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[FR Doc. E8–3392 Filed 2–27–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–275; MB Docket No. 02–376; RM–10617, RM–10690]

Radio Broadcasting Services; Davis-Monthan Air Force Base, Sells, and Willcox, AZ

AGENCY: Federal Communications Commission.

ACTION: Final rule; denial of petition for reconsideration.

SUMMARY: The staff denied a petition for reconsideration filed by Lakeshore Media, LLC of a *Report and Order* in this proceeding, which had denied Lakeshore's counterproposal and granted a mutually exclusive allotment of Channel 285A at Sells, Arizona. The staff determined the counterproposal was properly denied because the proposed ''backfill'' of two new FM allotments at Willcox were not adequate substitutes for the creation of sizeable ''white'' and ''gray'' service loss areas that would be caused by the downgrade and reallotment of Lakeshore's Station KWCX–FM from Willcox to Davis-Monthan Air Force Base.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order,* MB Docket No. 02–376, adopted January 30, 2008 and released February 1, 2008. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

The *Memorandum Opinion and Order* agreed that the *Report and Order* had properly applied the Commission's policy of not permitting ''backfill'' vacant allotments to the facts of this case. See 69 FR 71386 (December 9, 2004). Specifically, the proposed relocation of Lakeshore's station KWCX–FM would result in the loss of all radio service for 2,846 persons (*i.e.*, a ''white'' area) and the reduction from two to one full-time reception service for 1,022 persons (*i.e.*, a ''gray'' area). Although Lakeshore argued that its counterproposal does not create ''white'' area, as a matter of law, because the Commission considers a vacant allotment to prevent the creation of ''white'' area, the *Memorandum Opinion and Order* disagreed, finding that the policy of no longer permitting ''backfill'' allotments has necessarily modified, to some extent, the calculation of ''white'' or ''gray'' areas in cases of operating, as opposed to unbuilt, stations. As a result, the potential service from new ''backfill'' allotments, existing vacant allotments, or unbuilt construction permits will no longer be considered in calculating the loss of service by the reallotment of operating stations. By way of contrast, the traditional test of considering the potential service from ''backfill'' or existing vacant allotments would continue to apply in cases involving reallotments and changes of community of license for unbuilt stations because existing on-air service is not being lost.

This document is not subject to the Congressional Review Act. (The Commission, is, therefore, not required to submit a copy of this Memorandum Opinion and Order to GAO, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A) because the petition for reconsideration was denied.)

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E8–3703 Filed 2–27–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 07–42; FCC 07–208]

Leased Commercial Access

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission modifies the leased access rate formula; adopts customer service obligations that require minimal standards and equal treatment of leased access programmers with other programmers; eliminates the requirement for an independent accountant to review leased access rates; requires annual reporting of leased access statistics; adopts expedited time frames for resolution of complaints and modifies the discovery process.

DATES: The amendments contained in this final rule are effective as follows:

Revised § 76.970 is effective May 28, 2008 except for paragraph (j)(3) which contains information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Federal Communications Commission will publish a document announcing the effective date upon OMB approval of those collection requirements.

Section 76.972 is effective March 31, 2008 except for paragraphs (a), (b), (c), (d), (e) and (g) which contain information collection requirements that have not been approved by OMB and paragraph (f) which contains requirements related to those information collection requirements. The Federal Communications Commission will publish a document announcing the effective date upon OMB approval of those collection requirements.

Amendments to § 76.975 are effective March 31, 2008 except for paragraphs (d), (e), (g), and (h)(4) which contain information collection requirements that have not been approved by OMB and paragraphs (b), (c), and (f) which contain requirements related to those information collection requirements. The Federal Communications Commission will publish a document announcing the effective date upon OMB approval of those collection requirements.

Section 76.978, as added in this rule, contains information collection requirements that have not been approved by OMB. The Federal Communications Commission will publish a document announcing the effective date upon OMB approval of those collection requirements.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *PRA@fcc.gov*. For additional information, 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*; Katie Costello, *Katie.Costello@fcc.gov*; or

David Konczal, *David.Konczal@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 *Report and Order* (''*Order*''), FCC 07–208, adopted on November 27, 2007, and released on February 1, 2008. 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 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*.

Paperwork Reduction Act of 1995 Analysis

This document contains new and modified information collection requirements. The Commission will send the requirements to OMB for review. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public to comment on the information collection requirements as required by the Paperwork Reduction Act of 1995, Public Law 104–13. 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 sought specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and we find that these requirements will benefit many companies with fewer than 25 employees by facilitating the use of leased access channels and by promoting the fair and expeditious resolution of leased access complaints.

Summary of the Report and Order

I. Introduction

1. In this Report and Order, we modify the Commission's leased access rules. With respect to leased access, we modify the leased access rate formula; adopt customer service obligations that require minimal standards and equal treatment of leased access programmers with other programmers; eliminate the requirement for an independent accountant to review leased access rates; and require annual reporting of leased access statistics. We also adopt expedited time frames for resolution of complaints and improve the discovery process. Finally, we seek comment in a Further Notice of Proposed Rulemaking on whether we should apply our new rate methodology to programmers that predominantly transmit sales presentations or program length commercials.

II. Commercial Leased Access Rules

A. Background

2. The commercial leased access requirements are set forth in Section 612 of the Communications Act of 1934, as amended (''Communications Act''). The statute and corresponding leased access rules require a cable operator to set aside channel capacity for commercial use by unaffiliated video programmers. In implementing the statutory directive to determine maximum reasonable rates for leased access, the Commission adopted a maximum rate formula for full-time carriage on programming tiers based on the ''average implicit fee'' that other programmers are implicitly charged for carriage to permit the operator to recover its costs and earn a profit. The Commission also adopted a maximum rate for a la carte services based on the ''highest implicit fee'' that other a la carte services implicitly pay, and a prorated rate for part-time programming.

B. Customer Service Standards and Equitable Contract Terms

3. In this Order, we adopt uniform customer service standards to address the treatment of leased access programmers and potential leased access programmers by cable system operators. In order to make the leased access carriage process more efficient, we adopt new customer service standards, in addition to the existing standards. These standards are designed to ensure that leased access programmers are not discouraged from pursuing their statutory right to the designated commercial leased access channels, to facilitate communication of these rights and obligations to potential programmers, and to ensure a smooth process for gaining information about a cable system's available channels. We require cable system operators to maintain a contact name, telephone number and e-mail address on its website, and make available by telephone, a designated person to respond to requests for information about leased access channels. We also require cable system operators to maintain a brief explanation of the leased access statute and regulations on its website. Within three business days of a request for information, a cable system operator shall provide the prospective leased access programmers with the following information: (1) The process for requesting leased access channels; (2) The geographic levels of service that are technically possible; (3) The number and location and time periods available for each leased access channel; (4) Whether the leased access channel is currently being occupied; (5) A complete schedule of the operator's statutory maximum full-time and part-time leased access rates; (6) A comprehensive schedule showing how those rates were calculated; (7) Rates associated with technical and studio costs; (8) Electronic programming guide information; (9) The available methods of programming delivery and the instructions, technical requirements and costs for each method; (10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability; and (11) Information regarding prospective launch dates for the leased access programming. In addition to the customer service standards, we adopt penalties for ensuring compliance with these standards. We emphasize that the leased access customer service standards adopted herein are ''minimum'' standards. We cannot anticipate each and every instance of interaction between cable operators and leased access programmers.

4. *Maintenance of Contact Information.* We require every cable system operator to maintain, on its website, a contact name, telephone number, and e-mail of an individual designated by the cable system operator to respond to requests for information about leased access channels. One of the more basic elements necessary to permit potential programmers reasonable access to cable systems is ready availability of a contact name, telephone number, and e-mail address of a cable system operator that the programmer can use to reach the appropriate person in the cable system to begin the process for requesting access to the system. While the physical location of a person designated as the leased access contact should not be critical in the relationship between the potential programmer and the cable system operator, the identity of that person and the ease of access to him are critical. Other aspects of the rules we adopt here deal with expeditious and full responses to leased access requests. The fact that the designated person is located some distance away should not affect the timeliness and substance of responses.

5. *Timing for Response.* We amend our rules to require a cable system operator to respond to a request for information from a leased access programmer within three business days. We retain the 30-day response period currently provided in Section 76.970(i)(2) of the Commission's rules for cable systems that have been granted small system special relief. The identity of a designated person by the cable system operator who the potential programmer can contact is important only if that person replies quickly and fully to the requests of the programmer. Our current rules provide for a 15 day response by cable system operators to a request by a potential programmer. That response must include information on channel capacity available, the applicable rates, and a sample contract if requested. That response time is unnecessarily long and, as discussed below, the information is inadequate. Cable operators must have leased access channel information available in order to be able to comply with the statute and our rules. It does not take 15 days to provide a copy of that information to a potential leased access programmer. Three business days to reply to a request for such information is more than adequate. Accordingly, we are amending the response time permitted a cable system operator to three business days. We are also providing a more detailed list of information the operator must provide upon request within that time period. All of the information required to be provided is necessary for a potential leased access programmer to be able to file a *bona fide* request for carriage. There is no reason to delay providing the leased access programmer with the information it needs to take the necessary steps to obtain access.

6. *Process for Requesting Leased Access Channels.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the process for requesting leased access channels. One element of the information the cable system operator must make available to the potential programmer within three business days of a request is an explanation of the cable system operator's process for requesting leased access channels. Accordingly, we are requiring that the cable system operator include an explanation of the operator's process and procedures for requesting leased access channels.

7. *Geographic Levels of Service that Are Technically Possible.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the geographic levels of service that are technically possible. Commenters complain that cable system operators make available only limited levels of service. Typically, the service offered is defined by the size of the headend. We will not require, at this time, the operator to allow the leased access programmer to serve discrete communities smaller than the area served by a headend if they are not doing the same with other programmers. We acknowledge that with the consolidation of headends, programmers may be forced to purchase larger areas at higher costs than they would prefer. We will monitor developments in this area, and may revisit this issue if circumstances warrant. However, we will require cable system operators to clearly set out in their responses to programmers what geographic and subscriber levels of service they offer.

