Dated: October 19, 2007.

Russell L. Wright, Jr.,

Acting Regional Administrator, Region 4.

[FR Doc. E7–21235 Filed 10–30–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R09–OAR–2007–0916; FRL–8489–5]

Approval and Promulgation of State Air Quality Plans for Designated Facilities and Pollutants; Control of Emissions From Existing Other Solid Waste Incinerator Units; Nevada

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a negative declaration submitted by the Nevada Division of Environmental Protection. The negative declaration certifies that other solid waste incinerator units, which are subject to the requirements of sections 111(d) and 129 of the Clean Air Act, do not exist within the agency's air pollution control jurisdiction.

DATES: Any comments on this proposal must arrive by *November 30, 2007.*

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2007–0916, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.
2. *E-mail: steckel.andrew@epa.gov.*
3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or e-mail. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Mae Wang, EPA Region IX, (415) 947–4124, *wang.mae@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses a Clean Air Act section 111(d)/129 negative declaration submitted by the Nevada Division of Environmental Protection certifying that other solid waste incinerator units do not exist within its air pollution control jurisdiction. This negative declaration was submitted on December 19, 2006. For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication. If no adverse comments are received in response to this action, no further activity will be contemplated. If adverse comments are received, then EPA will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

Dated: September 17, 2007.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. E7–21448 Filed 10–30–07; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 07–198; FCC 07–169]

Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on revisions to the Commission's program access and retransmission consent rules and whether it may be appropriate to preclude the practice of programmers to tie desired programming with undesired programming. In the *NPRM,* the Commission also seeks comment on whether to revise its procedures for resolving program access complaints.

DATES: Comments for this proceeding are due on or before November 30, 2007; reply comments are due on or before December 17, 2007. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before December 31, 2007.

ADDRESSES: You may submit comments, identified by MB Docket No. 07–198, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site: http://www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Steven Broeckaert, *Steven.Broeckaert@fcc.gov*; David Konczal, *David.Konczal@fcc.gov*; or Katie Costello, *Katie.Costello@fcc.gov*; of the Media Bureau, Policy Division, (202) 418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact

Cathy Williams at 202–418–2918, or via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking* (*NPRM*), MB Docket No. 07–198, FCC 07–169, adopted on September 11, 2007, and released on October 1, 2007. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act proposed information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 12th St., SW., Room 1–C823, Washington, DC 20554, or via the Internet at *PRA@fcc.gov*; and also to Nicholas A. Fraser of the Office of Management and Budget (OMB), via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167.

Initial Paperwork Reduction Act of 1995 Analysis

This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due December 31, 2007. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

OMB Number: 3060–0888.

Title: Section 76.7, Petition Procedures; § 76.9, Confidentiality Of Proprietary Information; § 76.61, Dispute Concerning Carriage; § 76.914, Revocation Of Certification; § 76.1003, Program Access Proceedings; § 76.1302, Carriage Agreement Proceedings; § 76.1513, Open Video Dispute Resolution.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 600.

Estimated Time per Response: 4 to 60 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 19,200 hours.

Total Annual Costs: $240,000.

Nature of Response: Required to obtain or retain benefits.

Nature and Extent of Confidentiality: A party that wishes to have confidentiality for proprietary information with respect to a submission it is making to the Commission must file a petition pursuant to the pleading requirements in § 76.7 and use the method described in §§ 0.459 and 76.9 to demonstrate that confidentiality is warranted.

Privacy Act Impact Assessment: None.

Needs and Uses: On September 11, 2007, the Commission adopted a Report and Order and a Notice of Proposed Rulemaking *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992—Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket Nos. 07–29, 07–198, FCC 07–169. Section 628 of the Communications Act proscribes a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor from engaging in unfair methods of competition and deceptive practices and directs the Commission to, among other things, prescribe regulations to provide for an expedited Commission review of any complaints made under this section. Section 76.1003 contains the Commission's procedural rules for resolving these program access complaints. The new proposed rules to this information collection are 47 CFR 76.1003(e)(1) and 47 CFR 76.1003(j). Therefore, the rules for this information collection are as follows:

47 CFR 76.1003(e)(1) requires a cable operator, satellite cable programming vendor, or satellite broadcast programming vendor that expressly references and relies upon a document in asserting a defense to a program access complaint filed pursuant to § 76.1003 or in responding to a material allegation in a program access complaint filed pursuant to § 76.1003, to include such document or documents as part of the answer.

47 CFR 76.1003(j) states in addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice. This proposed rule would add a new universe of filers to this information collection and OMB approval is needed.

47 CFR Section 76.7. Pleadings seeking to initiate FCC action must adhere to the requirements of § 76.6 (general pleading requirements) and § 76.7 (initiating pleading requirements). Section 76.7 is used for numerous types of petitions and special relief petitions, including general petitions seeking special relief, waivers, enforcement, show cause, forfeiture and declaratory ruling procedures.

47 CFR 76.9. A party that wishes to have confidentiality for proprietary information with respect to a submission it is making to the FCC must file a petition pursuant to the pleading requirements in § 76.7 and use the method described in §§ 0.459 and 76.9 to demonstrate that confidentiality is warranted. The petitions filed pursuant to this provision are contained in the existing information collection requirement and are not changed by the proposed rule changes.

