

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

In the Matter of
DTV Consumer Education Initiative
MB Docket No. 07-148

ORDER ON RECONSIDERATION AND
FURTHER NOTICE OF PROPOSED RULEMAKING

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Comment Date: [30 days after date of publication in the Federal Register]

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By the Commission: Commissioner McDowell approving in part, concurring in part and issuing a statement.

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I. INTRODUCTION

1. In this Order on Reconsideration, we reconsider in part, *sua sponte*, our March 3, 2008, decision in this proceeding,¹ in which we adopted digital television (“DTV”) transition consumer education and outreach requirements for a number of industry participants, and clarify some of those requirements. In the *DTV Consumer Education Order* we required, among other things, that consumer electronics manufacturers include information about the DTV transition with certain products and eligible telecommunications carriers (“ETC”) include information about the DTV transition in customer bills.² In this Order, we modify our requirements regarding the timing, scope, and content of manufacturer notices and the method of delivery of ETC notices, and clarify other manufacturer requirements. In the accompanying *Further Notice of Proposed Rulemaking*, we ask whether the ETC obligation to provide monthly DTV transition notices to low-income subscribers should be expanded to require the provision of such notices to all subscribers, and whether MVPDs should be required to provide on-air DTV transition education on their systems.

II. BACKGROUND

2. In the *DTV Consumer Education Order* the Commission sought to ensure widespread consumer understanding of the benefits and mechanics of the transition by promoting a coordinated, national DTV consumer education campaign. One facet of this campaign was the establishment of a requirement that manufacturers of television receivers and related devices include information with those devices explaining the DTV transition and what effect, if any, it would have on the use of the device, and providing contact information for consumers to find out more.³ In particular, we required that such information had to be included with receivers and “related devices” (a term defined only by a non-exclusive list) that were “shipped” between the effective date of the rules and March 31, 2009, by any party that manufactured, imported, or shipped the device.⁴ The rules as adopted also required ETCs that receive federal universal service funds to provide DTV transition information to low-income subscribers and potential subscribers. In particular, we required that ETCs provide notice to their Lifeline and Link-Up customers, by notices in their monthly bills or billing notices.⁵

3. Following release of the *DTV Consumer Education Order*, we received a number of *ex parte* filings and pleadings raising concerns about the manufacturer requirements and the manner of notification required by ETCs. Specifically, the Consumer Electronics Retailers Coalition (“CERC”), along with the Consumer Electronics Association (“CEA”) and several individual retailers and manufacturers, ask the Commission to clarify the parties responsible for inclusion of the notices, and the

¹ *In the Matter of DTV Consumer Education Initiative*, Report and Order, 23 FCC Rcd 4134, MB Docket No. 07-148 (rel. Mar. 3, 2008) (“*DTV Consumer Education Order*”).

² *Id.* at ¶ 46.

³ *Id.* at ¶¶ 46-47.

⁴ *Id.* at Appendix B, Section 15.124.

⁵ The Rules also required education by a number of industry groups not at issue in the instant Order. For example, full-power broadcasters are required to engage in extensive on-air education via public service announcements and other efforts, and must file quarterly reports with the Commission on their voluntary and mandatory efforts and make those reports available to the public. *Id.* at Appendix A.

point in the manufacturing process that is relevant for application of the rules. CEA and CERC also seek delayed implementation of the rules with respect to manufacturers, the removal of manufacturers from the list of contacts from which consumers can seek further information, and a narrowing of the list of devices covered. On the separate issue of ETC education, Rural Cellular Corporation (“RCC”), followed by a number of other ETCs, filed petitions for reconsideration, or in the alternative, limited waiver, seeking authorization for using alternative methods (*i.e.*, not bill notices) to notify Lifeline and Link-Up customers of the transition.

III. ORDER ON RECONSIDERATION

4. In this Order on Reconsideration, we provide manufacturers and those acting on their behalf with greater certainty regarding the devices that are covered by these rules, additional time to prepare to include the required notices, and a modified list of contact points to list in those notices. We also clarify the parties responsible for inclusion of the notices, and the relevant point in the manufacturing process at which the requirement begins, and take this opportunity to revise the rules to better capture the devices and parties to which they apply. Finally, we revise our rules to permit ETCs to educate their low-income customers via targeted monthly mailings, as an alternative to inclusion of notices in or on billing statements.

A. Manufacturer Notice Requirements

1. Devices Covered

5. Every consumer electronics commenter supported changes to the “related devices” standard in Section 15.124(a). CEA, in its initial *ex parte* filing, argues for excluding “related devices” from the rule entirely, and requiring notices only with television receivers.⁶ The consumer electronics commenters initially supported this proposal, but offered a number of variations over the course of their presentations to the Commission.⁷ We agree with the essential thrust of these *ex partes*, that the group of “related devices” to which the notice requirement applies should be certain and clear. They support: (1) a discrete list of devices rather than the open ended category of “related devices,” and (2) limiting that list to devices that work closely with television receivers.

6. Upon reconsideration, we will limit the “related devices” covered by this rule to the following categories, which are derived in large part from existing rule requirements, with specific adjustments that are appropriate to these consumer education requirements.⁸ The categories are: television broadcast receivers as defined in Section 15.3(w); TV interface devices as defined in Section 15.3(y); devices that record and/or display signals received from television broadcast receivers;⁹ and set-top boxes available for sale at retail that receive video programming provided by multi-channel video programming distributors (“MVPDs”).¹⁰ This definition creates a discrete and definable universe of

⁶ CEA March 6 *ex parte* at 2.

⁷ See generally, *e.g.*, Pioneer March 12 *ex parte* and Pioneer April 2 *ex parte*. We note that CERC’s March 17 *ex parte* contained three distinct proposals, each of which, if adopted, would cover slightly different groups of devices. Our decision, *sua sponte*, is largely consistent with these proposals but eliminates the inconsistency and ambiguity.

⁸ The “related devices” included within this rule by no means constitute a full list of devices related to televisions. When used in the context of this Order, the term refers to the devices covered by the rule. Its use in this manner, however, reflects neither the limits of the term’s meaning or the limits of the Commission’s authority.

⁹ This category includes only those devices designed for use with television receivers, such as DVD and Blu-ray recorders. It also includes only those monitors with at least one baseband NTSC input, thus excluding monitors intended solely for use with computer equipment.

¹⁰ See revised rule Section 15.124(a) in Appendix A.

