fee Calculation

The following table illustrates the channel line-up of a tier with greater than 50% subscriber penetration. The tier consists of 26 channels. We will assume that 100 subscribers purchase this tier and that they all pay the retail price of $18.95.

Programming	Affiliation Fee Paid by Cable Operator to the Programmer (monthly amount per subscriber)	Implicit Fee (net revenue)
Broadcast Station 1	$ 0.00	$ 0.000
Broadcast Station 2	$ 0.05	$ 0.082
Broadcast Station 3	$ 0.00	$ 0.000
PEG 1	$ 0.00	$ 0.000
Leased Access 1	$ 0.00	$ 0.000
Cable Network 1	$ 0.12	$ 0.196
Cable Network 2	$ 0.34	$ 0.556
Cable Network 3	$ 0.05	$ 0.082
Cable Network 4	$ 0.07	$ 0.114
Cable Network 5	$ 0.01	$ 0.016
Cable Network 6	$ 0.04	$ 0.065
Cable Network 7	$ 0.05	$ 0.082
Cable Network 8	$ 0.27	$ 0.442
Cable Network 9	$ 0.00	$ 0.000
Cable Network 10	$ 0.10	$ 0.164
Cable Network 11	$ 0.48	$ 0.785
Cable Network 12	$ 2.19	$ 3.582
Cable Network 13	$ 1.10	$ 1.799
Cable Network 14	$ 0.57	$ 0.932
Cable Network 15	$ 0.15	$ 0.245
Cable Network 16	$ 0.41	$ 0.671
Cable Network 17	$ 0.19	$ 0.311
Cable Network 18	$ 0.06	$ 0.098
Cable Network 19	$ 0.21	$ 0.343
Cable Network 20	$ 0.11	$ 0.180
Cable Network 21	$ 0.62	$ 1.014

Step 1: Determine Monthly per-subscriber Affiliation Fees for each Channel on the Tier

The preceding table presents the monthly per-subscriber affiliation fee paid by the cable operator to the programmer. These values are those contractually agreed to and paid by the cable operator. As illustrated, this hypothetical cable operator carries three broadcast stations. Two of the broadcast stations do not receive a monthly per-subscriber payment from the cable operator, while "Broadcast Station 2" receives $0.05 per month per subscriber from the cable operator. In addition, "Cable Network 8" and "Cable Network 9" are sold by the programmer on a bundled basis in a contract which does not specify individual affiliation fees for each network, but instead specifies a rate of $0.27 for carriage of both

networks. "Cable Network 8" is the higher rated of the two networks and therefore the affiliation fee is allocated to it and the affiliate fee for "Cable Network 9" is set equal to zero.

Step 2: Determine the Mark-up of the Tier

The mark-up is equal to the total subscriber revenue for the programming tier (100 x $18.95 = $1,895), divided by the total of the affiliation fees the cable operator pays to the programmers for the channels on the tier (100 x $7.19 = $719). In the example the mark-up is equal to 2.636.

Step 3: Determine the Implicit Fee of each Channel on the Tier

The implicit fee, or net revenue, is equal to the gross revenue from the channel less the affiliation fee of the channel. The gross revenue is obtained by multiplying the affiliation fee by the mark-up of the tier.

Step 4: Determine the Number of Marginal Channels on the Tier

The number of marginal channels is equal to 15% of the non-mandated channels on the tier. In this case, the tier contains 5 mandated channels: "Broadcast Station 1," "Broadcast Station 2," "Broadcast Station 3," "PEG 1," and "Leased Access 1." Therefore there are 21 non-mandated channels on the tier. The number of marginal channels is 0.15 x 21 = 3.15. The result should be rounded to the nearest positive integer. This tier has three marginal channels.

Step 5: Determine the Marginal Channels

The marginal channels are the three non-mandated channels with the lowest implicit fee. In this example, those channels are: "Cable Network 5," "Cable Network 6," and "Cable Network 9."

Step 6: Calculate the Marginal Implicit Fee

The marginal implicit fee is the mean of the implicit fees of the three marginal channels. The marginal implicit fee is (0.000 + 0.016 + 0.065)/3 = 0.027. The monthly rate for a leased access programmer on this tier is $0.027 per subscriber.

II. Alternative Methods for Calculating the Maximum Allowable Leased Access Rate

1. We use several methods to examine aggregate information on the cable industry and develop a maximum allowable leased access rate. All of our methods begin with the construction of hypothetical analog and digital tiers based upon the 194 most widely distributed networks.[1] We base the sizes of the hypothetical analog and digital tiers on data collected via the FCC's Cable Price Survey. The survey indicates that the average analog tier contains 54.9 non-mandated channels and the most highly subscribed digital tier contains 33.7 additional channels.[2] The most widely distributed networks were

[1] We obtain the number of subscribers to the most widely distributed programming networks from SNL Kagan, *Economics of Basic Cable Networks, 13th Ed.* (at 36-40) and SNL Kagan, *Media Trends, 2007 Edition* (at 58). Affiliation fees for these networks are from SNL Kagan, *Economics of Basic Cable Networks, 13th Edition* (at 60-62); SNL Kagan, *Media Trends, 2007 Edition* (at 59); and SNL Kagan, *Cable Program Investor*, October 18, 2007 (at 2-3).

[2] *Report on Cable Industry Prices*, Table 4, 21 FCC Rcd 15087 (released December 27, 2006).

ranked according to their subscribers. They are then weighted according to the number of subscribers that they reach relative to the most widely distributed network, The Discovery Channel, which received a weight of 1. Lesser distributed networks receive weights that are equivalent to the fraction of subscribers they have relative to the most widely distributed network.

