

minimum of nine months a year for an average of 20 hours of service per week and a maximum of 1044 hours per year. The proposed amendment would allow Foster Grandparent Program sponsors increased flexibility in determining the hours of service for Foster Grandparents in accordance with local needs, within a range of from 15 to 40 hours per week, subject to a maximum of 2088 hours per year.

(4) Section 2552.61 details conditions in which a Foster Grandparent Program sponsor may serve as a volunteer station. The Corporation believes these conditions should be expanded. Since each sponsor currently submits workplans with its grant applications for approval by the Corporation State Office, the Corporation believes the review of these workplans provides sufficient basis for deciding the appropriateness of a given sponsor serving as a volunteer station. The proposed amendment would permit a sponsor to serve as a volunteer station provided that this is part of a workplan submitted with the application.

**List of Subjects in 45 CFR Part 2552**

Aged, Grant programs—social programs, Volunteers.

For the reasons set forth in the preamble, the Corporation for National and Community Service proposes to amend 45 CFR part 2552 as follows:

**PART 2552—FOSTER GRANDPARENT PROGRAM**

1. The authority citation for part 2552 continues to read as follows:

*Authority:* 42 U.S.C. 4950 *et seq.*

2. Revise § 2552.23(c)(2)(iv) to read as follows:

**§ 2552.23 What are a sponsor's program responsibilities?**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iv) That states the station assures it will not discriminate against Foster Grandparents or in the operation of its program on the basis of race; color; national origin, including individuals with limited English proficiency; sex; age; political affiliation; religion; or on the basis of disability, if the participant or member is a qualified individual with a disability; and

\* \* \* \* \*

3. In § 2552.42, revise paragraph (b) to read as follows:

**§ 2552.42 What income guidelines govern eligibility to serve as a stipended Foster Grandparent?**

\* \* \* \* \*

(b) For applicants to become stipended Foster Grandparents, annual income is projected for the following 12 months, based on income at the time of application. For serving stipended Foster Grandparents, annual income is counted for the past 12 months. Annual income includes the applicant or enrollee's income and that of his/her spouse, if the spouse lives in the same residence. Sponsors shall count the value of shelter, food, and clothing, if provided at no cost by persons related to the applicant, enrollee, or spouse.

\* \* \* \* \*

4. Revise § 2552.51 to read as follows:

**§ 2552.51 What are the terms of service of a Foster Grandparent?**

A Foster Grandparent shall serve a minimum of 15 hours per week and a maximum of 40 hours per week. A Foster Grandparent shall not serve more than 2088 hours per year. Within these limitations, a sponsor may set service policies consistent with local needs.

5. Revise § 2552.61 to read as follows:

**§ 2552.61 May a sponsor serve as a volunteer station?**

Yes, a sponsor may serve as a volunteer station, provided this is part of the application workplan approved by the Corporation.

Dated: April 10, 2002.

**Tess Scannell,**

*Director, National Senior Service Corps.*

[FR Doc. 02-9200 Filed 4-16-02; 8:45 am]

BILLING CODE 6050-SS-P

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 76**

[CS Docket No. 02-52; FCC 02-77]

**Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities**

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document addresses the consequences of the Commission's classification of cable modem service as an information service as defined in section 3(20) of the Communications Act, 47 U.S.C. 153(20). Cable modem service is a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access.

The Notice of Proposed Rulemaking asks questions about whether, and if so,

how, cable modem service should be regulated by the Commission. This document also seeks comment on how the classification decision may affect State and local regulation of cable modem service. This document provides persons with the opportunity to submit comments and information with which the Commission can address these issues.

**DATES:** Comments are due on or before June 17, 2002 and reply comments are due on or before July 16, 2002.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION, CONTACT:** Steve Garner, Media Bureau at (202) 418-1063 or via Internet at [sgarner@fcc.gov](mailto:sgarner@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rulemaking, CS Docket No. 02-52, adopted March 14, 2002, and released March 15, 2002. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554, and may be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com) or may be viewed via Internet at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-02-77A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf).

