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This document is not subject to the Congressional Review Act. (The Commission, is, therefore, not required to submit a copy of this Report and Order to Government Accountability Office, pursuant to the Congressional Review Act, see 5 U.S.C. Section 801(a)(1)(A) because the proposed rule is dismissed).

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

[MB Docket No. 07-51; FCC 07-32]

#### Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Commission takes steps to encourage greater competition in the market for the delivery of multichannel video programming by soliciting comment on the use of exclusive contracts for the provision of video services to multiple dwelling units ("MDUs") or other real estate developments. The Commission also seeks comment on whether the use of exclusive contracts in the MDU video provider market unreasonably impedes the achievement of the interrelated federal goals of enhanced multichannel video competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem.

**DATES:** Comments for this proceeding are due on or before June 18, 2007; reply comments are due on or before July 18, 2007.

**ADDRESSES:** You may submit comments, identified by MB Docket No. 07-51, 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](mailto: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 Holly Saurer, [Holly.Saurer@fcc.gov](mailto:Holly.Saurer@fcc.gov) of the Media Bureau, Policy Division, (202) 418-2120.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM), FCC 07-32, adopted on March 22, 2007, and released on March 27, 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. These documents 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](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

#### Initial Paperwork Reduction Act of 1995 Analysis

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

## Summary of the NPRM of Proposed Rulemaking

### I. Introduction

In this Notice of Proposed Rulemaking ("NPRM"), we solicit comment on the use of exclusive contracts for the provision of video services to multiple dwelling units ("MDUs") or other real estate developments. Greater competition in the market for the delivery of multichannel video programming is one of the primary goals of Federal communications policy. Moreover, for many participants in the marketplace, the ability to offer video to consumers and the ability to deploy broadband networks rapidly are linked intrinsically. However, potential competitors seeking to enter the multichannel video programming distributor ("MVPD") marketplace have alleged that the use of exclusive contracts for the provision of video services to MDUs or other real estate developments serves as a barrier to entry. Accordingly, this NPRM is designed to solicit comment on whether the use of exclusive contracts in the MDU video provider market unreasonably impedes the achievement of the interrelated federal goals of enhanced multichannel video competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem.

### II. Background

1. In 1997, the Commission issued an NPRM regarding the use of exclusive access arrangements in MDUs. The Commission stated that exclusive service contracts between MDU owners and MVPDs could be considered pro-competitive or anti-competitive, depending upon the circumstances involved. Commenters who were effectively prohibited from providing service due to the existence of exclusive contracts argued that those contracts were anti-competitive. Other commenters argued that exclusive contracts were necessary to enhance their ability to recover investment costs. In the corresponding Report and Order, the Commission declined to take any action regarding exclusive agreements, concluding that there was insufficient evidence in the record to determine the extent of use of such exclusive contracts, and whether or not such contracts had significantly impeded access by competitive providers into the MDU market.

2. We note that the Commission is considering MDU access with respect to other services. In the context of

commercial telecommunications services, the Commission has prohibited the enforcement of exclusive access arrangements in multiple tenant environments ("MTEs"). In the *Competitive Networks Order*, the Commission concluded that a ban on exclusive contracts for telecommunications service in commercial MTEs would foster competition in that market. Unlike parties in the inside wiring proceeding, no party in the competitive networks proceeding argued in support of exclusive contracts in the commercial setting. Further, in *Competitive Networks FNPRM*, the Commission sought comment on other issues related to the imposition of a nondiscriminatory access requirement, including possibly extending the *Competitive Networks Order* findings to residential MTEs. We intend to issue a public notice seeking to refresh the record in that proceeding. Also, in the *Cox Inside Wiring* proceeding, the Commission is considering issues relating to the scope of competitors' right to access incumbent LECs' inside wire in multiunit premises for purposes of offering competing telephone service.