8. *Number, Location, and Time Periods Available for Each Leased Access Channel.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the number, location, and time periods available for each leased access channel. Our current leased access channel placement standards provide that programmers be given access to tiers that have subscriber penetration of more than 50 percent. 47 CFR 76.971(a)(1) We will not change that requirement, but we will expand on the current requirement relating to capacity in Section 76.970(i) to require cable system operators to provide, in their replies to requests from programmers, the specific number and location and time periods available for each leased access channel. This greater degree of certainty should assist programmers in their evaluations.

9. *Explanation of Currently Available and Occupied Leased Access Channels.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with an explanation of currently available and occupied leased access channels. Section 612 of the Communications Act imposes specific requirements on cable operators with regard to leased access. 47 U.S.C. 532. It is inherent in these obligations to be able to provide timely and accurate information to prospective leased access programmers. Within three business days of a request by a current or potential leased access programmer, a cable operator shall provide information documenting: (1) The number of channels that the cable operator is required to designate for commercial leased access use pursuant to Section 612(b)(1); (2) the current availability of those channels for leased access programming on a full- or part-time basis; (3) the tier on which each leased access channel is located; (4) the number of customers subscribing to each tier containing leased access channels; (5) whether those channels are currently programmed with non-leased access programming; and (6) how quickly leased access channel capacity can be made available to the prospective leased access programmer. We believe this information is vital to enable leased access programmers to make an informed decision regarding whether to pursue leased access negotiations with a cable operator. Provision of this information will also benefit cable operators by timely informing leased access programmers of current leased access timing and availability, and thereby eliminating leased access requests that cannot be accommodated by existing leased access availability.

10. *Schedule and Calculation of Leased Access Rates.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with a schedule and calculation of its leased access rates. As with information regarding available and occupied leased access channels, we believe Section 612 imposes on cable operators the obligation to provide a timely and accurate explanation of its leased access

rates to prospective leased access programmers. Accordingly, within three business days of a request by a current or potential leased access programmer, a cable operator shall provide information documenting the schedule of all leased access rates (full- and part-time) available on the cable system. Cable operators must attach to this schedule a separate calculation detailing how each rate was derived pursuant to the revised rate formula adopted herein. This information will assist leased access programmers in determining whether leased access capacity on a given cable system is economically feasible. In addition, the rate calculations will further assist leased access programmers in determining whether particular cable operators are complying with their leased access obligations.

11. *Explanation of Any Rates Associated with Technical or Studio Costs.* Included in the customer standards we are adopting today is a requirement that a cable operator provide a prospective leased access programmer, within three business days of a request, with a list of fees for providing technical support or studio assistance to the leased access programmer along with an explanation of such fees and how they were calculated. We note that our rules require leased access providers to reimburse cable operators ''for the reasonable cost of any technical support the operators actually provide.'' 47 CFR 76.971(c) Further, our rate calculation includes technical costs common to all programmers so that cable operators may not impose a separate charge for technical support they already provide to non-leased access programmers. *Second Report and Order,* 12 FCC Rcd at 5324, para. 114. At this time, we will not prescribe an hourly rate for technical support, but instead will monitor the effectiveness of the new customer standards that require that cable operators list up front any technical fees along with an explanation of the fee calculation. If leased access programmers have continued problems with high technical or studio cost, we will consider implementing a more specific solution.

12. *Programming Guide Information.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with all relevant information for obtaining carriage on the program guide(s) provided on the operator's system. Moreover, we expressly require that, if a cable operator does not charge non-leased access programmers for carriage of their program information on a programming guide, the cable operator cannot charge leased access programmers for such service. Because of the dynamic nature of leased access programming, we believe that it would be impracticable to impose a requirement on cable operators to include all leased access listings in their programming guides. However, we believe that, in situations where time permits and the leased access programming information is submitted as reasonably required by the cable operators, cable operators must ensure that leased access programming information is incorporated in its program guide to the same extent that it does so for non-leased access programmers. In order to accomplish this, cable operators are required to provide potential leased access programmers with all relevant information for obtaining carriage on the program guide(s) provided on the operator's system. This information shall include the requirements necessary for a leased access programmer to have its programming included in the programming guide(s) that serve the tier of service on which the leased access provider contracts for carriage. At a minimum, the cable operator must provide: (1) The format in which leased access programming information must be provided to the cable operator for inclusion in the appropriate programming guide; (2) the content requirements for such information; (3) the time by which such programming information must be received for inclusion in the programming guide; and (4) the additional cost, if any, related to carriage of the leased access programmer's information on the programming guide. We expressly require that, if a cable operator does not charge non-leased access programmers for carriage of their program information on a programming guide, the cable operator cannot charge leased access programmers for such service.

13. *Methods of Programming Delivery.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with available information regarding all acceptable, standard methods for delivering leased access programming to the cable operator. Because of the variable circumstances experienced by each cable system, we cannot establish a list of acceptable, standard delivery methods for leased access programming applicable to all cable systems. However, we believe that it incumbent upon a cable operator to provide prospective leased access programmers with sufficient information to be able to gauge the relative difficulty and expense of delivering its programming for carriage by the cable operator. A cable operator must make available information to leased access programmers regarding all acceptable, standard methods for delivering leased access programming to the cable operator. For each method of acceptable, standard delivery, the cable operator shall provide detailed instructions for the timing of delivery, the place of delivery, the cable operator employee(s) responsible for receiving delivery of leased access programming, all technical requirements and obligations imposed on the leased access programmer, and the total cost involved with each acceptable, standard delivery method that will be assessed by the cable operator. We clarify, however, that cable operators must give reasonable consideration to any delivery method suggested by a leased access programmer. A leased access programmer that is denied the opportunity to deliver its programming via a reasonable method may file a complaint with the Commission. In such complaint proceeding, the burden of proof shall be on the cable operator to demonstrate that its denial was reasonable given the unique circumstances of its cable system.

14. *Comprehensive Sample Leased Access Carriage Contract.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with a comprehensive sample leased access carriage contract. We also require a cable system operator in its leased access carriage contract to apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers.

15. We do not intend by this requirement to infringe the freedom of contract of either party and expressly clarify that neither the cable operator nor the prospective leased access programmer need abide by any of the terms and conditions set forth in the sample contract. Instead, we believe that the provision of such agreements by cable operators serve to inform leased access programmers of terms and conditions that are generally acceptable to the cable operator and will be a useful first step in the initiation of leased access negotiations. Accordingly, within three business days of a request by a current or potential leased access programmer, a cable operator shall provide a copy of a sample leased access carriage contract setting forth what the cable operator considers to be the

standard terms and conditions for a leased access carriage agreement.

16. As discussed below, we also require cable system operators to apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers. Rather than dictate specific reasonable terms and conditions, we require that cable system operators apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers.

17. The Commission has stated in the past that the reasonableness of specific terms and conditions will be determined on a case-by-case basis, but set broad guidelines for tier placement and a general standard of reasonableness for contract terms and conditions.

18. We will continue to address complaints about specific contract terms and conditions on a case-by-case basis. We emphasize that in all cases, the Commission will evaluate any complaints pursuant to a reasonableness standard. We also clarify that a cable system operator may not continue to include terms and conditions in new contracts that previously have been held to be unreasonable by the Commission. Not only are our orders binding on the affected parties to a leased access complaint, but unless and until an order is stayed or reversed by the Commission, a cable system operator is under an obligation to follow the Commission's rules and precedent in setting its practices, terms, and conditions.

19. Because we do not think that every potential leased access programmer should be required to file a complaint to determine if every term in its contract is reasonable, we will require the cable operator to provide, along with its standard leased access contract, an explanation and justification, including a cost breakdown, for any terms and conditions that require the payment or deposit of funds. This includes insurance and deposit requirements, any fees for handling or delivery, and any other technical or equipment fees, such as tape insertion fees. This will allow the leased access programmer to determine whether the cost is reasonable and expedite any review by the Commission. We believe that requiring a cable operator to provide an explanation and justification for such a fee will encourage cable operators to impose only reasonable fees or, at least, facilitate the filing of a leased access complaint demonstrating that such a fee is unreasonable.

20. With regard to non-monetary terms and conditions, such as channel and tier placement, targeted programming, access to electronic program guides, VOD, etc., we similarly require the cable operator to provide, along with its standard leased access contract, an explanation and justification of its policy. For example, with regard to the geographic scope of carriage, if a leased access programmer requests to have its programming targeted to a finite group of subscribers based on community location, unless the operator agrees to the request, it must not provide such limited carriage to other programmers or channels. To the extent the cable operator denies the request for limited carriage, the cable operator must provide an explanation as to why it is technically infeasible to provide such carriage. If limited carriage is technically feasible, the cable operator must provide a fee and cost breakdown for such carriage for comparison with similar coverage provided for non-leased access programmers.

21. Similarly, with regard to tier placement and channel location, we require the cable operator to provide, along with its standard leased access contract, an explanation and justification of its policy regarding placement of a leased access programmer on a particular channel as well as an explanation and justification for the cable operator's policy for relocating leased access channels. To the extent a request for a particular channel is denied, the cable operator must provide a detailed explanation and justification for its decision.

22. *Launch Date.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with information regarding prospective launch dates for the leased access programmer. Moreover, we require cable operators to launch leased access programmers within a reasonable amount of time. We consider 35–60 days after the negotiation is finalized to be a reasonable amount of time for launch of a programmer, unless the parties come to a different agreement. We note that this time frame affords cable operators sufficient time to satisfy the requirement, if applicable, to provide subscribers with 30-days written notice in advance of any changes in programming services or channel positions.

C. Response to Bona Fide Proposals for Leased Access

23. We adopt rules to ensure that cable system operators respond to proposals for leased access in a timely manner and do not unreasonably delay negotiations for leased access. To address this concern, after the cable system operator provides the information requested above, in order to be considered for carriage on a leased access channel, we require a leased access programmer to submit a proposal for carriage by submitting a written proposal that includes the following information: (1) The desired length of a contract term; (2) The tier, channel and time slot desired; (3) The anticipated commencement date for carriage; (4) The nature of the programming; (5) The geographic and subscriber level of service requested; and (6) Proposed changes to the sample contract. The cable system operator must respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days. This same response deadline will apply until an agreement is reached or negotiations fail.