**Synopsis of the Notice of Proposed Rulemaking**

1. This Notice of Proposed Rulemaking ("NPRM") was initiated based on the record developed in the Notice of Inquiry ("NOI") proceeding initiated in GN Docket No. 00-185 in September 2000. The NOI pleading cycle, in which interested parties ("commenters") could file pleadings, ended in January 2001.

2. This NPRM concerns cable modem service, which is a high-speed (or "broadband") Internet access service provided to residential subscribers over cable system facilities. The Commission found in a Declaratory Ruling accompanying the NPRM that cable modem service is an information service as that term is defined in Section 3(20) of the Communications Act of 1934, as amended ("the 1934 Act"), 47 U.S.C. 153(20). The NPRM addresses a number of possible consequences of the Commission's classification of cable modem service as an information service. The following paragraphs

describe the issues on which the Commission asks for comment in the NPRM.

#### *Background*

3. The NPRM first seeks comment on the Commission's jurisdiction and authority to regulate cable modem service. The NPRM also seeks comment on whether the Commission may, and, if so, should, impose any form of so-called "multiple ISP (Internet Service Provider) access" requirements on operators of cable systems ("cable operators"). The NPRM describes multiple ISP access as a requirement that cable operators provide unaffiliated ISPs with the right access to cable modem service customers directly. Previously, the NOI sought comment on a variety of models by which a cable operator could be required to provide multiple ISP access. The NPRM requests commenters to specify, in asking the questions summarized below, whether commenters are addressing any form of multiple ISP access in particular, on all forms described in the Notice of Inquiry, and whether any access requirement should specifically limit ISP access to uses related to the offering of cable modem service, or should explicitly permit other uses by ISPs.

#### *Commission Authority*

4. Given its classification of cable modem service as an interstate information service, the Commission asks for comment on whether the Commission should exercise its ancillary authority under Title I of the 1934 Act with regard to the provision of cable modem service. In another recent NPRM, concerning broadband Internet access service provided by traditional wireline telecommunications common carriers (the "*Wireline Broadband NPRM*"), the Commission tentatively concluded that wireline broadband Internet access service is an interstate information service. In the present NPRM, the Commission asks how its findings and decisions in one proceeding should impact the other. It also requests comment on whether there are legal or policy reasons why it should reach different conclusions with respect to wireline broadband Internet access service and cable modem service. Should any decision to exercise Title I jurisdiction over either service be influenced by the cable operators' current status as the leading providers of residential broadband services?

5. The NPRM seeks comment on any explicit statutory provisions, including expressions of congressional goals, which would be furthered by the Commission's exercise of ancillary

jurisdiction over cable modem service. The Commission mentions as possibilities sections 1, 230(b), and 601(4) of the 1934 Act and section 706 of the 1996 Telecommunications Act. The NPRM requests comment on the use of these or other statutory provisions as the basis for the Commission's exercise of Title I jurisdiction. It also requests comment on whether reliance on ancillary jurisdiction in support of these or other provisions would be analogous to the Commission's reliance on ancillary jurisdiction in adoption of its *Computer Inquiry* rules. In addition, given the relationship of cable modem service (including the underlying transmission component) to services provided by wireline common carriers, the NPRM seeks comment on whether there are any additional bases for asserting ancillary jurisdiction.

6. The NPRM seeks comment on whether a federally mandated system of multiple ISP access would violate the First Amendment rights of cable operators. The NPRM seeks comment in particular on the level of First Amendment scrutiny that would apply to a federal multiple ISP access requirement, especially in light of recent case law or Commission precedent concerning the First Amendment. Have marketplace conditions in the residential high-speed Internet access business changed since the close of the pleading cycle in this proceeding in ways that alter the First Amendment analysis? Have trials and limited commercial offerings of different kinds of multiple ISP access shown that certain types of access place a minimal burden on the cable operators while achieving the maximum choice for subscribers?

7. The NPRM also seeks comment whether multiple ISP access would constitute a "*per se*" or "regulatory" taking of the cable operator's property without just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution. It seeks comment on what, if a form of multiple ISP access did entail a taking, would be "just compensation" for it. Would ensuring just compensation necessarily involve regulators in setting the price that a cable operator charges unaffiliated ISPs (or vice versa)? Or could just compensation be ensured by some market-based process of negotiations? Do recent technological developments, technical trials, and limited commercial offerings of multiple ISP access indicate that some forms of multiple ISP access minimize occupation of the cable operator's property and economic harm to it? The NPRM requests comment on these issues. The NPRM also seeks

comment on whether there are additional Constitutional concerns related to multiple ISP access requirements.