2. The hypothetical analog tier consists of the channels with the highest subscribers, whose weights sum to 54.9. This hypothetical analog tier consists of 67 program networks. These 67 networks reach the same number of subscribers as that which would be reached if 55 networks each reached 100% of cable subscribers. Construction of the hypothetical digital tier is complicated by the fact that 12 of the 194 most widely distributed networks do not currently receive any license fees. We therefore proceed on two fronts. We construct a digital tier which includes these "no-fee" networks which we refer to as the "inclusive digital tier" as well as an "exclusive digital tier" which excludes networks with no license fees from the hypothetical digital tier. An additional complication is that our information on affiliation fees and distribution of cable networks is not sufficiently broad to get a sufficient number of networks whose weights sum to 33.7, the number of channels on the average digital tier. Therefore both the inclusive and exclusive digital tiers will contain all of the networks not included in our hypothetical analog tier. The inclusive digital tier consists of 127 networks with a total weight of 17. The exclusive digital tier contains 115 networks with a weight of 15.1.

3. We examine two approaches to calculating the marginal implicit fees of the hypothetical analog and digital tiers. The first approach, which we refer to as the net revenue approach, follows the method used to calculate the operator-specific rates. The average mark-up of cable operators is determined. This value is used to determine net revenue of each network on the tier by multiplying it against the affiliation fee to obtain gross revenue and subtracting off the programming cost to obtain net revenue. The marginal implicit fee is calculated as the mean or median net revenue of the least profitable 15% of channels on the tier. The other approach, which we call the per-subscriber fee approach, calculates the marginal implicit fee as the mean or median affiliation fee of the least costly 15% of channels on the hypothetical tier. Because the mark-up of each channel on a tier is the same, ranking networks by net revenue or per-subscriber fees leads to the same ordering of the networks. Therefore, the identities of the channels used to calculate the marginal implicit fee under either approach are the same for a given hypothetical tier.

A. The Marginal Implicit Fee under the Net Revenue Approach

4. As discussed, the net revenue approach mirrors the system-specific method adopted in this order. The mark-up of programming costs by cable operators is determined by dividing video revenues by programming costs.[3] The mark-up in the cable industry is 2.76. This mark-up is then applied to the per-subscriber affiliation fees of the networks in the hypothetical tiers in order to determine the gross revenue per subscriber that each of those networks generates for the cable industry. Subtracting the per subscriber affiliation fee from the gross revenue per subscriber yields the net revenue per subscriber. The next step in the calculation is to determine the marginal channels, which is based upon the number of channels that the average cable operator must set aside for leased access. The marginal networks for the maximum allowable rate on an analog tier will be the 15% of 54.9 or 8.2 networks. The marginal channels are those channels, with the lowest net revenues amongst the 67, whose weights sum to 8.2 (the number of marginal channels on our hypothetical analog tier). The weighted mean of the net revenue of those 13 networks is equal to $0.091 per subscriber per month and the weighted median is equal to $0.094

[3] We base this calculation on the average of the programming cost as a percentage of revenue for three large cable operators in 2005. The inverse of this number is equal to the mark-up. SNL Kagan, *Cable TV Investor: Deals and Finance*, January 31, 2007 at 6.

per subscriber per month.

5. Calculation of the maximum rate for the hypothetical digital tiers is similar. The tier consists of those networks that were not included in the hypothetical analog tier with the greatest numbers of subscribers, whose weights sum to 33.7.[4] The marginal channels are those channels, with the lowest net revenues whose weights sum to 5.1 (15% of the number of channels on our hypothetical digital tier). The weighted mean net revenue of those networks is $0.056 per subscriber per month and the weighted median is $0.070 per subscriber per month for the exclusive digital tier. The weighted mean net revenue for the inclusive digital tier is $0.026 per subscriber per month and the weighted median is $0.035 per subscriber per month.

B. The Marginal Implicit Fee under the Per-Subscriber Fee Approach

6. The per-subscriber fee method is based upon the costs incurred by a cable system when it must vacate a channel in order to provide capacity to a commercial leased access programmer. If a cable system that receives a request for LA carriage has no vacant channels available, then the system will need to incur certain costs in order to make the required capacity available to the LA programmer. Specifically, it is unlikely that the commercial contracts that the cable operator has with program channels permit unilateral costless cancellation by the cable operator. Even without detailed information on these contracts, it is reasonable to assume that the cable operator would need to provide some compensation to the "bumped" channel in order to induce it to vacate the system. One reasonable candidate for this is the fee that the cable operator was collecting from each consumer and paying to the bumped channel (the "per-subscriber fee"). If we assume that the marginal channel is earning negligible advertising revenues, then that channel would be made whole if it continued to receive the per-subscriber fee that the cable operator had been paying. We use this as an alternative method of examining the costs that leased access programming may impose on cable operators.

7. To calculate the marginal implicit fee under the per-subscriber fee approach, rather than calculating the weighted means and medians of the net revenue of the bottom 15% of networks in a tier, the weighted means and medians of the affiliation fees are calculated. As discussed, because a constant mark-up is applied to affiliation fees when calculating net revenue, networks with the lowest net revenue are also the networks with the lowest affiliation fees. Therefore the marginal implicit cost using the per-subscriber fee method is based on exactly the same networks as used to calculate the marginal implicit fee with the net revenue method. The weighted mean of the per-subscriber fee of the marginal networks on the hypothetical analog tier is equal to $0.051 per subscriber per month and the weighted median is equal to $0.053 per subscriber per month. The weighted mean of the per-subscriber fee of the marginal networks on the hypothetical inclusive digital tier is equal to $0.015 per subscriber per month and the weighted median is equal to $0.020 per subscriber per month. The weighted mean of the programming cost of the marginal networks on the hypothetical exclusive digital tier is equal to $0.032 per subscriber per month and the weighted median is equal to $0.040 per subscriber per month.

[4] Our information on per subscriber affiliation fees and distribution of cable networks is not sufficiently broad to get a sufficient number of networks whose weights sum to 33.7. This occurs because there is a substantial population of networks with very limited distribution. However, in our existing data, we noted that there are a number of networks with license fees that are effectively zero. It is likely that the lesser networks that we have been unable to include have a similar paucity of license revenues. Failure to include these additional networks makes the marginal implicit fee for digital tiers slightly higher than it otherwise would be.