3. The Commission recently adopted a Report and Order ("*Franchising Reform Order*") relating to Section 621 of the Act. The *Franchising Reform Order* adopted several provisions to remedy unreasonable local government procedures and behavior with respect to the franchising process that result in unreasonable refusals to grant additional competitive franchises. The NPRM in that proceeding asked for comment on the specific rules or guidance that we should adopt to ensure that the local cable franchising process does not unreasonably impede competitive entry. Among other issues, commenters discussed the impediment presented by the use of exclusive contracts for the provision of video services to MDUs and other real estate developments.

4. Specifically, SureWest Communications, which provides bundled offerings of voice, data, and video services, filed an *ex parte* statement asking the Commission to prohibit MVPDs from executing new, or enforcing existing, exclusive access agreements with MDUs and other real estate developments. SureWest argues that exclusive agreements are used by incumbent providers to undercut the competitive market for video services and states that over 25% of the MDUs that its network passes are locked into exclusive agreements, which effectively bar SureWest from offering its services to residents in those MDUs. Manatee

County, Florida submitted comments arguing that exclusive access agreements, if permitted at all, should be of limited duration. Manatee County stated that exclusive long-term contracts harm competition and permit incumbent providers to become complacent, imposing antiquated systems on their subscribers. The County noted that it recently adopted an ordinance which prohibits any of its franchisees from entering into exclusive agreements of more than five years.

Verizon filed *ex parte* statements arguing that the Commission should prohibit MVPDs from entering into new, or enforcing existing, exclusive access agreements with owners of MDUs. Verizon stated that it had "repeatedly encountered exclusive access arrangements which have prevented it from providing cable services to significant numbers of residents." Verizon provided examples of requests to cease and desist the marketing of its FiOS video service offerings (discussing various examples, including a cease and desist letter from Bright House Networks regarding marketing of FiOS in the River Chase apartment complex in Tampa, Florida; a letter from BDR Broadband, LLC regarding the provision of FiOS in apartment complexes in Plano and Carrollton, Texas; negotiations with Ariger Management in Maryland that have an exclusive contract with Comcast; and negotiations with Post Properties in Fairfax County, Virginia that have a perpetual contract with Cox). Verizon stated that some landlords would like to give tenants a greater variety of cable choices, but are unable to do so because of exclusive contracts. Further, Verizon notes that exclusive contracts do not provide video providers any incentives to upgrade equipment or improve services, which adversely impacts consumers. In contrast, the National Multi-Housing Council filed an *ex parte* statement urging the Commission to reject calls for regulation of exclusive access agreements, stating that exclusive contracts give competitive providers assurance that they will be able to recover the capital costs of installing their facilities, thereby increasing the prospects of competition.

### III. Discussion

5. Potential competitive video providers have alleged that the use of exclusive contracts for MDUs or other real estate developments serves as a barrier to entry, and that these exclusive contracts unreasonably delay competitive entry. As noted in the *621 Order*, the video provider marketplace is currently undergoing a change, with the

entrance of traditional phone companies that are primed to offer a "triple play" of voice, high-speed Internet access, and video services over their respective networks. Given the interrelated Federal goals of enhanced cable competition and rapid broadband deployment, we seek comment on a number of issues relating to the prevalence and use and effect of exclusive contracts in today's marketplace.

#### A. Potential Competitors' Current Ability to Obtain Access to MDUs

6. As an initial matter, we request comment on the current environment for MVPDs attempting to obtain access to MDUs or other real estate developments. To what extent do exclusive contracts impede the realization of our policy goals? How often have competitive entrants confronted exclusive access agreements, what are the terms of those agreements, and are those agreements becoming more prevalent? How has the multichannel video marketplace changed since adoption of our *Inside Wiring Report and Order*, and what effect have those changes had for consumers who live in MDUs or other real estate developments? What is the current status of state mandatory access laws and what impact do they have on the issues raised herein?

7. We also ask for additional information on the MVPDs operating pursuant to such exclusive contracts. In the *Inside Wiring Second Report and Order* we stated that exclusive contracts may benefit new entrants by reducing investment risk. Verizon indicates, however, that incumbent providers are soliciting such exclusive contracts when a potential competitor is actively seeking a local franchise to provide service in the MDU's franchise area. We seek comment on whether MVPDs seek exclusive contracts in an effort to frustrate competitive entry. Do incumbent providers use the time during which new entrants are negotiating local franchises in order to obtain exclusive contracts? We also seek comment on whether, in today's market, exclusive contracts benefit new entrants, incumbent providers, or both. We also ask whether the video providers entering into such exclusive contracts would be unable to provide service to these MDUs or other real estate developments absent the protections afforded by exclusive contracts.