“related devices,” most of which interact directly with a television receiver either by receiving information from it or relying on its presence to convey information to a viewer. The rule also requires manufacturers to provide information with MVPD set-top boxes even if they do not contain or rely on a television receiver. This information is needed to counter consumer confusion about the functioning of such boxes in light of the over-the-air digital transition.¹¹ In this instance, for example, the information provided could explain that the transition does not affect the use or functioning of these boxes or clarify that such boxes are not eligible for NTIA coupons.

7. We make these modest changes because we believe that some of the concerns of the consumer electronics commenters regarding scope are well taken. The devices related to televisions and television use are many and varied, and, upon reconsideration, we are convinced that requiring that notices be included with every such device will create a greater burden on consumer electronics manufacturers and importers than is justified by the incremental gains in consumer awareness. Because we find that this revised rule more clearly reflects the best approach to educating consumers, the Commission will exercise its enforcement discretion and decline to penalize entities for not adhering to the requirements of the original rule while waiting for the modified rule to go into effect.

2. Parties Responsible

8. The *DTV Consumer Education Order* imposed responsibility for compliance with the manufacturer rules on parties that “manufacture, import, or ship interstate television receivers and related devices.”¹² CERC, the first consumer electronic manufacturer to file an *ex parte* raising concern about this language, argued that the language was “potentially highly misleading,” and, at best, “entirely redundant” because “law and regulation already define the parties responsible for Part 15 compliance.”¹³ Over the course of its filings, CERC argued that the language as written could impose responsibility and liability on parties far beyond “the party responsible as the ‘manufacturer,’” and that this would expand the rule beyond that contemplated in the Notice of Proposed Rulemaking.¹⁴ Furthermore, as noted, CERC argued that the parties responsible for compliance were already clear under the rules, and that to go beyond that existing understanding would add burden by making it unclear which party was responsible for the notices without reaching any additional consumers. Subsequent filers agreed, and Pioneer in its April 4 filing proposed to revise Section (c) to explicitly cite to Section 2.909 of the Commission’s Rules.

9. Upon reconsideration, we revise Section 15.124(c) to clarify that the party responsible for inclusion of the notice is the “manufacturer,” or the party acting as the manufacturer under our rules. We are revising the rule in accordance with the suggestion of Pioneer (speaking with the concurrence of all the consumer electronics commenters), to simply direct parties to Section 2.909 of the Rules in order to determine the “responsible party” for the purposes of enforcement of this rule.¹⁵ Because we find that this revised rule more clearly reflects the best approach to educating consumers, the Commission will exercise its enforcement discretion and decline to penalize entities for not adhering to the requirements of the original rule while waiting for the modified rule to go into effect.

3. Point of “Manufacture”

10. The consumer electronics commenters, including LG, Hitachi, and Samsung, argue that

¹¹ *DTV Consumer Education Order*, 23 FCC Rcd 4134 at ¶ 38 and note 108.

¹² *DTV Consumer Education Order*, 23 FCC Rcd 4134 at Appendix B.

¹³ CERC March 10 *ex parte* at 2.

¹⁴ CERC March 17 *ex parte* at 2.

¹⁵ See revised rule Section 15.124(c) in Appendix A.

the current language of the rules, under which devices “shipped” during the effective period of the rules are covered by the rules, is neither clear as to its intent nor, on its face, limited to manufacturers and those acting in their stead.¹⁶ Instead, they argue that the word “manufactured” should be used to clarify that our rules do not “require notices to be applied at secondary logistics centers, which would require opening or repackaging, or to products staged in containers for delivery to dealers after such products had already been imported or shipped from the point of manufacture.”¹⁷ Indeed, CERC argues that “a rule that would apply to all interstate shipments, whether or not from the factory, would be unworkable because identical products could be in various stages of preparation, shipment, and storage when the regulation becomes effective,”¹⁸ and indeed under such a regime that it would be “impossible” to determine whether compliance was required for any given product.¹⁹ The industry commenters on this question ask the Commission to clarify that we are applying the rules to devices “packed and sealed” for eventual retail purchase,²⁰ not simply devices shipped by any party during the effective period of the rules.²¹

11. Upon reconsideration, we find that it is in the public interest to revise the language of our rules, replacing “shipped” with “manufactured” to more accurately and clearly reflect the intent of the rule.²² The requirement to ensure that each covered device include, on or in the packaging, the required consumer education information, rests with the responsible party. Therefore, as under the existing rule, we will require notices to be included with any television receiver or related device if the date of manufacture of the final product occurs during the effective period of the rules. Because we find that this revised rule more clearly reflects the best approach to educating consumers, the Commission will exercise its enforcement discretion and decline to penalize entities for not adhering to the requirements of the original rule while waiting for the modified rule to go into effect.

4. Start Date

12. The *DTV Consumer Education Order* created consumer notice requirements requiring printed notices for three groups: MVPDs, ETCs, and manufacturers. In the Order as adopted, both MVPDs and ETCs were given 30 days from the effective date of the rules to begin complying, but manufacturers were required to begin compliance immediately (*i.e.*, on March 31, 2008).²³ Shortly after the release of the *DTV Consumer Education Order*, CERC, CEA, Sony Electronics Inc. (“Sony”), Pioneer North America, Inc. (“Pioneer”), and Panasonic Corporation of North America (“Panasonic”) (collectively, “the consumer electronics commenters”) made *ex parte* presentations requesting that manufacturers be granted the same time period for implementation of the DTV notice requirements as

¹⁶ See generally, Pioneer April 2 *ex parte*.

¹⁷ Panasonic March 14 *ex parte* at 2.

¹⁸ CERC April 1 *ex parte* at 1.

¹⁹ CERC March 17 *ex parte* at 1.

²⁰ Pioneer April 2 *ex parte* at 2.

²¹ CERC March 14 *ex parte* at 1.

²² See revised rule Section 15.124(a) in Appendix A.

²³ Section 54.418(a), governing ETCs, requires notice “beginning 30 days after the effective date of these rules, and concluding in March 2009.” In identical language, Section 76.1630(a), governing MVPDs, requires notice “beginning 30 days after the effective date of these rules and concluding in March, 2009.” Section 15.124(b), however, requires that manufacturers include notices with “[t]elevision receivers and related devices shipped between the effective date of these rules and March 31, 2009....” *DTV Consumer Education Order* at Appendix B.