47 CFR 76.61. Section 76.61(a) permits a local commercial television station or qualified low power television station that is denied carriage or channel positioning or repositioning in accordance with the must-carry rules by a cable operator to file a complaint with the FCC in accordance with the procedures set forth in § 76.7. Section 76.61(b) permits a qualified local noncommercial educational television station that believes a cable operator has failed to comply with the FCC's signal carriage or channel positioning requirements (§§ 76.56 through 76.57) to file a complaint with the FCC in accordance with the procedures set forth in § 76.7.

47 CFR 76.914. Section 76.914(c) permits a cable operator seeking revocation of a franchising authority's certification to file a petition with the FCC in accordance with the procedures set forth in § 76.7.

47 CFR 76.1003. Section 76.1003(a) permits any multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the FCC's competitive access to cable programming rules to commence an adjudicatory proceeding at the FCC to obtain enforcement of the rules through the filing of a complaint, which must be filed and responded to in accordance with the procedures specified in § 76.7, except to the extent such procedures are modified by § 76.1003.

47 CFR 76.1302. Section 76.1302(a) permits any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the FCC's regulation of carriage agreements to commence an adjudicatory proceeding at the FCC to obtain enforcement of the rules through the filing of a complaint, which must be filed and responded to in accordance with the procedures specified in § 76.7, except to the extent such procedures are modified by § 76.1302.

47 CFR 76.1513. Section 76.1513(a) permits any party aggrieved by conduct that it believes constitutes a violation of the FCC's regulations or in section 653 of the Communications Act (47 U.S.C. 573) to commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint, which must be filed and responded to in accordance with the procedures specified in § 76.7, except to the extent such procedures are modified by § 76.1513.

Summary of Notice of Proposed Rulemaking

I. Procedure for Shortening Term of Extension of Exclusive Contract Prohibition

1. In light of the five-year extension of the exclusivity ban in § 76.1002(c)(6) adopted in the *Report and Order* in MB Docket No. 07–29 on September 11, 2007 (72 FR 56645, October 4, 2007), the Commission seeks comment on whether it can establish a procedure that would shorten the term of the extension if, after two years (*i.e.*, October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA. We seek comment on what this penetration level should be. And, we seek comment on whether two years or some other time frame is the appropriate period of time. Finally, we ask parties to comment on whether a market-by-market analysis is appropriate as both a legal and policy matter.

II. Extending Program Access Rules to Terrestrially Delivered Cable-Affiliated Programming

2. In comments on the *Notice of Proposed Rulemaking* in MB Docket No. 07–29 (72 FR 9289, March 1, 2007), competitive MVPDs provided various examples of withholding of terrestrially delivered cable-affiliated programming. Moreover, in the *Report and Order*, we note the Commission's previous findings that in two instances—Philadelphia and San Diego—withholding of terrestrially delivered cable-affiliated programming has had a material adverse impact on competition in the video distribution market. As discussed in the *Report and Order*, however, the Commission has previously concluded that terrestrially delivered programming is ''outside of the direct coverage'' of the exclusive contract prohibition in section 628(c)(2)(D). In the *Report and Order*, we state our continued view that the plain language of the definitions of ''satellite cable programming'' and ''satellite broadcast programming'' as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of section 628(c)(2)(D). Commenters, however, cite various other provisions of the Communications Act as providing the Commission with statutory authority to extend the program access rules, including an exclusive contract prohibition, to terrestrially delivered cable-affiliated programming, such as sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), and 706.

3. As demonstrated by the examples of withholding of regional sports networks (RSNs) in San Diego and Philadelphia, we believe that withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market. To address this concern, we seek comment on whether it would be appropriate to extend our program access rules to all terrestrially delivered cable-affiliated programming pursuant to sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act. *See* 47 U.S.C. 154(i); 47 U.S.C. 201(b); 47 U.S.C. 303(r); 47 U.S.C. 521(6); 47 U.S.C. 532(g); 47 U.S.C. 536(a); 47 U.S.C. 548(b); 47 U.S.C. 157 nt. In particular, we note our previous conclusion that the ability to offer a viable video service is ''linked intrinsically'' to broadband deployment. *See Local Franchising Report and Order,* 72 FR 13189, March 21, 2007. We seek comment on whether the ability to offer terrestrially delivered cable-affiliated programming is needed to offer a viable video service and, accordingly, whether extending the program access rules, including the prohibition on exclusive contracts, to terrestrially delivered cable-affiliated programming would promote the goal of section 706 to facilitate broadband deployment. In addition, we note that the plain language of section 628(b), like

section 628(c)(2)(D), specifies ''satellite cable programming'' and ''satellite broadcast programming.'' *See* 47 U.S.C. 548(b); 548(c)(2)(D). We seek comment regarding whether we have the authority to extend our program access rules to all terrestrially delivered cable-affiliated programming by way of statutory provisions granting general authority to the Commission, in light of the specific authority in section 628 that limits their scope to satellite programming.

