

## II. Legal Basis

3. This action, including publication of proposed rules, is authorized under sections (4)(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended.<sup>28</sup>

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

4. 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.<sup>29</sup> The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>30</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>31</sup> 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).<sup>32</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>33</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>34</sup> "Small governmental jurisdiction"<sup>35</sup> generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>36</sup> As of 1992, there were approximately 85,006 governmental entities in the United States.<sup>37</sup> This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96%, have populations of fewer than 50,000.<sup>38</sup> The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (96%) are small entities. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by these rules.

## Cable Services or Systems

5. 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 revenue annually.<sup>39</sup> This definition includes cable systems 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 1,788 total cable and other pay television services and 1,423 had less than \$11 million in revenue.<sup>40</sup>

6. The Commission has developed its own definition of a small cable system operator for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>41</sup> Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.<sup>42</sup> 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 1,439 small entity cable system operators.

7. The Communications Act of 1934, as amended, 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 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."<sup>43</sup> The Commission has determined that there are 67,500,000 subscribers in the United States.<sup>44</sup> Therefore, we estimate that an operator serving fewer than 675,000 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.<sup>45</sup> Based on available data, we estimate that the number of cable operators serving 675,000 subscribers or less totals 1,450.<sup>46</sup> We do not request nor collect information on whether

cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000,<sup>47</sup> and therefore are unable at this time to estimate more accurately the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

8. *Other Pay Services.* Other pay television services are also classified under the North American Industry Classification System (NAICS) codes 51321 and 51322, which includes cable systems operators, closed circuit television services, direct broadcast satellite services (DBS),<sup>48</sup> multipoint distribution systems (MDS),<sup>49</sup> satellite master antenna systems (SMATV), and subscription television services.

## Wireline Competition Services and Related Entities

9. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Provider Locator* report, which encompasses data compiled from FCC Form 499—A Telecommunications Reporting Worksheets.<sup>50</sup> According to data in the most recent report, there are 5,679 interstate service providers.<sup>51</sup> These providers include, *inter alia*, incumbent local exchange carriers, competitive access providers (CAPS)/competitive local exchange carriers (CLECs), local resellers and other local exchange carriers, interexchange carriers, operator service providers, prepaid calling card providers, toll resellers, and other toll carriers.

10. We have included small incumbent local exchange carriers (LECs)<sup>52</sup> in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."<sup>53</sup> The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.<sup>54</sup> We

<sup>28</sup> 47 U.S.C. 154(i) and (j), 159, and 303(r).

<sup>29</sup> 5 U.S.C. 603(b)(3).

<sup>30</sup> 5 U.S.C. 601(6).

<sup>31</sup> 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**." 5 U.S.C. 601(3).

<sup>32</sup> Small Business Act, 15 U.S.C. 632 (1996).

<sup>33</sup> 5 U.S.C. 601(4).

<sup>34</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>35</sup> 47 CFR 1.1162.

<sup>36</sup> 5 U.S.C. 601(5).

<sup>37</sup> U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

<sup>38</sup> *Id.*

<sup>39</sup> 13 CFR 121.201, North American Industry Classification System (NAICS) codes 51321 and 51322.

<sup>40</sup> 1992 *Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, NAICS codes 51321 and 51322 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

<sup>41</sup> 47 CFR 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

<sup>42</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>43</sup> 47 U.S.C. 543(m)(2).

<sup>44</sup> Media Services (Cable Division) estimate.

<sup>45</sup> *Id.* 47 CFR 76.1403(b).

<sup>46</sup> FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice, DA-01-0158 (released January 24, 2001).

<sup>47</sup> We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.1403(b) of the Commission's rules. See 47 CFR 76.1403(d).

<sup>48</sup> Direct Broadcast Services (DBS) are discussed with the international services, *infra*.

<sup>49</sup> Multipoint Distribution Services (MDS) are discussed with the mass media services, *infra*.

<sup>50</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Telecommunications Provider Locator*, Table 1 (November 2001).

<sup>51</sup> FCC, *Telecommunications Provider Locator* at Table 1.

<sup>52</sup> See 47 U.S.C. 251(h) (defining "incumbent local exchange carrier").

<sup>53</sup> 5 U.S.C. 601(3).

<sup>54</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA