

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

In the Matter of)	
)	
Expanding Consumers' Video Navigation Choices)	MB Docket No. 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80

REPORT AND ORDER

Adopted: September 4, 2020

Released: September 4, 2020

By the Commission: Commissioners Rosenworcel and Starks concurring.

I. INTRODUCTION

1. In this Report and Order, we terminate a proceeding in which we sought comment on the adoption of new regulations for “navigation devices”—devices that consumers use to access multichannel video programming and other services offered over multichannel video programming networks—and eliminate outdated CableCARD support and reporting requirements. Four years ago, the Commission proposed a complex framework of regulations which would have required multichannel video programming distributors (MVPDs) to provide unbundled flows of programming information to third-party manufacturers, retailers, and software developers to enable them to create navigation devices in an attempt to assure a commercial market for navigation devices.¹ However, the record submitted in response to the *NPRM* raises serious and significant questions about whether the proposed rules would adequately protect multichannel video programming content. Moreover, the record fails to convince us that the proposal is necessary to accomplish its intended goal, and we conclude that the proposed regulations do not reflect the past four years of substantial marketplace changes in the delivery and consumption of video programming. Separately, we eliminate the CableCARD consumer support rules and the requirement that large cable operators report to the Commission about support and deployment of CableCARD modules because these regulations no longer serve a useful purpose and thus are no longer necessary.

II. BACKGROUND

2. Section 629 of the Communications Act of 1934, as amended (Act), directs the Commission to adopt regulations to assure the commercial availability of devices that consumers use to access multichannel video programming and other services offered over multichannel video programming networks.² Section 629 further directs that the Commission shall not prescribe such regulations “which would jeopardize the security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service.”³ Through a series of rulemakings, the Commission has adopted regulations

¹ *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, MB Docket No. 16-42 and CS Docket No. 97-80, Notice of Proposed Rulemaking & Memorandum Opinion and Order, 31 FCC Rcd 1544 (2016) (*NPRM*). See also 47 CFR § 76.1200(c) (defining “navigation devices” to include “[d]evices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems”).

² 47 U.S.C. § 549(a).

³ *Id.* § 549(b).

intended to assure this commercial availability of devices.⁴ The bellwether requirement of these rulemakings, which led to the “CableCARD” standard,⁵ allows viewers to receive digital cable services by attaching their own equipment directly to the cable network.⁶ In 2005, to better monitor support for the then-nascent CableCARD technology, the Commission required the six largest cable operators to submit status reports to the Commission every 90 days that detail how these cable operators meet “their obligations to deploy and support CableCARD.”⁷ The Commission stated at the time that it would “indicate in a future proceeding when the CableCARD status reports will terminate.”⁸ In 2010, the Commission adopted regulations to further ensure cable operator support for retail CableCARD devices.⁹

⁴ See *NPRM*, 31 FCC Rcd at 1547-49, paras. 6-8.

⁵ A CableCARD is a security device provided by an MVPD that can be installed in a navigation device bought by a consumer in the retail market to allow the consumer’s television to display MVPD-encrypted video programming. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80 and PP Docket No. 00-67, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657, 14659, para. 3 (2010) (*Third Plug and Play Report and Order*), recon. granted in part sua sponte, Order on Reconsideration, 26 FCC Rcd 791 (2011) (*2011 Reconsideration Order*).

⁶ In 1998, the Commission first adopted rules implementing section 629 that required cable operators to use a separated security standard that allowed third-party devices to access cable services but did not impose a specific standard. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd 14775, 14793-803, paras. 49-69 (1998) (*First Plug and Play Report and Order*). In 2002, the cable and consumer electronics industries adopted a Memorandum of Understanding regarding a one-way plug-and-play CableCARD compatibility standard for digital cable. *NPRM*, 31 FCC Rcd at 1548, para. 7. In 2003, the Commission adopted the CableCARD standard as the method that must be used by digital cable operators in implementing the separation of security requirement for navigation devices. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80 and PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) (*Second Plug and Play Report and Order*), recon. granted in part, Order on Reconsideration, 31 Communications Reg. (P&F) 408 (2003) (*2003 Reconsideration Order*), vacated sub nom., *Echostar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013) (*Echostar*).

⁷ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Second Report and Order, 20 FCC Rcd 6794, 6814-15, para. 39 (2005) (*2005 Report and Order*). The reports are required to address the following: (1) the general availability of CableCARDS; (2) the number of CableCARDS currently in service and how those devices are placed in service; (3) whether service appointments are required for all CableCARD installations; (4) the average number of truck rolls required to install a CableCARD; (5) the monthly price charged for a CableCARD and the average cost of installation; (6) problems encountered in deploying CableCARDS and how those problems have been resolved; (7) the process in place for resolving existing and newly discovered CableCARD implementation problems; and (8) the effort to develop and deploy a multi-stream CableCARD. *Id.* As a result of mergers and acquisitions, there are currently only four large cable operators that provide the CableCARD reports: Altice USA, Inc., Charter Communications, Comcast Corp., and Cox Communications.

⁸ *Id.* at 6815, para. 39.

⁹ *Third Plug and Play Report and Order*, 25 FCC Rcd at 14658, para. 1. The CableCARD consumer support rules: (1) require cable operators to support the reception of switched digital video services on retail CableCARD devices to ensure that subscribers are able to access the services for which they pay regardless of whether they lease or purchase their devices; (2) prohibit price discrimination against retail CableCARD devices to support a competitive marketplace for such devices; (3) require cable operators to allow self-installation of CableCARDS where device manufacturers offer device-specific installation instructions to make the installation experience for retail devices comparable to the experience for leased devices; (4) require cable operators to provide multi-stream CableCARDS by default to ensure that cable operators are providing their subscribers with current CableCARD technology; and (5) clarify that CableCARD device certification rules are limited to certain technical features to make it easier for device manufacturers to get their products to market. 47 CFR § 76.1205(b).