24. Failure to provide the requested information will result in the issuance of a notice of apparent liability (''NAL'') including a forfeiture in the amount of $500.00 per day. A potential leased access programmer need not file a formal leased access complaint pursuant to Section 76.975 of the Commission's rules in order to bring a violation of our customer service standards to our attention. Rather, the programmer may notify the Commission either orally or in writing, and where necessary the Commission will submit a Letter of Inquiry (''LOI'') to the cable operator to obtain additional information. A cable system which is found to have failed to respond on time with the required information will be issued an NAL. The same process and forfeiture amount will apply for the failure to timely respond to a proposal as for the failure to comply with an information request. We rely on our general enforcement authority under Section 503 of the Communications Act to impose forfeitures in appropriate cases. *See* 47 U.S.C. 503

D. Leased Access Rates

1. Maximum Rate for Leasing a Full Channel

25. *Background.* The Commission's current rules calculate leased access rates for all tiers that have subscriber penetration of more than 50 percent. Upon request, cable operators generally must place leased access programmers on such a tier. To determine the average implicit fee for a full-time channel on a tier with a subscriber penetration over 50 percent, an operator first calculates the total amount it receives in subscriber revenue per month for the

programming on all such tiers, and then subtracts the total amount it pays in programming costs per month for such tiers (the ''implicit fee calculation''). A weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s) is used to determine how much of the total will be recovered from a particular tier. To calculate the average implicit fee per channel, the implicit fee for the tier is divided by the number of channels on the tier. The final result is the rate per month that the operator may charge the leased access programmer for a full-time channel on that tier. Where the leased access programmer agrees to carriage on a tier with less than 50 percent penetration, the average implicit fee is determined using subscriber revenues and programming costs for only that tier. The implicit fee for full-time channel placement as an a la carte service is based upon the revenue received by the cable operator for non-leased access a la carte channels on its system.

26. In this Order we modify the method for determining the leased access rate for full-time carriage on a tier. We harmonize the rate methodology for carriage on tiers with more than 50% subscriber penetration and carriage on tiers with lower levels of penetration by calculating the leased access rate based upon the characteristics of the tier on which the leased access programming will be placed. Cable operators will calculate a leased access rate for each cable system on a tier-by-tier basis which will adequately compensate the operator for the net revenue that is lost when a leased access programmer displaces an existing program channel on the cable system. In addition, the Order sets a maximum allowable leased access rate of $0.10 per subscriber per month to ensure that leased access remains a viable outlet for programmers. At this time we leave the method for calculating rates for a la carte carriage unchanged.

27. As an initial matter, we conclude that we will not apply this new rate methodology to programmers that predominantly transmit sales presentations or program length commercials. These programmers often ''pay'' for carriage—either directly or through some form of revenue sharing with the cable operator. In our previous Order, we set the leased access rate for a la carte programmers at the ''highest implicit fee'' partly out of a concern that lower rates would simply lead these programmers to migrate to leased access if it were less expensive than what they are currently ''paying'' for carriage. Such a migration would not add to the diversity of voices and would potentially financially harm the cable system. Similarly, we do not wish to set the leased access rates at a point at which programmers that predominantly transmit sales presentations or program length commercials simply migrate to leased access because it is less expensive than their current commercial arrangements. We will seek comment in the Further Notice of Proposed Rulemaking on whether leased access is affordable at current rates to programmers that predominantly transmit sales presentations or program length commercials and whether reduced rates would simply cause migration of existing services to leased access.

2. The Marginal Implicit Fee

28. The purposes of Section 612 are ''to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.'' Because Section 612 also requires that the price, terms and conditions for leased access be ''at least sufficient to assure that such use will not adversely affect the operation, financial condition or market development of the cable system,'' the Commission is faced with balancing the interests of leased access programmers with those of cable operators. We believe that our method provides a cable operator with a leased access rate that will allow the operator to replace an existing channel from its cable system with a leased access channel without experiencing a loss in net revenue. While we do not believe that our method for determining leased access rates will result in cable operators experiencing any loss in net revenue, the relevant statutory provision does not require such a finding. As explained above, Section 612(c)(1) provides that the ''prices, terms and conditions'' of use must be ''at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.'' We interpret this provision to restrict ''prices, terms, and conditions'' of leased access use that materially affect the financial health of a cable system. We do not interpret the provision to require that cable operators experience no loss in revenue whatsoever as a result of leased access use. Thus, even if we were to conclude that our method for determining leased access rates would have some impact on cable operators' revenue, we would still adopt this method because we are confident that any impact on operators'' revenue would not be of sufficient magnitude to materially affect the financial health of cable systems. In addition, since we are required to balance the revenue requirement of cable operators and that of leased access programmers, we will assume that the cable operator will elect to replace a channel which does not generate a significant amount of the total net revenue of the system. We refer to this channel as the marginal channel and use the marginal implicit fee to determine leased access rates. Our method was intended to promote the goals of competition and diversity of programming sources while doing so in a manner consistent with growth and development of cable systems.

29. Based on the wide variance between the actual use of leased access and the goals stated in the law, it appears that the current ''average implicit fee'' formula for tiered leased access channels yields fees that are higher than the statute mandates, resulting in an underutilization of leased access channels. According to the Commission's most recent annual cable price survey, cable systems on average carry only 0.7 leased access channels. Because our Rules are not achieving their intended purpose, we are revisiting decisions made in the *Second Report and Order* establishing the maximum leased access rates in order to make the leased access channels a more viable outlet for programming. Throughout its implementation of Section 612, the Commission has recognized that the Rules adopted would need refinement as specifics regarding how the leased access rules were functioning became available.

30. Due to the variances in channel line-ups and tier prices of cable systems, in most instances, a flat rate would either over- or undercompensate cable operators. As discussed below, however, we will set a cap on the maximum rate that cable operators may charge in order to prevent the construction of tiers in a manner that makes leased access rates excessively high.

31. We agree with Shop NBC's assertion that the average implicit fee overcompensates cable operators because it reflects the *average* value of a channel to the cable operator instead of the value of the channel replaced. We will make adjustments to the rate calculations that should lower prices by using the marginal implicit fee rather than the average. The result is intended to promote the goals of leased access by providing more affordable opportunities

for programmers without creating an artificially low rate.

32. The legislative history provides that the leased access provisions are ''aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers'' To promote this legislative purpose the Commission should set the leased access rates as low as possible consistent with the requirement to avoid any negative financial impact on the cable operator. One may assume that the cable operator, faced with a requirement to free up a channel for leased access, would have its own incentives to elect to replace one of the channels with the lowest implicit fee. But even if this is not the case, the discussion above suggests that the Commission should set its rules to encourage such a result. This dictates, at least in principle, the use of the lowest implicit fee, which we refer to as the ''marginal implicit fee.'' And it supports the conclusion that the current ''average implicit fee'' criterion for tiered channels is higher than warranted by the statute and may be impeding, rather than promoting, the goals of competition and diversity of programming sources. These rules provide cable operators a higher return for lost channel capacity than the value the cable operator would have received if the channel was not used for leased access programming. The ''average implicit fee'' is calculated based on the average value of all of the channels in a tier instead of the value of the channels most likely to be replaced. We will adopt a method which eliminates this excess recovery. This method remains faithful to the statutory requirements while more appropriately balancing the interests of cable operators and leased access programmers.

3. The Cable Operator's Net Revenue From a Cable Channel

33. Cable channels are sold in bundles of channels known as tiers. It is therefore not possible to directly observe the revenue per subscriber a cable operator earns from carrying an individual channel included in a tier. We therefore approximate the revenue earned by those channels on the tier. To do so we assume that the revenue generated by each channel is directly proportional to the per subscriber affiliation fee paid by the cable operator to the programmer. The first step in the calculation is to determine this factor of proportionality which we refer to as the mark-up. To do so, the cable operator will take the total subscriber revenue for the programming tier at issue and divide by the total of the affiliation fees that the cable operator pays to the programmers for the channels on that tier. For the purposes of defining the price of a tier and the channels on the tier we adopt the incremental approach in cases where the cost and channels of one tier are implicitly incorporated into larger tiers. For example, when the expanded basic tier incorporates the basic tier, the expanded basic tier price is the retail price of the expanded basic tier less the retail price of the basic tier and the channels on the expanded basic tier are those that are not available on the basic tier. A similar adjustment is required of other tiers which are not sold on an incremental basis. This calculation will generate the mark-up of channels that are sold on the tier. The gross revenue per subscriber due to carriage of a specific channel on the tier is then simply the per subscriber affiliation fee paid to the programmer for the specific channel multiplied by the mark-up. It is our understanding that some programming contracts specify a single rate for a group, or bundle, of channels. In these cases, for the purposes of determining the per subscriber affiliation fee for one of the bundled channels, the fee in the contract shall be allocated in its entirety to the highest rated network in the bundle. The net revenue per subscriber earned by the cable operator from the channel is the difference between the gross revenue per subscriber and the per subscriber affiliation fee paid by the cable operator. This value represents the implicit fee for the channel.

4. The Net Revenue of the Marginal Channel

34. The net revenue per subscriber is the reduction in profit a cable operator would experience if it did not carry the channel in question. In our previous method for calculating leased access rates the calculation was based the average net revenue of all channels carried by the cable operator. In our new method, we base the leased access rate on the net revenue of the least profitable channels voluntarily carried by the cable operators on the tier where the leased access programming will be carried. We do so because this represents an approximation of the minimum net revenue a network must generate in order for the cable operator to consider carrying it on the tier. As mentioned, we examine the net revenue of channels that are voluntarily carried by the cable operator. From this calculation we exclude channels whose carriage is mandated by statute, regulation, or franchise agreement. These mandated channels consist of broadcast stations that are subject to the must-carry rules as well as public, educational, and governmental (''PEG'') channels that are carried pursuant to a franchise agreement. In addition, broadcaster's multi-cast channels are also excluded from the marginal channels. Our goal is to base the leased access rate on the net revenue of channels which are subject to free market negotiations over the carriage decision and affiliation fee. It is the net revenue of these types of channels which provides an indication of the net revenue that would be forgone when a cable operator devotes channel capacity to a leased access programmer since the cable operator would be unable to displace a broadcast station or PEG channel.