MVPDs and ETCs.²⁴ The parties argued that a certain “lead time” is necessary to ensure compliance with the Commission requirements, due to the time necessary for reconfiguring packaging equipment and printing notices. CEA in particular expressed concern that the rules as drafted would put manufacturers out of compliance immediately upon becoming effective. Thus, they request that the Commission delay their effective date, as the Commission had done for the other groups who were required by the Order to provide written notice to consumers.²⁵

13. We find upon reconsideration that it is in the public interest to revise the start date for our manufacturer notice requirements.²⁶ Due to the urgent need for consumer education, we found good cause to make the original rules effective immediately upon publication in the Federal Register.²⁷ As a result, manufacturers did not get the more common 30 day lead time after notice of publication before the rules became effective. We are persuaded that they need additional time to come into compliance, and the approval and publication process associated with implementation of the amended rules will give manufacturers sufficient time to fully comply.²⁸ To further assist the manufacturers in ensuring their readiness for compliance, we are establishing a date certain, May 30, 2008,²⁹ as the effective date for these rules.³⁰ The rule revisions adopted in this *Order on Reconsideration* modify information collections and will not be effective until OMB approval.³¹ We will be seeking emergency review by OMB, and will note in our request that the amended rules give manufacturers additional flexibility beyond that granted in the rules already in place, which were granted emergency review.³² Furthermore, as discussed above,³³ the Commission will refrain from enforcement of any manufacturer rules until the new rules go into effect. Consequently, manufacturers will have ample time after adoption and release of this Order to come into compliance before the rules take effect.

²⁴ See CEA March 6 *ex parte*; CERC March 10 *ex parte*; Sony March 10 *ex parte*; Pioneer March 12 *ex parte*; Panasonic March 14 *ex parte*.

²⁵ CEA March 6 *ex parte* at 1.

²⁶ See revised rule Section 15.124(a) in Appendix A.

²⁷ *DTV Consumer Education Order*, 23 FCC Rcd 4134 at ¶ 72, citing 5 U.S.C. § 553(d)(3) and 47 C.F.R. §§ 1.103(a), 1.427(b).

²⁸ As noted above, CEA, later joined by CERC and other consumer electronics commenters, sought a delay of enforcement of the manufacturer notice rules, requesting “the same time period for implementation of the notice requirement that is required of MVPDs” and ETCs. CEA March 6 *ex parte* at 1. MVPDs and ETCs will be required to be compliant with the rules governing them on April 30, 2008. Because of the approval and publication process through which these revised manufacturer rules must go, they will be effective no earlier than May 30, 2008. Thus, consumer electronics commenters will have sufficient time to comply.

²⁹ As noted, this date is subject to the modified rules having received OMB approval by this date.

³⁰ We anticipate that the summary of the Order will be published in the Federal Register at least 30 days before the effective date of May 30, 2008. In the event that publication is delayed, however, we find good cause for these rules to be effective on May 30, 2008, to ensure that consumers are informed about the digital television transition on February 17, 2009, the statutory deadline for all full power television broadcasters to transition to all digital service.

³¹ Paperwork Reduction Act of 1995, 44 U.S.C. § 3507(d).

³² 5 C.F.R. § 1320.13.

³³ ¶¶ 7, 9, and 11, *supra*.

5. Manufacturer Contact Information in Notices

14. The *DTV Consumer Education Order* required that the notices included with television receivers and related devices contain a number of contact points in order for consumers to be able to find more information about the transition. The rules required that one of these contact points be the “manufacturer at [telephone number].”³⁴ CERC and CEA point out that “in many cases a manufacturer does not maintain an appropriate telephone number, so this requirement could result in consumer confusion.”³⁵ The notices also must contain web site addresses and contact information to allow consumers to find additional information about the DTV transition.

15. Upon reconsideration, we recognize and share the consumer electronics commenters’ concerns. We also recognize the importance of providing consumers with a variety of effective resources. Therefore, in order to ensure that consumers have straightforward access to the best sources of information about the transition, we will eliminate the requirement that manufacturers include their phone number on the notices shipped with televisions and certain related devices, but will require that manufacturers include the FCC Call Center’s number on these notices.³⁶

B. Eligible Telecommunications Carrier Notice Requirements

16. As discussed above, the ETC education rules require that ETCs include transition notices in the monthly bills or bill notices of their low-income (Lifeline/Link-Up) customers. The Commission has received two independent Petitions for Reconsideration, on behalf of several ETCs in the Midwest, which seek expedited reconsideration of the *DTV Consumer Education Order*, or, in the alternative, limited waivers, to allow ETCs to provide notice via monthly postcards, rather than in the bills themselves.³⁷ The ETCs argue that a monthly postcard would be significantly less expensive than a bill notice.³⁸ They also argue that it would be, at a minimum, impractical to include notices in the bills of only Lifeline and Link-Up customers, and that a portion of the cost savings will come from targeting Lifeline/Link-up subscribers, as our Order required, instead of distributing the notices to all customers.³⁹ The ETCs also argue that a postcard will be a better vehicle for customer education than a bill notice, because it is more noticeable than information included with a bill.⁴⁰

17. We find, upon reconsideration, that it is in the public interest to revise our rules to permit alternative methods of monthly outreach by ETCs to Lifeline and Link-Up customers. We adopt the proposal of RCC, to permit use of a monthly stand-alone mailer to these customers in lieu of inclusion of transition information in bills or billing notices.⁴¹ This change has no impact on the information which must be conveyed in the notice, it simply expands the permissible forms in which the notice may be

³⁴ 47 CFR 15.124(b)(2)(ii).

³⁵ CERC April 16 *Ex Parte* at 2.

³⁶ See revised rule section 15.124(b) in Appendix A.

³⁷ Petition For Expedited Reconsideration Or, In The Alternative, Petition For Limited Waiver of Rural Cellular Corporation (March 25, 2008) (“RCC PFR”); Petition For Expedited Reconsideration Or, In The Alternative, Petition For Limited Waiver of Northwest Dakota Cellular, *et al.* (March 28, 2008) (“Dakota PFR”).

³⁸ RCC PFR at 4.

³⁹ Dakota PFR at 5.

⁴⁰ RCC PFR at 4.

