Source of flooding and location	#Depth in feet above ground. * Elevation in feet (NGVD)
WASHINGTON	
Mason County (Unincorporated Areas) (FEMA Docket No. 7246)	
Skokomish River:	
Just upstream of State Route 106	*17
Approximately 2,000 feet downstream of confluence of North and South Fork Skokomish Rivers	*52
Maps are available for inspection at the Mason County Department of Community Development, 411 North Fifth Street, Shelton, Washington.	
Okanogan County (Unincorporated Areas) (FEMA Docket No. 7246)	
Early Winters Creek:	
Approximately 0.5 mile downstream of State Highway 20	#5
Approximately 0.5 mile upstream of State Highway 20	#5
Maps are available for inspection at the Okanogan County Planning and Development Office, 237 Fourth Avenue, Okanogan, Washington.	
WYOMING	
Ranchester (Town), Sheridan County (FEMA Docket No. 7246)	
Tongue River:	
At the southeastern corner of the corporate limit	*3,742
Just upstream of Wolf Creek County Road	*3,761
Approximately 300 feet west of the intersection of Fourth Avenue West and Rawlings Drive, along Rawlings Drive	*3,767
Five Mile Creek:	
Approximately 1,200 feet downstream of U.S. Route 14	*3,763
Just upstream of U.S. Route 14	*3,773
Just upstream of an unnamed road in the northwestern corner of Town	*3,785
Maps are available for inspection at the Town Clerk's Office, 145 Coffeen Street, Ranchester, Wyoming.	
Thermopolis (Town), Hot Springs County (FEMA Docket No. 7246)	
Big Horn River:	
At the northeasternmost corporate limit, approximately 4,900 feet downstream of State Park Street	*4,302
At the southernmost corporate limit, approximately 4,400 feet upstream of Eighth Street	*4,332
Maps are available for inspection at the Town of Thermopolis Town Hall, 420 Broadway, Thermopolis, Wyoming.	

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance'')

Dated: August 10, 1998.

Michael J. Armstrong,

Associate Director for Mitigation.

[FR Doc. 98–23067 Filed 8–26–98; 8:45 am]

BILLING CODE 6718–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 98–36; DA 98–1553]

Assessment and Collection of Regulatory Fees for Fiscal Year 1998

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: This document corrects portions of the Commission's rules that were published in the **Federal Register** of August 11, 1998 (63 FR 42734).

EFFECTIVE DATE: August 27, 1998.

FOR FURTHER INFORMATION CONTACT: Terry Johnson, Office of Managing Director, (202) 418–0445 or Martha Contee, Public Service Division, (202) 418–0192.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission published a document establishing fee collection dates in the **Federal Register** of August 11, 1998 (63 FR 42734). In rule FR Doc. 98–21259, published on August 11, 1998, (63 FR 42734) make the following correction:

1. On page 42735, in the first column, the dates are corrected to read as follows:

Adopted: August 20, 1998.

Released: August 21, 1998.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 98–22945 Filed 8–26–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 97–248; RM No. 9097; FCC 98–189]

Development of Competition and Diversity in Video Programming Distribution and Carriage

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Section 628 of the Communications Act prohibits unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming. Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.

DATES: This rule contains information collection requirements that have not been approved by the Office of Management and Budget (''OMB''). The Commission will publish a document in the **Federal Register** announcing the effective date of this rule. Written comments by the public on the modified information collection requirements contained should be submitted on or before October 26, 1998. If you anticipate that you will be submitting comments on the modified information collection requirements, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: A copy of any comments on the modified information collection requirements contained herein should be submitted to Judy Boley, Federal Communications, Room 234, 1919 M St., NW, Washington, DC 20554 or via internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information concerning the Report and Order contact Steve Broeckaert at (202) 418–7200 or via internet at sbroecka@fcc.gov. For additional information concerning the proposed and/or modified information collection requirements contained in the Report and Order contact Judy Boley at (202) 418–0214 or via internet at jboley@fcc.gov.