35. We identify the least profitable, or marginal, channels using the fraction of activated channels that a cable operator is statutorily required to make available for commercial leased access. The leased access rate is the mean value of net revenue earned by the lowest earning channels on the tier, up to the designated leased access fraction of qualifying channels on the tier. For example, in the case of a cable system with 100 activated channels and 40 channels on the expanded basic tier, the mean value of the net revenue of the 6 channels with the lowest net revenue will be the leased access rate for carriage on the expanded basic tier. We use the mean rather than the minimum value because use of the minimum would undercompensate the cable operator if more than one leased access channel was carried because, presumably, all channels other than the minimum earn higher net revenues. Use of the mean ensures that if the cable operator carries the statutory maximum number of leased access channels by displacing the lowest earning channels on its system, the cable operator will be fully compensated for lost revenue.

36. Appendix B of this Order presents an example of the calculation of the leased access rates for a hypothetical cable system.

5. Determining the Maximum Allowable Leased Access Rate

37. We recognize that our tier-based calculation method may lead to inequitable results in situations when a tier carries only a few non-mandated programming networks in combination with a large amount of mandated programming. This may create incentives among cable operators to design programming tiers that are unaffordable for leased access

programmers. Such an outcome would contravene our statutory directive. Therefore we institute a maximum allowable rate based upon industry-wide cable operator programming costs and revenues. This will ensure that leased access programmers can reach consumers in all areas of the country. We will permit cable operators to seek a waiver of the maximum allowable rate to ensure no unreasonable financial burden is put on any cable operator. The maximum allowable leased access rate will apply to carriage on any tier in which the operator-specific leased access rate for the tier exceeds the maximum allowable rate.

38. We take several approaches to calculating this maximum rate. For example, we calculate the maximum rate utilizing a methodology based on per-subscriber affiliation fees that compensates systems that must vacate a channel in order to provide capacity to a commercial leased access programmer. We also calculate the maximum allowable leased access rate using a method that follows the one used to calculate the system-specific rates. In both cases, maximum rates for each of the analog and digital tiers are no greater than $0.10 per subscriber per month. The methods are detailed in Appendix B. Therefore, the maximum leased access rate will not exceed $0.10 per subscriber per month for any cable system.

39. Cable operators may petition the Commission to exceed the maximum allowable leased access rates. A petition for relief must present specific facts justifying the system's specific leased access rate and provide an alternative rate which equitably balances the revenue requirements of the cable operator with the public interest goals of the leased access statute. Our presumption is that the mean value of the net revenue of the marginal networks, including those currently earning no license fee, provides the most reasonable approximation of the revenue which is forgone when a cable operator carries leased access programming.

6. Effective Date of New Rate Regulations

40. We recognize that the industry should receive an appropriate amount of time to review and to take steps to comply with the new rate regulations set forth above. Section 76.970(j)(3), which contains new or modified information collection requirements that have not been approved by the Office of Management and Budget (OMB), is effective upon OMB approval. Section 76.970 is effective May 28, 2008 or upon OMB approval of § 76.970(j)(3), whichever is later. After OMB approval is received, the Commission will publish a document in the **Federal Register** announcing the effective date of the rules requiring OMB approval and those whose effective date was delayed pending OMB approval of other rules.

E. Expedited Process

41. As explained below, we do not change the current pleading cycle for leased access complaints set forth in Section 76.975 of the Commission's rules, which requires the complaint to be filed with the Commission within 60 days of any alleged violation and the cable operator to submit a response within 30 days from the date of the complaint. The Media Bureau will resolve all leased access complaints within 90 days of the close of the pleading cycle, obtaining additional discovery from the parties as necessary to quickly resolve complaints. Finally, we eliminate the requirement that a complainant alleging that a leased access rate is unreasonable must first receive a determination of the cable operator's maximum permitted rate from an independent accountant.

42. *Discussion.* We retain our existing pleading cycle for resolution of leased access complaints set forth in Section 76.975 of the Commission's rules, which requires the complaint to be filed with the Commission within 60 days of any alleged violation and the cable operator to submit a response within 30 days from the date of the complaint. We find that our current pleading cycle is not too lengthy, as it is imperative that we receive all the necessary information to resolve the dispute. Although we retain the existing time limits on filing of complaints, we add an exception that the time limit on filing complaints will be suspended if the complainant files a notice with the Commission prior to the expiration of the filing period, stating that it seeks an extension of the filing deadline in order to pursue active negotiations with the cable operator. The cable operator must agree to the extension.

43. The Media Bureau will resolve all leased access complaints within 90 days of the close of the pleading cycle, obtaining additional discovery from the parties as necessary to quickly resolve complaints. As part of the remedy phase of the leased access complaint process, the Media Bureau will have discretion to request that the parties file their best and final offer proposals for the prices, terms, or conditions in dispute. The Commission will have the discretion to adopt one of the proposals or choose to fashion its own remedy. We believe that this expedited process will help to resolve leased access disputes quickly and efficiently and create a body of precedent to encourage private negotiations and the settlement of disputes. If the Media Bureau concludes that the complainant is entitled to access a leased access channel, the Media Bureau's resolution of the complaint will include a launch date for the programming.

44. *Elimination of Independent Accountant Requirement.* We eliminate the requirement for a complainant alleging that a leased access rate is unreasonable to first obtain a determination of the cable operator's maximum permitted rate from an independent accountant prior to filing a petition for relief with the Commission. While the Commission adopted the independent accountant requirement as a means to ''streamline'' the leased access complaint process, the record reflects that this requirement has not worked as intended. We conclude that the expense, delay, and uncertainty for leased access programmers resulting from the requirement to obtain a determination from an independent accountant are not what the Commission envisioned in attempting to ''streamline'' the leased access complaint process. Furthermore, we believe the new rate methodology we have adopted, along with the requirement to provide rate information and an explanation of how rates were calculated, will result in a simpler and transparent process for leased access rates. We also believe the expedited complaint process and expanded discovery we adopt herein provide leased access programmers with a more efficient process for challenging the commercial leased access rates charged by cable operators. While cable operators argue that the use of an independent accountant is important to protect commercially sensitive financial information, the Protective Order we adopt below will sufficiently safeguard such information.

F. Discovery

45. As discussed below, we adopt expanded discovery rules for leased access complaints to improve the quality and efficiency of the Commission's resolution of these complaints. We amend our discovery rules pertaining to leased access complaints to require respondents to attach to their answers copies of any documents that they rely on in their defense; find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either

requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute, subject to the protection of confidential material. We emphasize that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with reasonable discovery requests. The respondent shall have the opportunity to object to any request for documents. Such request shall be heard, and determination made, by the Commission. The respondent need not produce the disputed discovery material until the Commission has ruled on the discovery request. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection 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.

46. Under the current rules, a leased access complainant is entitled, either as part of its complaint or through a motion filed after the respondent's answer is submitted, to request that Commission staff order discovery of any evidence necessary to prove its case. *See* 47 CFR 76.7(e), (f). Respondents are also free to request discovery. We believe that expanded discovery will improve the quality and efficiency of the Commission's resolution of leased access complaints. Accordingly, we find that it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute. In reaching this finding, we agree that evidence detailing how the cable operator calculated its leased access rate, as well as the availability of certain contracts for carriage of leased access programming, subject to confidential treatment, are essential for determining whether the cable operator has violated the Commission's leased access rules. The Commission's Rules allow the Commission staff to order production of any documents necessary to the resolution of a leased access complaint. *See* 47 CFR 76.7(e), (f). The subject discovery may require the production of confidential material, including evidence detailing how the cable operator calculated its leased access rate as well as carriage contracts, subject to our confidentiality rules. While we retain this process for the Commission to order the production of documents and other discovery, we will also allow parties to a leased access complaint to serve requests for discovery directly on opposing parties.

47. Parties to a leased access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. As discussed above, 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 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.

48. We reiterate that respondents to leased access complaints must produce in a timely manner the contracts and other documentation that are necessary to resolve the complaint, subject to confidential treatment. In order to prevent abuse, the Commission will strictly enforce its default rules against respondents who do not answer complaints thoroughly or do not respond in a timely manner to permissible discovery requests with the necessary documentation attached. Respondents that do not respond in a timely manner to all discovery ordered by the Commission will risk penalties, including having the complaint against them granted by default. Likewise, a complainant that fails to respond promptly to a Commission order regarding discovery will risk having its complaint dismissed with prejudice. Finally, a party that fails to respond promptly to a request for discovery to which it has not raised a proper objection will be subject to these sanctions as well.

49. We understand that this approach requires the submission of confidential and extremely competitively-sensitive information. Accordingly, in order to appropriately safeguard this confidential information we believe it is necessary to utilize the protective order adopted for use in our program access proceedings (''Protective Order''), which we attach hereto as Appendix A.

50. A *Protective Order* constitutes both an Order of the Commission and an agreement between the party executing the declaration and the submitting party. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings. We intend to vigorously enforce any transgressions of the provisions of our protective orders.

G. Annual Reporting of Leased Access Statistics

51. We adopt an annual reporting requirement for cable operators to submit information pertaining to leased access rates, usage, channel placement, and complaints, among other leased access matters. In the NPRM, we sought comment on various questions regarding the status of commercial leased access, such as the extent to which programmers are making use of commercial leased access channels, whether cable operators have denied requests for commercial leased access, whether cable operators use commercial leased access channels for their own purposes, and the effectiveness of the complaint process.

52. We did not receive a large number of comments containing industry-wide data regarding use of leased access. As described below, to ensure that we have sufficient up-to-date information on the status of leased access programming in the future, we adopt an annual reporting requirement for cable operators.

