

Congressional authority under which the rule operates.

In accordance with Executive Order 12866, this rule was not reviewed by the Office of Management and Budget.

#### List of Subjects in 42 CFR Part 488

Administrative practice and procedure, Health facilities, Medicare, Reporting and recording requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV, part 488 as set forth below:

#### PART 488—SURVEY, CERTIFICATION, AND ENFORCEMENT PROCEDURES

■ 1. The authority citation for part 488 is revised to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act, unless otherwise noted (42 U.S.C. 1302 and 1395(hh)); Continuing Resolution Pub. L. 110–149 H.J. Res. 72. (Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: January 30, 2008.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: February 14, 2008.

**Michael O. Leavitt,**

*Secretary.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

[MM Docket No. 92–264; FCC 07–219]

#### The Commission's Cable Horizontal and Vertical Ownership Limits

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document adopts a rule prohibiting cable operators from owning or having an attributable interest in cable systems serving more than 30 percent of multichannel video programming subscribers nationwide. It also eliminates the overbuilder exception, which allowed cable operators to count against its horizontal limit only those cable subscribers served by its “incumbent cable franchises” and excluding new subscribers gained through overbuilding “non-incumbent

cable systems. Elimination of the exception prevents a cable operator near the horizontal limit from using the exception to exceed the 30 percent limit and thereby reduce the open field below the 70 percent necessary to ensure that no single operator can, by simply refusing to carry a video network, cause it to fail. The revised rule balances the need to ensure that cable operators cannot use their dominant position in the multichannel video programming distribution (MVPD) market to impede unfairly the flow of video programming to consumers with consideration of the efficiencies and other benefits that might be gained through increased ownership or control.

**DATES:** Effective March 31, 2008.

**FOR FURTHER INFORMATION CONTACT:** Elvis Stumbergs, (202) 418–7878; Mania Baghdadi, (202) 418–2330.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Federal Communications Commission's *Fourth Report and Order* in MB Docket No. 92–264, FCC 07–219, adopted December 18, 2007, and released February 11, 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. These documents will also be available via ECFs (<http://www.fcc.gov/cgb/ecfs>). The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice) (202) 418–0432 (TTY).

#### Summary of the Report and Order

1. This *Order* was adopted pursuant to Section 613(f)(1)(A) of the Telecommunications Act of 1996 (“1996 Act”), which requires the Commission to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest, and to respond to the concerns of the United States Court of Appeals for the District of Columbia Circuit in *Time Warner Entertainment Co. v. FCC* (“*Time Warner I*”) that the Commission had failed adequately to justify the 30 percent limit.

2. The court in *Time Warner II* held that Section 613(f) authorizes the

Commission to set a limit to ensure that no single company could be in a position single-handedly to deal a programmer a death blow but does not authorize the agency to regulate the legitimate, independent editorial choices of multiple MSOs and further found that the Commission lacked evidence that cable operators would collude and that the Commission could not simply assume that cable operators would coordinate their behavior in an anticompetitive manner.

3. The *Report and Order* establishes a 30% cable horizontal ownership limit by relying on a modified “open field” approach to ensure that no single cable operator becomes so large that a programming network can survive only if that operator carries it and eliminates the overbuilder exception to the calculation of the limit.

4. The Commission considered comments it had received relative to three possible approaches to use in fashioning a horizontal ownership limit: (1) The open field approach, which examines whether one or more cable operators are large enough to effectively limit the viability of a programming network if they denied it carriage; (2) monopsony theory, which considers whether a cable operator has sufficient market power to restrict the price it pays for programming by purchasing less of it and thereby restrict the flow of programming to subscribers; and (3) bargaining theory, which examines the negotiations between the programming network and the cable operator in order to determine the point at which programmers will curtail their activities and thereby limit the quality and diversity of programming.

5. We determine that the open field approach, suitably modified, represents the best method of determining an appropriate horizontal limit. We determine that monopsony theory does not apply to this market because of the lack of a single market price in the market for programming. Although we find that bargaining theory is useful in establishing the need for a limit, the record is insufficient to derive a specific limit using this theory.

6. The open field approach determines whether a programming network would have access to alternative MVPDs of sufficient size to allow it to successfully enter the market, if it were denied carriage by one or more of the largest cable operators.

7. To calculate a horizontal limit that meets this test, we first determine the minimum number of subscribers a network needs in order to survive in the marketplace and then estimate the percentage of subscribers a network is

likely to serve once it secures a carriage contract. The resulting calculation indicates that an open field of 70 percent and an ownership limit of 30 percent are necessary to ensure that no single cable operator is able to impede unfairly the flow of programming to consumers.

8. The Commission eliminated the overbuilder exception, which allowed counting against a cable operator's horizontal limit only those cable subscribers served by its "incumbent cable franchises," excluding new subscribers gained through overbuilding "non-incumbent cable systems and concluded that elimination of the exception was necessary to prevent a cable operator near the horizontal limit to use the exception to exceed the 30 percent limit, which would have the effect of reducing the open field below the 70 percent that is necessary to ensure that no single operator can, by simply refusing to carry a video network, cause it to fail.

9. The revised rule balances the need to ensure that cable operators cannot use their dominant position in the multichannel video programming distribution (MVPD) market to impede unfairly the flow of video programming to consumers with consideration of the efficiencies and other benefits that might be gained through increased ownership or control.