Paperwork Reduction Act

The requirements contained in this Report and Order have been analyzed

with respect to the Paperwork Reduction Act of 1995 (the ''1995 Act'') and would impose modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the proposed information collection requirements contained in this Notice, as required by the 1995 Act. Public comments are due October 26, 1998 and then implementation of any modified requirements will be subject to approval by the Office of Management and Budget (''OMB'') as prescribed by the 1995 Act. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–XXXX.

Title: Section 76.1003 Adjudicatory proceedings.

Type of Review: Revision of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 24.

Estimated Time Per Response: 4–30 hours.

Frequency of Response: On occasion.

Total Annual Burden to Respondents: 408 hours.

Total Annual Cost to Respondents: $54,360.

Needs and Uses: The information disclosed and collected in these proceedings has been used by Commission staff to resolve disputes alleging unfair methods of competition and deceptive practices where the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

Synopsis

1. The *Report and Order* addresses the issues raised in the *Memorandum Opinion and Order and Notice of Proposed Rulemaking* in CS Docket No. 97–248, 63 FR 1943 (December 18, 1997) (''*NPRM*''), regarding proposed amendments to the rules promulgated pursuant to section 628 of the Communications Act (47 USC § 548).

2. Sanctions. The Commission's existing statutory forfeiture authority can be used in appropriate circumstances as an enforcement mechanism for program access violations. Restitution in the form of damages is also an appropriate remedy to return improper gains obtained by vertically-integrated programmers to unjustly injured MVPDs. However, the law of program access continues to be refined, and it is not appropriate in all instances to impose damages for program access violations. Section 628 permits the Commission to exercise discretion in this area. Where a program access defendant relies upon a good faith interpretation of an ambiguous aspect of the program access provisions for which there is no guidance, we do not believe it would promote competition, or otherwise benefit the video marketplace, to require damages from a programming provider in such circumstances. Where a program access defendant knew, or should have known, that it was engaging in conduct violative of section 628, damages are appropriate and will be imposed. The Commission has the authority to assess forfeitures and damages separately and in combination depending upon the circumstances of a given case. The Commission also retains the authority to issue entirely prospective relief as it has in previous decisions.

3. Damages can best be calculated on a case-by-case basis using procedures similar to those employed by the Commission in adjudicating common carrier formal complaints. The most efficient method by which to administer damages is to provide the Commission with discretion to bifurcate the violation determination from any damages adjudication. The *Report and Order* requires that a complainant seeking damages for a program access violation must file as part of its complaint either:

(a) A detailed computation of damages, including supporting documentation and materials; or

(b) An explanation of:

(i) What information not in the possession of the complaining party is necessary to develop a detailed computation of damages;

(ii) Why such information is unavailable to the complaining party;

(iii) The factual basis the complainant has for believing that such evidence of damages exists; and

(iv) A detailed outline of the methodology that would be used to create a computation of damages with such evidence.

Where a violation is found, the Cable Services Bureau (''Bureau'') will indicate in its order whether the violation is the type for which the Commission will impose damages or forfeitures. The burden of proof regarding damages rests with the complainant, who must demonstrate with specificity the damages arising from the program access violation.

4. The Commission may adjudicate damages by determining the sufficiency of the damages calculation or computation methodology submitted by the complainant. Where the Commission issues a written order approving or modifying a damages calculation, the defendant shall recompense the complainant as directed in the Commission's order. Where the Commission issues a written order approving or modifying a damages computation methodology, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated methodology. To ensure that the parties are diligent in their negotiations to apply the approved methodology, the Commission will require that, within thirty days of the date the damages computation method is approved and released, the parties must file with the Commission a joint statement which will do one of the following: (1) detail the parties' agreement as to the amount of damages; (2) state that the parties are continuing to negotiate in good faith and request that the parties be given an extension of time to continue such negotiations, or (3) detail the bases for the continuing dispute and the reasons why no agreement can be reached. In cases in which the parties cannot resolve the amount of damages within a reasonable time period, the Commission retains the right to determine the actual amount of damages on its own, or through referral to an ALJ.

5. Time Limits. Denial of programming cases (unreasonable refusal to sell, petitions for exclusivity, and exclusivity complaints) should be resolved within five months of the submission of the complaint to the Commission. All other program access complaints, including price discrimination cases, should be resolved within nine months of the submission of the complaint to the Commission. Where the Commission bifurcates the program access violation determination from a damages determination, the time limits adopted by the Commission apply solely to the resolution of the program access violation. The time limits contemplate resolution times applicable to most typical program access disputes

which do not involve complex or repeated discovery, pleading extensions or extra pleadings based upon new information, or requests that the Commission stay proceedings pending settlement negotiations. Where the parties to a program access dispute submit a motion to stay proceedings pending settlement discussions, the Commission will afford the parties the time necessary to determine whether a negotiated settlement is possible. If parties choose to pursue negotiations time limits will be suspended. Program access defendants must file an answer within 20 days of service of the complaint, unless otherwise directed by the Commission. Program access complainants must file a reply within 15 days of service of the answer, unless otherwise directed by the Commission.

6. Discovery. The Commission retains the current system of Commission-controlled discovery. Discovery as-of-right, or expanded discovery, will not improve the quality or efficiency of the Commission's resolution of program access complaints. The Commission clarifies its rules to provide that, to the extent that a defendant expressly references and relies upon a document or documents within its control in responding to a program access complaint, the defendant must attach that document or documents to its answer. The Commission adopts the standardized protective order that was attached to the *NPRM* for program access matters with several minor revisions.

7. Terrestrial Delivery of Programming. The Commission concludes that the record developed in this proceeding fails to establish that the conduct complained of, *i.e.*, moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules, is significant and causing demonstrative competitive harm at this time. In circumstances where anti-competitive harm has not been demonstrated, the Commission perceives no reason to impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers. While the record does not indicate a significant anti-competitive impact necessitating Commission action at this time, the Commission believes that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace. The Commission will continue to monitor this issue and its impact on competition in the video marketplace.

8. Buying Groups: Joint and Several Liability. The record justifies adopting an alternative method to joint and several liability that buying groups can satisfy which ensures that programming distributors are adequately protected from excessive financial risk. To qualify for the alternative to joint and several liability, buying groups must maintain liquid cash or credit reserves (*i.e.*, cash, cash equivalents, or letters or lines of credit) equal to cover the cost of one month's programming for all of the buying groups members. In addition, each member of the buying group will remain liable to the programmer for its pro-rata share of the buying group's programming. Under this approach, the alternative financial assurances method is available to buying groups of all sizes. At the same time, programming providers are adequately protected from the catastrophic default by multiple members of a buying group. If multiple members of a particular buying group default on their obligations to the buying group, and the buying group is unable to meet its obligations with existing resources, the programming provider is ensured payment for all programming thus far provided. At such point, the programming provider would have the option of terminating its contract with the buying group, retaining the one month's programming fees, and contracting with buying group members on terms negotiated between the programmers and the individual MVPDs. Alternatively, the programming provider could retain only the portion of the one month's programming fees that were actually defaulted upon, continue providing programming to the buying group, and look to the individual member for the balance of its pro-rata share of the buying groups' contractual obligations.

Final Regulatory Flexibility Analysis

9. Background. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated into the Notice of Proposed Rule Making (''NPRM'') in this proceeding. The Commission sought written public comment on the possible impact of the proposed policies and rules on small entities in the NPRM, including comments on the IRFA. This Final Regulatory Flexibility Analysis (''FRFA'') in this Report and Order (''Order'') conforms to the RFA.

1. Need for Action and Objectives of the Rules. Section 628 of the Communications Act prohibits unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming and is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services. Pursuant to Congress' mandate in the 1992 Cable Act, the Commission promulgated regulations implementing the Communication Act's program access provisions. In 1997, Ameritech New Media, Inc. filed a petition for rulemaking requesting that the Commission amend our program access rules. The Commission issued a NPRM seeking comment on amendments to our program access rules. After reviewing the comments filed in this proceeding, we conclude that the public interest in increased competition and diversity in the multichannel video programming and the development of competition to traditional cable systems is further enhanced by amending our program access rules as described in the Order.

2. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA. No comments were filed specifically in response to the IRFA. We have, however, considered the economic impact on small entities through consideration of comments that pertain to issues of concern to MVPDs and programming producers and distributors. In particular, the Small Cable Business Association (''SCBA'') filed comments addressing a number of issues. One of the rule changes adopted in the Order is intended to assist program buying cooperatives, many members of which are small entities, in gaining access to vertically-integrated cable programming at competitive rates.

3. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules here adopted. The RFA 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. Under the Small Business Act, a small business concern is one which: (a) is independently owned and operated; (b) is not dominant in its field of operation; and (c) satisfies any additional criteria established by the SBA. The rules we adopt in this Report and Order will

affect cable systems, multipoint multichannel distribution systems, direct broadcast satellites, home satellite dish manufacturers, satellite master antenna television, open video systems, local multipoint distribution systems, and program producers and distributors. Below, we set forth the general SBA and FCC cable small size standards, and then address each service individually to provide a more precise estimate of small entities. We also describe program producers and distributors.

4. *SBA Definitions for Cable and Other Pay Television Services:* The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in annual receipts. This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were approximately 1,758 total cable and other pay television services and 1,423 had less than $11 million in revenue.

5. *Additional Cable System Definitions:* In addition, the Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving no more than 400,000 subscribers nationwide. Based on recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules we are adopting. We conclude that only a small percentage of these entities currently provide qualifying ''telecommunications services'' as required by the Communications Act and, therefore, estimate that the number of such entities are significantly fewer than noted.

6. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 61,700,000 cable subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450. 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.

7. *Multipoint Multichannel Distribution Systems (''MMDS'')*: The Commission refined its definition of ''small entity'' for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more than $40 million for the preceding three calendar years. This definition of a small entity in the context of MMDS auctions has been approved by the SBA.

8. The Commission completed its MMDS auction in March 1996 for authorizations in 493 basic trading areas (''BTAs''). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MMDS is an especially competitive service, with approximately 1573 previously authorized and proposed MMDS facilities. Information available to us indicates that no MMDS facility generates revenue in excess of $11 million annually. We conclude that, for purposes of this FRFA, there are approximately 1634 small MMDS providers as defined by the SBA and the Commission's auction rules.

9. *ITFS:* There are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business. However, we do not collect annual revenue data for ITFS licensees and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. No commenters address these non-educational licensees. Accordingly, we conclude that there may be as many as 2032 licensees that are small businesses.

10. *Direct Broadcast Satellite (''DBS'')*: Because DBS provides subscription services, DBS falls within the SBA definition of cable and other pay television services (SIC 4841). As of December 1996, there were eight DBS licensees. However, the Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be affected by these proposed rules. Although DBS service requires a great investment of capital for operation, in the NPRM, we acknowledged that there are several new entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated. Since the publication of the NPRM, however, more information has become available. In light of the 1997 gross revenue figures for the various DBS operators, we conclude that no DBS operator qualifies as a small entity.

11. *Home Satellite Dish (''HSD''):* The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 500 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 350 channels are scrambled and approximately 150 are unscrambled. HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming packager. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing.

12. According to the most recently available information, there are approximately 20 to 25 program packagers nationwide offering packages of scrambled programming to retail consumers. These program packagers provide subscriptions to approximately 2,184,470 subscribers nationwide. This is an average of about 77,163 subscribers per program packager. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small multiple system operator (''MSO'').

13. *Satellite Master Antenna Television (''SMATVs''):* Industry

sources estimate that approximately 5200 SMATV operators were providing service as of December 1995. Other estimates indicate that SMATV operators serve approximately 1.162 million residential subscribers as of June 30, 1997. The ten largest SMATV operators together pass 848,450 units. If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV 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 SMATVs, we conclude that a substantial number of SMATV operators qualify as small entities.

14. *Local Multipoint Distribution System (''LMDS''):* Unlike the above pay television services, LMDS technology and spectrum allocation will allow licensees to provide wireless telephony, data, and/or video services. A LMDS provider is not limited in the number of potential applications that will be available for this service. Therefore, the definition of a small LMDS entity may be applicable to both cable and other pay television (SIC 4841) and/or radiotelephone communications companies (SIC 4812). The SBA approved definition for cable and other pay services that qualify as a small business is defined in paragraphs 5–6, *supra.* A small radiotelephone entity is one with 1500 employees or fewer. However, for the purposes of this *Report and Order* on navigation devices, we include only an estimate of LMDS video service providers.