#### *Marketplace Developments*

8. The NPRM asks that commenters update the record on what has changed in the cable modem service marketplace since the pleading cycle on the Notice of Inquiry closed, particularly with respect to evolving business relationships among cable operators and their service offerings. Do recent events demonstrate that the market will provide consumers a choice of ISPs without government intervention, or that the absence of widespread business arrangements raises a level of concern sufficient to warrant Commission action? The NPRM asks that commenters who believe that Commission intervention is necessary describe in detail what sort of regulations the Commission should impose. It also asks for comment regarding whether any decision the Commission makes about multiple access requirements for cable systems in this proceeding should apply to Open Video Systems.

9. The NPRM asks whether, in current and likely future market conditions, any form of multiple ISP access is needed to promote the Commission's goals of, for example, promoting the deployment of advanced telecommunications capability; spurring investment in facilities to provide high-speed Internet access service and innovation among service providers, ISPs, and creators of content; and/or facilitating intramodal or intermodal competition. Or would multiple ISP access, if mandated by regulation, have the opposite effects? The NPRM seeks comment on whether the Commission's decision-making should be guided by principles that embrace intramodal competition. If so, the NPRM seeks comment on whether the market can or will satisfy these principles or whether some form of multiple ISP access regime for cable systems is needed to do so. To what extent should any decision regarding multiple ISP access requirements be influenced by the desirability of 'regulatory parity,' namely the presence or absence of multiple ISP access regimes for other technologies (such as wireline, terrestrial wireless, and satellite) that offer residential high-speed Internet access service? To what extent should that decision be impacted by cable operators' current status as the leading providers of residential broadband services?

10. *Consumer Demand.* The NPRM asks whether there is a demand for

access to several ISPs and, if there is, whether that demand is being met today. Specifically, does “click through” access to any ISP and content on the World Wide Web produce the same, or almost the same, value that a regulatory system of multiple ISP access would produce? Is any cable operator or ISP denying, or likely to deny, click through access? Is the threat that subscriber access to Internet content or services could be blocked or impaired, as compared to content or services provided by the cable operator or its affiliated ISP, sufficient to justify regulatory intervention at this time?

11. *Cost/Benefit Analysis.* The NPRM requests comment on the costs that a multiple ISP access mandate would impose on cable operators and on the benefits that a mandate would bring to consumers. Would some forms of multiple ISP access be less costly to cable operators and more beneficial to consumers than others? Is the cost/benefit calculation for multiple ISP access different for small cable operators than it is for others? Would the requirements imposed on telecommunications carriers by the Commission’s *Second Computer Inquiry* or *Third Computer Inquiry* provide a useful model for a multiple ISP access regime? Would the new forms of multiple ISP access that are being deployed or are under consideration by cable operators, such as the model being implemented by AOL Time Warner pursuant to the Federal Trade Commission’s AOL Time Warner Merger Order, provide useful models? Other possible means of effecting a multiple ISP access regime include adopting a general rule of reasonableness for cable operators in their dealings with ISPs seeking access to their cable systems and/or requiring cable operators to make high-speed transmission available to other ISPs at “market-based prices.” The Commission could then rely on its complaint processes to resolve individual disputes about these standards. The NPRM asks whether such a system of general principles and case-by-case adjudication would achieve the Commission’s goals in a timely and cost-effective manner.

12. The NPRM asks what lessons, if any, trials and current commercial offerings of multiple ISP access reveal about the costs and benefits of multiple ISP access and how such costs and benefits can be balanced. Has recent experience with the addition of source-based routers showed that technology to be an efficient form of multiple ISP access?