⁴¹ RCC PFR at Appendix A.

provided. We also remind ETCs of their obligation to include DTV transition information in all Lifeline and Link-up publicity and advertising, and that this obligation is not affected by these revisions. We note that the revised rules will not be effective until May 30, 2008, but that, pursuant to the existing effective rules, beginning April 30, 2008, ETCs must provide monthly DTV transition notices to their low-income customers.⁴² We intend to enforce these existing rules, beginning on April 30. However, we will apply our prosecutorial discretion, and will not enforce the existing rules against ETCs that use a monthly stand-alone mailer (e.g., postcard, brochure), rather than a billing insert, prior to May 30, so long as they otherwise comply with the customer notice rules.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

18. As discussed in the accompanying *Order on Reconsideration*, the revised ETC education rules require that ETCs provide monthly transition notices to their low-income (Lifeline/Link-Up) customers.⁴³ This requirement is similar to the one proposed by Chairmen Dingell and Markey in their Letter to the Commission, in which they suggested that the Commission “require, as an interim measure, that telecommunications carriers that receive funds under the Low Income Federal universal service program . . . notify each of their low income customers of the digital transition and include such a notice in their required Lifeline and Link-Up publicity efforts.”⁴⁴ On April 15, 2008, during Chairman Martin’s testimony before the House Committee on Energy and Commerce’s Subcommittee on Telecommunications and the Internet, Congressman Fred Upton suggested that the Commission explore revising these rules to require that ETCs provide monthly notices to all of their subscribers, rather than just low-income subscribers.⁴⁵ Such a revision would ensure a wider reach for DTV transition notices as the February 17, 2009, deadline approaches, but could increase expenses for ETCs. What is the appropriate balance for the Commission’s Rules in this area? We seek comment on this proposal.

19. The first Notice of Proposed Rulemaking in this proceeding sought comment on “other initiatives that the Commission can and should undertake to educate the public on the DTV transition.”⁴⁶ In response to this request, some commenters proposed that the Commission require multichannel video programming distributors (MVPDs) to provide on-air DTV transition education on their systems.⁴⁷ We seek comment on this proposal. As the National Cable and Telecommunications Association (NCTA) has noted, the cable industry, for instance, is already engaged in a “\$200 million digital TV transition consumer education campaign, highlighted by English and Spanish language television commercials.”⁴⁸ Should we require MVPDs, such as cable and DBS providers, to provide on-air DTV transition education on their systems as we have for TV broadcasters? We seek comment on what entities should be covered

⁴² Section 54.418.

⁴³ See III.B, *supra*.

⁴⁴ Letter from the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, to the Honorable Kevin J. Martin, Chairman, the Honorable Michael J. Copps, Commissioner, the Honorable Jonathan S. Adelstein, Commissioner, the Honorable Deborah Taylor Tate, Commissioner, and the Honorable Robert M. McDowell, Commissioner, Federal Communications Commission, received May 24, 2007 (“Letter”) at 4; attached as Appendix D.

⁴⁵ *Oversight of the Federal Communications Commission – the 700 MHz Auction, Hearing before the House Committee on Energy and Commerce’s Subcommittee on Telecommunications and the Internet*, 110th Cong. (2008).

⁴⁶ *DTV Consumer Education Initiative*, MB Docket No. 07-148, Notice of Proposed Rulemaking, 22 FCC Rcd 14091 (2007) (“DTV Consumer Education NPRM”).

⁴⁷ See, e.g., Comments of the Benton Foundation at 17 (September 17, 2007).

⁴⁸ Comments of the National Cable and Telecommunications Association at 2 (September 17, 2007).

and the on-air educational efforts that should be required.

V. PROCEDURAL MATTERS

A. Order on Reconsideration

1. Final Regulatory Flexibility Analysis

20. As required by the Regulatory Flexibility Act of 1980 (“RFA”),⁴⁹ the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Order on Reconsideration*. The FRFA is set forth in Appendix B.

2. Paperwork Reduction Act Analysis

21. This *Order on Reconsideration* was analyzed with respect to the Paperwork Reduction Act of 1995 (“PRA”) and contains modified information collection requirements, relating to the following approved collections: (1) manufacturers of television receivers and related devices must provide notice to consumers buying their devices of the transition’s impact on that equipment; and (2) ETCs that receive federal universal service funds must provide notice of the transition to their low income customers and potential customers. The information collection requirements contained in this Report and Order will be submitted to the Office of Management and Budget (“OMB”) for review under Section 3507(d) of the PRA.⁵⁰ The Commission will seek OMB approval for these information collection requirements and forms in accordance with OMB’s emergency processing rules.⁵¹ The Commission will publish a separate Federal Register Notice seeking comments from OMB, the general public, and other Federal agencies on the final information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we will also seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees”⁵² in the Federal Register Notice seeking comment on the information collections.

3. Congressional Review Act

22. The Commission will send a copy of this *Order on Reconsideration* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.⁵³

B. Further Notice of Proposed Rulemaking

1. Initial Regulatory Flexibility Analysis

23. As required by the Regulatory Flexibility Act of 1980 (“RFA”),⁵⁴ the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to this *Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix C.

⁴⁹ See 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

⁵⁰ 44 U.S.C. § 3507(d).

⁵¹ 5 C.F.R. § 1320.13.

⁵² 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).

⁵³ 5 U.S.C. § 801(a)(1)(A).

⁵⁴ *See* 5 U.S.C. § 603.

2. Initial Paperwork Reduction Act Analysis

24. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (“OMB”) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”⁵⁵

3. Ex Parte Rules

25. Permit-But-Disclose. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under Section 1.1206(b) of the Commission’s Rules.⁵⁶ *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.⁵⁷ Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

4. Filing Requirements

26. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules,⁵⁸ interested parties may file comments on or before 30 days after publication in the Federal Register, and reply comments on or before 45 days after publication in the Federal Register using: (1) the Commission’s Electronic Comment Filing System (“ECFS”), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies.⁵⁹

- 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.

⁵⁵ 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).

⁵⁶ See 47 C.F.R. § 1.1206(b); see also 47 C.F.R. §§ 1.1202, 1.1203.

⁵⁷ See *id.* § 1.1206(b)(2).

⁵⁸ See *id.* §§ 1.415, 1.419.

⁵⁹ See *Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998).

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

27. **Availability of Documents.** Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

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

C. Additional Information

29. For more information on this *Order on Reconsideration and Further Notice of Proposed Rulemaking*, please contact Lyle Elder, Lyle.Elder@fcc.gov, or Eloise Gore, Eloise.Gore@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

30. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 7, 254, 303, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 157, 254, 303, and 309, this Order on Reconsideration IS ADOPTED and Parts 15 and 54 of the Commission's Rules ARE AMENDED as set forth in Appendix A. These amended rules will be effective beginning May 30, 2008, provided, however, that the rules contain information collection requirements subject to the PRA and are not effective until approved by the OMB. We anticipate that the summary of the Order will be published in the Federal Register at least 30 days before the effective date of May 30, 2008. In the event that publication is delayed, however, we find good cause for these rules to be effective on May 30, 2008, to ensure that consumers are informed about the digital television transition on February 17, 2009, the statutory deadline for all full power television broadcasters to transition to all digital service.⁶⁰

⁶⁰ See 5 U.S.C. § 553(d)(3) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except...as otherwise provided by the agency for good cause found and published with the rule."). See also 47 C.F.R. §§ 1.103(a), 1.427(b). As described in this Order, the Commission has found that the (continued....)