15. An auction for licenses to operate LMDS systems was recently completed by the Commission. The vast majority of the LMDS license auction winners were small businesses under the SBA's definition of cable and pay television (SIC 4841). In the Second R&O, we adopted a small business definition for entities bidding for LMDS licenses as an entity that, together with affiliates and controlling principles, has average gross revenues not exceeding $40 million for each of the three preceding years. We have not yet received approval by the SBA for this definition.

16. There is only one company, CellularVision, that is currently providing LMDS video services. In the IRFA, we assumed that CellularVision was a small business under both the SBA definition and our auction rules. No commenters addressed the tentative conclusions we reached in the NPRM. Accordingly, we affirm our tentative conclusion that a majority of the potential LMDS licensees will be small entities, as that term is defined by the SBA.

17. *Open Video System (''OVS''):* The Commission has certified 15 OVS operators. Of these nine, only two are providing service. On October 17, 1996, Bell Atlantic received approval for its certification to convert its Dover, New Jersey Video Dialtone (''VDT'') system to OVS. Bell Atlantic subsequently purchased the division of Futurevision which had been the only operating program package provider on the Dover system, and has begun offering programming on this system using these resources. Metropolitan Fiber Systems was granted certifications on December 9, 1996, for the operation of OVS systems in Boston and New York, both of which are being used to provide programming. Bell Atlantic and Metropolitan Fiber Systems have sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. We believe that one OVS licensee may qualify as a small business concern. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

18. *Program Producers and Distributors:* The Commission has not developed a definition of small entities applicable to producers or distributors of television programs. Therefore, we will utilize the SBA classifications of Motion Picture and Video Tape Production (SIC 7812), Motion Picture and Video Tape Distribution (SIC 7822), and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922). These SBA definitions provide that a small entity in the television programming industry is an entity with $21.5 million or less in annual receipts for SIC 7812 and 7822, and $5 million or less in annual receipts for SIC 7922. The 1992 Bureau of the Census data indicate the following: (1) there were 7265 U.S. firms classified as Motion Picture and Video Production (SIC 7812), and that 6987 of these firms had $16,999 million or less in annual receipts and 7002 of these firms had $24,999 million or less in annual receipts; (2) there were 1139 U.S. firms classified as Motion Picture and Tape Distribution (SIC 7822), and that 1007 of these firms had $16,999 million or less in annual receipts and 1013 of these firms had $24,999 million or less in annual receipts; and (3) there were 5671 U.S. firms classified as Theatrical Producers and Services (SIC 7922), and that 5627 of these firms had less than $5 million in annual receipts.

19. Each of these SIC categories is very broad and includes firms that may be engaged in various industries including television. Specific figures are not available as to how many of these firms exclusively produce and/or distribute programming for television or how many are independently owned and operated. Consequently, we conclude that there are approximately 6987 small entities that produce and distribute taped television programs, 1013 small entities primarily engaged in the distribution of taped television programs, and 5627 small producers of live television programs that may be affected by the rules adopted in this Report and Order.

20. *Description of Reporting, Recordkeeping and Other Compliance Requirements.* This analysis examines the costs and administrative burdens associated with our rules and requirements. To the extent expressly relied upon in responding to a program access complaint, the rules we adopt require program access defendants to attach documents within their control to their answer or other responsive pleading permitted by the Commission. In addition, the rules we adopt, in certain situations, require program access complainants and defendants to negotiate in good faith regarding the amount of damages based upon a Commission-approved computation methodology. The Commission believes, however, that this requirement would not necessitate significant additional costs or skills beyond those already utilized in the ordinary course of business by MVPDs and program producers and distributors.

21. *Steps Taken to Minimize Significant Economic Impact On Small Entities and Significant Alternatives Considered.* We believe that our amended rules relating to program access will have a positive impact on small entities. The purpose of the program access provisions is to prohibit unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming and increase competition and diversity in the multichannel video programming market. Small entities play an important role in effectuating this purpose. The rules we adopt will enable small entities to more fairly and expeditiously obtain programming and compensate such entities, in appropriate circumstances, when such programming is denied or

obtained through unfair rates, terms or conditions.