13. The NPRM asks for comment on be the costs of regulatory enforcement of

a multiple ISP access mandate. Would a multiple ISP access mandate lead to significant opportunities for regulatory arbitrage—businesses making decisions based on regulatory classifications rather than on customers’ preferences and innovative and sustainable business plans? Would a multiple ISP access mandate impose long-term costs on the market? In light of the new and fast-changing nature of the residential high-speed Internet access business, would a multiple ISP access requirement, imposed at this time, hinder the development of a market that is still evolving? In particular, might a requirement preclude the discovery of network design, content, applications, and business models that would otherwise enjoy widespread adoption and enhance long-term consumer welfare? Is there a way to implement multiple ISP access now that would avoid any such harmful interference in the future and that would achieve the Commission’s goals? If the Commission adopts a multiple ISP access mandate for cable systems generally, should it exempt small cable systems from such a mandate because of the particular conditions that they face?

14. The NPRM notes that the Commission is particularly interested in comments that provide updated information and discuss relevant regulatory and judicial decisions issued since the comment period closed for the Notice of Inquiry in GN Docket 00–185. The Commission is likely to find particularly relevant and persuasive empirically supported studies that use well-established methods for quantifying benefits and harms, as well as comments based on well-established economic theory.

15. *Changing Market Conditions.* Assuming that the Commission ultimately concludes not to impose multiple ISP access at this time, the NPRM asks what, if any, future events should lead it to do so. Are there market conditions that are not currently pervasive but, should they become pervasive, would suggest the need for a multiple ISP access mandate in the future? Would these conditions include the acquisition of market power by cable operators in providing residential high-speed Internet access, cable operators’ refusals to satisfy subscriber demand for multiple ISP access, or the evolution of a mature market for residential high-speed Internet access? Would a finding that subscriber access to Internet content or services may be blocked or impaired, as compared to other content or services, particularly that provided by the cable operator or its affiliate, support regulatory intervention? The

NPRM seeks comment on other conditions that would suggest regulation is needed and on objective, readily measurable criteria by which the Commission could detect the occurrence of such conditions. It asks whether ongoing monitoring is appropriate to ensure that any relevant conditions are detected accurately and in a timely manner and, if so, what that monitoring would consist of.

16. The NPRM also seeks comment on indicia that a cable operator is offering a common carrier telecommunications service (other than local telephone service) or a private carrier service, on a stand-alone basis, to ISPs or subscribers. The NPRM asks how the Commission might detect that a cable operator is, in fact, making such an offering. If and when a cable operator makes such an offering, what, if any, access requirements should the Commission impose on it? For example, if the Commission found that a cable operator were making such an offering, would that trigger the requirements of the *Second Computer Inquiry* and *Third Computer Inquiry* with respect to the retail offering of cable modem service to subscribers, or make their application in the public interest? To what extent should these decisions impact, or be impacted by, the conclusions made in the *Wireline Broadband NPRM* proceeding? The NPRM asks for comment on the appropriate scope of regulation of any such offerings of telecommunications service.

17. *Forbearance from Telecommunications Service Obligations.* The U.S. District Court for the Southern District of California has expressed the view that it is bound by the Ninth Circuit’s decision in *AT&T v. City of Portland* that cable modem service is a telecommunications service. The Ninth Circuit had left open the question as to whether the Commission could forbear from particular Title II obligations under Section 10 of the Communications Act. To the extent that cable modem service may be subject to telecommunications service classification, the NPRM seeks comment on whether the Commission should forbear from applying each provision of Title II or common carrier regulation. The NPRM invites comment on whether enforcement of such provisions is not necessary to ensure that the charges, practices, classification or regulations in connection with cable modem service are just and reasonable and not unjustly or unreasonably discriminatory. Is enforcement not necessary for the protection of consumers? Would forbearance be consistent with the public interest? The NPRM tentatively

concludes that such forbearance would be justified. Given that cable modem service will be treated as an information service in most of the country, the Commission tentatively concludes that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent that cable modem service is classified as a telecommunications service. The Commission states its belief that forbearance would be in the public interest because cable modem service is still in its early stage; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still evolving. Thus, the Commission tentatively concludes that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly discriminatory. The Commission states its belief that forbearance from Title II and common carrier regulation is appropriate under the circumstances. The NPRM requests comment on this conclusion and the underlying analysis, and asks that commenters focus on how such forbearance and/or regulation would further the Commission's goals.