4. We also seek comment on the extent to which cable operators are shifting delivery of affiliated programming from satellite delivery to terrestrial delivery and whether such action is intended to evade the program access rules. We note Verizon's claim that Cablevision's programming subsidiary, Rainbow, has made standard definition feeds of its RSNs available by satellite, but High Definition (HD) feeds available terrestrially, thereby avoiding the program access rules, including the exclusive contract prohibition, for HD feeds. We seek comment on whether the program access rules should apply to all feeds of the same programming, including both standard and HD feeds, regardless of whether one feed is delivered terrestrially. We also seek comment on whether shifting the HD feed of vertically integrated cable programming to terrestrial delivery is an unfair method of competition or an unfair or deceptive act in violation of section 628(b) of the Communications Act. 47 U.S.C. 548(b). The Commission has stated ''there may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming.''

III. Expanding the Exclusive Contract Prohibition to Non-Cable-Affiliated Programming

5. We also seek comment on whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider. As discussed above, to the extent that an MVPD meets the definition of a ''cable operator'' under the Communications Act, the exclusive contract prohibition in section 628(c)(2)(D) already applies to its affiliated programming. Moreover, as noted above, section 628(j) of the Communications Act provides that any provision of section 628, including the exclusive contract prohibition in section 628(c)(2)(D), that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming. 47 U.S.C. 548(j). Programming affiliated with other MVPDs, such as DBS providers, is beyond the scope of the exclusive contract prohibition in section 628(c)(2)(D). We seek comment on whether to extend the exclusive contract prohibition to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, pursuant to sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act.

IV. Tying of Desired Programming With Undesired Programming

6. Small and rural cable operators and other MVPDs have raised concerns regarding tying of MVPDs' rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast network. For example, in 2002, the American Cable Association (ACA), representing small cable operators, filed a Petition for Inquiry stating that broadcast networks and station groups engage in unfair retransmission tying arrangements. *See* American Cable Association's Petition for Inquiry into Retransmission Consent Practices (filed October 1, 2002) (*ACA 2002 Petition*). ACA explains that tying harms small cable operators and their consumers by increasing the costs of basic cable and reducing program choices. Small and rural cable operators and other MVPDs, in addition to recent program access complainants, have also raised concerns regarding the practice of programmers to tie marquee programming, such as premium channels or regional sports programming, with unwanted, or less desirable, programming. For example, in their comments on the *Notice of Proposed Rulemaking* in MB Docket No. 07–29, OPASTCO/ITAA, representing small and rural MVPDs, cites the practice of programmers to require carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming as an onerous and unreasonable condition that denies consumers choice and impedes entry into the MVPD market.

7. When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. We note that the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network. Moreover, we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases. As discussed in more detail below, we seek comment on these various types of tying arrangements. Given the problems associated with such tying arrangements, we seek comment on whether it may be appropriate for the Commission to preclude them. We also seek comment on the extent to which these disparities in bargaining power are the result of media consolidation, and, if so, what steps the Commission can and should take to redress the imbalance.

8. *Tying of Broadcast Programming.* We seek comment on the tying of MVPDs' rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks. Section 325(b)(3)(C) of the Communications Act obligates broadcasters and multichannel video programming distributors to negotiate retransmission consent agreements in good faith. 47 U.S.C. 325(b)(3)(C). Specifically, the Commission must establish regulations that:

> Until January 1, 2010, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and

conditions are based on competitive marketplace considerations. 47 U.S.C. 325(b)(3)(C)(ii).

Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Congress extended 47 U.S.C. 325(b)(3)(C) until 2010 and amended that section to impose a reciprocal good faith retransmission consent bargaining obligation on MVPDs. The Commission adopted rules implementing section 207 of SHVERA. *See Reciprocal Bargaining Order,* 70 FR 40216, July 13, 2005.

9. In its *Good Faith Order,* the Commission adopted rules implementing the good faith negotiation provisions and the complaint procedures for alleged rule violations. *See Good Faith Order,* 68 FR 52127, September 2, 2003. The *Good Faith Order* adopted a two-part test for good faith. The first part of the test consists of a brief, objective list of negotiations standards. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD. The second part of the good faith test is based on a totality of the circumstances standard.

10. The Commission has held that ''[r]efusal by a Negotiating Entity to put forth more than a single, unilateral proposal'' is a *per se* violation of a broadcast licensee's good faith obligation. *See* 47 CFR 76.65(b)(1)(iv). The Commission has also indicated that such requirement is not limited to monetary considerations, but also applies to situations where a broadcaster is unyielding in its insistence upon carriage of a secondary programming service undesired by the cable operator as a condition of granting its retransmission consent:

''Take it or leave it'' bargaining is not consistent with an affirmative obligation to negotiate in good faith. For example, a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster. The MVPD might reject such offer on the reasonable grounds that it has no vacant channel capacity and request to compensate the broadcaster in some other way. Good faith negotiation requires that the broadcaster at least consider some form of consideration other than carriage of affiliated programming. This standard does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signal. This standard only requires that the broadcaster be open to discussing more than one form of consideration in seeking compensation for retransmission of its signal by MVPDs.