APPENDIX E

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* ("*Notice*") in MB Docket No. 07-42.[2] The Commission sought written public comment on the proposals in the *Notice of Proposed Rulemaking*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

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

2. The commercial leased access requirements set forth in Section 612 of the Communications Act of 1934 require a cable operator to set aside channel capacity for commercial use by video programmers unaffiliated with the cable operator.[4] The purposes of Section 612 are "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[5]

3. In the *Order*, the Commission concludes that its rules governing commercial leased access have impeded the use of leased access channels by programmers, including smaller entities, thereby undermining the goals of Section 612. The *Order* adopts several rules to address this concern. Regarding commercial leased access rates, the Commission concludes that its current formula for calculating leased access rates yields fees charged by cable operators that are higher than the statute mandates, resulting in an underutilization of leased access channels.[6] To address this concern, the *Order* modifies the Commission's formula used to calculate commercial leased access rates, which will result in making these channels a more viable outlet for leased access programming.[7] The *Order* also provides that the maximum leased access rate will not exceed $0.10 per subscriber per month for any cable system.[8] Cable operators may petition the Commission to exceed the maximum allowable leased access rates.[9] A petition for relief must present specific facts justifying the system's specific leased access rate and provide an alternative rate which equitably balances the revenue requirements of the cable operator with the public

[1] *See* 5 U.S.C. § 603. The RFA has been amended by the *Contract With America Advancement Act of 1996*, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). *See* 5 U.S.C. § 601 et. seq. Title II of the CWAAA is the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA").

[2] *See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage,* Notice of Proposed Rule Making, MB Docket No. 07-42, FCC 07-18 (rel. June 15, 2007) (the "*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] *See* 47 U.S.C. § 532.

[5] *See* 47 U.S.C. § 532(a).

[6] *See Order* at ¶¶ 35-42.

[7] *See id.* at ¶¶ 43-46.

[8] *See id.* at ¶ 47-49.

[9] *See id.* at ¶ 49.

interest goals of the leased access statute.[10] The *Order* does not apply the new rate methodology or the maximum allowable leased access rate of $0.10 per subscriber to programmers that predominantly transmit sales presentations or program length commercials.[11]

4. To address poor customer service practices of cable system operators with regard to potential leased access programmers, the *Order* requires a cable system operator to meet uniform customer service standards; to maintain a contact name, telephone number, and e-mail address on its website; to make available by telephone a designated person to respond to requests for information about leased access channels; and to maintain a brief explanation of the leased access statute and regulations on its website.[12] In response to concerns raised by commercial leased access programmers that contract terms and conditions imposed by cable operators are often unfair, unreasonable, onerous, and overly burdensome, the *Order* requires cable operators to apply the same uniform standards, terms, and conditions for all of its leased access programmers as it applies to its other programmers.[13] The *Order* also specifies the information that a leased access programmer must provide to a cable system operator in order to be considered for carriage, and requires the cable system operator to respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days.[14]

5. Regarding leased access complaint procedures, the *Order* adopts an expedited process which requires the Media Bureau to resolve leased access complaints within 90 days of the close of the pleading cycle and eliminates the requirement for a leased access complainant alleging that a rate is unreasonable to first obtain a determination of the cable operator's maximum permitted rate from an independent accountant.[15] The *Order* revises rules to provide that, as part of the remedy phase of a leased access complaint process, the Media Bureau will have the discretion to request that the parties file their best and final offer for the prices, terms, or conditions in dispute, and the Media Bureau will have the discretion to adopt one of the best and final offers or to choose to fashion its own remedy.[16] The *Order* also amends the Commission's discovery rules pertaining to leased access complaints by requiring respondents to attach to their answers copies of any documents that they rely on in their defense; finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute, subject to the protection of confidential material; and emphasizing that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with its discovery requests.[17]

6. Moreover, in order to ensure that the Commission has sufficient up-to-date information on the status of leased access programming in the future, the *Order* adopts a reporting requirement for cable operators that requires cable operators to file annual reports on leased access rates, channel usage, and

[10] *See id.*

[11] *See id*. at ¶ 37.

[12] *See id.* at ¶¶ 12-13.

[13] *See id.* at ¶¶ 27-31.

[14] *See id.* at ¶¶ 12, 14-32.

[15] *See id.* at ¶¶ 51-56.

[16] *See id.* at n.156.

[17] *See id.* at ¶¶ 57-65.

complaints, among other matters pertaining to leased access.[18] Leased access programmers will have an opportunity to file comments with the Commission in response to these reports.[19]

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

7. There were no comments filed specifically in response to the IRFA.

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

8. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[20] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[21] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[22] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[23]

9. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS code 517110), Cable and Other Program Distribution (2002 NAICS code 517510), and Internet Service Providers (2002 NAISC code 518111).[24] The 2007 NAISC defines this category 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

[18] *See id.* at ¶¶ 66-70.

[19] *See id.* at ¶ 70.

[20] 5 U.S.C. § 603(b)(3).

[21] 5 U.S.C. § 601(6).

[22] 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."

[23] 15 U.S.C. § 632.

[24] *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/ n07-n02.xls).

they operate are included in this industry."[25] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less.[26] According to Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC code 518111) that operated for the entire year.[27] Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC code 518111) had less than 100 employees.[28] Thus, under this size standard, the majority of firms can be considered small.

10. *Cable and Other Program Distribution.* The 2002 NAICS defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[29] This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The SBA has developed a small business size standard for Cable and Other Program Distribution, which is all such firms having $13.5 million or less in annual receipts.[30] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[31] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[32] Thus, under this size standard, the majority of firms can be considered small.

11. *Cable System Operators (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's

[25] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[26] 13 C.F.R. § 121.201 (2002 NAICS code 517110).

[27] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 2, Employment Size of Establishments for the United States: 2002 (2002 NAISC code 517110; 2002 NAISC code 517510; 2002 NAISC code 518111) (issued November 2005).