#### *Consequences of Legal Classification as Information Service*

18. State and Local Regulation of Cable Modem Service and Rights-of-Way. The NPRM seeks comment whether the Commission should interpret its assertion of jurisdiction over cable modem service under the Communications Act to preclude State and local authorities from regulating cable modem service and facilities in particular ways. The NPRM notes that the courts have recognized the Commission's authority under Title I to preempt non-Federal regulations that negate the Commission's goals, including regulations affecting enhanced services. The NPRM seeks comment as to any additional basis for preempting such regulations, including, for example, section 624(b) of the Communications Act.

19. In addition to the access requirements, franchise requirements, and franchise fees discussed below, the NPRM seeks comment on any other forms of State and local regulation that would limit the Commission's ability to achieve its national broadband policy, discourage investment in advanced communications facilities, or create an unpredictable regulatory environment. Specifically, the NPRM seeks comment as to whether the Commission should use its preemption authority to preempt

specific State laws or local regulations. It asks commenters to specify what preemption authority the Commission would rely on in each case.

20. *Access Requirements.* The NPRM seeks comment on any regulatory authority that State and local governments may have with respect to cable modem service as an information service, including any authority to impose multiple ISP access requirements or to prohibit, limit, restrict, or condition the provision of cable modem service. Is such regulation consistent with any exercise of the Commission's jurisdiction over cable modem service under Title I, including any affirmative decision the Commission might make to refrain from imposing specific regulatory requirements?

21. *Rights-of-Way and Franchising Issues.* The NPRM asks for comment on how the classification of cable modem service as an interstate information service impacts State and local regulation of rights-of-way and franchising. The NPRM tentatively concludes that once a cable operator has obtained a franchise for a cable system, the Commission's information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service. The NPRM seeks comment on this tentative conclusion. It also seeks comment on whether providing additional services over upgraded cable facilities imposes additional burdens on the public rights-of-way such that the existing franchise process is inadequate. If so, the NPRM asks whether Title VI nevertheless precludes local franchising authorities from imposing additional requirements on cable modem service. The NPRM tentatively concludes that Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service.

22. The NPRM also seeks comment generally on the scope of local franchising authority over facilities-based providers of information services. Do State statutes and Constitutional provisions authorizing local franchising in terms of utility services generally, or cable and telecommunications networks and services specifically, authorize localities to franchise providers of information service under existing law? If so, is there any basis for treating facilities-based providers of information services differently based on the facilities used? The NPRM expresses concern that State or local regulation

beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs on the development of new broadband services. It notes questions about potential State and local actions that could restrict entry, impose access or other requirements on cable modem service, or assess fees or taxes on cable Internet service. It seeks comment on these issues.

23. In the NPRM, the Commission tentatively concludes that Title VI of the 1934 Act does not provide an independent basis of authority for assessing franchise fees on cable modem service. The NPRM seeks comment on this issue.

24. *Franchise Fees Previously Paid Pursuant to Section 622.* The NPRM also notes that some cable operators, believing they were legitimately carrying out their obligations and rights under Title VI of the 1934 Act and local franchise agreements, collected franchise fees based on cable modem service revenues, identified these fees on subscriber bills, and remitted these franchise fees to local franchising authorities pursuant to the terms of their franchising agreements. After the Ninth Circuit's decision in *AT&T v. Portland*, some cable operators suspended collecting and remitting franchise fees for revenues from cable modem service in Ninth Circuit States out of concern about their exposure to significant litigation risk if they were to continue collecting a franchise fee on cable modem service. Subscribers in other states are understood to have raised the issue of whether franchise fees were lawfully collected from them and whether the fees collected should be refunded. The NPRM seeks comment on whether disputes regarding franchise fees based on cable modem service implicate a national policy concerning communications that calls upon Commission expertise, given that the fees in question were collected pursuant to the Communications Act and that the Commission's classification decision will alter, on a national scale, the regulatory treatment of cable modem service. The NPRM seeks comment on whether it is appropriate for the Commission to exercise its jurisdiction under section 622 of the Communications Act to resolve the issue of previously collected franchise fees based on cable modem service revenues or whether these issues are more appropriately resolved by the courts.