3. In the 2016 *NPRM*, the Commission proposed a new and complicated regulatory regime for navigation devices. The Commission sought comment on this proposed approach, under which, among other things, MVPDs would provide unbundled flows of programming information¹⁰ to third-party manufacturers, retailers, and software developers that would allow them to create competitive navigation devices.¹¹ The Commission also sought comment on an alternative approach under which the Commission would require MVPDs to develop their own applications that would run on consumer-owned devices.¹² Additionally, the Commission sought comment on whether the CableCARD consumer support rules set forth in section 76.1205(b) of the Commission's rules continue to serve a useful purpose and should be retained following the D.C. Circuit's 2013 decision in *EchoStar*, which vacated the two 2003 Commission orders adopting the CableCARD standard.¹³ The Commission also sought comment on whether to discontinue the requirement that the largest cable operators report to the Commission about their support for CableCARD.¹⁴

III. DISCUSSION

4. We conclude that further Commission intervention in the navigation device marketplace is not necessary at this time. As explained below, we have serious and unresolved concerns about the security of multichannel video programming and copyright licensing under the proposed rules. Moreover, we conclude that the record raises other substantial doubts about the wisdom and necessity of the complex regulations proposed in the *NPRM*. On the other hand, we find that the CableCARD consumer support rules no longer serve a useful purpose following the D.C. Circuit's 2013 decision in *EchoStar* and accordingly eliminate these rules. We also conclude that the 15-year-old CableCARD reporting requirement is no longer necessary.

1. Closing the 2016 Proceeding

5. In the *NPRM*, the Commission sought comment on the need for new rules to implement section 629. We conclude that we need not adopt any new rules at this time. Although the *NPRM* tentatively concluded that the Commission "should adopt new regulations to further section 629," there is

¹⁰ The Commission proposed to require MVPDs to provide "three flows of information using any published, transparent format that conforms to specifications set by open standards bodies;" these information flows would include "(1) service discovery (information about what programming is available to the consumer, such as the channel listing and video-on-demand lineup, and what is on those channels), (2) entitlements (information about what a device is allowed to do with content, such as record it), and (3) content delivery (the video programming itself, along with information necessary to make the programming accessible to persons with disabilities)." *NPRM*, 31 FCC Rcd at 1545, para. 2.

¹¹ *NPRM*, 31 FCC Rcd at 1558-82, paras. 25-78. In August 2015, the Downloadable Security Technology Advisory Committee (DSTAC) filed a Report as directed in section 106 of the STELA Reauthorization Act of 2014. *See id.* at 1549-50, para. 9 & n.32; Downloadable Security Technical Advisory Committee, Final Report of the DSTAC at 40, 262 (2015) (*DSTAC Report*), <https://ecfsapi.fcc.gov/file/60001515603.pdf>. The *DSTAC Report* presented (i) an MVPD-supported proposal that is based on proprietary applications (for the non-security element) and digital rights management (for the security element), and (ii) a consumer electronics-supported proposal that is based on standard protocols (for the non-security element) and link protection (for the security element). *NPRM*, 31 FCC Rcd at 1549-50, paras. 9-10. The Commission's Media Bureau sought comment on the *DSTAC Report*; those comments and the *DSTAC Report* also informed the *NPRM*. *Id.*

¹² *Id.* at 1567-68, paras. 47-49. Under this approach, the Commission would require MVPDs to develop device-specific applications for consumer-owned equipment or applications compatible with one of five specifications that can be used to run applications on consumer-owned devices without writing a device-specific application for each different device (the *DSTAC Report* identified HTML5 Web Applications, DLNA VidiPath, RVU, DISH Virtual Joey, and Sling Media Technology Clients as potential specifications). *Id.*

¹³ *Id.* at 1587-88, para. 90; *see also EchoStar*, 704 F.3d at 1000.

¹⁴ *NPRM*, 31 FCC Rcd at 1588, para. 91.

substantial evidence in the record challenging that tentative conclusion.¹⁵ As we discuss below, the consequences of adopting the proposed regulations could be substantial and detrimental to consumers, copyright holders, and MVPDs, and thus we are reluctant to adopt these additional regulations to implement section 629, quite apart from the substantial doubts in the record as to whether they will help assure a commercial market for devices that consumers can use to access multichannel video programming. In addition, the Commission last sought comment on these issues more than four years ago, and since then important changes have occurred in the video programming marketplace and delivery of those services via applications that run on subscriber-owned devices.¹⁶ Moreover, we note that since the record closed, the Government Accountability Office (GAO) concluded that the *NPRM* did not sufficiently analyze “the extent to which Internet-based providers affect consumer choice for video programming and what that change means for the importance of consumer choice for devices in the context of the Act.”¹⁷

6. As noted above, section 629(b) of the Act prohibits the Commission from adopting regulations under section 629 that would jeopardize the security of multichannel video programming.¹⁸ Several programmers, MVPDs, and the U.S. Copyright Office express serious concerns that the proposed rules and the applications-based alternative would jeopardize the security of programming and licensing contracts between programmers and MVPDs.¹⁹ Although we recognize that some commenters claim that

¹⁵ Compare, e.g., ARRIS Group, Inc. Comments at 2-7; AT&T Comments at 4-10; CALinnovates Comments at 9-12; Center for Individual Freedom Comments at 3; Cisco Systems, Inc. Comments at 5, 13; Frontier Communications Corporation Comments at 11; NCTA–The Internet and Television Association (formerly National Cable & Telecommunications Association) Comments at 10-14; Verizon Comments at 3-4; WTA–Advocates for Rural Broadband Comments at 2; AT&T Reply at 9-10; Cincinnati Bell Extended Territories LLC Reply at 3-4 with Amazon Comments at 2-4; Computer & Communications Industry Association Comments at 3-8; Public Knowledge Comments at 19-20; TiVo Inc. Comments at 1-4 (the first group of commenters argue that further regulation to implement section 629 is unnecessary, and the second group argue that regulation is necessary).