[28] *Id*.

[29] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM. As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[30] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[31] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002 (NAICS code 517510) (issued November 2005).

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

rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[33] As of 2006, 7,916 cable operators qualify as small cable companies under this standard.[34] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[35] Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[36] Thus, under this standard, most cable systems are small.

12. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[37] There are approximately 65.4 million cable subscribers in the United States today.[38] Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[39] Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.[40] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[41] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

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[33] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[34] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[35] 47 C.F.R. § 76.901(c).

[36] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[37] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[38] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 and 2617, Table B-1 (2006) ("*12th Annual Report*").

[39] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[40] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[41] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

13. *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. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.[42] This definition provides that a small entity is one with $13.5 million or less in annual receipts.[43] Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).[44] All three currently offer subscription services. Two of these three DBS operators, DIRECTV[45] and EchoStar Communications Corporation ("EchoStar"),[46] report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels.[47] Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

14. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems*. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less in annual receipts.[48] Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[49] Individual PCOs often

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[42] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[43] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[44] *See 12th Annual Report*, 21 FCC Rcd at 2538-39, ¶ 70 and 2620, Table B-3.

[45] DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 15.72 million subscribers nationwide as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[46] EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and one of the four largest MVPDs, serving an estimated 12.27 million subscribers nationwide. *Id*.

[47] *See id*. at 2540, ¶ 73 .

[48] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[49] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130. Previously, the Commission reported that IMCC had 250 members; *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*10th Annual Report*").

serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately one million subscribers.[50] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

15. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in revenue annually.[51] HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent.[52] The Commission has no information regarding the annual revenue of the four C-Band distributors.

16. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).[53] MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)).[54] We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to MDS and ITFS.[55]

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[50] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130.

[51] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[52] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1. HSD subscribership declined more than 33 percent between June 2003 and June 2004. *See id.*

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

[54] *See id.*

[55] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

17. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[56] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[57] In the MDS auction, 67 bidders won 493 licenses.[58] Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[59] MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of $13.5 million annually.[60] Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

18. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).[61] We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

19. *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.[62] The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to LMDS.[63] The Commission has also defined small LMDS entities in the context of Commission license

[56] 47 C.F.R. § 21.961(b)(1) (2002).

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

[58] MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

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

[60] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

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

[62] *See Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

[63] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

auctions. In the 1998 and 1999 LMDS auctions,[64] the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[65] Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years.[66] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[67] In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

20. *Open Video Systems ("OVS").* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[68] OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with $ 13.5 million or less in annual receipts.[69] The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.[70] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.[71] Among BSPs, however, those operating under the OVS framework are in the minority.[72] As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers.[73] RCN received approval to operate OVS systems in New York City, Boston,

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

[65] *See LMDS Order,* 12 FCC Rcd at 12545.

[66] *Id.*

[67] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

[68] *See* 47 U.S.C. § 573.

[69] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[70] *See* Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovscer.html (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovsarc.html (last visited July 25, 2007).

[71] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1.

[72] OPASTCO reports that less than 8 percent of its members provide service under OVS certification. *See id*. at 2548-49, ¶ 88 n.336.

[73] *See id*. at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,500 subscribers as of June 2005. *See id*. The third largest BSP is Knology, which was serving approximately 179,800 subscribers as of June 2005. *See id.*

Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

21. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[74] The SBA has developed a small business size standard for firms within this category, which is all firms with $13.5 million or less in annual receipts.[75] According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.[76] Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999.[77] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

22. *Motion Picture and Video Production*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials."[78] The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts.[79] According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year.[80] Of this total, 7,685 firms had annual receipts of under $24,999,999 and 45 firms had annual receipts of between $25,000,000 and $49,999,999.[81] Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

23. *Motion Picture and Video Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and

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[74] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[75] 13 C.F.R. § 121.201 (NAICS code 515210).

[76] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

[77] *Id*. An additional 40 firms had annual receipts of $25 million or more.

[78] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[79] 13 C.F.R. § 121.201 (NAICS code 51211).

[80] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51211) (issued November 2005).

[81] *Id*.

exhibitors."[82] The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts.[83] According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year.[84] Of this total, 365 firms had annual receipts of under $24,999,999 and 7 firms had annual receipts of between $25,000,000 and $49,999,999.[85] Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

24. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[86] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[87] We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

25. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[88] According to Commission data,[89] 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

26. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has

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[82] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[83] 13 C.F.R. § 121.201 (NAICS code 51212).

[84] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51212) (issued November 2005).

[85] *Id*.

[86] 15 U.S.C. § 632.

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

[88] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

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

developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[90] According to Commission data,[91] 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

27. *Electric Power Generation, Transmission and Distribution*. The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[92] The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."[93] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[94] Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

D. Description of Reporting, Recordkeeping and other Compliance Requirements

28. The rules adopted in the *Report and Order* will impose additional reporting, recordkeeping, and other compliance requirements on cable system operators and leased access programmers. The *Order* requires a respondent in a leased access complaint proceeding that expressly relies upon a document in asserting a defense to include the document as part of its answer.[95] The *Order* finds that in the context of a leased access complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute.[96] The *Order* requires the parties to a leased

[90] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[91] *See* Trends in Telephone Service at Table 5.3.

[92] U.S. Census Bureau, 2007 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211.

[93] 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

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

[95] *See Order* at ¶ 57.