10. The Commission further clarifies 76.503(g) of its rules which requires any cable operator serving 20 percent or more of nationwide MVPD subscribers to certify prior to acquiring additional MVPDs that no violation of the horizontal ownership limit will occur as a result of its acquisition, but does not prescribe a particular form of certification. We clarify in the *Report and Order* that certifications must be executed by an officer of the corporation and must state that the number of attributable subscribers served by the applicant is reported accurately in the certification. If this number varies from subscriber counts the cable operator has provided to other government agencies, financial institutions, or third-party publishers of industry-wide subscriber data, the certification shall disclose and explain the nature of such discrepancies. The Commission will consider specific allegations of misrepresentation on a case-by-case basis.

#### Fourth Report and Order

##### Paperwork Reduction Act Analysis

11. This document does not contain new or modified information collection requirements subject to the Paperwork

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

12. *Congressional Review Act*. The Commission will send a copy of this Fourth Report and Order in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.

13. *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 2005 Second FNPRM in MB Docket No. 92-264, FCC 05-96. The Commission sought written public comment on the proposals in the 2005 Second FNPRM including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

##### A. Need for, and Objectives of, This Fourth Report and Order

14. In this Fourth Report and Order, we set the Commission's cable horizontal ownership limit to bar cable operators from having an attributable interest in cable systems serving more than 30 percent of multichannel video programming subscribers nationwide. Our action here responds to the court's decision in *Time Warner Entertainment Co. v. FCC* ("*Time Warner II*"), which remanded the Commission's 30 percent limit. Our decision implements the statutory directive that we impose a limit designed to ensure that no single cable operator or group of operators, because of their size, unfairly impede the flow of programming to consumers.

15. In establishing the 30 percent cable horizontal ownership limit, we rely on a modified "open field" approach to ensure that no single cable operator becomes so large that a programming network can survive only if that largest operator carries it. To calculate a horizontal limit that meets this test, we first determine the minimum number of subscribers a network needs in order to survive in the marketplace, and then estimate the percentage of subscribers a network is likely to serve once it secures a carriage contract. The resulting calculation indicates that an open field of 70 percent and an ownership limit of 30 percent are necessary to ensure that no single cable operator is able to impede unfairly the flow of programming to consumers.

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

16. None of the parties in this proceeding filed comments on how issues raised in the 2001 FNPRM or the 2005 Second FNPRM would impact small entities.

##### C. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

17. 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 rules adopted herein. 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).

18. *Cable and Other Program Distribution*. The Census Bureau recently updated the NAICS so that these firms are included in the Wired Telecommunications Carriers category which is described 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 updated the small business size standards to accord with the revised NAICS. The size standard for Wired Telecommunications Carriers is all firms having an average of 1,500 or fewer employees. The Census Bureau has not collected information on the size distribution of firms in the revised classification of Wired

Telecommunications Carriers.

Accordingly we will apply the new size standard to Census Bureau data for 2002 regarding the size distribution of Cable and Other Program Distribution. There were a total of 1,191 firms in this category that operated for the entire year. Of this total, 1,178 firms had fewer than 1,000 employees. Thus, under this size standard, the majority of firms can be considered small.

19. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.” The Commission has determined that an operator serving fewer than 653,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Industry data indicate that, of 994 cable operators nationwide, all but thirteen are small under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

20. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Wired Telecommunications Carriers includes PCOs or SMATV systems and, thus, small entities are defined as all such companies with 1,500 or fewer employees. Currently, there are approximately 76 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 900,000 subscribers. Because these operators are not rate regulated, they are not required to file employment data with the Commission. Furthermore, we are not aware of any privately published employment information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

#### *D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

21. The new rule imposes a 30 percent limit on the number of MVPD subscribers nationwide that one person or entity may serve. No new reporting, recordkeeping or other compliance requirements are adopted.

#### *E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

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

23. In this *Fourth Report and Order*, based on its calculations using an open field approach, the Commission sets a 30 percent horizontal ownership limit. This rule limits the size of large MSOs and does not prevent small cable operators from growing larger. We also continue to base the limit on the number of actual MVPD subscribers, a figure used by cable operators when they negotiate with and purchase programming from video programmers. *See Id.* Finally, the horizontal cap would not change pursuant to the *Order*. Accordingly, we do not find that the *Order* will impose new burdens on small cable operators.

24. The Commission considered other alternatives, with respect to the horizontal limit, but the *Order* adopted a 30 percent horizontal ownership limit based on evidence that this is the level necessary to preserve programmer viability. The Commission believes that the decisions it adopts in the *Order*

serve our public interest goals and comport with the evidence.

#### *F. Report to Congress*

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

#### **List of Subjects in 47 CFR Part 76**

Multichannel video and Cable television service.

Federal Communications Commission.

**Marlene H. Dortch,**  
Secretary.

#### **Rule Changes**

■ For the reasons discussed 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 citations for part 76 continue to read as follows:

**Authority:** 47 U.S.C. 152(a), 154(i), 303, 307, 309, 310, 533.

■ 2. Amend § 76.503 by revising paragraph (a) and by removing and reserving paragraphs (b), (c) and (d) as follows:

#### **§ 76.503 National subscriber limits.**

(a) No cable operator shall serve more than 30 percent of all multichannel-video programming subscribers nationwide through multichannel video programming distributors owned by such operator or in which such cable operator holds an attributable interest.

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