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page) _____
public must be better informed regarding the digital television transition prior to its conclusion on February 17, 2009. Because of the limited period of time remaining prior to that date, we believe it is essential that coordinated, nationwide education efforts begin as soon as possible. Without sufficient accurate information to guide decisionmaking, consumers may be unprepared for the digital transition when it arrives, and may be unable to obtain critical information in emergencies after the transition. In such instances, consumers would be financially harmed and deprived of service at a critical time. Because delay can result in such harms to consumers and because affected parties will be afforded a reasonable opportunity to comply with the rule, we find that there is good cause to expedite the effective date of this rule. For these reasons, we are also requesting emergency PRA approval from OMB.

APPENDIX A

Amended Rules¹

Parts 15 and 54 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 15 – Radio Frequency Devices

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 302a, 303, 304, 307, 336, and 544a.

2. Section 15.124 is revised to read as follows:

§ 15.124 DTV Transition Notices by Manufacturers of Televisions and Related Devices

(a) Television receivers and related devices manufactured between May 30, 2008 and March 31, 2009 must include notices about the digital television (DTV) transition. Related devices covered by this requirement: all television broadcast receivers as defined in Section 15.3(w); TV interface devices as defined in Section 15.3(y); devices that record and/or display signals received from television broadcast receivers; and set-top boxes available for sale at retail that receive video programming provided by multi-channel video programming distributors.

(b) The notices required under (a) must:

- (1) Be in clear and conspicuous print;
- (2) Convey at least the following information about the DTV transition:
 - (i) After February 17, 2009, a television receiver with only an analog broadcast tuner will require a converter box to receive full power over-the-air broadcasts with an antenna because of the Nation's transition to digital broadcasting. Analog-only TVs should continue to work as before to receive low power, Class A or translator television stations and with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.
 - (ii) Information about the DTV transition is available from www.DTV.gov or ~~[this manufacturer at [telephone number]]~~ **1-888-CALL-FCC**, and from www.dtv2009.gov or 1-888-DTV-2009 for information about subsidized coupons for digital-to-analog converter boxes; and
- (3) Explain clearly what effect, if any, the DTV transition will have on the use of the receiver or related device, including any limitations or requirements associated with connecting a related device to a DTV receiver.

(c) This notice requirement applies to all responsible parties, as defined in § 2.909 of this chapter.

Part 54 – Universal Service

1. The authority citation for Part 54 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i), 201, 205, 214, and 254 unless otherwise noted.

¹ Changes are indicated in **bold**.

2. Section 54.418 is revised to read as follows:

§ 54.418 Digital Television Transition Notices by Eligible Telecommunications Carriers

(a) Eligible telecommunications carriers (ETCs) that receive federal universal service funds shall provide their Lifeline or Link-Up customers with notices about the transition for over-the-air full power broadcasting from analog to digital service (the “DTV Transition”) in the monthly bills or bill notices received by such customers, **or as a monthly stand-alone mailer (e.g., postcard, brochure)**, beginning April 30, 2008 and concluding in March 2009.

(b) The notice must be provided as part of an information section on the bill or bill notice itself or on a secondary document mailed with the bill or bill notice, **or as part of a monthly stand-alone mailer (e.g., postcard, brochure)** in the same language or languages as the **customer’s** bill or bill notice. These notices must:

(1) Be in clear and conspicuous print;

(2) Convey at least the following information about the DTV transition:

(i) After February 17, 2009, a television receiver with only an analog broadcast tuner will require a converter box to receive full power over-the-air broadcasts with an antenna because of the Nation’s transition to digital broadcasting. Analog-only TVs should continue to work as before to receive low power, Class A or translator television stations and with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.

(ii) Information about the DTV transition is available from www.DTV.gov, and from www.dtv2009.gov or 1-888-DTV-2009 for information about subsidized coupons for digital-to-analog converter boxes;

(c) If an ETC’s Lifeline or Link-Up customer does not receive paper versions of either a bill or a notice of billing, then that customer must be provided with equivalent monthly notices in whatever medium they receive information about their monthly bill **or as a monthly stand-alone mailer (e.g., postcard, brochure)**.

APPENDIX B

Supplemental 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 into the *Notice of Proposed Rulemaking (Notice)*.² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This present Supplemental Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the *Order on Reconsideration*

2. Following release of the *DTV Consumer Education Order*,⁴ we received a number of *ex parte* filings and pleadings raising concerns about the manufacturer requirements and the manner of notification required by eligible telecommunications carriers (ETCs). Specifically, the Consumer Electronics Retailers Coalition (CERC), along with the Consumer Electronics Association (CEA) and several individual retailers and manufacturers, ask the Commission to clarify the parties responsible for inclusion of the notices, and the point in the manufacturing process that is relevant for application of the rules. CEA and CERC also seek delayed implementation of the rules with respect to manufacturers, and a narrowing of the list of devices covered. On the separate issue of ETC education, Rural Cellular Corporation (RCC), followed by a number of other ETCs, filed petitions for reconsideration, or in the alternative, limited waiver, seeking authorization for using alternative methods (i.e., not bill notices) to notify Lifeline and Link-Up customers of the transition. This *Order on Reconsideration* provides manufacturers and those acting on their behalf with greater certainty regarding the devices that are covered by the consumer education rules, and additional time to prepare to include the required notices. We also clarify the parties responsible for inclusion of the notices, and the relevant point in the manufacturing process at which the requirement begins, and take this opportunity to revise the rules to better capture the devices and parties to which they apply. Finally, we revise our rules to permit ETCs to educate their low-income customers via targeted monthly mailings, as an alternative to inclusion of notices in or on billing statements.⁵ We make these modest changes because we believe that some of the concerns of the consumer electronics and ETC commenters are appropriate, and find that these revised rules more clearly reflect the best approach to educating consumers.

B. Summary of Issues Raised by Post-Order Filings

3. We received no filings directly in response to the previous FRFA.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *DTV Consumer Education Initiative*, MB Docket No. 07-148, Notice of Proposed Rulemaking, 22 FCC Rcd 14091 (2007) (DTV Consumer Education NPRM).

³ See 5 U.S.C. § 604.

⁴ *In the Matter of DTV Consumer Education Initiative*, Report and Order, 23 FCC Rcd 4134, MB Docket No. 07-148 (rel. Mar. 3, 2008) (“*DTV Consumer Education Order*”).

⁵ See amended rules in Appendix A, *supra*.