25. *Consumer Protection and Customer Service.* The NPRM also seeks comment on how the Commission's information service classification may

affect other aspects of State or local regulation, such as consumer protection and customer service standards regarding cable modem service. The NPRM asks whether the authority conferred on franchising authorities by section 632(a) of the Communications Act to establish and enforce customer service requirements applies to cable modem service provided by a cable operator. Do the provisions in section 632(d), stating that nothing in Title VI "shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by [Title VI]," or "to prevent the establishment or enforcement" of customer service laws or regulations that exceed Commission standards or address matters not addressed by Commission standards under section 632, apply to cable modem service?

26. *Protection of Subscriber Privacy.* Section 631 of the Communications Act addresses privacy for subscribers to "any cable service or other service" provided by a cable operator. The NPRM states that the Commission interprets cable modem service to be an "other service." The NPRM seeks comment on this interpretation. And, although section 631's terms are enforced by the courts, and not by the Commission, the NPRM seeks comment as to how the privacy requirements of section 631 affect providers of cable modem service.

#### *Initial Regulatory Flexibility Analysis*

27. As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.* as amended ("RFA"), the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to this IRFA and must be filed by the deadlines for comments on the NPRM provided in paragraph 41 of this NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").

28. Need for, and Objectives of, the Proposed Rules. With our declaratory ruling herein, we have sought to provide regulatory certainty for the emerging cable modem service industry by resolving a nationwide controversy concerning the proper regulatory classification of cable modem service under federal law. In doing so, we

recognize that there are a number of related issues that may need resolution in the form of federal rules. By this Notice of Proposed Rulemaking, we seek comment on certain issues related to the practical implementation of our classification of cable modem service as an information service.

29. *Legal Basis.* The authority for the action proposed in this rulemaking is contained in sections 1, 2(a), 3, 4(i), 4(j), 303, and 601 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 153, 154(i), 154(j), 303, and 521, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 *nt.*

30. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* The RFA, 5 U.S.C. 603(b)(3), 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. The RFA, 5 U.S.C. 601(6), generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. 632). Under 15 U.S.C. 632, 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.

31. The SBA has developed a small business size standard, 13 CFR 121.201, North American Industry Classification System ("NAICS") code 513220, for cable and other program distribution," which includes all such companies generating \$11 million or less in revenue annually. This category includes, among others, cable operators, closed circuit television services, direct broadcast satellite services, multipoint distribution services, open video systems ("OVS"), satellite master antenna television ("SMATV") systems, and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than \$11 million in revenue. The Commission addresses cable operators and OVS operators below to provide a more precise estimate of the affected small entities. The Commission does not believe that the other pay television services would

be affected by the proposals in the NPRM.

32. *Cable Systems.* The Commission has developed its own small business size standard for a small cable operator for the purposes of rate regulation. Under the Commission's rules, 47 CFR 76.901(e), a "small cable company" is one serving fewer than 400,000 subscribers nationwide. Based on Commission's most recent information, it estimates that there were 1,439 cable operators that qualified as small cable companies at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are fewer than 1,439 small cable companies that may be affected by the NPRM.

33. The Communications Act of 1934, 47 U.S.C. 543(m)(2) 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." The Commission has determined that there are 67,700,000 subscribers in the United States. 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. See 47 CFR 76.1403(b). Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450. The Commission does not request or collect information on whether cable operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, and therefore is unable to estimate accurately the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

34. *Open Video Systems ("OVS").* Because OVS operators provide subscription services, as specified in 47 U.S.C. 573, OVS falls within the SBA-recognized definition of "Cable and Other Program Distribution," 13 CFR 121.201, NAICS Codes 51321 and 51322. This standard provides that a small entity is one with \$11 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of those are currently providing service.

Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure the Commission that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, the Commission concludes that at least some of the OVS operators qualify as small entities.

35. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements. The NPRM seeks comment on the regulatory implications of the Commission's finding that cable modem service is an information service under the Communications Act, 47 U.S.C. 153(20) as amended. Specifically, the NPRM seeks comment on whether the Commission should require cable operators that provide cable modem service to allow unaffiliated ISPs to have direct access to the cable operator's subscribers via the cable system facilities.