#### B. The Commission's Authority to Prohibit the Use of Exclusive Contracts

8. We tentatively conclude that the Commission has authority to regulate exclusive contracts for the provision of

video services to MDUs or other real estate developments where we find that such contracts may impede competition and impair deployment of those services. We seek comment on this tentative conclusion, particularly with regard to our authority under, and the scope and applicability of, Section 628(b) of the Communications Act of 1934 and Section 706 of the 1996 Telecommunications Act. We also seek comment on the scope and applicability of Section 623, Section 1, Section 4(i), and Section 303(r) of the Communications Act of 1934 to this issue as well as other provisions that may provide us with authority to regulate exclusive contracts. We note that Section 628(b) states

[i]t shall be unlawful for a cable operator, a satellite, cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in 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 multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

We also seek comment on how we should define what constitutes “unfair methods of competition or unfair or deceptive acts or practices” under Section 628(b). We note that this language is similar to that used in the Federal Trade Commission Act. Commenters should address the relevance to our interpretation of Section 628(b) of any interpretation of similar language by the FTC or Federal courts.

9. In addition, Section 706 of the 1996 Telecommunications Act, charges the Commission to “encourage the deployment of \* \* \* advanced telecommunications capability to all Americans.” Given the relationship between a company’s ability to offer video programming to customers and its ability to invest in broadband facilities, does Section 706 provide the Commission authority to address competitive concerns relating to exclusive contracts? Moreover, the Commission is empowered by Section 1 of the Act “to execute and enforce the provisions of this Act,” and by Section 4(i) “to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” We also note that, with respect to MDU “home run” wiring, the Commission concluded that it had authority under Title VI (particularly Section 623) in conjunction with Sections 4(i) and

303(r) to regulate the disposition of such wiring upon termination of service. “Home run” wiring in an MDU is the wiring that runs from the demarcation point to the point at which the MVPD’s wiring becomes devoted to an individual subscriber or individual loop. We invite commenters to address whether these provisions, or others, can or should serve as a basis for regulating exclusive contracts for the provision of video services to MDUs or other real estate developments. In addition, we ask parties to address the scope of the Commission’s authority. Does the Commission have authority to regulate only exclusive contracts entered into after the effective date of the regulations or could it declare existing exclusive contracts void or voidable? Does the Commission have authority to regulate exclusive contracts entered into by MVPDs other than cable operators? Finally, we seek comment on the effect, if any, of state mandatory access laws or other statutory or constitutional considerations on the Commission’s authority in this area.

#### *C. Whether Commission Action Is Needed to Ensure Competitive Video Access to MDUs*

10. We seek comment on the impact of exclusive contracts on consumer choice and video competition. We note that, in the context of telecommunications services, the Commission has prohibited the enforcement of exclusive access arrangements in commercial MDUs. Does the existence of exclusive contracts within a community reduce the likelihood of competitive entry in the community? What are the typical durations of existing exclusive contracts? Are the costs associated with providing service to MDUs or other real estate developments significantly more than the costs of providing service in other areas? Is there more risk associated with serving these types of developments? Are the marketing costs higher in these areas? Is customer churn higher? How do the prices and services offered under the exclusive contracts compare to those offered to other customers? Are additional payments made to or by the MVPD in return for exclusive contracts? Do existing exclusive contracts provide the MVPD with a right of first refusal when renegotiating the contract? To the extent that some exclusive contracts can be pro-competitive and benefit consumers, we seek comment on those circumstances. If the Commission determines that it would serve the public interest to regulate exclusive

contracts, we seek comment on how we should regulate such contracts.