11. As discussed above, ACA in 2002 filed a Petition for Inquiry regarding the Commission's retransmission consent rules. *See ACA 2002 Petition.* This petition will be placed in the record of this proceeding. ACA's Petition raises concerns about broadcasters' alleged abuse of the retransmission consent process. ACA asserts that broadcast networks and station groups engage in unfair retransmission tying arrangements. ACA asserts that small cable operators have minimal bargaining power during negotiations and are targets for abuse because of their lack of resources to file complaints and engage in disputes. We note that its *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (September 8, 2005) (available at *http://www.fcc.gov/mb/policy/shvera.html*), the Commission addressed the tying issue. The Commission noted ''cable operators' widespread concern that retransmission consent negotiations frequently involve broadcasters tying carriage of their signals to numerous affiliated non-broadcast programming networks.'' The Report noted that ''since the Commission's decision to deny broadcasters the ability to assert dual and multicast must carry, broadcasters have begun using their retransmission consent negotiations to negotiate carriage of their digital signals, thus furthering the digital transition by increasing the number of households with access to digital signals. If broadcasters are limited in their ability to accept in-kind compensation, they should be granted full carriage rights for digital signals, including all free over-the-air digital multicast streams. Should Congress consider proposals circumscribing retransmission consent compensation, we encouraged review of related rules and policies to maintain proper balance.''

12. We seek comment on the current status of carriage negotiations in today's marketplace. We seek comment on whether broadcasters are tying carriage of their broadcast signals to carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks and, if so, how retransmission consent negotiations are impacted. We ask if broadcast networks and station groups engage in retransmission consent tying arrangements that result in harm to small cable operators and their customers. We ask if the Commission's good faith negotiation regulations provide enough protection for small cable operators and small broadcasters in the negotiation process, taking into account the administrative burdens and costs of engaging in a contested case before the Commission. We seek comment on whether and how the Commission's good faith negotiation regulations should be modified to address these concerns. Also, we ask what the effect of any modifications would be on the economic underpinnings of broadcast-affiliated programmers.

13. We also seek comment on whether the Commission has the jurisdiction to preclude tying arrangements by broadcasters, without modification of the retransmission consent regime by Congress. The legislative history of section 325 addresses the right of broadcasters to seek carriage of additional channels as part of retransmission consent transactions: ''Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.'' Congress appeared to contemplate carriage of broadcast-affiliated cable channels as part of legitimate retransmission consent negotiations.

14. In addition, we seek comment regarding whether there are grounds for the Commission to depart from prior holdings that permitted broadcasters to negotiate the carriage of affiliated channels as part of retransmission consent negotiations. The Commission has stated that examples of bargaining proposals ''presumptively * * * consistent with competitive marketplace considerations and the good faith

negotiation requirement'' include ''proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market.'' *See Implementation of the Satellite Home Viewer Improvement Act of 1999,* 65 FR 15559, March 23, 2000. We held that such a proposal contains ''presumptively legitimate terms and conditions or forms of consideration'' and found nothing to suggest that such a request is ''impermissible'' or anything ''other than a competitive marketplace consideration.'' In 2001, the Commission considered but refused to adopt rules specifically prohibiting tying arrangements. *See Carriage of Digital Television Broadcast Signals,* 66 FR 16533, March 26, 2001. The Commission concluded that such arrangements are permitted, but stated it would continue to monitor the situation with respect to potential anticompetitive conduct by broadcasters. We seek comment on whether market circumstances and industry practices have changed to warrant a different conclusion.

15. Lastly, we ask whether Commission action to preclude tying arrangements is consistent with the First Amendment. On the one hand, it could be argued that restricting such arrangements infringes the right of broadcasters to express a message by packaging together certain content. On the other hand, we note that the Supreme Court has observed that ''the programming offered on various channels'' by video distributors consists of ''individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience.'' Unlike newspapers and magazines, the Court suggested that these segments do not ''contribute something to a common theme'' expressed by the distributor to its subscribers.

16. *Tying of Satellite Cable Programming.* Small and rural MVPDs as well as program access complainants have asserted that tying practices by satellite cable programmers constitute ''unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming * * * to subscribers or consumers'' in violation of section 628(b) of the Communications Act. 47 U.S.C. 548(b). At the time of the *First Report and Order,* 58 FR 27658, May 11, 1993, the Commission declined to adopt specific rules under section 628(b) to address tying, while clearly reserving the right to do so if necessary:

> Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation of the statute with respect to the unspecified ''unfair practices'' prohibited by section 628(b) * * * The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition.
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> Thus, although the types of conduct more specifically referenced in the statute, *i.e.*, exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to broader distribution of satellite cable * * * programming.

17. We seek comment on the current status of carriage negotiations in today's marketplace. We seek comment on whether satellite cable programmers are tying carriage of their desirable channels to carriage of other less desirable owned or affiliated channels. We ask whether and how such tying arrangements affect small cable operators and their customers. We seek comment on whether ''take-it-or-leave-it'' tying arrangements (*i.e.*, where the purchase of desired programming is conditioned on the purchase of undesired programming) without any alternative offer to provide the programming on a stand-alone basis are prevalent in the industry; and if so, whether such an arrangement is a violation of section 628(b). As discussed above, in such situations, MVPDs are victims of an unfair method of competition that hinders significantly or prevents MVPDs from providing satellite cable programming to subscribers.

18. We also seek comment on whether the Commission has the jurisdiction to preclude tying arrangements by satellite cable programmers under section 628(b) or any other statutory authority. We seek comment on whether section 628(b) requires satellite cable programmers to offer each of their programming services on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. Moreover, to the extent that we decide in this proceeding to extend the Commission's program access rules to terrestrially delivered cable-affiliated programming networks, we seek comment on whether we should also require terrestrially delivered cable-affiliated programming networks to be offered on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. Lastly, we ask whether Commission action to preclude tying arrangements by satellite cable programmers is consistent with the First Amendment.