¹⁶ See, e.g., NCTA Comments, GN Docket No. 20-60, at 21-22 (reporting that the nine largest MVPDs “support apps that can be used to watch their content on hundreds of millions of consumer-owned devices, such as smart TVs; tablets; streaming sticks and devices such as Apple TV, Roku, Google Chromecast, and Amazon Fire; smartphones; game consoles; and personal computers”); Erica Pabst and Ian Olgeirson, *Cable, telco and DBS set-tops stream out of US homes in 2020 forecast* (July 22, 2020), <https://platform.mi.spglobal.com/web/client?overridecdc=1&auth=inherit#news/article?id=59462417> (“According to Kagan projections, combined set-tops installed for [cable, telco, and DBS] is on track to drop 15% in 2020 alone, tracking subscriber trends and near-term economic turmoil to finish the year below 190 million and down 73% from the 2016 high point of 256 million.”); *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, Memorandum Opinion and Order, MB Docket No. 18-283, CSR 8965-E, 34 FCC Rcd 10229, 10229 (2019) (granting a petition for effective competition based on competition from AT&T’s over-the-top video service, and recognizing “that in today’s video marketplace consumers have a choice of multiple delivery systems to access video programming via means other than traditional cable television”).

¹⁷ U.S. Gov’t Accountability Office, GAO-17-785, *FCC Should Conduct Additional Analysis to Evaluate Need for Set-Top Box Regulation*, at 22 (2017) (GAO Report).

¹⁸ 47 U.S.C. § 549(b).

¹⁹ See, e.g., 21st Century Fox, Inc., A&E Television Networks, LLC, CBS Corp, et al. Comments at 11-12 (the proposed rules pose risks to content companies’ ability to continue providing audiences a diverse array of compelling, high quality content); Letter from Maria A. Pallante, Register of Copyrights, to Rep. Blackburn et al., at 7-18 (Aug. 3, 2016), <https://ecfsapi.fcc.gov/file/1082363408166/Copyright%20Office%20Letter%20on%20Set%20Top%20Box%20Prop%20osal.pdf> (“as currently proposed, the rule could interfere with copyright owners’ rights to license their works as provided by copyright law, and restrict their ability to impose reasonable conditions on the use of these works through the private negotiations that are the hallmark of the vibrant and dynamic MVPD marketplace”); NCTA Comments at 18, 31-53 (the proposed rules would pose grave risk to programming and innovation for little consumer benefit and undermine the copyright and licensing protections that are necessary to sustain high-quality (continued....))

the proposed rules would not interfere with programmers' copyright interests,²⁰ we have ongoing concerns about the security risks and licensing issues the proposed rules could introduce. For instance, many commenters argue that the proposed rules would undermine anti-piracy protections, reducing the incentives of parties to invest in new content.²¹ In addition, the Commission's proposal could force MVPDs, programmers, and copyright holders to violate the copyright licensing contract obligations to which they agreed, leading to costly and time-consuming litigation.²² Further, the record also raises licensing concerns with respect to the applications-based alternative, as commenters contend that this approach might lead to content to be distributed on terms to which programmers have not agreed and object to Commission involvement in the licensing process.²³ Accordingly, in light of section 629(b) and the impact the proposed rules could have on the video programming marketplace generally, including the availability and quality of programming, we find that we should not adopt the proposed rules or the applications-based alternative.

7. We also note that it appears the policy goals that the Commission set forth in the *NPRM* are well underway to being met without additional government regulation. The Commission stated in 2016 that it wanted to "let MVPD subscribers watch what they pay for wherever they want, however they want, and whenever they want, and pay less money to do so, making it as easy to buy an innovative means of accessing multichannel video programming (such as an app, smart TV, or set-top box) as it is to buy a cell phone or TV."²⁴ And according to NCTA, the nine largest MVPDs "support apps that can be used to watch their content on hundreds of millions of consumer-owned devices, such as smart TVs; tablets; streaming sticks and devices such as Apple TV, Roku, Google Chromecast, and Amazon Fire;

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programming); NAB Comments at 2, 7 (stating that the "Commission's proposal, if adopted as is, will disrupt existing protections programmers have in place through agreements with MVPDs to maintain the value of content" and urging the Commission not to harm the dynamic video programming marketplace as it attempts to promote competition in the navigation devices market); International Center for Law and Economics Comments at 2, 10 (positing that the Commission's proposed rules fail to take account of the fundamental economic realities that govern the creation of content distribution and fail to properly respect copyright and contractual rights); Letter from Anne Lucey, Senior Vice President, Regulatory Policy, Government Affairs, CBS Corporation, et al. to Marlene H. Dortch, Secretary, FCC (Sept. 15, 2016) (opposing any applications-based proposal "that [would] require our content to be distributed on terms or conditions to which programmers would not agree" and urging the Commission "not to adopt *any* proposal that includes any FCC involvement in the licensing process or that grants the FCC *any* ability to establish the terms and conditions of a license related to the distribution of content").

²⁰ Copyright Law Scholars and Electronic Frontier Foundation Reply at 1-5; Letter from Annemarie Bridy, Professor of Law, University of Idaho College of Law, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, at 1-2 (Sept. 22, 2016).

²¹ See, e.g., AT&T Comments at 45; Comcast Comments at 89-90; Copyright Alliance Comments at 15; MPAA Comments at 6-9; NCTA Comments at 100-103; TechFreedom and CEI Comments at 38-44.

²² See AMC Reply at 3-4 ("If a third-party device manufacturer had the ability to select individual programs and repackage and present the programming without [] network branding –by distributing it on a platform that is not AMCN-branded, for example – then AMCN would be in violation of its licensing agreements"); AT&T Comments at 78-79 (explaining that "alterations to the [user] interface or features would violate MVPDs' agreements with programmers that impose specific restrictions on channel placement and search functionality"); Creators of Color Comments at 1 ("The set top box mandate would allow Silicon Valley firms to scrape our programming and use it for their own purposes – without negotiating or paying for rights."); Digital Liberty Comments at 2 (arguing that the proposed regulations would "violate contracts already established in a free market").

²³ See, e.g., Letter from Anne Lucey, Senior Vice President, Regulatory Policy, Government Affairs, CBS Corporation, et al. to Marlene H. Dortch, Secretary, FCC (Sept. 15, 2016); Letter from Jared S. Sher, Senior Vice President and Associate General Counsel, 21st Century Fox, to Marlene H. Dortch, Secretary, FCC (Sept. 6, 2016); Letter from Kyle Dixon, Vice President, Public Policy, Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (June 30, 2016).