[96] *See id.* at ¶ 57.

access complaint proceeding to enter into a Protective Order to protect pleading or discovery material that is deemed by the submitting party to contain confidential information.[97] The *Order* requires cable system operators to submit annual reports on leased access rates, channel usage, and complaints.[98] The *Order* requires cable system operators to provide prospective leased access programmers with certain information within three business days of the date on which a request for leased access information is made.[99] A longer period for small systems to respond has been retained. The *Order* requires cable system operators to meet uniform customer service standards with respect to their dealings with leased access programmers and to apply uniform contract terms and conditions to all leased access programmers as applied to other programmers.[100] The *Order* requires cable systems to maintain a contact name, telephone number, and e-mail address on their website and to make available by telephone a designated person to respond to requests for information about leased access channels.[101] The *Order* requires a cable system operator to maintain a brief explanation of the leased access statute and regulations on its website.[102] The *Order* specifies the information that a leased access programmer must provide to a cable system operator in order to be considered for carriage and requires the cable system operator to respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days.[103]

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

29. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[104] The *Notice* invited comment on issues that had the potential to have significant economic impact on some small entities.[105]

30. As discussed in Section A, the decision to modify the leased access rules will facilitate the goals of Section 612 of the Communications Act "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[106] The decision confers benefits upon the variety of leased access programmers, most of which are smaller entities. Thus, the decision to modify the leased access rules benefits smaller entities as

[97] *See id.* at ¶¶ 62-65.

[98] *See id.* at ¶¶ 66-70.

[99] *See id.* at ¶¶ 14-32.

[100] *See id.* at ¶¶ 26-31.

[101] *See id.* at ¶ 13.

[102] *See id.* at ¶ 12.

[103] *See id.* at ¶¶ 33-34.

[104] 5 U.S.C. § 603(c).

[105] *See NPRM*, 22 FCC Rcd 11222, ¶ 27 and Appendix A.

[106] *See* 47 U.S.C. § 532(a).

well as larger entities. The alternative of retaining the current leased access rules would hinder achieving the goals of competition and diversity as envisioned by Congress. Moreover, the alternative of requiring only certain cable operators to comply with these new rules, such as only large cable operators, would similarly impede achieving the goals of competition and diversity as envisioned by Congress. However, a longer period for small systems to respond to certain requests for information has been retained.

F. Report to Congress

31. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[107] In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[108]

[107] *See* 5 U.S.C. § 801(a)(1)(A).

[108] *See* 5 U.S.C. § 604(b).

APPENDIX F

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA")[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* ("*FNPRM*").[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the document. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.[4]

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

2. *Overview*. The commercial leased access requirements set forth in Section 612 of the Communications Act of 1934 require a cable operator to set aside channel capacity for commercial use by video programmers unaffiliated with the cable operator.[5] The purposes of Section 612 are "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[6]

3. In the *Report and Order* in MB Docket No. 07-42, the Commission modified its formula used to calculate commercial leased access rates, which will result in making leased access channels a more viable outlet for leased access programming. The *Order* also provides that the maximum leased access rate will not exceed $0.10 per subscriber per month for any cable system. The *Order*, however, did not apply the modified rate formula or the maximum allowable leased access rate to programmers that predominantly transmit sales presentations or program length commercials. These direct sales programmers often "pay" for carriage -- either directly or through some form of revenue sharing with the cable operator.[7]

4. In the *FNPRM*, the Commission notes its concern about setting the leased access rates at a point at which programmers that predominantly transmit sales presentations or program length commercials simply migrate to leased access because it is less expensive than their current commercial arrangements.[8] Accordingly, the *FNPRM* considers whether leased access at current rates is affordable to programmers that predominantly transmit sales presentations and program length commercials.[9] The

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

[2] *See* 5 U.S.C. § 603.

[3] *See* 5 U.S.C. § 603(a).

[4] *See id.*

[5] *See* 47 U.S.C. § 532.

[6] *See* 47 U.S.C. § 532(a).

[7] *See FNPRM* at ¶ 74.

[8] *See id*. at ¶ 75.

[9] *See id*.

FNPRM considers whether applying the modified leased access rate formula to programmers that predominantly transmit sales presentations or program length commercials will cause migration of these services to leased access.[10] If these services do migrate to leased access, the *FNPRM* considers the effect of such a migration.[11] The *FNPRM* also considers whether a separate category for direct sales programmers is appropriate.[12]

5. In the *FNPRM*, the Commission seeks comment on the foregoing issues. In particular, the *FNPRM* invites comment on issues that may impact small entities, including cable operators and leased access programmers.

B. Legal Basis

6. The authority for the action proposed in the rulemaking is contained in Section 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532.

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

32. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[13] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[14] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[15] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[16]

33. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS code 517110), Cable and Other Program Distribution (2002 NAISC code 517510), and Internet Service Providers (2002 NAISC code 518111).[17] The 2007 NAISC defines this category 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

[10] *See id*.

[11] *See id*.

[12] *See id*.

[13] 5 U.S.C. § 603(b)(3).

[14] 5 U.S.C. § 601(6).

[15] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in 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."

[16] 15 U.S.C. § 632.

[17] *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/ n07-n02.xls).

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."[18] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less.[19] According to Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC code 518111) that operated for the entire year.[20] Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC code 518111) had less than 100 employees.[21] Thus, under this size standard, the majority of firms can be considered small.

34. *Cable and Other Program Distribution.* The 2002 NAICS defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[22] This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The SBA has developed a small business size standard for Cable and Other Program Distribution, which is all such firms having $13.5 million or less in annual receipts.[23] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[24] Of this total, 1,087 firms had annual receipts of

[18] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[19] 13 C.F.R. § 121.201 (2002 NAICS code 517110).

[20] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 2, Employment Size of Establishments for the United States: 2002 (2002 NAISC code 517110; 2002 NAISC code 517510; 2002 NAISC code 518111) (issued November 2005).

[21] *Id*.

[22] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM. As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[23] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[24] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002 (NAICS code 517510) (issued November 2005).

under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[25] Thus, under this size standard, the majority of firms can be considered small.

35. *Cable System Operators (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[26] As of 2006, 7,916 cable operators qualify as small cable companies under this standard.[27] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[28] Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[29] Thus, under this standard, most cable systems are small.

36. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[30] There are approximately 65.4 million cable subscribers in the United States today.[31] Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[32] Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.[33] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities

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

[26] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[27] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[28] 47 C.F.R. § 76.901(c).