53. *Discussion.* We adopt an annual reporting requirement for cable operators pertaining to leased access rates, usage, channel placement, and complaints, among other leased access matters. We find that gathering up-to-date information and statistics on an annual basis pertaining to leased access is critical to our efforts to track trends in commercial leased access rates and usage as well as to monitor any efforts by cable operators to impede use of commercial leased access channels. This information will allow us to determine whether further modifications to the commercial leased access rules we adopt herein are needed based on a more concrete factual setting. The Annual Report will require each cable system to provide the following information:

- List the number of commercial leased access channels provided by the cable system.
- List the channel number and tier applicable to each commercial leased access channel.
- Provide the rates the cable system charges for full-time and part-time leased access on each leased access channel.

• Provide the calculated maximum commercial leased access rate and actual rates.

• List programmers using each commercial leased access channel and state whether each programmer is using the channel on a full-time or part-time basis.

• List number of requests received for information pertaining to commercial leased access and the number of *bona fide* proposals received for commercial leased access.

• Describe whether you have denied any requests for commercial leased access and, if so, explain the basis for the denial.

• Describe whether a complaint has been filed against the cable system with the Commission or with a Federal district court regarding a commercial leased access dispute.

• Describe whether any entity has sought arbitration with the cable system regarding a commercial leased access dispute.

• Describe the extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes.

• Describe the extent to which the cable system impose different rates, terms, or conditions on commercial leased access programmers (such as with respect to security deposits, insurance, or termination provisions). Explain any differences.

• List and describe any instances of the cable system requiring an existing programmer to move to another channel or tier.

54. Each cable system must submit this report with the Commission by April 30th of each year. The report will request information for the preceding calendar year. We anticipate that any burdens associated with this annual reporting requirement will be limited, as the information requested should be readily available to cable operators.

55. We provide leased access programmers and other interested parties with an opportunity to file comments on a voluntary basis with the Commission responding to the cable operators' annual leased access reports. These comments should be filed by May 15th of each year. We invite commercial leased access programmers to provide information such as the following in these comments:

• List the number of commercial leased access channels leased on each cable system. Indicate the channel number and tier applicable to each commercial leased access channel.

• Describe whether a cable operator has denied any request for commercial leased access and, if so, explain the basis for the denial.

• Describe whether cable operators have responded to requests for information pertaining to leased access within three business days, as required by the Commission's rules.

• Describe whether the programmer has filed any complaints with the Commission or a Federal district court against a cable operator regarding a commercial leased access dispute.

• Describe whether the programmer has sought arbitration with a cable operator regarding a commercial leased access dispute.

• Describe any difficulties the programmer has faced in trying to obtain access to a commercial leased access channel.

III. Constitutional Issues

56. The revisions to the leased access rules we adopt herein withstand constitutional scrutiny. The leased access provision of the 1992 Cable Act has survived a facial First Amendment challenge in *Time Warner Entertainment Co., L.P.* v. *FCC,* 93 F.3d 957 (DC Cir. 1996) (''Time Warner''). The DC Circuit has already decided that the leased access provision of the 1992 Cable Act is not content-based. The leased access provision does not favor or disfavor speech on the basis of the ideas contained therein; rather, it regulates speech based on affiliation with a cable operator. The court held in *Time Warner* that the provisions of the Cable Act that regulate speech based on affiliation with a cable operator are subject to intermediate scrutiny and are constitutional if the government's interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim. The *Time Warner* court found that there is a substantial government interest in promoting diversity and competition in the video programming marketplace. We find that this substantial government interest remains today. While MVPDs argue that there are more outlets today for independent programmers, such as the Internet, they fail to demonstrate that these alternative outlets can be considered sufficient to conclude that Congress's goals of promoting competition and diversity in passing the leased access provisions of the 1992 Cable Act have been achieved. The rules we adopt today simply implement the statutory requirements enacted by Congress.

57. We also reject the claim that the leased access rules deprive cable operators of the value of their property (*i.e.*, channel capacity) without just compensation in violation of the Fifth Amendment. The Fifth Amendment ''takings'' clause requires ''just compensation'' for a government ''taking'' of private property. Moreover, the leased access provision of the 1992 Cable Act, as well as our rules implementing that provision, provide just compensation to cable operators for use of their channel capacity. We conclude that leased access rules satisfy requirements that there must be an ''essential nexus'' between the taking and a legitimate state interest as well as a ''rough proportionality'' between the taking and the magnitude of the government objective. As the DC Circuit previously held, there is a substantial government interest in promoting competition and diversity in the video programming marketplace, and the provisions of the 1992 Cable Act regulating cable-affiliated programming are narrowly tailored to achieve those goals. Thus, there is no ''taking'' within the meaning of the Fifth Amendment.

58. We also reject the argument that the NPRM failed to provide the specificity required under the Administrative Procedure Act (''APA'') and that the Commission must issue another notice before adopting final rules. Section 553(b) and (c) of the APA requires agencies to give public notice of a proposed rule making that includes ''either the terms or substance of the proposed rule or a description of the subjects and issues involved'' and to give interested parties an opportunity to submit comments on the proposal. *See* 5 U.S.C. 553(b), (c). The notice ''need not specify every precise proposal which [the agency] may ultimately adopt as a rule''; it need only ''be sufficient to fairly apprise interested parties of the issues involved.'' *See Nuvio Corp.* v. *FCC,* 473 F.3d 302, 310 (DC Cir. 2006) (internal quotations omitted). In particular, the APA's notice requirements are satisfied where the final rule is a ''logical outgrowth'' of the actions proposed. *See Public Service Commission of the District of Columbia* v. *FCC,* 906 F.2d 713, 717 (DC Cir. 1990). The questions raised in the NPRM, as well as the concerns mentioned in the Adelphia Order which resulted in the NPRM, regarding the adequacy of the current leased access regimes, including the complaint process, were sufficient to put interested parties on notice that the Commission was considering how to revise the leased access rules to effectuate the intent of Congress. *See* NPRM, 22 FCC Rcd 11222, para. 1 (citing Adelphia Order, 21 FCC Rcd 8203, 8277, para. 165; 8367 (Statement of Commissioner

Copps); 8371 (Statement of Commissioner Adelstein)); *See also* Adelphia Order, 21 FCC Rcd at paras. 99, 109, 114, 165, 190–91, 298. Because parties could have anticipated that the rules ultimately adopted herein were possible, it is a ''logical outgrowth'' of the original proposal, and adequate notice was provided under the APA. *See Northeast Maryland Waste Disposal Authority* v. *EPA,* 358 F.3d 936, 951 (DC Cir. 2004) (discussing APA notice requirements and the ''logical outgrowth'' test).

IV. Procedural Matters

59. Congressional Review Act. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

60. *Effective Date.* Sections 76.975(h)(1),(2) and (3) and (i) are effective March 31, 2008. Sections 76.970(j)(3), 76.972(a), (b), (c), (d), (e), and (g); 76.975(d), (e), (g) and (h)(4); and 76.978, which contain new or modified information collection requirements that have not been approved by the Office of Management and Budget (OMB), are effective upon OMB approval. Section 76.970 is effective May 28, 2008 or upon OMB approval of § 76.970(j)(3), whichever is later. The effective date of Sections 76.972 (f) and 76.975 (b), (c) and (f) is delayed until OMB approval of the aforementioned rule sections. After OMB approval is received, the Commission will publish a document in the **Federal Register** announcing the effective date of the rules requiring OMB approval and those whose effective date was delayed pending OMB approval of other rules.

61. Final Regulatory Flexibility Analysis. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the Notice of Proposed Rulemaking (''NPRM'') in MB Docket No. 07–42. The Commission sought written public comment on the proposals in the Notice of Proposed Rulemaking, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

A. Need for, and Objectives of, the Rules Adopted

62. The commercial leased access requirements set forth in Section 612 of the Communications Act of 1934 require a cable operator to set aside channel capacity for commercial use by video programmers unaffiliated with the cable operator. The purposes of Section 612 are ''to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.''

63. In the Order, the Commission concludes that its rules governing commercial leased access have impeded the use of leased access channels by programmers, including smaller entities, thereby undermining the goals of Section 612. The Order adopts several rules to address this concern. Regarding commercial leased access rates, the Commission concludes that its current formula for calculating leased access rates yields fees charged by cable operators that are higher than the statute mandates, resulting in an underutilization of leased access channels. To address this concern, the Order modifies the Commission's formula used to calculate commercial leased access rates, which will result in making these channels a more viable outlet for leased access programming. The Order also provides that the maximum leased access rate will not exceed $0.10 per subscriber per month for any cable system. Cable operators may petition the Commission to exceed the maximum allowable leased access rates. A petition for relief must present specific facts justifying the system's specific leased access rate and provide an alternative rate which equitably balances the revenue requirements of the cable operator with the public interest goals of the leased access statute. The Order does not apply the new rate methodology or the maximum allowable leased access rate of $0.10 per subscriber to programmers that predominantly transmit sales presentations or program length commercials.

64. To address poor customer service practices of cable system operators with regard to potential leased access programmers, the Order requires a cable system operator to meet uniform customer service standards; to maintain a contact name, telephone number, and e-mail address on its website; to make available by telephone a designated person to respond to requests for information about leased access channels; and to maintain a brief explanation of the leased access statute and regulations on its website. In response to concerns raised by commercial leased access programmers that contract terms and conditions imposed by cable operators are often unfair, unreasonable, onerous, and overly burdensome, the Order requires cable operators to apply the same uniform standards, terms, and conditions for all of its leased access programmers as it applies to its other programmers. The Order also specifies the information that a leased access programmer must provide to a cable system operator in order to be considered for carriage, and requires the cable system operator to respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days.

65. Regarding leased access complaint procedures, the Order adopts an expedited process which requires the Media Bureau to resolve leased access complaints within 90 days of the close of the pleading cycle and eliminates the requirement for a leased access complainant alleging that a rate is unreasonable to first obtain a determination of the cable operator's maximum permitted rate from an independent accountant. The Order revises rules to provide that, as part of the remedy phase of a leased access complaint process, the Media Bureau will have the discretion to request that the parties file their best and final offer for the prices, terms, or conditions in dispute, and the Media Bureau will have the discretion to adopt one of the best and final offers or to choose to fashion its own remedy. The Order also amends the Commission's discovery rules pertaining to leased access complaints by requiring respondents to attach to their answers copies of any documents that they rely on in their defense; finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute, subject to the protection of confidential material; and emphasizing that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with its discovery requests.

