APPENDIX C

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* ("*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 provided in Section IV.D. of the *Notice*. The Commission will send a copy of the *Notice,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

2. Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")[4] creates Section 340 of the Communications Act of 1934, as amended,[5] and amends the copyright laws[6] to provide satellite carriers with the authority to offer Commission-determined "significantly-viewed" signals of out-of-market broadcast stations to subscribers. Section 340 directs the Commission, within 60 days of enactment of the SHVERA, to (1) publish and maintain a list of the stations and the communities containing such stations that are eligible for "significantly viewed" status, and (2) commence a rulemaking proceeding to implement new Section 340.[7] This *Notice* achieves these statutory objectives by opening the present proceeding and publishing a list of significantly viewed stations,[8] and proposes rule changes to Part 76 of the Commission's rules[9] to implement Section 340's statutory authorization for satellite carriage of significantly viewed signals.

B. Legal Basis

3. The proposed action is authorized under Sections 1, 4(i) and (j), and 340 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 340.

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

[2] *See* 5 U.S.C. § 603(a).

[3] *See* 5 U.S.C. § 603(a).

[4] Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), Pub. L. No. 108-447, § 202, 118 Stat 2809, 3393 (2004) (to be codified at 47 U.S.C. § 340).

[5] 47 U.S.C. § 340.

[6] Section 102 of the SHVERA creates a new 17 U.S.C. § 119(a)(3) to provide satellite carriers with a statutory copyright license to offer out-of-market "significantly viewed" signals to subscribers. 17 U.S.C. § 119(a)(3).

[7] *See* 47 U.S.C. § 340(c)(1).

[8] The list of significantly viewed stations is contained in Appendix B to this *Notice*.

[9] *See* proposed rules contained in Appendix A to this *Notice*.

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

1. Entities Directly Affected By Proposed Rules

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 proposed rules, if adopted.[10] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," small organization," and "small government jurisdiction."[11] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[12] 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.[13]

5. The proposed rules contained in this *Notice*, as required by statute, are intended to permit the distribution of Commission-determined "significantly viewed" signals by statutorily defined "satellite carriers" to consumers.[14] Therefore, "satellite carriers," which includes Direct Broadcast Satellite (DBS), will be directly and primarily affected by the proposed rules, if adopted. In addition, we believe the proposed rules, if adopted, will also directly affect television stations, which may be carried via satellite under the SHVERA if determined to be significantly viewed, and cable operators, which would share some of the new and revised rules with satellite carriers. We also believe that private cable operators (PCOs), also known as satellite master antenna television (SMATV) systems, may be directly affected because PCOs often use DBS video programming as part of their service package to subscribers. Therefore, in this IRFA, we consider, and invite comment on, the impact of the proposed rules on small television broadcast stations, small cable and satellite operators and other small entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

6. *Satellite Carriers.* The SHVERA defines the term "satellite carrier" by reference to the definition in the copyright title 17.[15] This definition 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.[16] As a general practice, not mandated by any regulation, DBS licensees usually own and

[10] 5 U.S.C. § 603(b)(3).

[11] 5 U.S.C. § 601(6).

[12] 5 U.S.C. § 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." 5 U.S.C. § 601(3).

[13] 15 U.S.C. § 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.

[14] *See*, *supra*, Section III.A.8. of the *Notice*; *see also* 47 U.S.C. § 340(i)(1); 47 U.S.C. § 338(k)(3), as amended by the SHVERA, and 17 U.S.C. §119(d)(6).

[15] *See* 47 U.S.C. § 340(i)(1); 47 U.S.C. § 338(k)(3), as amended by the SHVERA, and 17 U.S.C. §119(d)(6).

[16] 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.

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.[17] In the *Notice*, we tentatively conclude that the definition of "satellite carrier" would include all three types of entities described above, but nonetheless request comment on this issue. Because the definition of "satellite carrier" will affect the type and number of entities impacted by the proposed rules, we again seek comment here, in the context of this IRFA.

7. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.[18] This definition provides that a small entity is one with $12.5 million or less in annual receipts.[19] Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DirecTV[20] and EchoStar Communications Corporation ("EchoStar"),[21] report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of $12.5 million, and thus does not qualify as a small business.[22] The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.[23] The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated $12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

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[17] *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).

[18] 13 C.F.R. § 121.201, NAICS code 517510.

[19] *Id.*

[20] DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; *see* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, FCC 05-13, ¶ 55 (rel. Feb. 4, 2005) ("*2005 Cable Competition Report*").

[21] EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id*.

[22] Rainbow DBS, which provides service under the brand name VOOM, reported an estimated 25,000 subscribers. *Id*.

[23] Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id*.

8. *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.[24] 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 Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in revenue annually.[25] Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Two 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.