[29] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[30] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[31] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 and 2617, Table B-1 (2006) ("*12th Annual Report*").

[32] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[33] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

whose gross annual revenues exceed $250 million.[34] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

37. *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. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.[35] This definition provides that a small entity is one with $13.5 million or less in annual receipts.[36] Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).[37] All three currently offer subscription services. Two of these three DBS operators, DIRECTV[38] and EchoStar Communications Corporation ("EchoStar"),[39] report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels.[40] Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

38. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems*. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less

[34] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[35] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[36] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[37] *See 12th Annual Report*, 21 FCC Rcd at 2538-39, ¶ 70 and 2620, Table B-3.

[38] DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 15.72 million subscribers nationwide as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[39] EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and one of the four largest MVPDs, serving an estimated 12.27 million subscribers nationwide. *Id*.

[40] *See id*. at 2540, ¶ 73 .

in annual receipts.[41] Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[42] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately one million subscribers.[43] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

39. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in revenue annually.[44] HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent.[45] The Commission has no information regarding the annual revenue of the four C-Band distributors.

40. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).[46] MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS)

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[41] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[42] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130. Previously, the Commission reported that IMCC had 250 members; *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*10th Annual Report*").

[43] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130.

[44] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[45] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1. HSD subscribership declined more than 33 percent between June 2003 and June 2004. *See id.*

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

(formerly known as Instructional Television Fixed Service (ITFS)).[47] We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to MDS and ITFS.[48]

41. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[49] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[50] In the MDS auction, 67 bidders won 493 licenses.[51] Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[52] MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of $13.5 million annually.[53] Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

42. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).[54] We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

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[47] *See id.*

[48] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[49] 47 C.F.R. § 21.961(b)(1) (2002).

[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, Report and Order*, 10 FCC Rcd 9589 (1995).

[51] MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

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

[53] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

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

43. *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.[55] The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to LMDS.[56] The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions,[57] the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[58] Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years.[59] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[60] In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

44. *Open Video Systems ("OVS").* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[61] OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with $ 13.5 million or less in annual receipts.[62] The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.[63] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD

[55] *See Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

[56] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

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

[58] *See LMDS Order,* 12 FCC Rcd at 12545.

[59] *Id.*

[60] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

[61] *See* 47 U.S.C. § 573.

[62] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[63] *See* Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovscer.html (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovsarc.html (last visited July 25, 2007).

households.[64] Among BSPs, however, those operating under the OVS framework are in the minority.[65] As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers.[66] RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

45. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[67] The SBA has developed a small business size standard for firms within this category, which is all firms with $13.5 million or less in annual receipts.[68] According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.[69] Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999.[70] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

46. *Motion Picture and Video Production*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials."[71] The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts.[72] According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year.[73] Of this total, 7,685 firms had annual receipts of under $24,999,999 and 45 firms had annual receipts of between $25,000,000 and $49,999,999.[74] Thus, under this category and

[64] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1.

[65] OPASTCO reports that less than 8 percent of its members provide service under OVS certification. *See id*. at 2548-49, ¶ 88 n.336.

[66] *See id*. at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,500 subscribers as of June 2005. *See id*. The third largest BSP is Knology, which was serving approximately 179,800 subscribers as of June 2005. *See id.*

[67] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[68] 13 C.F.R. § 121.201 (NAICS code 515210).

[69] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

[70] *Id*. An additional 40 firms had annual receipts of $25 million or more.

[71] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[72] 13 C.F.R. § 121.201 (NAICS code 51211).

[73] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51211) (issued November 2005).

[74] *Id*.

associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

47. *Motion Picture and Video Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[75] The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts.[76] According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year.[77] Of this total, 365 firms had annual receipts of under $24,999,999 and 7 firms had annual receipts of between $25,000,000 and $49,999,999.[78] Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

48. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[79] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[80] We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

49. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[81] According to

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[75] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[76] 13 C.F.R. § 121.201 (NAICS code 51212).

[77] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51212) (issued November 2005).

[78] *Id*.

[79] 15 U.S.C. § 632.

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

[81] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

Commission data,[82] 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

50. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[83] According to Commission data,[84] 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

51. *Electric Power Generation, Transmission and Distribution*. The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[85] The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."[86] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[87] Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

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

[83] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[84] *See* Trends in Telephone Service at Table 5.3.

[85] U.S. Census Bureau, 2007 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211.

[86] 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

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

D. Description of Proposed Reporting, Recordkeeping and other Compliance Requirements

52. The rules ultimately adopted as a result of this *FNPRM* may contain new or modified information collections. We anticipate that none of the changes would result in an increase to the reporting and recordkeeping requirements of small entities. We invite small entities to comment in response to the *FNPRM*.

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

53. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[88]

54. In response to the *FNPRM*, the Commission may choose to continue to apply its current leased access rates to programmers that predominantly transmit sales presentations or program length commercials; it may choose to apply the modified rate formula and the maximum allowable leased access rate of $0.10 per subscriber per month to these programmers; or it may adopt an alternative approach. We invite comment on the options the Commission is considering, or alternatives thereto as referenced above, and on any other alternatives commenters may wish to propose for the purpose of minimizing any significant economic impact on smaller entities.

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

55. None.

[88] 5 U.S.C. § 603(c).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage (*MB Docket No. 07-42)*

The item we adopt today significantly reforms the Commission's leased access rules. I believe it is important for the Commission to foster the development of independent channels, including those owned by minorities and women. By adopting an expedited complaint process and a more rationale method for determining leased access rates, we take steps to make it easier for independent programmers to reach local audiences.

Section 612 of the Communications Act requires the Commission to promote "competition in the delivery of diverse sources of video programming." Unfortunately, however, our existing leased access rules were simply not achieving their intended purpose. For example, the Commission's most recent cable price survey found that cable systems on average carry only .7 leased access channels. The record suggests that the leased access regime has been extremely underutilized because of artificially high rates. Our order, therefore, is designed to increase the use of leased access channels and thereby enhance the diversity of programming.