36. The NPRM also seeks comment on the scope of state and local government authority over cable modem service in light of the Commission's finding that it is an information service. This determination may not have a direct effect on small entities, but indirectly it may impact small entities, such as small cable operators, if local governments are permitted to require cable operators to grant unaffiliated ISPs access to the cable system or if local governments are permitted to enforce other regulations that affect a cable operator's provision of cable modem service.

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

38. The NPRM seeks comment on several regulatory alternatives to

implement the Commission's classification of cable modem service as an information service under the Communications Act. For example, alternatives considered in the NPRM include whether unaffiliated ISPs should be provided with access to cable systems and, if so, which of the various access models should be adopted. In addition, the Commission will also consider whether any access requirements ultimately adopted should be different for large cable operators from those imposed on small cable operators. Finally, the NPRM considers whether the Commission should refrain entirely from imposing any ISP access requirements on cable operators. The Commission expects that whichever alternatives are chosen the Commission will seek to minimize any adverse effects on small entities.

39. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals. None.

#### Procedural Matters

##### *Ex Parte*

40. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under § 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b), as revised. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 CFR 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b), as revised. Parties submitting written ex parte presentations or summaries of oral ex parte presentations are urged to use the Electronic Comment Filing System ("ECFS") in accordance with the Commission rules discussed below. Parties filing paper ex parte submissions must file an original and one copy of each submission with the Commission's Acting Secretary, William F. Caton, at the appropriate address below (see Filing of Comments and Reply Comments) for filings sent by either U.S. mail, overnight delivery, or hand or messenger delivery. Parties must also serve the following with either one copy

of each ex parte filing via e-mail or two paper copies: (1) Quallex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at [qualexint@aol.com](mailto:qualexint@aol.com); and (2) Sarah Whitesell, Media Bureau, 445 12th Street, SW., 3-C488, Washington, DC, 20554, [swhitese@fcc.gov](mailto:swhitese@fcc.gov); and (3) Steve Garner, Media Bureau, 445 12th Street, SW., 4-C468, Washington, DC 20554, [sgarner@fcc.gov](mailto:sgarner@fcc.gov).

##### *Filing of Comments and Reply Comments*

41. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before June 17, 2002, and reply comments on or before July 15, 2002. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Given recent changes in the Commission's mail delivery system, parties are strongly urged to use the ECFS to file their pleadings. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, electronic filers should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

42. Parties who choose to file by paper must file an original and four copies of each filing in CS Docket No. 02-52. If parties want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must

be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Parties must also serve the following with either one copy of each filing via e-mail or two paper copies: (1) Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at [qualexint@aol.com](mailto:qualexint@aol.com); and (2) Sarah Whitesell, Media Bureau, 445 12th Street, SW., 3-C488, Washington, DC 20554, [swhitese@fcc.gov](mailto:swhitese@fcc.gov). In addition, five copies of each filing must be filed with Steve Garner, Media Bureau, 445

12th Street, SW., 4-C468, Washington, DC 20554, [sgarner@fcc.gov](mailto:sgarner@fcc.gov).

#### *Availability of Documents*

43. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267, (202) 418-7365 TTY, or [bcline@fcc.gov](mailto:bcline@fcc.gov). These documents also will be available electronically at the Commission's Disabilities Issues Task Force Web site: [www.fcc.gov/dtf](http://www.fcc.gov/dtf), and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Qualex International, Portals II, 445 12th Street, SW., Room, CY-B402, Washington, DC 20554, telephone (202)

863-2893, facsimile (202) 863-2898, or via e-mail at [qualexint@aol.com](mailto:qualexint@aol.com).

44. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or send an e-mail to [access@fcc.gov](mailto:access@fcc.gov).

#### *Contact Information*

45. The Media Bureau contact for this proceeding is Steve Garner at (202) 418-1063, [sgarner@fcc.gov](mailto:sgarner@fcc.gov).

#### *Ordering Clause*

46. This Notice of Proposed Rulemaking is issued pursuant to authority contained in sections 1, 2, 3, 4, 303, 403, and 601 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

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