22. Report to Congress. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801(a)(1)(A). The *Report and Order* and this FRFA (or summaries thereof) will be sent to the Chief Counsel for Advocacy of the Small Business Administration. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated into the *NPRM* in this proceeding. The Commission sought written public comment on the possible impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. This Final Regulatory Flexibility Analysis (''FRFA'') in this *Report and Order* conforms to the RFA.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended 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, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.1003 is amended by adding paragraph (c)(5), revising paragraphs (d)(1), (d)(2), (e), and (s)(1), and adding paragraph (s)(3) to read as follows:

§ 76.1003 Adjudicatory proceedings.

* * * * *

(c) * * *

(5) *Damages requests.* (i) In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim in accordance with the requirements of paragraph (c)(iii) of this section.

(ii) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded if the complaint complies fully with the requirement of paragraph (c)(iii) of this section where the defendant knew, or should have known that it was engaging in conduct violative of section 628 of the Communications Act.

(iii) In all cases in which recovery of damages is sought, the complainant shall include within, or as an attachment to, the complaint, either:

(A) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(B) An explanation of:

(*1*) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(*2*) The reason such information is unavailable to the complaining party;

(*3*) The factual basis the complainant has for believing that such evidence of damages exists; and

(*4*) A detailed outline of the methodology that would be used to create a computation of damages when such evidence is available.

* * * * *

(d) *Answer.* (1) Any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents within its control in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any defendant failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

* * * * *

(e) *Reply.* Within fifteen (15) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defense set forth therein. Replies containing information claimed by defendant to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked ''Not for Public Inspection.'' An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the defendant.

* * * * *

(s) *Remedies for violations.*—(1) *Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, (i) the imposition of damages, and/or

(ii) the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance, and shall become effective upon release.

* * * * *

(3) *Imposition of damages.* (i) *Bifurcation.* In all cases in which damages are requested, the Commission may bifurcate the program access violation determination from any damage adjudication.

(ii) *Burden of proof.* The burden of proof regarding damages rests with the complainant, who must demonstrate with specificity the damages arising from the program access violation. Requests for damages that grossly overstate the amount of damages may result in a Commission determination that the complainant failed to satisfy its burden of proof to demonstrate with specificity the damages arising from the program access violation.

(iii) *Damages adjudication.* (A) The Commission may, in its discretion, end adjudication of damages with a written order determining the sufficiency of the damages computation submitted in accordance with paragraph (c)(5)(iii)(A) of this section or the damages computation methodology submitted in accordance with paragraph (c)(5)(iii)(B)(*4*) of this section, modifying such computation or methodology, or requiring the complainant to resubmit such computation or methodology.

(*1*) Where the Commission issues a written order approving or modifying a damages computation submitted in accordance with paragraph (c)(5)(iii)(A) of this section, the defendant shall

recompense the complainant as directed therein.

(*2*) Where the Commission issues a written order approving or modifying a damages computation methodology submitted in accordance with paragraph (c)(5)(iii)(B)(*4*) of this section, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated methodology.

(B) Within thirty days of the issuance of a paragraph (c)(5)(iii)(B)(*4*) of this section damages methodology order, the parties shall submit jointly to the Commission either:

(*1*) A statement detailing the parties' agreement as to the amount of damages;

(*2*) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(*3*) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(C) (*1*) In cases in which the parties cannot resolve the amount of damages within a reasonable time period, the Commission retains the right to determine the actual amount of damages on its own, or through the procedures described in paragraph (s)(3)(iii)(C)(*2*) of this section.

(*2*) Issues concerning the amount of damages may be designated by the Chief, Cable Services Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge.