²⁴ *NPRM*, 31 FCC Rcd at 1551, para. 11.

smartphones; game consoles; and personal computers.”²⁵ Therefore, without Commission intervention, many MVPD subscribers can watch the services that they pay for wherever, however, and whenever they want on an array of innovative devices via many different applications. Given the current state of the video programming marketplace, we are concerned that adopting the proposals set forth in the *NPRM* would risk stifling innovation and deterring investment in this sector and, thus, could ultimately detract from Congress’s overarching goal for a fully competitive market for navigation devices.²⁶

8. The 2017 GAO Report recommended that we “analyze how the ongoing evolution in the video programming market affects competition in the related market for set-top boxes and devices, including how it affects the extent to which consumer choice for devices to access MVPD content remains a relevant aspect of the competitive environment” as part of our competition reports.²⁷ In our recent Public Notice seeking comment for the Communications Marketplace Report, we sought comment on that precise topic.²⁸ Thus, although we close this docket, we will continue to monitor the navigation marketplace to determine whether further regulation is necessary to assure a commercial market for navigation devices, consistent with the requirements of section 629.²⁹

2. Elimination of the CableCARD Support and Reporting Requirements

9. We eliminate the CableCARD consumer support rules. We conclude that these rules no longer serve a useful purpose following the D.C. Circuit’s 2013 decision in *Echostar*. In *Echostar*, the court vacated the two 2003 Orders adopting the CableCARD standard as the method that must be used by all MVPDs in implementing the separation of security requirement for navigation devices—the *Second Plug and Play Report and Order* and the *2003 Reconsideration Order*.³⁰ Under the separation of security requirement, MVPDs are required to make available a conditional access or security element separate from the other elements of a navigation device.³¹ This allows unaffiliated consumer electronics companies to offer retail navigation devices, while at the same time enabling MVPDs to retain control

²⁵ NCTA Comments, GN Docket No. 20-60, at 21-22. Those nine MVPDs are Comcast/Xfinity, Charter/Spectrum, DIRECTV/AT&T, DISH, Cox, Altice, Verizon, Mediacom, and Frontier. See Xfinity Stream App on Xfinity TV Partner Devices FAQs <https://www.xfinity.com/support/articles/xfinity-stream-beta-app-faqs> (last visited July 6, 2020); Spectrum TV App – TV Shows, Live TV & Movies, <https://www.spectrum.com/cable-tv/spectrum-tv-app> (last visited July 6, 2020); DIRECTV App – Stream [sic] TV on Your Mobile Phone or Tablet, <https://www.att.com/directv/app/> (last visited July 6, 2020); DISH Anywhere App | Watch TV & Movies with DISH TV Mobile App, <https://www.dish.com/availability/ways-to-watch/tv-mobile-app> (last visited July 6, 2020); Watch TV Online – On Any Device | Cox Communications, <https://www.cox.com/residential/tv/watch-tv-online.html>, (last visited July 6, 2020); Altice One App, <https://www.optimum.net/pages/alticeone/app.html> (last visited July 6, 2020); Fios TV App | Stream Live TV and Verizon Fios On Demand, <https://www.verizon.com/home/fios-tv-app/> (last visited July 6, 2020); Xtream TV App & Website, http://mediacomcc.custhelp.com/app/answers/detail/a_id/3746/~/xtream-tv-app-%26-website (last visited July 6, 2020); FiOS TV App. Watch Frontier TV Everywhere, <https://go.frontier.com/fios/tv/frontier-app> (last visited July 6, 2020).

²⁶ See 47 U.S.C. § 549(e)(2).

²⁷ GAO Report at 22-23.

²⁸ *Office of Economics and Analysis Seeks Comment on the State of Competition in the Communications Marketplace*, GN Docket No. 20-60, 35 FCC Rcd 1577 (OEA 2020).

²⁹ 47 U.S.C. § 549(a).

³⁰ *EchoStar*, 704 F.3d at 1000. The court concluded that the Commission lacked the authority under section 629 of the Act to impose encoding rules, which put a ceiling on the recording limits that MVPDs can impose, on satellite carriers. *Id.* The Commission argued that the encoding rules were not severable from the rest of the rules adopted in the 2003 Orders (including the rule that imposes the CableCARD standard), and therefore the court vacated both of the Orders. *Id.*

³¹ *First Plug and Play Report and Order*, 13 FCC Rcd at 14793-94, para. 49; 47 CFR § 76.1204(a)(1).

over access to their services and security.³² The court's ruling in *Echostar* did not invalidate the separation of security requirement, and this requirement remains in effect. Although the CableCARD support rules were not adopted in either of the 2003 Orders vacated in *Echostar*,³³ these rules expressly apply only to MVPDs that are "subject to the requirements of § 76.640."³⁴ Section 76.640 required digital cable systems to support unidirectional digital cable products such as televisions, set-top boxes, and recording devices connected to digital cable systems by providing to subscribers CableCARDS and related services that meet certain technical standards. It was adopted in the *Second Plug and Play Report and Order* and therefore was vacated in *Echostar*.³⁵ Since there are no longer any MVPDs that are "subject to the requirements of § 76.640," we conclude that the CableCARD support rules no longer serve a useful purpose, and we accordingly eliminate these rules.

10. We acknowledge that the *NPRM* tentatively concluded that the CableCARD support rules continue to serve a useful purpose and should be retained.³⁶ Nevertheless, after further consideration, we are unpersuaded by assertions that these rules remain necessary to ensure that consumers have retail alternatives to leased set-top boxes and that cable operators continue to support retail CableCARD devices during their expected lifetime.³⁷ The CableCARD support rules were intended to help "assure the development of a retail market for devices that can navigate cable services" by "improv[ing] consumers' experience with retail navigation devices ... and CableCARDS."³⁸ However, during the ten years in which these rules have been in effect, consumer demand for retail CableCARD devices never developed as anticipated.³⁹ Indeed, in the four years since the *NPRM* in this proceeding was issued, consumer

³² *First Plug and Play Report and Order*, 13 FCC Rcd at 14793-94, para. 49.

³³ The CableCARD consumer support rules were adopted in 2010 in the *Third Plug and Play Report and Order* and revised in the *2011 Reconsideration Order*. See *supra* note 9.

