

conventional citations as a convenience to readers. We are unable to update these URLs after adoption of this *NPRM*, and readers may find some URLs to be out of date as time progresses. We also advise readers that the only definitive text of FCC documents is the one that is published in the FCC Record. In case of discrepancy between the electronic documents cited here and the FCC Record, the version in the FCC Record is definitive.

### Initial Regulatory Flexibility Analysis

11. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Second Further Notice of Proposed Rulemaking (*NPRM*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided in paragraph 124 of the item. The Commission will send a copy of this *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

### *Need for, and Objectives of, the Proposed Rule*

12. In this *NPRM*, we revisit the issues of the geographic licensing scheme for MVDDS and build-out requirements. In the Second Report and Order, the Commission adopted geographic license service areas for MVDDS on the basis of Component Economic Areas (CEAs). Based on the previously-established record in this proceeding, and on subsequent discussions between Commission staff and Nielsen representatives which indicate that, although Nielsen remains unable to enter into a formal agreement to allow the Commission to use its Designated Market Area (DMA) designation for the MVDDS service areas, Nielsen does not object to the Commission's use of DMAs in this manner, subject to certain parameters. Specifically, in a letter received on March 26, 2003, it appears that Nielsen would agree to extend a perpetual, royalty-free license to the Commission, without the right to sublicense, to its DMA mark and regions, provided that the Commission:

(i) Agrees, and continues to communicate to prospective MVDDS suppliers, that a territorial license from the Commission to supply MVDDS does not confer the right to

use Nielsen Media Research's DMA mark, regions or data, and that such right must be obtained from Nielsen Media Research on such terms as may be mutually acceptable to Nielsen Media Research and the supplier, in their sole and respective discretion, and (ii) does not republish DMA regions or data in any statute, regulation or rule or otherwise.

13. We are concerned that Nielsen's conditions on the use of DMAs may unduly limit the business plans and opportunities for MVDDS licensees. By its most recent letter, Nielsen makes it clear that it is unwilling to consent to allowing the Commission's MVDDS licensees use the DMA mark, regions or data in their MVDDS business without an individual license from Nielsen. Thus, it does not appear that the license Nielsen described would give Commission licensees sufficient flexibility to make practical use of the DMA designation in connection with their MVDDS operations. Additionally, although the Commission could cross-reference DMAs in its rules, Nielsen's limitations may interfere with our enforcement flexibility, since Nielsen does not want us to "republish DMA regions or data in any statute, regulation or rule or otherwise." We seek comment on whether the conditions described by Nielsen are so restrictive that use of DMAs would be of limited utility to small businesses. We also request comment on the potential impact on small business plans if we change the service area designation.

14. Given that we are revisiting the service area definition, we also take this opportunity to explore whether the current build out requirement sufficiently promotes expeditious deployment of service, particularly for those communities that are traditionally unserved or underserved. As indicated earlier, the Second R&O establishes a ten-year build out requirement for the MVDDS licensees based on substantial service as a basis for a renewal expectancy. MDS America has expressed concern that a ten-year build out period for MVDDS licenses was too long given the potential for anti-competitive warehousing of spectrum in this service and the great demand for rural broadband service. MDS America supports a five-year build out period, a requirement advocated by other commenters in this record.

15. We seek limited comment on the timing of whether a 10-year build out requirement is optimal for fostering expeditious delivery of advanced wireless services to all communities, in particular communities that are traditionally unserved or underserved. In addition, we seek comment on whether a shorter build out requirement

will facilitate more effective deployment of these services as well as the appropriate benchmark for a buildout requirement. Finally, we seek comment on the potential impact on small business plans if we change the build out requirement.

16. We seek comment on the following issues under consideration in this *NPRM*:

- The appropriate service area designation for MVDDS.
- The appropriate buildout requirement for MVDDS.

### *Legal Basis*

17. The proposed action is authorized under the Administrative Procedure Act, 5 U.S.C. 553; and sections 1.4(i), 7, 301, 303, 308 and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157, 301, 303, 308 and 309(j).

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

18. 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).

19. Small Multichannel Video Programming Distributors (MVPDs). SBA has developed a definition of small entities for cable, which includes all such companies generating \$11 million or less in annual receipts. This definition includes cable system operators and DBS services. According to the Census Bureau data from 1992, there were 1,758 total cable and other pay television services and 1,423 had less than \$11 million in revenue. We address below each service individually to provide a more precise estimate of small entities.

20. Cable Services. 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 400,000 or fewer subscribers nationwide. We last estimated that there