C. Description and Estimate of the Number of Small Entities to Which the Report and Order Will Apply

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.⁶ The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small business concern” under Section 3 of the Small Business Act.⁷ Under the Small Business Act, 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).⁸ The rules adopted herein will directly affect small consumer electronics (CE) manufacturers and those acting in that capacity (frequently CE retailers) and small eligible telecommunications carriers (ETCs). A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

5. *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.⁹ According to Commission data,¹⁰ 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.

6. *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.¹¹ According to Commission data,¹² 859 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.

⁶ 5 U.S.C. § 604(b).

⁷ 5 U.S.C. § 601(3) and (6).

⁸ 15 U.S.C. § 632.

⁹ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁰ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (Feb. 2007) (Trends in Telephone Service). This source uses data that are current as of October 20, 2005.

¹¹ 13 C.F.R. § 121.201, NAICS code 517110.

¹² Trends in Telephone Service at Table 5.3.

7. *Audio and Video Equipment Manufacturing.* These establishments manufacture “electronic audio and video equipment for home entertainment, motor vehicle, public address and musical instrument amplifications.”¹³ The SBA has developed a small business size standard for this category of manufacturing; that size standard is 750 or fewer employees.¹⁴ According to Census Bureau data, there were 571 establishments in this category that operated with payroll during 2002.¹⁵ Of these, 560 had employment of under 500, and ten establishments had employment of 500 to 999. Consequently, we estimate that the majority of these establishments are small entities.

8. *Other Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment).”¹⁶ The SBA has developed a small business size standard for Other Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.¹⁷ According to Census Bureau data for 2002, there were a total of 503 establishments in this category that operated for the entire year.¹⁸ Of this total, 493 had employment of under 500, and an additional 7 had employment of 500 to 999.¹⁹ Thus, under this size standard, the majority of firms can be considered small.

9. *Retailers.* The rules adopted herein will apply only to retailers that are subject to the Commission’s rules governing manufacturers because they qualify as the “responsible party” under Section 2.909 of the Commission’s rules. The SBA has developed a small business size standard for Radio, Television, and Other Electronics Stores, which is: all such firms having \$8 million or less in annual receipts.²⁰ This standard is described below.

10. *Radio, Television, and Other Electronics Stores.* The Census Bureau defines this economic census category as follows: “This U.S. industry comprises: (1) establishments known as

¹³ U.S. Census Bureau, 2002 NAICS Definitions, “334310 Audio and Video Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/ND334310.HTM#N334310>.

¹⁴ 13 C.F.R. § 121.201, NAICS code 334310.

¹⁵ U.S. Census Bureau, 2002 Economic Census, Industry Series: Manufacturing, “Audio and Video Equipment Manufacturing,” Table 4, NAICS code 334310 (issued Dec. 2004).

¹⁶ U.S. Census Bureau, 2002 NAICS Definitions, “334290 Other Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

¹⁷ 13 C.F.R. § 121.201, NAICS code 334290.

¹⁸ U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334290 (released May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 471.

¹⁹ *Id.* An additional 3 establishments had employment of 1,000 or more.

²⁰ 13 C.F.R. § 121.201, NAICS code 443112.

consumer electronics stores primarily engaged in retailing a general line of new consumer-type electronic products; (2) establishments specializing in retailing a single line of consumer-type electronic products (except computers); or (3) establishments primarily engaged in retailing these new electronic products in combination with repair services.”²¹ The SBA has developed a small business size standard for Radio, Television, and Other Electronics Stores, which is: all such firms having \$8 million or less in annual receipts.²² According to Census Bureau data for 2002, there were 10,380 firms in this category that operated for the entire year.²³ Of this total, 10,080 firms had annual sales of under \$5 million, and 177 firms had sales of \$5 million or more but less than \$10 million.²⁴ Thus, the majority of firms in this category can be considered small.

11. *Electronic Shopping.* According to the Census Bureau, this economic census category “comprises establishments engaged in retailing all types of merchandise using the Internet.”²⁵ The SBA has developed a small business size standard for Electronic Shopping, which is: all such entities having \$23 million or less in annual receipts.²⁶ According to Census Bureau data for 2002, there were 4,959 firms in this category that operated for the entire year.²⁷ Of this total, 4,742 firms had annual sales of under \$10 million, and an additional 133 had sales of \$10 million to \$24,999,999.²⁸ Thus, the majority of firms in this category can be considered small.

D. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements for Small Entities

12. The rules adopted by this *Report and Order* impose reporting and other compliance requirements on small entities. These burdens are less than those imposed by prior rules. Manufacturers or those acting in their stead must include DTV transition notices with certain devices manufactured between June 16, 2008 and March 31, 2009. ETCs must provide DTV transition notices to their low-income customers on a monthly basis, either via targeted mailings or by inclusion with or on bills or bill notices.

²¹ U.S. Census Bureau, 2002 NAICS Definitions, “443112 Radio, Television, and Other Electronics Stores”; <http://www.census.gov/epcd/naics02/def/NDEF443.HTM>.

²² 13 C.F.R. § 121.201, NAICS code 443112.

²³ U.S. Census Bureau, 2002 Economic Census, Industry Series: Retail Trade, Table 4, Sales Size of Firms for the United States: 2002, NAICS code 443112 (issued November 2005).

²⁴ *Id.* An additional 123 firms had annual sales of \$10 million or more. As a measure of small business prevalence, the data on annual sales are roughly equivalent to what one would expect from data on annual receipts.

²⁵ U.S. Census Bureau, 2002 NAICS Definitions, “454111 Electronic Shopping”; <http://www.census.gov/epcd/naics02/def/NDEF454.HTM#N4541>.

²⁶ 13 C.F.R. § 121.201, NAICS code 454111.

²⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Retail Trade, Table 4, “Sales Size of Firms for the United States: 2002,” NAICS code 454111 (issued Nov. 2005); <http://www.census.gov/prod/ec02/ec0244ssz.pdf>. As a measure of small business prevalence, the data on annual sales are roughly equivalent to what one would expect from data on annual receipts.

²⁸ *Id.* An additional 84 firms had annual sales of \$25 million or more.

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

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁹

14. The rules adopted by this *Report and Order* limit the existing requirements on consumer electronics (CE) manufacturers and those acting in their stead, and provide greater flexibility to ETCs in their required consumer notifications. The rules clarify that only one party is the “responsible party” for purposes of enforcement of the manufacturer rules, and provide those responsible parties with additional time to come into compliance. They also more clearly delineate the devices to which the rules apply, and reduce the number of such devices. Finally, we revise our rules to permit the use of an alternative method by which ETCs may educate their low-income customers, as requested by several small ETCs. These reductions in burden apply to both small and non-small entities, while retaining the requirements for consumer education that are necessary to ensure the success of the transition. Thus, no alternative rules would be appropriate.