9. *Cable and Other Program Distribution.* Cable system operators fall within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in revenue annually.[26] According to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more, but less than $25 million.[27] In addition, limited preliminary census data for 2002 indicates that the total number of Cable and Other Program Distribution entities increased approximately 46 percent between 1997 and 2002.[28] The Commission estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

10. *Cable System Operators (Rate Regulation Standard).* The Commission has developed, with SBA's approval, its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[29] We last estimated that there were 1,439 cable operators that qualified as small cable

[24] *See* 47 C.F.R. § 2.1(c).

[25] 13 C.F.R. § 121.201, NAICS code 517510.

[26] 13 C.F.R. § 121.201, NAICS code 517510.

[27] U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of $10 million was used to estimate the number of small business firms because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

[28] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513220 (issued Nov. 2004). The preliminary data indicate that the number of total "establishments" increased from 4,185 to 6,118. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[29] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. For "regulatory simplicity," the Commission established the company size standard in terms of subscribers, rather than dollars; in the cable context, $100 million in annual regulated revenues equates to approximately 400,000 subscribers. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Doc. Nos. 92-266 and 93-215, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7408-7409, ¶¶ 28-30 (1995).

companies at the end of 1995.[30] 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, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the proposals contained in this *Notice*.

11. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one 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."[31] The Commission has determined that there are 67.7 million subscribers in the United States.[32] 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 of its affiliates, do not exceed $250 million in the aggregate.[33] Based on available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 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,[34] 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.

12. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than $12 million in annual receipts.[35] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[36] According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of

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[30] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[31] 47 U.S.C. § 543(m)(2).

[32] *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 superceding Public Notice. We recognize that the number of cable subscribers was recently estimated by the Commission to be almost 66.1 million, as of June 2004; *see 2005 Cable Competition Report*, FCC 05-13, ¶¶ 9, 21. 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*.

[33] 47 C.F.R. § 76.901(f).

[34] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 U.S.C. § 573.

[35] *See* 13 C.F.R. § 121.201, NAICS Code 515120 (adopted Oct. 2002).

[36] NAICS Code 515120. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

June 26, 2004, about 860 of the 1,270 commercial television stations in the United States have revenues of $12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[37] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. There are also 2,127 low power television stations (LPTV).[38] Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the SBA definition.

13. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

14. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems*. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $12.5 million or less in annual receipts.[39] Currently, there are approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[40] 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 1.1 million subscribers.[41] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO qualify as small entities.

2. Entities Not Directly Affected By Proposed Rules

15. Because the SHVERA authorizes carriage of significantly viewed stations only by "satellite carriers," we do not believe that our proposed rules implementing the SHVERA will directly affect other multichannel video programming distributors (MVPDs), such as home satellite dish (HSD) services, multipoint distribution services (MDS)/multichannel multipoint distribution service (MMDS),

[37] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[38] FCC News Release, "Broadcast Station Totals as of September 30, 2002."

[39] 13 C.F.R. § 121.201, NAICS code 517510.

[40] *See 2005 Cable Competition Report*, FCC 05-13, ¶ 110. Previously, the Commission reported that IMCC had 250 members; *see* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*2004 Cable Competition Report*").

[41] *See 2005 Cable Competition Report*, FCC 05-13, ¶¶ 110.

Instructional Television Fixed Service (ITFS), local multipoint distribution service (LMDS) and open video systems (OVS). These other MVPDs were not included in the SHVERA and are therefore outside the scope of this IRFA. Nevertheless, although not required by the RFA, we invite comment from any small MVPDs which may be indirectly impacted from our proposed implementation of the SHVERA, but only to the extent that the impact on small entities can be minimized while fully implementing the SHVERA.

16. *Other Program Distribution.* The SBA-recognized definition of Cable and Other Program Distribution includes these other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS and OVS. This definition provides that a small entity is one with $12.5 million or less in annual receipts.[42] As previously noted, according to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more, but less than $25 million.[43] In addition, limited preliminary census data for 2002 indicates that the total number of Cable and Other Program Distribution entities increased approximately 46 percent between 1997 and 2002.[44] The Commission estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

17. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in revenue annually.[45] HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003, and June 2004, HSD subscribership fell from 502,191

[42] 13 C.F.R. § 121.201, NAICS code 517510. This NAICS code applies to all services listed in this paragraph.

[43] U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of $10 million was used to estimate the number of small business firms because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

[44] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513220 (issued Nov. 2004). The preliminary data indicate that the number of total "establishments" increased from 4,185 to 6,118. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[45] 13 C.F.F. § 121.201, NAICS code 517510.

subscribers to 335,766 subscribers, a decline of more than 33 percent.[46] The Commission has no information regarding the annual revenue of the four C-Band distributors.