19. *Tying of Other Programming.* We also seek comment on whether we have the jurisdiction or authority to require networks that are affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network, to be offered on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. We seek comment on the extent to which such programming networks have engaged in unfair tying practices or other abusive practices that would require regulatory intervention. We seek comment on whether it would be appropriate to regulate these programming networks in such a manner pursuant to sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), and 706, or any other provision under the Communications Act.

V. Program Access Concerns Raised by Small and Rural MVPDs

20. As discussed above, small and rural MVPDs raise additional issues in their comments regarding obstacles they face in trying to obtain access to programming. They ask the Commission to examine various conditions they describe as onerous and unreasonable, which they allege are imposed by programmers on small and rural MVPDs for access to content, including restrictions on the use of shared headends for receiving content. NTCA and OPASTCO/ITTA claim that use of a shared headend is an economical means for multiple rural MVPDs to provide video service in a high-cost area, but that programmers have expressed concern with the potential for the use of shared headends to result in unauthorized reception of programming. NTCA states that while shared headend providers are currently negotiating with content providers to resolve these issues, it is concerned that rural consumers served by shared headends may lose access to programming if these negotiations fail. In addition to the issue of shared headends, small and rural MVPDs ask the Commission to examine other conditions imposed by programmers, including (i) requiring MVPDs to enter into mandatory non-disclosure agreements with programmers, which prevents small and rural MVPDs from obtaining information about the market value of

programming; (ii) requiring small and rural MVPDs to provide programmers with ''hundreds of advertising slots''; and (iii) mandating unwarranted security requirements that extend beyond the legitimate need to protect programming. OPASTCO/ITTA claim that all of these conditions impede the entry of small and rural telephone companies into the video distribution marketplace. We seek comment on the extent to which such practices are occurring in the marketplace and, if so, whether we should, and whether we have the authority to, take action to address these practices.

VI. Modification of Program Access Complaint Procedures

21. *Remedies for Violations.* We seek comment on whether to add an arbitration-type step as part of the Commission's determination of an appropriate remedy for program access violations. We agree with commenters that commercial arbitration requires parties to put forth their best effort to resolve disputes or risk the arbitrator adopting the opposing parties' proposals. In the *Hughes Order,* the Commission concluded that final offer arbitration has the attractive ''ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'' This type of pressure can encourage the parties to resolve their differences through settlement. We believe that a modified version of this method can encourage negotiation among the parties. Therefore, we seek comment on whether, when feasible, the Commission should request, as part of its evaluation of the appropriate remedy to impose for program access violations, that the parties each submit their best ''final offer'' proposal for the rates, terms, or conditions under review. We seek comment on whether the Commission should have the discretion to adopt one of the parties' proposals as the remedy for the program access complaint.

22. *Status of Existing Contract Pending Resolution of Program Access Complaint.* While we declined to adopt mandatory arbitration in lieu of the Commission's complaint process in the *Report and Order,* we issue this *NPRM* on the issue of a provision for complainants to request a stay of any action or proposed action that would change an existing program contract that is the subject of a program access complaint, pending the resolution of the program access complaint. Some competitive providers recommend a ''standstill'' requirement for pre-existing carriage contracts during adjudication of program access disputes, to preserve the *status quo* until the program access complaint has been resolved. In a recent merger transaction, in adopting conditions for arbitration of program access disputes, the Commission required that an aggrieved MVPD have continued access to the programming in question under the terms and conditions of the expired contract, pending resolution of the dispute. Provision of the disputed programming during the pendency of arbitration was not required in the case of the first time requests for programming where no carriage agreement had previously existed between the parties. Verizon supports a five-month long standstill provision while complaints are being resolved. BSPA, RCN, and USTelecom support a standstill provision pending the resolution of the complaint, wherein carriage is continued and the parties are subject to the same price, terms, and conditions of the existing contract, with any new price arising out of resolution to be applied retroactively to the date of the complaint. BSPA asserts that vertically integrated programmers covered by the program access rules have incentives to use temporary foreclosure strategies during negotiations for programming and, therefore, standstill agreements should be made part of the program access complaint procedures. Other parties favoring a standstill provision include ACA, EchoStar, and SureWest. EchoStar asserts that there can be no doubt that the Commission has the authority to promulgate a standstill requirement as a lesser interim remedy where interruption of carriage threatens to cause irreparable injury to the public.

23. NCTA opposes any ''standstill'' provision and states that there is no authority that allows the Commission to interfere in the right to contract in this way. Time Warner asserts that the standstill requirement would prohibit a network from de-authorizing carriage by an MVPD, but would allow the MVPD to drop the network, creating an unfair bargaining situation. Time Warner believes that any standstill requirement would increase the likelihood of program access complaints because the MVPD will have a strong incentive to file a complaint just to protect the *status quo* and decrease the chances that parties will resolve their disputes because the incentive of either party to negotiate could be reduced once the *status quo* is protected. Comcast and the Broadcast Networks also oppose any ''standstill'' requirement.