³⁴ *2011 Reconsideration Order*, 26 FCC Rcd at 797, Appx. B (amending the introductory text of section 76.1205(b) to reference section 76.640 in order to clarify that the rule's requirements are applicable only to MVPDs that are "subject to the requirements of § 76.640"). We note that in the Federal Register summary of the *2011 Reconsideration Order*, the introductory text of section 76.1205(b) erroneously referenced section 76.1204(a)(1) of the Commission's rules, rather than section 76.640. See 76 Fed. Reg. 40263, 40279 (July 8, 2011). Thus, the introductory text of section 76.1205(b), as currently set forth in the Code of Federal Regulations, erroneously references section 76.1204(a)(1), rather than section 76.640. See 47 CFR 76.1205(b). Nevertheless, we believe that the *2011 Reconsideration Order* reflects a clear intent to specify that the requirements of section 76.1205(b) apply only to MVPDs that are subject to the requirements of section 76.640. *2011 Reconsideration Order*, 26 FCC Rcd at 792, para. 3.

³⁵ *Second Plug and Play Report and Order*, 18 FCC Rcd at 20892-99, paras. 13-29, at 20932, Appx. B.

³⁶ *NPRM*, 31 FCC Rcd at 1586, para. 87.

³⁷ Consumer Video Choice Coalition Comments at 48; CCIA Comments at 33-34; Public Knowledge Comments at 53-54; TiVo Comments at 34-35; TiVo Reply at 24-25.

³⁸ *Third Plug and Play Order*, 25 FCC Rcd at 14658, para. 1.

³⁹ In 2010, there were only 531,000 CableCARDS installed in retail navigation devices. *Id.* at 14660, para. 4. According to CableCARD reports, in the first quarter of 2011, there were approximately 536,000 CableCARDS installed in retail navigation devices on the networks of the five largest cable operators and 572,000 CableCARDS installed in retail navigation devices on the networks of the ten largest cable operators. Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed March 31, 2011, at 1 (attaching CableCARD reports for Q1 2011). In the first quarter of 2013, there were approximately 572,000 CableCARDS installed in retail navigation devices on the networks of the five largest cable operators and 604,000 CableCARDS installed in retail navigation devices on the networks of the ten largest cable operators. Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed Apr. 30, 2013, at 1 (attaching CableCARD reports for Q1 2013). In the first quarter of 2016, there were approximately 590,000 CableCARDS installed in retail navigation devices on the networks of the five largest cable operators and 621,400 CableCARDS installed in retail devices on the networks of the nine largest cable operators.

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demand for retail CableCARD devices has steadily declined.⁴⁰ We agree with NCTA that this decline in demand is partially attributable to the growing popularity of MVPD applications.⁴¹ MVPD applications are ubiquitous today, and consumers have fully embraced the use of such applications to access video programming.⁴² We note that the CableCARD support rules were intended to help advance the market for retail navigation devices “[u]ntil a successor technology is actually available.”⁴³ MVPD applications are a new technology that is providing consumers an alternative to leased set-top boxes.⁴⁴ Given that consumers have demonstrated a clear preference in recent years for applications over retail CableCARD devices, we expect that demand for retail CableCARD devices will only continue to fall. Accordingly, we conclude that retention of the CableCARD support rules is not necessary to ensure that consumers have retail alternatives to leased set-top boxes.

11. We also find that retention of the CableCARD support rules is unnecessary to ensure that cable operators continue to support retail CableCARD devices during their expected lifetime. As NCTA points out, cable operators are still required to provide separable security under section 76.1204 of the Commission’s rules,⁴⁵ and industry complies with this obligation through the use of CableCARDS, even after *Echostar* eliminated the mandate that the CableCARD standard be used by all MVPDs in implementing the separation of security requirement.⁴⁶ NCTA also asserts that since there are tens of millions of CableCARDS currently deployed in cable operator-provided devices, “[c]able operators have strong business incentives to ensure that CableCARDS continue to function properly.”⁴⁷ We agree and further find that competitive market forces should incentivize cable operators to continue to support retail CableCARD devices. The number of cable television subscribers has declined sharply since the CableCARD support rules were adopted in 2010, as more and more subscribers have opted to cut the cord

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Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed Apr. 27, 2016, at 1 (attaching CableCARD reports for Q1 2016).

⁴⁰ CableCARD reports indicate there were approximately 528,000 CableCARDS installed in retail navigation devices on the networks of the four largest cable operators in the first quarter of 2017; 509,000 in the first quarter of 2018; 494,000 in the first quarter of 2019; and 456,000 in the first quarter of 2020. Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed Apr. 24, 2017 (attaching CableCARD reports for Q1 2017); Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed Apr. 30, 2018 (attaching CableCARD reports for Q1 2018); Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed Apr. 30, 2019 (attaching CableCARD reports for Q1 2019); Letter from Paul Jamieson, Vice President, Government Affairs and Policy, Altice USA, Inc., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed Apr. 3, 2019 (attaching CableCARD report for Q1 2019); Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed Apr. 28, 2020 (attaching CableCARD reports for Q1 2020); Letter from Paul Jamieson, Vice President, Government Affairs and Policy, Altice USA, Inc., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, filed Apr. 2, 2020 (attaching CableCARD report for Q1 2020).

⁴¹ NCTA Comments, GN Docket No. 20-60, at 21-22.

⁴² *Id.*

⁴³ *Third Plug and Play Order*, 25 FCC Rcd at 14662, para. 8.

⁴⁴ *See supra* para. 7 (finding that the Commission’s policy goals in this proceeding are already underway to being satisfied through the widespread availability of MVPD applications).

⁴⁵ NCTA Comments at 173; NCTA Reply at 91.

⁴⁶ *See* NCTA Comments at 173 (asserting that “[t]here is no evidence of any regression in CableCARD support” following *Echostar*); NCTA Reply at 91 (noting that “there is no demonstrable reduction in industry-wide support for CableCARDS since *EchoStar*”).