18. *Wireless Cable Systems.* Wireless cable systems use the Multipoint Distribution Service ("MDS")[47] and Instructional Television Fixed Service ("ITFS")[48] frequencies in the 2 GHz band to transmit video programming and provide broadband services to subscribers. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[49] As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $12.5 million in annual receipts, appears applicable to MDS, ITFS and LMDS. In addition, the Commission has defined small MDS and LMDS entities in the context of Commission license auctions.

19. In the 1996 MDS auction,[50] 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.[51] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[52] In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[53] MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these

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[46] *See 2005 Cable Competition Report*, FCC 05-13, ¶ 64. HSD subscribership declined more than 28 percent between June 2002 and June 2003. *See 2004 Cable Competition Report*, 19 FCC Rcd 1654-55, ¶¶ 73-4.

[47] 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*").

[48] 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.

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

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

[51] 47 C.F.R. § 21.961(b)(1).

[52] *See ITFS Order*, 10 FCC Rcd at 9589.

[53] 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.

licensees and operators that do not generate revenue in excess of $12.5 million annually. Therefore, we estimate that there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

20. While SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.[54] There are currently 2,032 ITFS 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.

21. In the 1998 and 1999 LMDS auctions,[55] the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[56] 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.[57] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[58] In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

22. In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

23. *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,[59] OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with $ 12.5 million or less in annual receipts.[60] 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

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

[55] 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.)

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

[57] *Id.*

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

[59] *See* 47 U.S.C. § 573.

[60] 13 C.F.R. § 121.201, NAICS code 517510.

local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services.[61] As of June 2003, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.[62] Among BSPs, however, those operating under the OVS framework are in the minority, with approximately eight percent operating with an OVS certification.[63] Serving approximately 460,000 of these subscribers, Affiliates of Residential Communications Network, Inc. ("RCN") is currently the largest BSP and 11th largest MVPD.[64] 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.

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

24. The SHVERA was enacted to permit satellite carriage of Commission-determined "significantly-viewed" signals of out-of-market broadcast stations to consumers. The SHVERA allows satellite carriers and broadcast stations to obtain "significantly-viewed" status for satellite carriage pursuant to Section 340 of the Act, and thus does not impose any mandatory reporting, recordkeeping and other compliance requirements, unless a satellite carrier and station choose to take advantage of the SHVERA's provisions. The proposed rule changes that we believe will directly affect reporting, recordkeeping and other compliance requirements are described below.[65]

25. This *Notice* proposes that satellite carriers and broadcast stations seeking a "significantly viewed" designation for a station and the community containing such station pursuant to Section 340 will follow the same petition process now in place for cable operators (and broadcast stations), as required by Sections 76.5, 76.7 and 76.54 of the Commission's rules.[66] Therefore, entities seeking a "significantly viewed" designation would file a petition pursuant to the pleading requirements in Section 76.7(a)(1) and use the method described in Section 76.54 to demonstrate that the station is significantly viewed as defined in Section 76.5(i). Parties filing such petitions must also comply with the existing notification requirements of Section 76.54(c).[67]

26. Furthermore, this *Notice* proposes to (1) create a limited right for a station or distributor to assert nonduplication and exclusivity rights with respect to a station carried by a satellite carrier as significantly viewed; (2) allow that significantly viewed station to assert the significantly viewed exception, just as a station would with respect to cable carriage; and (3) allow the station or distributor

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[61] *See 2005 Cable Competition Report*, FCC 05-13, ¶ 71.

[62] *See 2004 Cable Competition Report*, 19 FCC Rcd at 1659-60, ¶¶ 80-1.

[63] *See 2005 Cable Competition Report*, FCC 05-13, ¶ 71.

[64] *Id*. WideOpenWest is the second largest BSP and 15th largest MVPD, with cable systems serving about 288,000 subscribers as of September 2003. The third largest BSP is Knology, which currently serves approximately 174,957 subscribers as of June 2004; *see 2005 Cable Competition Report*, FCC 05-13, ¶ 71.

[65] *See* proposed rules contained in Appendix A to this *Notice*.

[66] *See* 47 C.F.R. §§ 76.5, 76.7, 76.54; *see also, supra,* Section III.A.3. of the *Notice*.

[67] *See* 47 C.F.R. § 76.54(c) (requiring notice to certain broadcast stations); *see also* proposed Section 76.54(c) contained in Appendix A to this *Notice*.

asserting exclusivity to petition the Commission for a waiver from the exception.[68] The assertion of these rights will require affected parties to file Section 76.7 petitions.