24. We agree that the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints. In the *Adelphia Order,* the Commission discussed circumstances wherein temporary foreclosure of programming service may be profitable even where permanent foreclosure is not. By temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier. The Commission included, as a measure to alleviate such foreclosure strategies, a requirement that, upon receiving timely notice of an MVPD's intent to arbitrate, program carriage be continued under the existing terms and conditions. We request comment on whether the issuance of temporary stay orders would encourage parties to resolve program access disputes and to make use of the Commission's complaint procedures when needed. We request comment on whether complainants must formally request such relief from the Commission and must establish that they are likely to prevail on the merits of their complaint; will suffer irreparable harm absent a stay; that the balance of harms to the parties favors grant of a stay; and that the public interest favors grant of the stay. We request comment on whether, as part of a showing of irreparable harm, complainants may discuss the likelihood that subscribers would switch MVPDs to obtain the programming in dispute for a long enough period to make the strategy profitable to the respondent. We request comment on whether these stays should be routinely granted when the facts support their issuance and that they will help to encourage settlement negotiations. We request comment on the nature of the stay, that is, whether both the complainant and the respondent will be subject to the stay order, and required to fulfill their respective obligations under the terms and conditions of the carriage contract in issue, while the stay is in effect. We request comment on whether complainants will be permitted to drop the programming that is the subject of the program access dispute unless and until a request to dismiss the complaint with prejudice is granted by the Commission. We request comment on whether the length of the stay should be entirely discretionary. Finally, we request comment on whether the Commission should include, as part of

its final order resolving the complaint or resolving damages, adjustments to its remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous agreement.

VII. Procedural Matters

A. Ex Parte Rules

25. *Permit-But-Disclose.* The *NPRM* in this proceeding will be treated as ''permit-but-disclose'' subject to the ''permit-but-disclose'' requirements under § 1.1206(b) of the Commission's rules. *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. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b).

B. Filing Requirements

26. *Comment Information.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the website for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 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, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

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

27. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, 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 (voice), (202) 418–7365 (TTY), or *bill.cline@fcc.gov.* These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; they can also be reached by telephone, at (202) 488–5300 or (800) 378–3160; by e-mail at *fcc@bcpiweb.com;* or via their Web site at *http://www.bcpiweb.com.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0531 (voice), (202) 418–7365 (TTY).

C. Initial Paperwork Reduction Act of 1995 Analysis

28. The *NPRM* has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, and contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the proposed information collection requirements contained in this *NPRM,* as required by the PRA.

29. Written comments on the PRA proposed information collection requirements must be submitted by the public, the OMB, and other interested parties on or before December 31, 2007. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' In addition to filing comments with the Office of the Secretary, a copy of any comments on the proposed information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 12th St., SW., Room 1–C823, Washington, DC 20554, or via the Internet at *PRA@fcc.gov*; and also to Nicholas A. Fraser of the Office of Management and Budget (OMB), via Internet at

Nicholas_A._Fraser@omb.eop.gov or via fax at (202) 395–5167.

30. *Further Information.* For additional information concerning the PRA proposed information collection requirements contained in this NPRM, contact Cathy Williams at 202–418–2918, or via the Internet at *PRA@fcc.gov.*

D. Initial Regulatory Flexibility Analysis

31. As required by the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *NPRM.* Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *NPRM.* Comments must be identified as responses to the IRFA. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

32. *Overview.* The *NPRM* considers Commission action with respect to seven issues. First, the Commission is considering whether it can establish a procedure that would shorten the term of the five-year extension of the exclusive contract prohibition if, after two years (*i.e.*, October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in a Designated Market Area. Second, the Commission is contemplating the extension of its program access rules to terrestrially delivered cable-affiliated programmers in order to facilitate competition in the video distribution market. Third, the Commission is considering whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a Direct Broadcast Satellite (DBS) provider. Fourth, the *NPRM* is contemplating whether it may be appropriate for the Commission to preclude the practice of programmers to require multichannel video programming distributors (MVPDs) to purchase and carry undesired programming in return for the ability to purchase and carry desired programming. The *NPRM* considers whether to instead require programmers to offer each of their programming services on a stand-alone basis to all MVPDs. Fifth, the *NPRM* contemplates action to address concerns raised by small and rural MVPDs regarding conditions imposed by programmers for access to content. The *NPRM* also contemplates revising the Commission's program access complaint procedures in two respects. First, the *NPRM* is considering whether to establish a process whereby a program access complainant may seek a temporary stay of any proposed changes to its existing programming contract pending resolution of a complaint. Second, the *NPRM* contemplates revising the Commission's program access complaint procedures by requiring parties to submit to the Commission, when requested, ''final offer'' proposals as part of the remedy phase of the complaint process. Each of these issues is discussed in further detail below.

33. *Procedure for Shortening Term of Extension of Exclusive Contract Prohibition.* Section 628(c)(2)(D) of the Communications Act prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators unless the Commission determines that such exclusivity is in the public interest. *See* 47 U.S.C. 548(c)(2)(D). In MB Docket 07–29, the Commission decided to extend this prohibition for five years, until October 5, 2012. In light of the five-year extension of the exclusivity ban, the *NPRM* considers whether it can establish a procedure that would shorten the term of the extension if, after two years (*i.e.*, October 5, 2009), a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA. The *NPRM* contemplates what this penetration level should be, whether two years or some other time frame is the appropriate period of time, and whether a market-by-market analysis is appropriate as both a legal and policy matter.