66. Moreover, in order to ensure that the Commission has sufficient up-to-date information on the status of leased access programming in the future, the Order adopts a reporting requirement for cable operators that requires cable operators to file annual reports on leased access rates, channel usage, and complaints, among other matters pertaining to leased access. Leased access programmers will have an opportunity to file comments with the Commission in response to these reports.

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

67. There were no comments filed specifically in response to the IRFA.

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

68. 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'').

69. *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 NAICS 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.

70. *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.

71. *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.

72. *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.

73. *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.

74. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communications 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.

75. *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.

76. *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. 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.

77. 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.

78. 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.

79. *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.

80. *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.

81. *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.

82. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.'' The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts. According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year. Of this total, 7,685 firms had annual receipts of under $24,999,999 and 45 firms had annual receipts of between $25,000,000 and $49,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

83. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.'' The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts. According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year. Of this total, 365 firms had annual receipts of under $24,999,999 and 7 firms had annual receipts of between $25,000,000 and $49,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

84. *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.

85. *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 service are small businesses.

86. *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.

87. *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.

D. Description of Reporting, Recordkeeping and Other Compliance Requirements

88. The rules adopted in the Report and Order will impose additional reporting, recordkeeping, and other compliance requirements on cable system operators and leased access programmers. The Order requires a respondent in a leased access complaint proceeding that expressly relies upon a document in asserting a defense to include the document as part of its answer. The Order finds that in the context of a leased access complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute. The Order requires the parties to a leased access complaint proceeding to enter into a Protective Order to protect pleading or discovery material that is deemed by the submitting party to contain confidential information. The Order requires cable system operators to submit annual reports on leased access rates, channel usage, and complaints. The Order requires cable system operators to provide prospective leased access programmers with certain information within three business days of the date on which a request for leased access information is made. A longer period for small systems to respond has been retained. The Order requires cable system operators to meet uniform customer service standards with respect to their dealings with leased access programmers and to apply uniform contract terms and conditions to all leased access programmers as applied to other programmers. The Order requires cable systems to maintain a contact name, telephone number, and e-mail address on their Web site and to make available by telephone a designated person to respond to requests for information about leased access channels. The Order requires a cable system operator to maintain a brief explanation of the leased access statute and regulations on its Web site. The Order specifies the information that a leased access programmer must provide to a cable system operator in order to be considered for carriage and requires the cable system operator to respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days.

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

89. 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. The Notice invited comment on issues that had the potential to have significant economic impact on some small entities.

90. As discussed in Section A, the decision to modify the leased access rules will facilitate the goals of Section 612 of the Communications Act ''to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.'' The decision confers benefits upon the variety of leased access programmers, most of which are smaller entities. Thus, the decision to modify the leased access rules benefits smaller entities as well as larger entities. The alternative of retaining the current leased access rules would hinder achieving the goals of competition and diversity as envisioned by Congress. Moreover, the alternative of requiring only certain cable operators to comply with these new rules, such as only large cable operators, would similarly impede achieving the goals of competition and diversity as envisioned by Congress. However, a longer period for small systems to respond to certain requests for information has been retained.

F. Report to Congress

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

V. Ordering Clauses

92. Accordingly, *it is ordered,* pursuant to the authority found in Sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 532, this *Report and Order and Further Notice of Proposed Rulemaking is adopted.*

93. *It is ordered* that, pursuant to the authority found in Sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 532, the Commission's Rules *are hereby amended* as set forth in the Rule Changes.

94. *It is further ordered* that, Sections 76.975(h)(1), (2) and (3) and (i) are effective March 31, 2008. Sections 76.970(j)(3), 76.972(a), (b), (c), (d), (e), and (g); 76.975(d), (e), (g) and (h)(4); and

76.978, which contain new or modified information collection requirements that have not been approved by the Office of Management and Budget (OMB), are effective upon OMB approval. Section 76.970 is effective May 28, 2008 or upon OMB approval of § 76.970(j)(3), whichever is later. The effective date of Sections 76.972 (f) and 76.975 (b), (c) and (f) is delayed until OMB approval of the aforementioned rule sections. After OMB approval is received, the Commission will publish a document in the **Federal Register** announcing the effective date of the rules requiring OMB approval and those whose effective date was delayed pending OMB approval of other rules.

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

96. *It is further ordered* that the Commission *shall send* a copy of this Report and Order and Further Notice of Proposed Rulemaking in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Administrative practice and procedure and Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons stated in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

■ 2. Revise § 76.970 to read as follows:

§ 76.970 Commercial leased access rates.

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the requirement of 47 U.S.C. 532. For purposes of 47 U.S.C. 532(b)(1)(A) and (B), only those channels that must be carried pursuant to 47 U.S.C. 534 and 535 qualify as channels that are required for use by Federal law or regulation. For cable systems with 100 or fewer channels, channels that cannot be used due to technical and safety regulations of the Federal Government (e.g., aeronautical channels) shall be excluded when calculating the set-aside requirement.

(b) In determining whether an entity is an ''affiliate'' for purposes of commercial leased access, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities.

(c) Attributable interest shall be defined by reference to the criteria set forth in Notes 1–5 to § 76.501 provided, however, that:

(1) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and

(2) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(d) The maximum commercial leased access rate that a cable operator may charge to programmers that predominantly transmit sales presentations or program length commercials for full-time channel placement on a tier exceeding a subscriber penetration of 50 percent is the average implicit fee for full-time channel placement on all such tier(s).

(e) The average implicit fee identified in paragraph (d) of this section for a full-time channel on a tier with a subscriber penetration over 50 percent shall be calculated by first calculating the total amount the operator receives in subscriber revenue per month for the programming on all such tier(s), and then subtracting the total amount it pays in programming costs per month for such tier(s) (the ''total implicit fee calculation''). A weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s) must be used to determine how much of the total implicit fee calculation will be recovered from any particular tier. The weighting scheme is determined in two steps. First, the number of subscribers is multiplied by the number of channels (the result is the number of ''subscriber-channels'') on each tier with subscriber penetration over 50 percent. For instance, a tier with 10 channels and 1,000 subscribers would have a total of 10,000 subscriber-channels. Second, the subscriber-channels on each of these tiers is divided by the total subscriber-channels on all such tiers. Given the percent of subscriber-channels for the particular tier, the implicit fee for the tier is computed by multiplying the subscriber-channel percentage for the tier by the total implicit fee calculation. Finally, to calculate the average implicit fee per channel, the implicit fee for the tier must be divided by the corresponding number of channels on the tier. The final result is the maximum rate per month that the operator may charge the leased access programmer for a full-time channel on that particular tier. The average implicit fee shall be calculated by using all channels carried on any tier exceeding 50 percent subscriber penetration (including channels devoted to affiliated programming, must-carry and public, educational and government access channels). In the event of an agreement to lease capacity on a tier with less than 50 percent penetration, the average implicit fee should be determined on the basis of subscriber revenues and programming costs for that tier alone. The license fees for affiliated channels used in determining the average implicit fee shall reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the license fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The average implicit fee shall be based on contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(f) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement as an a la carte service is the highest implicit fee on an aggregate basis for full-time channel placement as an a la carte service.

(g) The highest implicit fee on an aggregate basis for full-time channel placement as an a la carte service shall be calculated by first determining the total amount received by the operator in subscriber revenue per month for each non-leased access a la carte channel on its system (including affiliated a la carte channels) and deducting the total amount paid by the operator in programming costs (including license and copyright fees) per month for programming on such individual channels. This calculation will result in implicit fees determined on an aggregate basis, and the highest of these implicit fees shall be the maximum rate per month that the operator may charge the

leased access programmer for placement as a full-time a la carte channel. The license fees for affiliated channels used in determining the highest implicit fee shall reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the license fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The highest implicit fee shall be based on contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services). Any subscriber revenue received by a cable operator for an a la carte leased access service shall be passed through to the leased access programmer.

(h) The maximum commercial leased access rate that a cable operator may charge for part-time channel placement shall be determined by either prorating the maximum full-time rate uniformly, or by developing a schedule of and applying different rates for different times of the day, provided that the total of the rates for a 24-hour period does not exceed the maximum daily leased access rate.

(i) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement, except to programmers that predominantly transmit sales presentations or program length commercials, is the lower of the marginal implicit fee for a full-time channel placement on the tier where the leased access programming will be placed or $0.10 per subscriber per month.

(j)(1)(i) The marginal implicit fee identified in paragraph (i) of this section for a full-time channel shall be calculated by first determining the mark-up of the tier where the leased access programming will be placed. The mark-up is calculated by determining the total amount the operator receives in subscriber revenue per month for the tier, and dividing by the total amount it pays in affiliation fees for the channels located on the tier. The resulting figure is the mark-up. In cases where the cost and channels of one tier are implicitly incorporated into a larger tier, the larger tier price is equal to the larger tier price minus the smaller tier price and the channels on the larger tier are those that are not available on the smaller tier.

(ii) The monthly gross subscriber revenue per channel is obtained by multiplying the monthly per subscriber affiliation fee for each channel by the mark-up for the tier. The net subscriber revenue per channel per month for each channel is the difference between the monthly gross subscriber revenue per channel and the monthly per subscriber affiliation fee paid for that channel by the cable operator. This value represents the implicit fee for the individual channel.

(iii) To determine the marginal channels on the tier for systems with 55 or more activated channels, multiply the number of non-mandated channels on the tier by 0.15 and round to the nearest number. To determine the marginal channels on the tier for systems with 54 or less activated channels, multiply the number of non-mandated channels on the tier by 0.10 and round to the nearest number. That is the number of marginal channels. Next identify the channels with the lowest implicit fee until that number is reached. These are the marginal channels.

(iv) Finally, calculate the marginal implicit fee by taking the mean of the implicit fees of the marginal channels by summing the implicit fees of the marginal channels and dividing by the number of marginal channels. The result is the marginal implicit fee.