⁴⁷ NCTA Comments at 173; NCTA Reply at 91. *See supra* notes 39 and 40 (noting the number of CableCARDS deployed in retail navigation devices as opposed to cable operator-provided devices).

and move to online streaming services. Specifically, the number of cable subscribers decreased from 59.8 million in 2010 to 48.6 million in 2019, a nearly 19 percent decline.⁴⁸ Given this continuing decline in subscribership and the vast array of streaming service options available to consumers today, we expect that cable operators will make every effort to retain subscribers by continuing to support retail CableCARD devices, even in the absence of the CableCARD support rules.⁴⁹ We further note that one of the major concerns leading to the adoption of the CableCARD support rules was the cable industry's poor performance with regard to subscriber premise installations of CableCARDS in retail devices.⁵⁰ Cable subscribers have come to expect self-installation options and we think it is exceedingly unlikely that cable operators will revert to requiring professional installations for retail CableCARD devices, particularly in light of issues raised by the current coronavirus pandemic.

12. Finally, we conclude that it is appropriate to eliminate the requirement that the largest cable operators report about CableCARD support and deployment on a quarterly basis.⁵¹ The Commission adopted the CableCARD reporting requirement in 2005 in response to complaints from consumer electronics manufacturers that “cable industry deployment and support of CableCARDS has been disappointing.”⁵² The Commission stated at the time that it would “indicate in a future proceeding when the CableCARD status reports will terminate.”⁵³ We note that much of the information required to be included in the reports is either repetitious or has little relevance today.⁵⁴ For example, the cable operators are required to report how CableCARDS are placed in service, whether service appointments are required for all CableCARD installations, and the average number of truck rolls required to install a CableCARD.⁵⁵ Since these cable operators all permit self-installation of retail CableCARD devices and the majority of subscribers opt for self-installation, this information is no longer useful or meaningful. Additionally, the cable operators are required to report on problems encountered in deploying CableCARDS, how those problems have been resolved, and the process in place for resolving existing and

⁴⁸ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10555, para. 129 (2013) (reporting that cable MVPDs had 59.8 million subscribers at the end of 2010); Ian Olgeirson, Tony Lenoir, and Erica Pabst, *Online Video Households Poised to Overtake Multichannel in U.S. Forecast*, S&P Global, May 5, 2020 (reporting that cable MVPDs had 48.6 million subscribers at the end of 2019). This decline in cable subscribership is expected to continue. *Id.* (projecting a decline in cable subscribership to 45.1 million in 2020, 40 million in 2020, and 36.3 million in 2024).

⁴⁹ We also note that one of the CableCARD support rules—the requirement that cable operators provide multi-stream CableCARDS by default to ensure that cable operators are providing their subscribers with current CableCARD technology—is apparently obsolete and unnecessary. In adopting this requirement in 2010, the Commission observed that “[a]ll new devices require multi-stream CableCARDS, and multi-stream CableCARDS have been standard equipment since 2007” and that “CableCARD manufacturers are no longer making single stream CableCARDS to sell to cable operators.” *Third Plug and Play Order*, 25 FCC Rcd at 14674, para. 33. The record shows no evidence and we think it is unlikely that, ten years later, cable operators would have a supply of or provide obsolete single-stream CableCARDS to their subscribers.

⁵⁰ *Third Plug and Play Order*, 25 FCC Rcd at 14660-01, para. 5 (noting that many cable operators required professional installation of retail CableCARD devices and that installation problems undermined the development of a retail market); *see also id.* at 14671, para. 29 (concluding that “the best means of assuring the development of a retail market for navigation devices is to require cable operators to allow subscribers to self-install CableCARDS”).

⁵¹ *NPRM*, 31 FCC Rcd at 1588, para. 91 (seeking comment on whether to eliminate the CableCARD reporting requirement applicable to the six largest cable operators). As previously noted, as a result of mergers and acquisitions, there are currently only four large cable operators that must file CableCARD reports: Altice USA, Inc., Charter Communications, Comcast Corp., and Cox Communications.

⁵² *2005 Report and Order*, 20 FCC Rcd at 6814, para. 39.

⁵³ *Id.*

⁵⁴ NCTA Comments at 173, n.416 (asserting that the reports “are now largely repetitive of each other”).

⁵⁵ *2005 Report and Order*, 20 FCC Rcd at 6814, para. 39.

newly discovered CableCARD implementation problems.⁵⁶ The reports filed in recent years reveal few problems with CableCARD deployment and the processes for resolving CableCARD implementation problems are generally unchanged from report to report. Thus, we see little practical utility in continuing to require the cable operators to report this information. We are also not aware of any instances where consumers or consumer equipment manufacturers have used the information in the reports as the basis for a complaint. Therefore, although we do not believe that this reporting requirement imposes an onerous burden on cable operators,⁵⁷ we nevertheless find that the burden of preparing and filing these reports on a quarterly basis outweighs any limited benefits to the Commission of receiving these reports. Further, while CVCC urges the Commission to retain the CableCARD reporting requirement to ensure that cable operators continue to support retail CableCARD devices,⁵⁸ as discussed above, we find that cable operators have strong business incentives to continue to support CableCARDs. We accordingly conclude that the quarterly status reports are no longer necessary to ensure that cable operators support retail CableCARD devices and we eliminate them.

IV. PROCEDURAL MATTERS

13. *Final Regulatory Flexibility Act Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, as amended,⁵⁹ the Commission's Final Regulatory Flexibility Analysis of the *Report and Order* is attached as Appendix B.

14. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

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

16. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is "non-major" under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

17. *Additional Information.* For additional information on this proceeding, contact Brendan Murray of the Media Bureau, Policy Division, (202) 418-1573.

V. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED**, pursuant to the authority contained in sections 4(i), 4(j), 303(r), and 629 of the Communications Act of 1934, as amended, 47 U.S.C §§ 154(i), 154(j), 303(r), and 549 that this *Report and Order* **IS ADOPTED**.

19. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, CS Docket No. 97-80 and MB Docket No. 16-42 **SHALL BE TERMINATED** and the dockets **CLOSED**.

⁵⁶ *Id.*

⁵⁷ *See* NCTA Comments at 173, n.416 (asserting that these reports impose an administrative burden on cable operators to gather the required information every 90 days).

⁵⁸ CVCC Comments at 48.