I believe that the actions we take today will go a long way to accomplishing the twin goals of competition and diversity articulated in section 612 of the Act. I look forward to continuing to work with my colleagues to adopt other policies that are designed to ensure that independent voices are heard.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, CONCURRING IN PART

Re: *In the Matter of Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage (MB Docket No. 07-42)*

The express statutory purpose of leased access is to give independent programmers an opportunity to obtain cable carriage at reasonable rates in order to promote competition and "the widest possible diversity of information sources." Thus, Congress intended leased access to contribute to the diversity of voices that is so central to the proper functioning of our media and, ultimately, to our democracy itself.

Unfortunately, those purposes have rarely been realized. In our most recent annual cable price survey, the Commission found that cable systems on average carry only 0.7 leased access channels. This Order tries to remove several obstacles that may be hindering the use of leased access capacity, including clarifying the information that cable operators must be prepared to provide in response to inquiries, and the time in which it must be provided.

Another obstacle cited by independent programmers is excessive rates. The Order adopts a new methodology that will lower the rates and make them more affordable. One important caveat is that we do not yet extend the lower rate to programmers that carry primarily sales presentations and program length commercials. These programmers often "pay" for carriage -- either directly or through some form of revenue sharing with the cable operator. Lowering the rates for these programmers could cause them to simply migrate to leased access from elsewhere on the cable system because it is less expensive than their current commercial arrangements. Migrating from one part of the cable platform to another would not increase programming diversity. I thank my colleagues for their willingness to examine this issue in a Further Notice.

Finally, while I am generally in favor of ensuring that complainants at the Commission have the information they need to prove their case, as in the recent program access proceeding, I believe that the discovery procedures adopted in this item go too far, and, paradoxically, not far enough. They go too far in establishing a bare "relevance and control" standard for discovery requests with no apparent limits on requests that are duplicative or unduly burdensome. I fear that these rules will embroil the Commission in an endless stream of discovery disputes. On the other hand, I believe the decision does not go far enough because if we are going to liberalize our discovery rules, it ought to apply to other contexts – such as cases dealing with petitions to deny broadcast station license renewals and transfers. I hope that parties in other disputes file waivers with the Commission asking for liberalized discovery. If sunshine is the best disinfectant, we ought to let the sun shine into every nook and cranny of the Commission.

I thank the Bureau for their work on this complex subject, and hope that the rules we adopt will help at long last to turn leased access into a viable and diverse outlet for independent programming.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: Leased Commercial Access, and Development of Competition and Diversity in Video Programming Distribution and Carriage (MB Docket No. 07-42)

I am pleased to support this item which deals with the Commission's commercial leased access rules.

When I requested that we launch this proceeding to reform the current leased access regime, I did so for two reasons. First, I had heard that many small and independent creators of local and diverse programming could not gain access to and carriage on their local cable systems. And second, while Congress explicitly required the Commission to ensure that leased access opportunities remain available and viable, our rules and practices over the years have made leased access unnecessarily burdensome and, in some instances, prohibitively expensive for many independent programmers.

I am, therefore, pleased that the instant *Order* addresses these problems. As the initiator of this proceeding, I would like to thank my colleagues for supporting this thoughtful item. I particularly would like to thank Chairman Martin for heeding my request and following through on our agreement in the *Adelphia* transaction to bring this proceeding to a final order. Given that the Commission's experience with managing leasing arrangements in media is limited to commercial cable leased access, the rules we consider and implement here today should set the baseline standard for any other media leasing arrangement contemplated by the Commission.

Today's *Order* makes remarkable improvements to our commercial cable leased access rules. We first adopt uniform customer service standards to remedy the lack of a consistent and fair treatment of actual and interested leased access programmers. We then reduce the potential expense and burden on a programmer associated with filing a complaint with the Commission about an alleged violation. To ensure that we better monitor leased access practices and the effects of our rules, we adopt an annual reporting requirement for cable operators and we invite leased access programmers to comment on the information provided by cable operators.

As the underlying record shows, the inconsistent and unpredictable treatment of leased access programmers has impeded their ability to lease cable channels. Considering that many part-time leased programmers are small, community-based operations, the difficulty to obtain basic information about leased access opportunities can create an unnecessary barrier of entry. I believe that the Commission must take appropriate steps to facilitate the entry of new and diverse programmers in a manner that has been specifically authorized by Congress.

Leased access programmers should be able to request and then obtain information about rates, terms and conditions in a timely manner. Today, we reaffirm that cable operators have an obligation to reasonably accommodate these requests. Accordingly, we conclude that within three business days of an initial inquiry, a cable operator must provide the prospective leased access programmer with information about, for example, the leased access process and procedures for that specific cable system, the availability of time and leased access channels, the attendant schedule and calculation of rates, and the acceptable methods of delivering leased access programming to the cable operator.

Providing this information to prospective leased programmers does not impose an undue burden on cable operators. In fact, I believe that the service standards we adopt today should simplify the entire leasing process, as all leased access inquires will be treated in a predictable and timely manner. The new and clear standards will set the expectations of prospective and current leased access programmers, and

cable operators. Moreover, the information that programmers receive after their initial inquiry should empower them with sufficient information to determine whether commercial leasing is an opportunity worth pursuing.

In addition to new consumer service standards, I believe this *Order* improves the complaint process in certain important respects. As I said in the underlying Notice of Proposed Rule Making, "there will always be good faith disputes between cable operators and programmers, [but] the Commission does not have mechanisms in place to ensure prompt resolution of complaints. It should not take the Media Bureau nearly two years to respond to a programmer's leased access complaint.[1]" Hence, pursuant to this *Order*, we will codify a rule that requires the Media Bureau to resolve all leased access complaints within 90 days of the close of the pleading cycle, which requires the respondent to reply to a complaint within 30 days. Also, we reduce the expense of filing a complaint by eliminating the requirement for a complainant to obtain a determination of the cable operator's maximum permitted rate from an independent accountant before filing a complaint alleging a rate violation. Finally, the expanded discovery rules we adopt in this *Order* will enable leased access programmers to support complaints of alleged rule violations or unfair treatment.