(2) The affiliation fees for channels used in determining the marginal implicit fee are the contractual license fee or retransmission consent fee representing the compensation per subscriber per month paid to the programmer for the right to carry the programming. It excludes fees for services other than the provision of channel capacity, such as marketing, and excludes revenues. The affiliation fees for channels used in determining the marginal implicit fee shall reflect the prevailing affiliation fees offered in the marketplace to third parties. If a prevailing affiliation fee does not exist, the affiliation fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The marginal implicit fee calculation shall be based on affiliation fees in contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(3) Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

(4) Cable operators are permitted to negotiate rates below the maximum permitted rates.

■ 3. Add § 76.972 to read as follows:

§ 76.972 Customer service standards.

(a)(1) A cable system operator shall maintain a contact name, telephone number and e-mail address on its Web site and available by telephone of a designated person to respond to requests for information about leased access channels.

(2) A cable system operator shall maintain a brief explanation of the leased access statute and regulations on its Web site.

(b) Cable system operators shall provide prospective leased access programmers with the following information within three business days of the date on which a request for leased access information is made:

(1) The cable system operator's process for requesting leased access channels;

(2) The geographic and subscriber levels of service that are technically possible;

(3) The number and location and time periods available for each leased access channel;

(4) Whether the leased access channel is currently being occupied;

(5) A complete schedule of the operator's statutory maximum full-time and part-time leased access rates;

(6) A comprehensive schedule showing how those rates were calculated;

(7) Rates associated with technical and studio costs;

(8) Whether inclusion in an electronic programming guide is available;

(9) The available methods of programming delivery and the instructions, technical requirements and costs for each method;

(10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability; and

(11) Information regarding prospective launch dates for the leased access programmer.

(c) A bona fide proposal, as used in this section, is defined as a proposal from a potential leased access programmer that includes the following information:

(1) The desired length of a contract term;

(2) The tier, channel and time slot desired;

(3) The anticipated commencement date for carriage;

(4) The nature of the programming;

(5) The geographic and subscriber level of service requested; and

(6) Proposed changes to the sample contract.

(d) All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator.

(e) A cable system operator must respond to a bona fide proposal within 10 days after receipt.

(f) A cable system operator will be subject to a forfeiture for each day it fails to comply with §§ 76.972(a) or 76.972(e).

(g)(1) Operators of systems subject to small system relief shall provide the information required in paragraph (b) of this section within 30 calendar days of a bona fide request from a prospective leased access programmer. For these purposes, systems subject to small system relief are systems that either:

(i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or

(ii) Have been granted special relief.

(2) Bona fide requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information:

(i) The desired length of a contract term;

(ii) The time slot desired;

(iii) The anticipated commencement date for carriage; and

(iv) The nature of the programming.

■ 4. Section 76.975 is amended to revise paragraphs (b) through (g) and redesignate paragraph (h) as paragraph (i) and to add new paragraph (h) to read as follows:

§ 76.975 Commercial leased access dispute resolution.

* * * * *

(b) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of Title VI of the Communications Act, or our implementing regulations, §§ 76.970, 76.971, and 76.972 may file a petition for relief with the Commission.

(c) A petition must contain a concise statement of the facts constituting a violation of the statute or the Commission's rules, the specific statute(s) or rule(s) violated, and certify that the petition was served on the cable operator.

(d) The petition must be filed within 60 days of the alleged violation. The time limit on filing complaints will be suspended if the complainant files a notice with the Commission prior to the expiration of the filing period, stating that it seeks an extension of the filing deadline in order to pursue active negotiations with the cable operator, and the cable operator agrees to the extension.

(e) *Discovery.* In addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a leased 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, 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.

(f) *Protective Orders.* In addition to the procedures contained in § 76.9 of this part related to the protection of confidential material, the Commission may issue orders to protect the confidentiality of proprietary information required to be produced for resolution of leased access complaints. A protective order constitutes both an order of the Commission and an agreement between the party executing the protective order declaration and the party submitting the protected material. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.

(g) The cable operator or other respondent will have 30 days from the filing of the petition to file a response. To the extent that a cable operator expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after a response is submitted, the staff finds a prima facie violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

(h)(1) The Media Bureau will resolve a leased access complaint within 90 days of the close of the pleading cycle.

(2) The Media Bureau, after consideration of the pleadings, may grant the relief requested, in whole or in part, including, but not limited to ordering refunds, injunctive measures, or forfeitures pursuant 47 U.S.C. 503, denying the petition, or issuing a ruling on the petition or dispute.

(3) To be afforded relief, the petitioner must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions in 47 U.S.C. 532 or §§ 76.970, 76.971, or 76.972, or otherwise acted unreasonably or in bad faith in failing or refusing to make capacity available or to charge lawful rates for such capacity to an unaffiliated leased access programmer.

(4) As part of the remedy phase of the leased access complaint process, the Media Bureau will have discretion to request that the parties file their best and final offer for the prices, terms, or conditions in dispute. The Commission will have the discretion to adopt one of the proposals or choose to fashion its own remedy.

* * * * *

■ 5. Section 76.978 is added to read as follows:

§ 76.978 Leased access annual reporting requirement.

(a) Each cable system shall submit a Leased Access Annual Report with the Commission on a calendar year basis, no later than April 30th following the close of each calendar year, which provides the following information for the calendar year:

(1) The number of commercial leased access channels provided by the cable system.

(2) The channel number and tier applicable to each commercial leased access channel.

(3) The rates the cable system charges for full-time and part-time leased access on each leased access channel.

(4) The cable system's calculated maximum commercial leased access rate and actual rates.

(5) The programmers using each commercial leased access channel and whether each programmer is using the channel on a full-time or part-time basis.

(6) The number of requests received for information pertaining to

commercial leased access and the number of bona fide proposals received for commercial leased access.

(7) Whether the cable system has denied any requests for commercial leased access and, if so, with an explanation of the basis for the denial.

(8) Whether a complaint has been filed against the cable system with the Commission or a Federal district court regarding a commercial leased access dispute.

(9) Whether any entity has sought arbitration with the cable system regarding a commercial leased access dispute.

(10) The extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes.

(11) The extent to which the cable system impose different rates, terms, or conditions on commercial leased access programmers (such as with respect to security deposits, insurance, or termination provisions) with an explanation of any differences.

(12) A list and description of any instances of the cable system requiring an existing programmer to move to another channel or tier.

(b) Leased access programmers and other interested parties may file comments with the Commission in response to the Leased Access Annual Reports by May 15th.

The attached Appendices A and B *will not be included* in the Code of Federal Regulations (CFR).

Appendix A—Standard Protective Order and Declaration for Use in Section 612 Commercial Leased Access Proceedings

Before the Federal Communications Commission, Washington, DC 20554

In the Matter of [Name of Proceeding], Docket No. _____

PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which ''Confidential Information,'' as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 CFR 0.442.

2. Definitions.

a. *Authorized Representative.* ''Authorized Representative'' shall have the meaning set forth in Paragraph 7.

b. *Commission.* ''Commission'' means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. *Confidential Information.* ''Confidential Information'' means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. *Declaration.* ''Declaration'' means Attachment A to this Protective Order.

e. *Reviewing Party.* ''Reviewing Party'' means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. *Submitting Party.* ''Submitting Party'' means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

3. *Claim of Confidentiality.* The Submitting Party may designate information as ''Confidential Information'' *consistent* with the *definition* of that term in Paragraph 2.c of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 CFR 0.459 and 0.461, determine that all or part of the information claimed as ''Confidential Information'' is not entitled to such treatment.

4. *Procedures for Claiming Information is Confidential.* Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, ''CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION—DO NOT RELEASE.'' Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

5. *Storage of Confidential Information at the Commission.* The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. *Access to Confidential Information.* Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

7. *Disclosure.* Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 8 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

8. Authorized Representatives shall be limited to:

a. Subject to Paragraph 8.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 8.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 8.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. Disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or any other person's business decisions that are or will be made in light of similar or corresponding information about a competitor.

9. *Inspection of Confidential Information.* Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, DC. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

10. *Copies of Confidential Information.* The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

11. *Filing of Declaration.* Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

12. *Use of Confidential Information.* Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

13. *Pleadings Using Confidential Information.* Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: ''Confidential Information included pursuant to Protective Order, [cite proceeding];'' and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 13 are not removed.

14. *Violations of Protective Order.* Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

15. *Termination of Proceeding.* Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 10 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

16. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) Agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

17. *Additional Rights Preserved.* The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

18. *Effect of Protective Order.* This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

19. *Authority.* This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. 154(i), (j) and 47 CFR 0.457(d).

Attachment A to Section 612 Protective Order

DECLARATION

In the Matter of [Name of Proceeding] Docket No.___

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) _____
(printed name) _____
(representing) _____
(title) _____
(employer) _____
(address) _____
(phone) _____
(date) _____
(date) _____

Appendix B—Example Calculation of the Leased Access Rate

I. Example of the Marginal Implicit Fee Calculation

The following table illustrates the channel line-up of a tier with greater than 50% subscriber penetration. The tier consists of 26 channels. We will assume that 100 subscribers purchase this tier and that they all pay the retail price of $18.95.

Programming	Affiliation fee paid by cable operator to the programmer (monthly amount per subscriber)	Implicit fee (net revenue)
Broadcast Station 1	$0.00	$0.000
Broadcast Station 2	0.05	0.082
Broadcast Station 3	0.00	0.000
PEG 1	0.00	0.000
Leased Access 1	0.00	0.000
Cable Network 1	0.12	0.196
Cable Network 2	0.34	0.556
Cable Network 3	0.05	0.082
Cable Network 4	0.07	0.114
Cable Network 5	0.01	0.016
Cable Network 6	0.04	0.065
Cable Network 7	0.05	0.082
Cable Network 8	0.27	0.442
Cable Network 9	0.00	0.000
Cable Network 10	0.10	0.164
Cable Network 11	0.48	0.785
Cable Network 12	2.19	3.582
Cable Network 13	1.10	1.799
Cable Network 14	0.57	0.932
Cable Network 15	0.15	0.245
Cable Network 16	0.41	0.671
Cable Network 17	0.19	0.311
Cable Network 18	0.06	0.098
Cable Network 19	0.21	0.343
Cable Network 20	0.11	0.180
Cable Network 21	0.62	1.014

Step 1: Determine Monthly Per-Subscriber Affiliation Fees for Each Channel on the Tier

The preceding table presents the monthly per-subscriber affiliation fee paid by the cable operator to the programmer. These values are those contractually agreed to and paid by the cable operator. As illustrated, this hypothetical cable operator carries three broadcast stations. Two of the broadcast stations do not receive a monthly per-subscriber payment from the cable operator, while ''Broadcast Station 2'' receives $0.05 per month per subscriber from the cable operator. In addition, ''Cable Network 8'' and ''Cable Network 9'' are sold by the programmer on a bundled basis in a contract which does not specify individual affiliation fees for each network, but instead specifies a rate of $0.27 for carriage of both networks. ''Cable Network 8'' is the higher rated of the two networks and therefore the affiliation fee is allocated to it and the affiliate fee for ''Cable Network 9'' is set equal to zero.