27. This *Notice* also proposes to rely on the Commission's existing Section 76.7 petition process as the procedural framework for the filing of complaints filed pursuant to new Section 340. Thus, we propose that interested parties that wish to report Section 340 violations may file a Petition for Special Relief under Section 76.7.[69]

28. As required by Section 340(g)(1), this *Notice* proposes a new rule, proposed Section 76.54(e), to require satellite carriers seeking to retransmit significantly viewed signals pursuant to new Section 340 to provide 60 days written notice to all stations located in the local market. As required by Section 340(g)(2), this *Notice* also proposes a new rule, proposed Section 76.54(f), to require satellite carriers retransmitting significantly viewed stations pursuant to new Section 340 to publish a list of all such stations on their website. These proposed rules do not impose any burden on broadcast stations, but rather are intended to protect the rights of broadcast stations, including small stations.

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

29. The RFA requires an agency to describe any significant alternatives that it has considered in 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.[70]

30. With respect to the implementation of new Section 340, the SHVERA does not offer much flexibility with respect to minimizing its impact on small entities. In seeking regulatory parity with cable operators, Congress sought to apply to satellite carriers the existing regulatory framework concerning the distribution of significantly viewed signals.[71] Accordingly, the SHVERA authorizes satellite carriage of significantly viewed stations using the same framework in place for the cable carriage context that has been in effect as of April 15, 1976.[72] Therefore, the Commission does not have discretion to choose an alternate means of implementing the SHVERA.

31. Notably, the nature of new Section 340 is permissive, meaning only satellite carriers that choose to carry significantly viewed stations would be impacted by our proposed implementation of the statute. Likewise, only television broadcast stations seeking carriage as significantly viewed would be impacted. The compliance requirements of cable operators with respect to carriage of significantly viewed stations are not changed.

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[68] *See, supra,* Section III.A.5. of the *Notice*.

[69] *See* 47 C.F.R. § 76.7; *see also, supra,* Section III.D.1. of the *Notice*.

[70] 5 U.S.C. § 603(c)(1)-(c)(4)

[71] *See* 17 U.S.C. § 119(a)(3); *House Commerce Committee Report* at 1 (Purpose of the SHVERA includes "increasing regulatory parity by extending to satellite carriers the same type of authority cable operators already have to carry 'significantly viewed' signals into a market"); *see also, supra,* Section III.A.3. of the *Notice*.

[72] 17 U.S.C. § 119(a)(3).

32. The statute's compliance requirements primarily impact satellite carriers, such as DBS providers. As previously noted, there are now only four DBS licensees, none of which are small entities. Small businesses do not generally have the financial ability to become DBS licensees because of the high implementation costs associated with satellite services. Moreover, the statute confers a benefit to satellite carriers, enabling them to carry significantly viewed stations.

33. Nevertheless, to the extent they are affected, we urge small broadcast stations and small cable and satellite operators to provide data on the impact of the proposals and issues raised in the *Notice*, including how we might tailor our proposals to address and minimize the impact on small businesses. We expect that, whichever alternatives are chosen, the Commission will seek to minimize any adverse effects on small entities, to the extent permitted by statute.

34. We believe that the SHVERA will benefit some number of small broadcast stations by offering them the opportunity to be a significantly viewed station that will be delivered to more viewers. We recognize, however, that there is also the possibility that small in-market stations will face a competitive impact from the entry of out-of-market significantly viewed stations. We do not believe it is possible to measure whether small stations are more or less likely to benefit in this regard, but invite comment on this question.

35. While the statute does not impose any requirements on small cable operators, it is possible that such small entities could face a competitive impact because of the benefit conferred to satellite carriers. In fact, the express intent of the statute was to level the competitive playing field between cable operators and satellite providers.[73] Congress, however, recognized that the SHVERA may impact the competitiveness of small cable operators, and thus directed the Commission to conduct an inquiry in a separate proceeding on the impact of specific provisions of the Communications Act of 1934, as amended, the SHVERA provisions, and Commission rules on competition in the MVPD market.[74] Accordingly, the Commission has issued a Public Notice to initiate this inquiry.[75]

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

36. None.

G. Report to Congress

37. The Commission will send a copy of the *Notice*, including this IRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[76] In addition, the Commission will send a copy of the *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Notice* and IRFA (or summaries thereof) will also be published in the Federal Register.[77]

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[73] *See id*.

[74] *See* Section 208 of SHVERA. The Commission is required to submit a report to Congress on the results of its inquiry no later than nine months after SHVERA's enactment date (*i.e.*, September 8, 2005).

[75] Public Notice, "Media Bureau Seeks Comment For Inquiry Required By the on Rules Affecting Competition In the Television Marketplace," MB Docket No. 05-28, DA 05-169 (rel. Jan. 25, 2005) (Comments are due March 1, 2005; replies are due March 16, 2005.).

[76] *See* 5 U.S.C. § 801(a)(1)(A).

[77] *See* 5 U.S.C. § 604(b).