34. *Terrestrially Delivered Cable-Affiliated Programming.* Congress enacted the program access provisions contained in section 628 of the Communications Act of 1934, as amended, as part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Act). The program access provisions are intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing MVPDs to ''satellite cable programming'' and ''satellite broadcast programming.'' The term ''satellite cable programming'' means ''video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers,'' except that such term does not include satellite broadcast programming. 47 U.S.C. 548(i)(1); 47 U.S.C. 605(d)(1); *see also* 47 CFR 76.1000(h). The term ''satellite broadcast programming'' means ''broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.'' 47 U.S.C. 548(i)(3); *see also* CFR 76.1000(f). The Commission has previously concluded that terrestrially delivered programming (*i.e.*, programming transmitted or retransmitted by satellite for direct reception by cable operators) is not covered by the definitions of ''satellite cable programming'' and ''satellite broadcast programming.'' *See 2002 Extension Order,* 67 FR 49247, July 30, 2002. Thus, terrestrially delivered programming is not subject to the program access provisions. The Commission has previously found that cable operators have withheld terrestrially delivered cable-affiliated programming from competitive MVPDs and that this has resulted in a material adverse impact on competition in the video distribution market. *See Adelphia Order,* 21 FCC Rcd 8203. To remedy this concern, the *NPRM* considers whether to extend the program access provisions to all terrestrially delivered cable-affiliated programming pursuant to various provisions of the Communications Act, such as sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), and 706. The Commission also seeks information as to whether cable operators, again with anti-competitive results, are shifting delivery of affiliated programming from satellite delivery to terrestrial delivery and whether such action is intended to evade the program access rules.

35. *Expanding the Exclusive Contract Prohibition to Non-Cable-Affiliated Programming.* The *NPRM* is considering whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider. To the extent that an MVPD meets the definition of a ''cable operator'' under the Communications Act, the exclusive contract prohibition in section

628(c)(2)(D) already applies to its affiliated programming. Moreover, section 628(j) of the Communications Act provides that any provision of section 628, including the exclusive contract prohibition in section 628(c)(2)(D), that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming. *See* 47 U.S.C. 548(j). Programming affiliated with other MVPDs, such as DBS providers, is beyond the scope of the exclusive contract prohibition in section 628(c)(2)(D). The *NPRM* is considering whether to extend the exclusive contract prohibition to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, pursuant to sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act.

36. *Tying.* Various MVPDs have raised concerns regarding the practice of some programmers to require MVPDs to purchase and carry undesired programming in return for the right to carry desired programming, referred to as ''tying.'' When presented with a tying arrangement, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. The *NPRM* explains that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases. Given the problems associated with such tying arrangements, the *NPRM* is contemplating whether it may be appropriate for the Commission to preclude them and to instead require each programming service to be offered on a stand-alone basis to all MVPDs. The *NPRM* considers precluding the tying practices of broadcasters, satellite cable programmers, terrestrially delivered cable-affiliated programmers, and programmers that are affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent programmer.

37. *Concerns Raised by Small and Rural MVPDs.* Small and rural MVPDs have raised concerns regarding obstacles they face in trying to obtain access to programming which impede competition in the video distribution marketplace. These obstacles include (i) restrictions on the use of shared headends for receiving content; (ii) requiring small and rural MVPDs to enter into mandatory non-disclosure agreements with programmers; (iii) requiring small and rural MVPDs to provide programmers with advertising slots; and (iv) mandating unwarranted security requirements. The *NPRM* contemplates Commission action to address these practices.

38. *Modification of Program Access Complaint Procedures.* The *NPRM* also contemplates revising the Commission's program access complaint procedures in two respects. First, the *NPRM* contemplates adding an arbitration-type step as part of the Commission's determination of an appropriate remedy for program access violations. The *NPRM* is considering whether, when feasible, the Commission should request, as part of its evaluation of the appropriate remedy to impose for program access violations, that the parties each submit their best ''final offer'' proposal for the rates, terms or conditions under review. The *NPRM* considers whether the Commission should have the discretion to adopt one of the parties' proposals as the remedy for the program access complaint. Second, the *NPRM* is considering whether to allow complainants to request a stay of any action or proposed action that would change an existing program contract that is the subject of a program access complaint, pending the resolution of the program access complaint. In the *NPRM*, the Commission agrees that the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints. The *NPRM* thus contemplates whether the issuance of temporary stay orders would encourage parties to resolve program access disputes and to make use of the Commission's complaint procedures when needed. The *NPRM* considers whether complainants should be required to formally request such relief from the Commission and establish that they are likely to prevail on the merits of their complaint; will suffer irreparable harm absent a stay; that the balance of harms to the parties favors grant of a stay; and that the public interest favors grant of the stay. The *NPRM* also considers whether, as part of a showing of irreparable harm, complainants may discuss the likelihood that subscribers would switch MVPDs to obtain the programming in dispute for a long enough period to make the strategy profitable to the respondent. The *NPRM* further contemplates whether these stays should be routinely granted when the facts support their issuance and that they will help to encourage settlement negotiations. The *NPRM* considers the nature of the stay, that is, whether both the complainant and the respondent will be subject to the stay order, and required to fulfill their respective obligations under the terms and conditions of the carriage contract in issue, while the stay is in effect. The *NPRM* also contemplates whether complainants will be permitted to drop the programming that is the subject of the program access dispute unless and until a request to dismiss the complaint with prejudice is granted by the Commission. The *NPRM* considers whether the length of the stay should be entirely discretionary. The *NPRM* also considers whether the Commission should include, as part of its final order resolving the complaint or resolving damages, adjustments to its remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous agreement.