⁵⁹ 5 U.S.C. § 603.

20. **IT IS FURTHER ORDERED** that the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A effective as of the date of publication of a summary in the *Federal Register*.⁶⁰

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

22. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of the *Report and Order* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁰ These rule changes "reliev[e] a restriction." 5 U.S.C. § 553(d)(1).

APPENDIX A**Final Rules**

The Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.1205 to remove paragraphs (b) and (c) and revise the heading to read as follows:

§ 76.1205 Availability of Interface Information.

(a) Technical information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems shall be provided by the system operator upon request in a timely manner.

APPENDIX B

Final Regulatory Flexibility Analysis

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

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

2. The *Report and Order* terminates the proceedings CS Docket No. 97-80 *Commercial Availability of Navigation Devices* and MB Docket No. 16-42 *Expanding Consumers' Video Navigation Choices*. The *NPRM* in this proceeding proposed a complex framework of regulations for “navigation devices”—devices that consumers use to access multichannel video programming and other services offered over multichannel video programming networks—that would have required multichannel video programming distributors (MVPDs) to provide unbundled flows of programming information to third-party manufacturers, retailers, and software developers to enable them to create navigation devices. However, the *Report and Order* concludes that serious and significant questions about whether the proposed rules would protect programming outweigh the speculative benefits of the proposal. Specifically, several programmers, MVPDs, and the U.S. Copyright Office express serious concerns that the proposed rules would undermine anti-piracy protections, reducing the incentives of parties to invest in new content, and would force MVPDs, programmers, and copyright holders to violate the copyright licensing contract obligations to which they agreed, leading to costly and time-consuming litigation. In addition, the record in this proceeding has been fallow for four years and does not reflect important changes in the video programming marketplace and delivery of those services via applications that run on subscriber-owned devices.

3. The *Report and Order* also eliminates the CableCARD consumer support rules,⁴ concluding that these rules no longer serve a useful purpose following the D.C. Circuit’s 2013 decision in *Echostar Satellite L.L.C. v. FCC (Echostar)*.⁵ In *Echostar*, the court vacated the two 2003 Orders adopting the CableCARD standard as the method that must be used by all MVPDs in implementing the

¹ 5 U.S.C. § 603. The RFA, 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. 857 (1996).

² *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, MB Docket No. 16-42 and CS Docket No. 97-80, Notice of Proposed Rulemaking & Memorandum Opinion and Order, 31 FCC Rcd 1544, Appx. C (2016).

³ 5 U.S.C. § 604.

⁴ The CableCARD consumer support rules: (1) require cable operators to support the reception of switched digital video services on retail CableCARD devices to ensure that subscribers are able to access the services for which they pay regardless of whether they lease or purchase their devices; (2) prohibit price discrimination against retail CableCARD devices to support a competitive marketplace for such devices; (3) require cable operators to allow self-installation of CableCARDs where device manufacturers offer device-specific installation instructions to make the installation experience for retail devices comparable to the experience for leased devices; (4) require cable operators to provide multi-stream CableCARDs by default to ensure that cable operators are providing their subscribers with current CableCARD technology; and (5) clarify that CableCARD device certification rules are limited to certain technical features to make it easier for device manufacturers to get their products to market. 47 CFR § 76.1205(b).

⁵ 704 F.3d 992 (DC Cir 2013).

separation of security requirement for navigation devices.⁶ Although the consumer support rules were not adopted in either of the 2003 Orders vacated in *Echostar*, these rules expressly apply only to MVPDs that are “subject to the requirements of § 76.640.”⁷ Section 76.640, which imposed support requirements for unidirectional digital cable products on digital cable systems, was adopted in one of the 2003 Orders vacated in *Echostar*.⁸ Since there are no longer any MVPDs that are “subject to the requirements of § 76.640,” the *Report and Order* concludes that the CableCARD consumer support rules are unnecessary and accordingly eliminates these rules. The *Report and Order* also finds that retention of the CableCARD support rules is not necessary to ensure that consumers have retail alternatives to leased set-top boxes. Consumer demand for retail CableCARD devices never developed as anticipated and such demand has declined steadily in recent years due to the growing popularity of MVPD applications. The *Report and Order* finds, moreover, that retention of the CableCARD support rules is unnecessary to ensure that cable operators continue to support retail CableCARD devices during their expected lifetime. Cable operators are still required to provide separable security under section 76.1204, and industry complies with this obligation through the use of CableCARDS, even after *Echostar* eliminated the mandate that the CableCARD standard be used by all MVPDs in implementing the separation of security requirement.

4. Finally, the *Report and Order* eliminates the requirement that the largest cable operators submit status reports to the Commission every 90 days that detail show the cable operators meet “their obligations to deploy and support CableCARDS.”⁹ The *Report and Order* finds that much of the information required to be included in the reports is either repetitious or has little relevance today. The *Report and Order* further finds that cable operators have strong business incentives to continue to support retail CableCARD devices. Accordingly, the *Report and Order* concludes that the quarterly status reports are no longer necessary to ensure that cable operators support retail CableCARD devices.

⁶ 704 F.3d at 1000. The court concluded that the Commission lacked the authority under section 629 of the Act to impose encoding rules, which put a ceiling on the copy protections that MVPDs can impose, on satellite carriers. *Id.* The Commission argued that the encoding rules were not severable from the rest of the rules adopted in the 2003 Orders (including the rule that imposes the CableCARD standard), and therefore the court vacated both of the Orders. *Id.*

⁷ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80 and PP Docket No. 00-67, Order on Reconsideration, 26 FCC Rcd 791, 797, Appx. B (2011).

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80 and PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, 20892-99, paras. 13-29, 20932, Appx. B (2003).

⁹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Second Report and Order, 20 FCC Rcd 6794, 6814-15, para. 39 (2005). The reports are required to address the following: (1) the general availability of CableCARDS; (2) the number of CableCARDS currently in service and how those devices are placed in service; (3) whether service appointments are required for all CableCARD installations; (4) the average number of truck rolls required to install a CableCARD; (5) the monthly price charged for a CableCARD and the average cost of installation; (6) problems encountered in deploying CableCARDS and how those problems have been resolved; (7) the process in place for resolving existing and newly discovered CableCARD implementation problems; and (8) the effort to develop and deploy a multi-stream CableCARD. *Id.* The Commission stated that it “will indicate in a future proceeding when the CableCARD status reports will terminate.” *Id.* at 6815, para. 39. As a result of mergers and acquisitions, there are currently only four large cable operators that provide the CableCARD reports: Altice USA, Inc., Charter Communications, Comcast Corp., and Cox Communications.