F. Report to Congress

15. The Commission will send a copy of the *Order on Reconsideration*, including this supplemental FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.³⁰ In addition, the Commission will send a copy of the *Order on Reconsideration*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order on Reconsideration* and FRFA (or summaries thereof) will also be published in the Federal Register.³¹

²⁹ 5 U.S.C. § 603(c)(1) – (c)(4).

³⁰ See 5 U.S.C. § 801(a)(1)(A).

³¹ See 5 U.S.C. § 604(b).

APPENDIX C

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible economic impact on a substantial number of small entities by the rules proposed in this *Further Notice of Proposed Rulemaking* (“*Further Notice*”). 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 on the *Further Notice* as indicated on the first page of the Order. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).² In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposals

2. This *Further Notice* seeks comment on a proposal to require that eligible telecommunications carriers (ETCs) provide monthly notices to all of their subscribers, rather than just low-income subscribers as required by the current rules. It also seeks comment on a proposal to require multichannel video programming distributors (MVPDs) to provide on-air DTV transition education on their systems. It seeks comment on whether, as a policy matter, the Commission should impose such requirements.

B. Legal Basis

3. The authority for the action proposed in this rulemaking is contained in Sections 1, 2, 4(i), 7, 254, 303, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 157, 254, 303, and 309.

C. Description and Estimate of the Number of Small Entities To Which the Proposals Will Apply

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.⁴ The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small business concern” under Section 3 of the Small Business Act.⁵ Under the Small Business Act, 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).⁶ The rules adopted herein will directly affect small ETCs. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ 5 U.S.C. § 604(b).

⁵ 5 U.S.C. § 601(3) and (6).

⁶ 15 U.S.C. § 632.

5. *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.⁷ According to Commission data,⁸ 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.

6. *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.⁹ According to Commission data,¹⁰ 859 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.

7. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined 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.” The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.¹¹ To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. 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. Thus, the majority of these firms can be considered small.

8. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the

⁷ 13 C.F.R. § 121.201, NAICS code 517110.

⁸ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (Feb. 2007) (Trends in Telephone Service). This source uses data that are current as of October 20, 2005.

⁹ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁰ Trends in Telephone Service at Table 5.3.

¹¹ 13 C.F.R. § 121.201 (NAICS Code 517210).

Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.¹² The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.¹³ Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

9. *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."¹⁴ The Commission has determined that there are 67,700,000 subscribers in the United States.¹⁵ Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.¹⁶ Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,¹⁷ and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

10. *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 includes PCOs and, thus, small entities are defined as all such companies generating \$13.5 million or less

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

¹³ Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

¹⁴ 47 U.S.C. § 543(m)(2).

¹⁵ *See* Public Notice, "FCC Announces New Subscriber Count for the Definition of Small Cable Operator," 16 FCC Rcd 2225 (2001) ("2001 Subscriber Count PN"). In this Public Notice, the Commission established the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers, and determined that this threshold will remain in effect until the Commission issues a superseding Public Notice. We recognize that the number of cable subscribers was recently estimated by the Commission to be 65.4 million in June 2005; *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 (2006) ("2005 Cable Competition Report"). However, because the Commission has not issued a public notice subsequent to the 2001 Subscriber Count PN, we propose to rely on the subscriber count threshold established by the 2001 Subscriber Count PN.

¹⁶ 47 C.F.R. § 76.901(f).

¹⁷ 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).

in annual receipts.¹⁸ Currently, there are more than 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.¹⁹ 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.²⁰ Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs qualify as small entities.

11. *Satellite Carriers.* The term “satellite carrier” includes entities providing services as described in 17 U.S.C. § 119(d)(6) using the facilities of a satellite or satellite service licensed under Part 25 of the Commission’s rules to operate in Direct Broadcast Satellite (“DBS”) or Fixed-Satellite Service (“FSS”) frequencies.²¹ As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.²² Since 2007, the SBA has recognized satellite television distribution services within the broad economic census category of Wired Telecommunications Carriers.²³ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in this category. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. 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. Thus, the majority of these firms can be considered small.

12. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Wired Telecommunications Carriers.²⁴ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small

¹⁸ 13 C.F.R. § 121.201 (NAICS Code 517210).

¹⁹ See *2005 Cable Competition Report*, 21 FCC Rcd 2564-65, ¶ 130.

²⁰ See *id.*

²¹ Part 100 of the Commission’s Rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed pursuant to Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

²² See, e.g., *Application Of DirecTV Enterprises, LLC, Request For Special Temporary Authority for the DirecTV 5 Satellite*; *Application Of DirecTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DirecTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location*, 19 FCC Rcd. 15529 (Sat. Div. 2004).

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

²⁴ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

entity is one with \$13.5 million or less in annual receipts.²⁵ Currently, only two operators – DirecTV²⁶ and EchoStar Communications Corporation (“EchoStar”)²⁷ – hold licenses to provide DBS service, which requires a great investment of capital for operation. Both currently offer subscription services and report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge 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.

13. *Fixed-Satellite Service (“FSS”).* The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.²⁸ The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Wired Telecommunications Carriers.²⁹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with \$13.5 million or less in annual receipts.³⁰ Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Both of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

14. *Home Satellite Dish (HSD) Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.³¹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with \$13.5 million or less in annual receipts.³² 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

²⁵ 13 C.F.R. § 121.201, NAICS Code 515210 (2002).

²⁶ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 14.67 million subscribers nationwide, as of June 2005; see *2005 Cable Competition Report*, 21 FCC Rcd at 2540 ¶ 73.

²⁷ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the third largest MVPD, serving an estimated 11.45 million subscribers nationwide, as of June 2005. *Id.*

²⁸ See 47 C.F.R. § 2.1(c).

²⁹ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

³⁰ 13 C.F.R. § 121.201, NAICS Code 515210 (2002).

³¹ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

³² 13 C.F.R. § 121.201, NAICS Code 515210 (2002).

programming. There are approximately 30 satellites operating in the C-band, which carry more than 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 show that, as of June 2005, there were 206,358 households authorized to receive HSD service.³³ The Commission has no information regarding the annual revenue of the four C-Band distributors.

15. *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,³⁴ OVS falls within the SBA-recognized definition of Wired Telecommunications Carriers.³⁵ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with \$13.5 million or less in annual receipts.³⁶ The Commission has certified 25 OVS operators with some now providing service. 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.³⁷ As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.5 percent of all MVPD households.³⁸ Affiliates of Residential Communications Network, Inc. ("RCN"), which serves about 371,000 subscribers as of June 2005, is currently the largest BSP and 14th largest MVPD.³⁹ 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.