39. In the *NPRM*, the Commission seeks comment on the foregoing issues. In particular, the *NPRM* invites comment on issues that may impact small entities, including MVPDs and programmers.

Legal Basis

40. The authority for the action proposed in the rulemaking is contained in section 4(i), 303, and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 548.

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

41. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. *See* 5 U.S.C. 603(b)(3). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,''

and ''small governmental jurisdiction.'' *See* 5 U.S.C. 601(6). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. *See* 5 U.S.C. 601(3). A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). *See* 15 U.S.C. 632.

42. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (NAICS) defines ''Wired Telecommunications Carriers'' (2007 NAISC Code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS Code 517110), Cable and Other Program Distribution (2002 NAISC Code 517510), and Internet Service Providers (2002 NAISC Code 518111). The 2007 NAISC defines this category as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less. According to Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) that operated for the entire year. Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) had less than 100 employees. Thus, under this size standard, the majority of firms can be considered small.

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

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

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

46. *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. This definition provides that a small entity is one with $13.5 million or less in annual receipts. Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. (Dominion) (marketed as Sky Angel). All three currently offer subscription services. Two of these three DBS operators, DIRECTV and EchoStar Communications Corporation (EchoStar), report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels. Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital,

we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

47. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less in annual receipts. Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs. Individual PCOs often serve approximately 3,000–4,000 subscribers, but the larger operations serve as many as 15,000–55,000 subscribers. In total, PCOs currently serve approximately one million subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs may qualify as small entities.

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

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

50. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. 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. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of $13.5 million annually. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

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

52. *Local Multipoint Distribution Service*. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to LMDS. The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions, 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. 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. These definitions of ''small business'' and ''very small business'' in the context of the LMDS auctions have been approved by the SBA. 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.

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

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

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

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

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

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

59. *Television Broadcasting*. The SBA defines a television broadcast station as a small business if such station has no more than $13.0 million in annual receipts. Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' The Commission has estimated the number of licensed commercial television stations to be 1,376. According to Commission staff review of the BIA Financial Network, MAPro Television Database (BIA) on March 30, 2007, approximately 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) have revenues of $13.5 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations 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. The Commission has estimated the number of licensed NCE television stations to be 380. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

60. 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.

Description of Proposed Reporting, Recordkeeping and Other Compliance Requirements

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

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

62. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. First, regarding the establishment of a procedure that would shorten the five-year term of the extension of the exclusive contract prohibition, the Commission may choose to establish such a procedure or, in the alternative, it may not choose to do so. Second, regarding the extension of the program access rules to terrestrially delivered cable-affiliated programmers, the Commission may choose to extend these rules to terrestrially delivered cable-affiliated programmers or, in the alternative, it may choose not to extend these rules to such programmers. Third, regarding expansion of the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, the Commission may choose to extend the exclusive contract prohibition to apply to such non-cable-affiliated programming or, in the alternative, it may choose not to extend the exclusive contract prohibition to such programming. Fourth, regarding the practice of programmers to engage in tying of desired with undesired programming, the Commission may choose to preclude all such tying arrangements or, in the alternative, it may choose not to preclude any such arrangements or, in the alternative, it may choose to preclude only certain tying arrangements. Fifth, with respect to concerns raised by small and rural MVPDs regarding conditions imposed by programmers for access to content, the Commission may choose to take action to address some or all of these concerns or, in the alternative, it may choose not to take action to address these concerns. Sixth, regarding the establishment of a process whereby a program access complainant may seek a temporary stay of any proposed changes to its existing programming contract pending resolution of the complaint, the Commission may establish such a process or, in the alternative, it may choose not to establish such a process. Seventh, regarding the requirement that parties submit to the Commission, when requested, ''final offer'' proposals as part of the remedy phase of the complaint process, the Commission may adopt such a requirement or, in the alternative, it may choose not to adopt such a requirement. We invite comment on the options the Commission is considering, or alternatives thereto as referenced above, and on any other alternatives commenters may wish to propose for the purpose of minimizing significant economic impact on smaller entities.

Federal Rules Which Duplicate, Overlap, or Conflict With the Commission's Proposals

63. None.

F. Additional Information

64. For additional information on this proceeding, contact Steven Broeckaert, *Steven.Broeckaert@fcc.gov*; David Konczal, *David.Konczal@fcc.gov*; or Katie Costello, *Katie.Costello@fcc.gov*; of the Media Bureau, Policy Division, (202) 418–2120.

VIII. Ordering Clauses

65. Accordingly, *it is ordered*, pursuant to the authority found in sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, this *Notice of Proposed Rulemaking Is Adopted*.

66. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 07–5388 Filed 10–30–07; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 7, 8, 12, and 39

[FAR Case 2005–014; Docket 2007-0001; Sequence 9]

RIN 9000–AK83

Federal Acquisition Regulation; FAR Case 2005–014, SmartBUY

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement the Governmentwide Enterprise Software Licensing Program,