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

5. Several commenters raised concerns that the proposed rules would be disproportionately and significantly burdensome on small MVPDs and asked the Commission to exempt small MVPDs from the final regulations.¹⁰ The *Report and Order* concludes, however, that the proposed rules should not be adopted and that the proceeding should be terminated. Accordingly, there is no need to address these comments.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

6. Pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.¹¹ The Chief Counsel filed comments expressing concern that “that the FCC’s proposed rules will be disproportionately and significantly burdensome for small [MVPDs]” and urging the FCC to “exempt small MVPDs when it finalizes its new rules.”¹² The *Report and Order* concludes that the proposed rules should not be adopted and that the proceeding should be terminated. Accordingly, there is no need to respond to the comments of the Chief Counsel.

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

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

8. The rule changes adopted herein will directly affect small cable television operators. Below, we provide a description of these small entities, as well as an estimate of the number of such small entities, where feasible.

9. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s

¹⁰ See, e.g., American Cable Association Comments at 39-55, 85-107 (ACA); Small Business & Entrepreneurship Council Comments at 2-4 (SBEC); ACA Reply at 8-13; SBEC Reply at 1-2; TiVo Reply at 23-24.

¹¹ 5 U.S.C. § 604(a)(3).

¹² Letter from Darryl L. DePriest, Chief Counsel for Advocacy, U.S. Small Business Administration, Office of Advocacy, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, at 1 (June 6, 2016).

¹³ 5 U.S.C. § 603(b)(3).

¹⁴ *Id.* § 601(6).

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

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

rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.¹⁷ Industry data indicate that there are currently 4,600 active cable systems in the United States.¹⁸ Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.¹⁹ In addition, under the Commission's rate regulation rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²⁰ Current Commission records show 4,600 cable systems nationwide.²¹ Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.²² Thus, under this standard as well, we estimate that most cable systems are small entities.

10. *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% 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.”²³ As of 2019, there were approximately 48,646,056 basic cable video subscribers in the United States.²⁴ Accordingly, an operator serving fewer than 486,460 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.²⁵ Based on available data, we find that five incumbent cable operators are small entities under this size standard.²⁶ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.²⁷ Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

¹⁷ 47 CFR § 76.901(e)

¹⁸ Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission’s Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals.

¹⁹ See SNL KAGAN at <https://www.snl.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8> (subscription required).

²⁰ 47 CFR § 76.901(c).

²¹ Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission’s Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals.

²² *Id.*

²³ 47 U.S.C. § 543(m)(2); see 47 CFR § 76.901(e).

²⁴ S&P Global Market Intelligence, *U.S. Cable Subscriber Highlights, Basic Subscribers(actual) 2019, U.S. Cable MSO Industry Total*, see also *U.S. Multichannel Industry Benchmarks, U.S. Cable Industry Benchmarks, Basic Subscribers 2019Y*, <https://platform.marketintelligence.spglobal.com>.

²⁵ 47 CFR § 76.901(e).

²⁶ S&P Global Market Intelligence, *Top Cable MSOs as of 12/2019*, <https://platform.marketintelligence.spglobal.com>. The five cable operators all had more than 486,460 basic cable subscribers.

²⁷ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to section 76.901(e) of the Commission’s rules. See 47 CFR § 76.901(e).

11. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic dish antenna at the subscriber's location. DBS is included in SBA's economic census category "Wired Telecommunications Carriers."²⁸ The Wired Telecommunications Carriers 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.²⁹ Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services.³⁰ By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.³¹ The SBA determines that a wireline business is small if it has fewer than 1500 employees.³² U.S. Census Bureau data for 2012 indicate that 3,117 wireline companies were operational during that year.³³ Of that number, 3,083 operated with fewer than 1,000 employees.³⁴ Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. Currently, however, only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network.³⁵ DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Accordingly, we must conclude that internally developed FCC data are persuasive that in general DBS service is provided only by large firms.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

12. In this section, we identify the reporting, recordkeeping, and other compliance requirements adopted in the *Report and Order* and consider whether small entities are affected disproportionately by any such requirements.

13. *Reporting Requirements.* The *Report and Order* eliminates the requirement that large cable operators report about CableCARD support and deployment on a quarterly basis.

14. *Other Compliance Requirements.* The *Report and Order* eliminates the CableCARD consumer support rules.

²⁸ See 13 CFR § 120.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICS code as 517311 for Wired Telecommunications Carriers. See, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

²⁹ *Id.*

³⁰ See *id.* Examples of this category are: broadband Internet service providers (*e.g.*, cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); CCTV services; VoIP service providers, using own operated wired telecommunications infrastructure; DTH services; telecommunications carriers (wired); satellite television distribution systems; and MMDS.

³¹ *Id.*

³² 13 CFR § 121.201, NAICS CODE 517110.

³³ See U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5/naics~517110.

³⁴ *Id.*

³⁵ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247, Eighteenth Report, 32 FCC Rcd 568, 595, Table III.A.5 (MB 2017).

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

15. 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 and reporting requirements under the rule for such 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.”³⁶

16. The elimination of the CableCARD reporting requirements³⁷ will not have any impact on small entities since these requirements applied only to the four largest cable operators.

17. The elimination of the CableCARD consumer support requirements³⁸ will have little, if any, impact on small entities. Competitive market forces are expected to incentivize cable operators to continue to support retail CableCARD devices even in the absence of the CableCARD support rules. Moreover, at least one of the CableCARD support requirements is obsolete and unnecessary.

G. Report to Congress

18. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.³⁹ In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.

³⁶ 5 U.S.C. § 603(c)(1)-(c)(4).

³⁷ See *supra* para. 13.

³⁸ See *supra* para. 14.

³⁹ 5 U.S.C. § 801(a)(1)(A).