(D) Interest on the amount of damages awarded will accrue from either the date indicated in the Commission's written order issued pursuant to paragraph (s)(3)(iii)(A)(*1*) of this section or the date agreed upon by the parties as a result of their negotiations pursuant to paragraph (s)(3)(iii)(A)(*2*) of this section. Interest shall be computed at applicable rates published by the Internal Revenue Service for tax refunds.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[FCC 98–167]

800 MHz SMR Licensees

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) addresses several petitions filed since the Commission adopted the *Goodman/Chan Order*, published elsewhere in this issue of the **Federal Register**, on May 22, 1995 and addresses certain issues relating to certain General Category Specialized Mobile Radio (SMR) Licenses. Dismissing the outstanding pleadings and addressing these other issues removes the impediments to implementing the relief the *Goodman/Chan Order* granted. Implementing the relief will allow the licensees to construct and/or transfer their licenses and give prospective bidders a clear idea on available spectrum in the upcoming lower band auction.

DATES: Licensees have four months from August 27, 1998 to complete construction of their licenses.

FOR FURTHER INFORMATION CONTACT: Terry Fishel at (717) 338–2602 or Ramona Melson or David Judelsohn at (202) 418–7240.

SUPPLEMENTARY INFORMATION:

1. In this document the Commission addresses several pleadings that have been filed since the adoption of the *Goodman/Chan Order*. The Commission dismisses the Brown and Schwaninger petition for reconsideration of the *Goodman/Chan Order* because the Brown and Schwaninger Petition was filed after the statutory deadline for submission of such petitions. Second, the Commission dismisses a motion for clarification filed by Daniel R. Goodman (Goodman) of the *Goodman/Chan Order* because it similarly was filed after the statutory deadline for such pleadings. Further, the Commission dismisses a petition for reconsideration, filed by Goodman, of the November 20 Staff Letter, discussing the processing of the General Category SMR licenses that received a four-month extension of their construction periods per the *Goodman/Chan Order*. Finally, the Commission addresses certain issues relating to certain General Category SMR Licenses. By dismissing the outstanding pleadings filed against the *Goodman/Chan Order*, dismissing the Receiver's December 1 Petition for Reconsideration of the November 20 Staff Letter and addressing these other issues, this Order removes the impediments to implementing the relief the *Goodman/Chan Order* granted.

2. On January 11, 1994, the Federal Trade Commission (FTC) filed a Complaint for a permanent injunction and other relief against a number of application preparation companies in the United States District Court, Southern District of New York (U.S. District Court). Prior to the FTC action, the application preparation companies used television commercials and telemarketing solicitations to promote SMR licenses as ''investment opportunities'' for individuals with little or no experience in the communications industry. On January 14, 1994, the U.S. District Court issued a preliminary injunction freezing the assets of the application preparation companies, and appointed Goodman as the Receiver (Receiver) for four of these companies (Receivership Companies). The U.S. District Court directed the Receiver to use all reasonable efforts to ensure that the licenses are either (1) constructed and placed in operation in a timely manner, in substantial conformance with our regulations, or (2) assigned to an entity which will use reasonable efforts to do the same.

3. On March 15, 1994, and March 21, 1994, respectively, Dr. Robert Chan (Chan) and the Receiver filed petitions for waiver of § 90.633 of our rules to allow certain SMR licensees additional time to construct facilities and commence operation. The Goodman Petition was brought on behalf of approximately 2500 individuals (Goodman/Chan Receivership) who had obtained approximately 4400 conventional licenses on 800 MHz General Category channels by using the services of one of the Receivership Companies.

4. In his waiver petition, the Receiver requested an eight-month extension of time for the Goodman/Chan Receivership to construct their licensed facilities and commence operations, starting from the petition grant date. The Receiver also requested a Stay of all automatic cancellations of licenses during the pendency of the Goodman Petition. On April 29, 1994, the Receiver filed a supplement to his March 21, 1994 waiver petition, requesting that the PRB refrain from taking any action that would result in the cancellation of the General Category licenses of the licensees who received their licenses through the Receivership Companies during the pendency of the Receiver's waiver request. The Receiver also requested that the PRB suspend the mailing of automated letter inquiries to the affected licensees concerning the construction and loading status of their licenses. In the event that the Receiver's petition for waiver was denied, the Receiver requested that the PRB provide the licensees a period of 120 days from the date of such denial to comply with the provisions of § 90.633 of the rules. In the Supplemental Petition, the Receiver also filed his initial list of approximately 3,100 entities that had obtained their licenses or applications