Step 2: Determine the Mark-Up of the Tier

The mark-up is equal to the total subscriber revenue for the programming tier ($100 \times \$18.95 = \$1{,}895$), divided by the total of the affiliation fees the cable operator pays to the programmers for the channels on the tier ($100 \times \$7.19 = \$719$). In the example the mark-up is equal to 2.636.

Step 3: Determine the Implicit Fee of Each Channel on the Tier

The implicit fee, or net revenue, is equal to the gross revenue from the channel less the affiliation fee of the channel. The gross revenue is obtained by multiplying the affiliation fee by the mark-up of the tier.

Step 4: Determine the Number of Marginal Channels on the Tier

The number of marginal channels is equal to 15% of the non-mandated channels on the tier. In this case, the tier contains 5 mandated channels: ''Broadcast Station 1,'' ''Broadcast Station 2,'' ''Broadcast Station 3,'' ''PEG 1,'' and ''Leased Access 1.'' Therefore there are 21 non-mandated channels on the tier. The number of marginal channels is $0.15 \times 21 = 3.15$. The result should be rounded to the nearest positive integer. This tier has three marginal channels.

Step 5: Determine the Marginal Channels

The marginal channels are the three non-mandated channels with the lowest implicit fee. In this example, those channels are: ''Cable Network 5,'' ''Cable Network 6,'' and ''Cable Network 9.''

Step 6: Calculate the Marginal Implicit Fee

The marginal implicit fee is the mean of the implicit fees of the three marginal channels. The marginal implicit fee is $(0.000 + 0.016 + 0.065)/3 = 0.027$. The monthly rate for a leased access programmer on this tier is $0.027 per subscriber.

II. Alternative Methods for Calculating the Maximum Allowable Leased Access Rate

20. We use several methods to examine aggregate information on the cable industry and develop a maximum allowable leased access rate. All of our methods begin with the construction of hypothetical analog and digital tiers based upon the 194 most widely distributed networks. We obtain the number of subscribers to the most widely distributed programming networks from SNL Kagan, Economics of Basic Cable Networks, 13th Ed. (at 36–40) and SNL Kagan, Media Trends, 2007 Edition (at 58). Affiliation fees for these networks are from SNL Kagan, Economics of Basic Cable Networks, 13th Edition (at 60–62); SNL Kagan, Media Trends, 2007 Edition (at 59); and SNL Kagan, Cable Program Investor, October 18, 2007 (at 2–3). We base the sizes of the hypothetical analog and digital tiers on data collected via the FCC's Cable Price Survey. The survey indicates that the average analog tier contains 54.9 non-mandated channels and the most highly subscribed digital tier contains 33.7 additional channels. *Report on Cable Industry Prices*, Table 4, 21 FCC Rcd 15087 (released December 27, 2006). The most widely distributed networks were ranked

according to their subscribers. They are then weighted according to the number of subscribers that they reach relative to the most widely distributed network, The Discovery Channel, which received a weight of 1. Lesser distributed networks receive weights that are equivalent to the fraction of subscribers they have relative to the most widely distributed network.

21. The hypothetical analog tier consists of the channels with the highest subscribers, whose weights sum to 54.9. This hypothetical analog tier consists of 67 program networks. These 67 networks reach the same number of subscribers as that which would be reached if 55 networks each reached 100% of cable subscribers. Construction of the hypothetical digital tier is complicated by the fact that 12 of the 194 most widely distributed networks do not currently receive any license fees. We therefore proceed on two fronts. We construct a digital tier which includes these ''no-fee'' networks which we refer to as the ''inclusive digital tier'' as well as an ''exclusive digital tier'' which excludes networks with no license fees from the hypothetical digital tier. An additional complication is that our information on affiliation fees and distribution of cable networks is not sufficiently broad to get a sufficient number of networks whose weights sum to 33.7, the number of channels on the average digital tier. Therefore both the inclusive and exclusive digital tiers will contain all of the networks not included in our hypothetical analog tier. The inclusive digital tier consists of 127 networks with a total weight of 17. The exclusive digital tier contains 115 networks with a weight of 15.1.

22. We examine two approaches to calculating the marginal implicit fees of the hypothetical analog and digital tiers. The first approach, which we refer to as the net revenue approach, follows the method used to calculate the operator-specific rates. The average mark-up of cable operators is determined. This value is used to determine net revenue of each network on the tier by multiplying it against the affiliation fee to obtain gross revenue and subtracting off the programming cost to obtain net revenue. The marginal implicit fee is calculated as the mean or median net revenue of the least profitable 15% of channels on the tier. The other approach, which we call the per-subscriber fee approach, calculates the marginal implicit fee as the mean or median affiliation fee of the least costly 15% of channels on the hypothetical tier. Because the mark-up of each channel on a tier is the same, ranking networks by net revenue or per-subscriber fees leads to the same ordering of the networks. Therefore, the identities of the channels used to calculate the marginal implicit fee under either approach are the same for a given hypothetical tier.

A. The Marginal Implicit Fee Under the Net Revenue Approach

23. As discussed, the net revenue approach mirrors the system-specific method adopted in this order. The mark-up of programming costs by cable operators is determined by dividing video revenues by programming costs. We base this calculation on the average of the programming cost as a percentage of revenue for three large cable operators in 2005. The inverse of this number is equal to the mark-up. SNL Kagan, Cable TV Investor: Deals and Finance, January 31, 2007 at 6. The mark-up in the cable industry is 2.76. This mark-up is then applied to the per-subscriber affiliation fees of the networks in the hypothetical tiers in order to determine the gross revenue per subscriber that each of those networks generates for the cable industry. Subtracting the per subscriber affiliation fee from the gross revenue per subscriber yields the net revenue per subscriber. The next step in the calculation is to determine the marginal channels, which is based upon the number of channels that the average cable operator must set aside for leased access. The marginal networks for the maximum allowable rate on an analog tier will be the 15% of 54.9 or 8.2 networks. The marginal channels are those channels, with the lowest net revenues amongst the 67, whose weights sum to 8.2 (the number of marginal channels on our hypothetical analog tier). The weighted mean of the net revenue of those 13 networks is equal to $0.091 per subscriber per month and the weighted median is equal to $0.094 per subscriber per month.

24. Calculation of the maximum rate for the hypothetical digital tiers is similar. The tier consists of those networks that were not included in the hypothetical analog tier with the greatest numbers of subscribers, whose weights sum to 33.7. Our information on per subscriber affiliation fees and distribution of cable networks is not sufficiently broad to get a sufficient number of networks whose weights sum to 33.7. This occurs because there is a substantial population of networks with very limited distribution. However, in our existing data, we noted that there are a number of networks with license fees that are effectively zero. It is likely that the lesser networks that we have been unable to include have a similar paucity of license revenues. Failure to include these additional networks makes the marginal implicit fee for digital tiers slightly higher than it otherwise would be. The marginal channels are those channels, with the lowest net revenues whose weights sum to 5.1 (15% of the number of channels on our hypothetical digital tier). The weighted mean net revenue of those networks is $0.056 per subscriber per month and the weighted median is $0.070 per subscriber per month for the exclusive digital tier. The weighted mean net revenue for the inclusive digital tier is $0.026 per subscriber per month and the weighted median is $0.035 per subscriber per month.

B. The Marginal Implicit Fee Under the Per-Subscriber Fee Approach

25. The per-subscriber fee method is based upon the costs incurred by a cable system when it must vacate a channel in order to provide capacity to a commercial leased access programmer. If a cable system that receives a request for LA carriage has no vacant channels available, then the system will need to incur certain costs in order to make the required capacity available to the LA programmer. Specifically, it is unlikely that the commercial contracts that the cable operator has with program channels permit unilateral costless cancellation by the cable operator. Even without detailed information on these contracts, it is reasonable to assume that the cable operator would need to provide some compensation to the ''bumped'' channel in order to induce it to vacate the system. One reasonable candidate for this is the fee that the cable operator was collecting from each consumer and paying to the bumped channel (the ''per-subscriber fee''). If we assume that the marginal channel is earning negligible advertising revenues, then that channel would be made whole if it continued to receive the per-subscriber fee that the cable operator had been paying. We use this as an alternative method of examining the costs that leased access programming may impose on cable operators.

To calculate the marginal implicit fee under the per-subscriber fee approach, rather than calculating the weighted means and medians of the net revenue of the bottom 15% of networks in a tier, the weighted means and medians of the affiliation fees are calculated. As discussed, because a constant mark-up is applied to affiliation fees when calculating net revenue, networks with the lowest net revenue are also the networks with the lowest affiliation fees. Therefore the marginal implicit cost using the per-subscriber fee method is based on exactly the same networks as used to calculate the marginal implicit fee with the net revenue method. The weighted mean of the per-subscriber fee of the marginal networks on the hypothetical analog tier is equal to $0.051 per subscriber per month and the weighted median is equal to $0.053 per subscriber per month. The weighted mean of the per-subscriber fee of the marginal networks on the hypothetical inclusive digital tier is equal to $0.015 per subscriber per month and the weighted median is equal to $0.020 per subscriber per month. The weighted mean of the programming cost of the marginal networks on the hypothetical exclusive digital tier is equal to $0.032 per subscribe.

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