While I am pleased with the outcome of this Order, I would have preferred that we first solicited meaningful public comment and review on the new rate methodology adopted here. To be frank, the methodology was invented by staff out of whole cloth without sufficient public input, independent review or any transparency. I received much of the details only late last week, right before the Thanksgiving holiday and right after Sunshine closed. As with any new pricing formula, its reliability and accuracy are directly correlated to the extent to which it has undergone rigorous examination and independent review. To my knowledge, neither has occurred in this case. Indeed, good government cautions us to seek comment before adopting a new, industry price regulation. All stakeholders have a right to see and comment on the specific formula on which we intend to rely. To be sure, I actually like the outcome – a maximum leased access rate of 10 cents per subscriber per month for any cable system. But as an expert governmental agency, it is incumbent upon us to provide regulatees with a process that is fair and open, and inspires confidence in the American people and the courts.

I am, however, satisfied that we do not apply this new rate methodology on programmers that predominately transmit sales presentations or program length commercials, but rather seek comment on these issues. It is also appropriate that we provide a 90 day delay in the effective date of the new formula so that all parties can have opportunity to inform us of any concerns or file petitions for reconsideration. This remedies the deficient notice sufficiently for me to support the item.

I am thankful to my fellow Commissioners and Chairman Martin for ensuring that this item was finalized within a reasonable period of time. I also want to thank the commenters for offering real solutions to this process and providing insight needed to ascertain the breadth of this item and the intricacies of how the process should work. I am hopeful that this *Order* today will help us reach both Congress' and our goal in having more diverse cable programming.

[1] *See United Production v. Mediacom Communications Corp.*, *Order*, Media Bureau, CSR 6336-L (adopted January 26, 2007, DA 07-273). The Petition for Commercial Leased Access was filed on February 25, 2005.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

Re: Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage

Allowing programmers to lease time on cable channels is yet another way the FCC encourages program diversity and the dissemination of a variety of viewpoints. It also allows local programmers to have access to cable's audience for the promotion of products and services, as well as airing of local community events. We appreciate the cooperation of cable operators in making these channels available.

In light of the concerns that have been raised with regard to the prices charged by cable for the use of these channels, I believe we should seek comment on whether our maximum allowable rate should be changed from the average implicit fee to the marginal implicit fee. Just as we did in 1996, when we initially lowered the maximum allowable rate for carriage, we should ask that interested parties analyze the advantages and disadvantages of this new rate formula. We should also seek input on whether lowering the maximum allowable rate will increase the number of leased access programmers on cable's systems.

Because we fail to seek comment on these important changes, I respectfully dissent.

DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage (MB Docket No. 07-42)

Rather few programmers have sought carriage on cable systems through leased access, which was designed by Congress in 1984 to bring about diversity of information sources. By all accounts, there are two primary reasons that leased access has not been more successful. First, leased access may not be economically viable for the vast majority of programmers. Outside of leased access, cable operators generally pay programmers per-subscriber fees for the programming they choose to carry. Those programmers rely on these fees, as well as advertising revenues, to generate enough revenue to develop programming for a full-time channel. Leased access programmers, however, must pay cable operators for access to channels. Therefore, the economics of leasing result in limited use by traditional, full-time programmers. The record indicates that generally, part-time programmers producing home shopping content, infomercials, adult content and, ironically, certain types of religious programs are attracted to this business model because they have other means of generating revenue from their viewers. Leased access channels are also used full-time by low-power broadcast stations, which transmit their programming over-the-air but do not have must-carry rights for cable carriage.

Secondly, outside of the leased access regime, the marketplace has generated an incredible amount of programming diversity as more programmers have created compelling content from all different genres of entertainment, news, sports and culture and gained cable carriage through negotiated deals. Competition has transformed the amount and content of program offerings available to cable subscribers to a degree not envisioned in 1984.

Against this backdrop, the majority today attempts to transform leased access into something that economic reality has shown it cannot be: a viable business model for independent and niche programmers to obtain distribution for their channels. The majority lowers leased access rates dramatically, in contravention of both the law and prior Commission findings. Congress mandated that any leased access rate we establish must be "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system." Congress also required that cable systems set aside public, educational and governmental access channels for free to the users. Congress, however, did not intend that cable operators subsidize commercial leased access users.

Moreover, the Commission developed the current "average implicit fee" methodology in 1997 after extensive review of the economic studies and policy discussions submitted at that time. The record in this proceeding, and our consideration of it, do not come close to reaching that level of careful analysis. The least we could have done was to seek comment on any changes to the current rate formula. This Order even fails to do that. The result of this radical change in rates, as many independent programmers have stated in the record, will be the opposite of what is intended. The result will be a loss in the diversity of programming as cable operators are forced to drop lesser-rated channels in favor of a flood of leased access requests seeking distribution distorted below cost and market rates.

Perhaps to ameliorate this result, the majority concludes that the new rate methodology will not apply to programmers that predominantly transmit sales presentations, or program-length commercials, and seeks additional public comment on related issues. This too is extremely problematic. I cannot fathom how distinguishing programmers based on the content they deliver can be constitutional. Perhaps the courts will guide us.

The majority goes on to: adopt "customer service standards," expedite our process for

adjudicating complaints, expand discovery, and require reporting of statistics – all additional regulations aimed at propping up a regulatory regime that is past its prime. I sympathize with programmers, particularly Class A television stations, who struggle for distribution. I also am concerned about programmers "getting the run-around" or being otherwise dissuaded from leasing cable channels. I strongly encourage cable operators to make their leased access rates and terms available to programmers who request information as expeditiously and transparently as possible. The rules set forth in this Order, however, go far beyond what is needed.

Accordingly, I respectfully dissent to this Report and Order.