11. We seek comment on whether the Commission should limit exclusive contracts only where the video provider at issue possesses market power. In this regard, we call for comment on how the video programming market has changed since the issue was last posed in the *Inside Wiring FNPRM*, and whether the Commission should reconsider restriction or prohibition of the use of exclusive contracts by video providers with market power. In particular, we seek comment on how to define “market power” for these purposes. We also seek input on any other issues relevant to the analysis of market power and exclusive contracts. Does the competitive impact of exclusive contracts differ depending on whether a competing terrestrial MVPD was able to provide service to the MDU or other real estate development at the time the exclusive contract was negotiated?

12. We also call for comment regarding the existence of “perpetual” contracts. Perpetual contracts are contracts that grant the incumbent provider the right to maintain its wiring and provide service to the MDU for indefinite or very long periods of time, or for the duration of the cable franchise term, and any extensions thereof. Perpetual contracts present some of the same competitive issues as exclusive contracts, and were also discussed in the *Inside Wiring Report and Order*. Are perpetual contracts currently being executed? If so, are perpetual contracts anti-competitive, as they effectively bar any competitive entry, or are there instances in which the use of perpetual contracts does not impede our policy goals of enhanced cable competition and accelerated broadband deployment? Commenters should address the Commission’s authority to nullify or otherwise regulate perpetual contracts.

13. We also solicit comment on the specific rules or guidance that we should adopt to ensure that exclusive contracts do not unreasonably impede competitive video entry. Should the Commission establish explicit rules to which contracting parties must adhere or specific guidelines for MVPDs? Are there certain practices that we should find unreasonable through rules or guidelines? If so, what are these practices?

#### **IV. Procedural Matters**

##### *A. Initial Regulatory Flexibility Analysis*

14. 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 *Notice of Proposed Rulemaking*. The IRFA is set forth in the Appendix. 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, and they should have a separate and distinct heading designating them as responses to the IRFA.

#### B. Ex Parte Rules

15. *Permit-But-Disclose*. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under section 1.1206(b) of the Commission’s rules. *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 section 1.1206(b).

#### C. Filing Requirements

16. *Comment Information*. Pursuant to sections 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 (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 Web site 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](mailto: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 should 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](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

17. *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. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

#### Initial Regulatory Flexibility Analysis

18. As required by the Regulatory Flexibility Act of 1980, as amended (the “RFA”), the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact of the policies and rules proposed in the Notice of Proposed Rulemaking (“NPRM”) on a substantial number of small entities. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided in paragraphs 17–18 of the item. 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

19. The NPRM initiates a proceeding to investigate the use of exclusive contracts for the provision of video services to multiple dwelling units (“MDUs”) and other real estate developments, in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. Specifically, the NPRM solicits comment on the existence of exclusive contracts for the provision of video services to MDUs and other real estate developments, and whether such exclusive contracts are ever pro-competitive, and if not, whether the Commission has authority to prohibit the use of such agreements.

#### Legal Basis

20. The NPRM asks whether the Commission has authority to regulate the use of exclusive contracts for the provision of video services to MDUs or other real estate developments. It specifically asks whether such authority can be found in Sections 1, 4(i), 303(r), 623 and 628(b) of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996.

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

21. 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. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental

jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 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”).

22. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

23. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.

24. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.” We assume that the villages, school districts, and special districts are small, and total 48,558. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. Thus, we estimate that most governmental jurisdictions are small.

25. The Commission has determined that the group of small entities possibly directly affected by our action consists of small governmental entities. In addition the Commission voluntarily provides, below, descriptions of certain entities that may be merely indirectly affected by any rules that may ultimately result from the NPRM.

#### Cable Operators

26. *Cable and Other Program Distribution.* The Census Bureau 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.” 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. An additional 61 firms had annual receipts of \$25 million or more. Thus, under this size standard, the majority of firms can be considered small.

27. *Cable Companies and Systems.* 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. The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size 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, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers. Thus, under this second size standard, most cable systems are small.

28. *Cable System Operators.* 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.” The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. 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, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard. The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable

operator pursuant to section 76.901(f) of the Commission’s rules.