16. *Wireless Cable Systems*. Wireless cable systems use the Broadband Radio Service ("BRS"), formerly Multipoint Distribution Service ("MDS"),⁴⁰ and Educational Broadband Service

³³ See *2005 Cable Competition Report*, 21 FCC Rcd 2544, ¶ 80.

³⁴ See 47 U.S.C. § 573.

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

³⁶ 13 C.F.R. § 121.201, NAICS Code 515210 (2002).

³⁷ See *2005 Cable Competition Report*, 21 FCC Rcd 2549, ¶ 88. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

³⁸ See *id.* at 2507, ¶ 14.

³⁹ See *id.* at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,000 subscribers as of June 2005. The third largest BSP is Knology, which currently serves approximately 170,800 subscribers as of June 2005. *Id.*

⁴⁰ MDS, also known as Multichannel Multipoint Distribution Service ("MMDS"), is regulated by Part 21 of the Commission's rules; see 47 C.F.R. Part 21, subpart K; and has been renamed the Broadband Radio Service (BRS); see *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; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico*; 19 FCC Rcd 14165 (2004) ("MDS/ITFS Order").

("EBS"), formerly Instructional Television Fixed Service ("ITFS"),⁴¹ frequencies in the 2 GHz band to transmit video programming and provide broadband services to residential subscribers.⁴² These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.⁴³ Nonetheless, they appear to fall within the SBA-recognized definition of Wired Telecommunications Carriers.⁴⁴ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with \$13.5 million or less in annual receipts.⁴⁵ We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. *Id.* Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁴⁶

17. *Wireless Cable Systems (Commission Auction Standard).* The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction,⁴⁷ 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.⁴⁸ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁴⁹ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. In addition to the 48 small businesses that have held 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.⁵⁰ MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Wired Telecommunications Carriers.⁵¹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which

⁴¹ ITFS systems are regulated by Part 74 of the Commission's rules; *see* 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS); *see MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

⁴² *See 2005 Cable Competition Report*, 21 FCC Rcd 2565, ¶ 131.

⁴³ *Id.*

⁴⁴ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

⁴⁵ 13 C.F.R. § 121.201, NAICS Code 515210 (2002).

⁴⁶ *See Local Multipoint Distribution Service*, 12 FCC Rcd 12545 (1997) ("*LMDS Order*").

⁴⁷ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

⁴⁸ 47 C.F.R. § 21.961(b)(1).

⁴⁹ *See ITFS Order*, 10 FCC Rcd at 9589.

⁵⁰ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$12.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

⁵¹ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

provides that a small entity is one with \$13.5 million or less in annual receipts.⁵² 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 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 defined a small business size standard for ITFS (now EBS).⁵³ We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

19. In the 1998 and 1999 LMDS auctions,⁵⁴ 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.⁵⁵ 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.⁵⁶ These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.⁵⁷ 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. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

D. Description of Projected Reporting, Record Keeping, and other Compliance Requirements for Small Entities

20. The *Further Notice* seeks comment on a rule that would impose compliance requirements on small ETCs. Small ETCs currently have an obligation to provide DTV transition notices on a monthly basis to their Lifeline and Link-up customers. These obligations would be increased by the rule contemplated in this *Further Notice*, but would not change in kind. Small ETCs will need to spend money printing the notices, and may either forgo advertising revenue as a result of dedicating bill space to DTV transition notices, or spend additional money mailing the notices separately. The *Further Notice* also seeks comment on a rule that would impose compliance requirements on small MVPDs. Small MVPDs would be required to provide on-air DTV transition education on their systems. Production costs would likely be minimal or nonexistent due to the already-produced PSAs available in the market. MVPDs may have to forgo advertising revenue as a result of dedicating available air time to DTV transition notices, or spend money reserving such time if they do not already have advertising time

⁵² 13 C.F.R. § 121.201, NAICS Code 515210 (2002).

⁵³ 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.

⁵⁴ The Commission has held two LMDS auctions: Auction 17 and Auction 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.)

⁵⁵ See *LMDS Order*, 12 FCC Rcd at 12545.

⁵⁶ *Id.*

⁵⁷ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

available.

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

21. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁵⁸ We seek comment on the applicability of any of these alternatives to affected small entities.

22. The requirements proposed in the *Further Notice* would impose costs on small ETCs and MVPDs, but would result in wider knowledge about the DTV transition, which could have an indirect positive impact on other small entities, including television broadcasters, consumer electronics manufacturers and retailers, and MVPDs themselves. We invite small entities to submit comments on how the Commission could further minimize potential burdens on small entities if the proposal in the *Further Notice* is ultimately adopted.

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

23. None.

⁵⁸ 5 U.S.C. § 603(c)(1) – (c)(4).

APPENDIX D

Letter from the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, to the Honorable Kevin J. Martin, Chairman, the Honorable Michael J. Copps, Commissioner, the Honorable Jonathan S. Adelstein, Commissioner, the Honorable Deborah Taylor Tate, Commissioner, and the Honorable Robert M. McDowell, Commissioner, Federal Communications Commission. (attached)

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
APPROVING IN PART, CONCURRING IN PART**

RE: *DTV Consumer Education Initiative*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 07-148

I am pleased that we have clarified our rules regarding the consumer education requirements imposed on manufacturers. I concur in part, however, with respect to the further notice that seeks comment on whether we should require MVPDs to provide on-air consumer education about the DTV transition. As the Further Notice cites, the cable industry is already engaged – voluntarily – in an extensive DTV consumer education campaign, which includes \$200 million in English and Spanish-language TV advertising. Along with cable companies, other MVPDs such as DirecTV and Verizon – again, voluntarily – are members of the Digital Television Transition Coalition. This coalition has commenced marketing and public education strategies to distribute consistent, accurate information about the DTV transition to the public. The MVPD industry has stepped up to partner with the government and with the broadcasters – through on-air and other efforts – to help ensure that consumers get the message about the DTV transition. Why then are we seeking comment about whether to require something that the industry is already doing? Where is the need for government regulation? Because this issue is being addressed in a notice, I cast a concurring vote. I am highly skeptical, however, about further Commission action being needed.

In our previous order, we required all MVPDs to provide notice of the DTV transition to their subscribers in monthly bills or billing notices, for each month starting with this one and ending after the transition is completed. We already mandated speech by MVPDs to serve a governmental purpose. Going further to again mandate speech – in the form of on-air ads – should raise First Amendment concerns that we all should carefully consider. I would prefer that we resist the temptation to intervene where we are not needed. Therefore, I concur in this part of the further notice.