29. *Open Video Services.* Open Video Service (“OVS”) systems provide subscription services. As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution. This standard provides that a small entity is one with \$13.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by our action.

#### Telecommunications Service Entities

30. As noted above, 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.

31. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.” Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year. Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more. The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.” Thus, under this category and associated small business size standard, the majority of firms can be considered small.

## Dwelling Units

32. *MDU Operators.* The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating \$6 million or less in revenue annually. According to the Census Bureau, there were 31,584 operators of nonresidential buildings generating less than \$6 million in revenue that were in operation for at least one year at the end of 1997. Also according to the Census Bureau, there were 51,275 operators of apartment dwellings generating less than \$6 million in revenue that were in operation for at least one year at the end of 1997. The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

### Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

33. We anticipate that any rules that result from this action would have at most a *de minimis* compliance burden on cable operators and telecommunications service entities. Any rules that might be adopted pursuant to this NPRM likely would not require any reporting or recordkeeping requirements.

### Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

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

35. As discussed in the NPRM, the Commission has initiated this proceeding to ensure that use of exclusive contracts for the provision of video services to MDUs and other real estate developments are pro-competitive. As noted above, applying

any rules regarding the use of exclusive contracts in the provision of video services to MDUs or other real estate developments likely would have at most a *de minimis* impact on small governmental jurisdictions. We seek comment on the impact that any rules might have on such small governmental entities, as well as the other small entities described, and on what effect alternative rules would have on those entities. For instance, should a definition of “market power,” if such a definition is appropriate, make reference to small entities? We also invite comment on ways in which the Commission might impose restrictions on the use of exclusive contracts for the provision of video services while at the same time imposing lesser burdens on small entities.

### Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

36. None.

### V. Ordering Clauses

37. Accordingly, it is ordered that, pursuant to Sections 1, 4(i), 303(r), 623 and 628(b) of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. 151, 154(i), 303(r), 543, 548(b) and 157, this Notice of Proposed Rulemaking is hereby adopted.

38. It is further ordered that the 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.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 070402075-7075-01; I.D. 022807F]

RIN 0648-AU73

### Fisheries Off West Coast States; Highly Migratory Species Fisheries

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS issues a proposed rule to amend vessel identification regulations of the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). The current regulatory text requires all commercial fishing vessels and recreational charter vessels to display their official numbers on the port and starboard sides of the deckhouse or hull, and on an appropriate weather deck (horizontal or flat surface) so as to be visible from enforcement vessels and aircraft. The proposed rule would amend the regulatory text to provide an exemption to HMS recreational charter vessels in complying with the vessel identification requirements. The regulation is necessary to clarify that vessel identification requirements apply to HMS commercial fishing vessels and not to HMS recreational charter vessels.

**DATES:** Comments must be received by May 18, 2007.

**ADDRESSES:** You may submit comments on this proposed rule, I.D. 022807F, by any of the following methods:

- E-mail: [0648-AU73.SWR@noaa.gov](mailto:0648-AU73.SWR@noaa.gov).

Include the I.D. number in the subject line of the message.

- Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

- Mail: Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802 4213.

- Fax: (562) 980 4047.

**FOR FURTHER INFORMATION CONTACT:**

Craig Heberer, Sustainable Fisheries Division, NMFS, 760-431-9440, ext. 303.

**SUPPLEMENTARY INFORMATION:** On April 7, 2004, NMFS published a final rule to implement the HMS FMP (69 FR 18444) that included regulatory text in 50 CFR 660.704 requiring display of vessel identification markings for commercial fishing vessels and recreational charter fishing vessels that fish for HMS off or land HMS in the States of California, Oregon, and Washington. The identification markings are consistent in size, shape, and location with vessel identification markings required on commercial fishing vessels operating under the Pacific Fishery Management Council's (Council) Groundfish Fishery Management Plan. The marking requirements at 50 CFR 660.704(b) state that the official number must be affixed to each vessel in block Arabic numerals at least 10 inches (25.40 cm) in height for vessels more than 25 ft (7.62 m) but equal to or less than 65 ft (19.81 m) in