

APPENDIX B

SECOND SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS *Report and Order*

As required by the Regulatory Flexibility Act (RFA),¹ a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix B of the *Report and Order*² (*R&O*) and a Supplement was incorporated in Appendix B of the *Report and Order on Reconsideration*³ (*Reconsideration Order*) in this proceeding. The Commission's Second Supplemental Final Regulatory Flexibility Analysis (Second Supplemental FRFA) in this *Report and Order on Further Reconsideration* (*Further Reconsideration Order*) reflects revised or additional information to that contained in the FRFA and Supplement. This Second Supplemental FRFA is thus limited to matters raised in response to the *R&O* and the *Reconsideration Order* and that are granted on reconsideration in the *Further Reconsideration Order*. The Second Supplemental FRFA conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.⁴

I. Need For and Objectives of Action:

In the *R & O*, we amended Parts 21 and 74 of our rules to enhance the ability of Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees to provide two-way communication services. The actions taken in this *Further Reconsideration Order* are in response to petitions for reconsideration, clarification or expansion of the rules and policies adopted in the *R&O* and the *Reconsideration Order*. The petitions have been granted in part and denied in part. The *Further Reconsideration* grants the petitions that sought to allow excess capacity leases between ITFS licensees and MDS operators to contain a provision that would require that the lease be assigned if the underlying license is assigned. We also grant those petitions that request we grandfather ITFS leases entered into prior to March 31, 1997 that contain automatic renewal provisions effective after March 31, 1997. We further grant those petitions for reconsideration that sought a modification of our rules to allow ITFS/MDS excess capacity to hold booster station licenses provided that at the end of the lease time such lessees either assign the booster station license to the underlying licensee or, if the ITFS licensee does not want the booster station license, turn the license into the Commission. We also grant those petitions that request that we permit lessees of ITFS capacity to request waivers of the ITFS programming requirements in areas within its Protected Service Area where the ITFS licensee does not yet provide educational service. Moreover, we grant those petitions seeking that we clarify our rules that an ITFS receive site does not lose its register status

¹ 5 U.S.C. § 603.

² *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112 (1998).

³ 14 FCC Rcd 12764 (1999).

⁴ Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA); *see generally* 5 U.S.C. §§ 601 *et seq.* Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

even if it engages in substantial technical modifications such as channel swapping. Finally, we grant those petitions seeking that we defer booster service area protection for low powered boosters until after the initial filing window. We believe these final rule amendments will facilitate further two-way transmission and other improvements to the MDS and ITFS services.

II. Significant Issues Raised by the Public in Response to the Initial Analysis:

No comments were received specifically in response to the FRFA contained in the *R&O* or the Supplement in the *Reconsideration Order*.

III. Description and Number of Small Entities Involved:

The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern."⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁶ 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 SBA.⁷

MDS: The Commission has defined "small entity" for the auction of MDS 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.⁸ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁹ The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (BTAs). Of 67 winning bidders, 61 qualified as small entities.¹⁰

⁵ 5 U.S.C. § 601(6).

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

⁷ Small Business Act, 15 U.S.C. § 632.

⁸ 47 C.F.R. § 21.961(b)(1).

⁹ See *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-31 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

¹⁰ One of these small entities, O'ahu Wireless Cable, Inc., was subsequently acquired by GTE Media Ventures, Inc., which did not qualify as a small entity for purposes of the MDS auction.

MDS is also heavily encumbered with licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services, which includes all such companies generating \$11 million or less in annual receipts.¹¹ This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators which did not participate in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of \$11 million annually. Therefore, for purposes of this FRFA, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules, and some of these providers may take advantage of our amended rules to provide two-way MDS.

ITFS: There are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions (these 100 fall in the MDS category, above). Educational institutions may be included in the definition of a small entity.¹² ITFS is a non-pay, non-commercial broadcast service that, depending on SBA categorization, has, as small entities, entities generating either \$10.5 million or less, or \$11.0 million or less, in annual receipts.¹³ However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we find that up to 1932 of these educational institutions are small entities that may take advantage of our amended rules to provide two-way ITFS.

IV. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The *Further Reconsideration Order* adopts the following proposals that include reporting, recordkeeping, and compliance requirements:

We refined our rules to require that lessees of ITFS excess capacity, who hold booster station licenses on that leased capacity, must either assign the booster station license to the underlying ITFS licensee, or if the ITFS licensee does not want the booster station license, turn it into the Commission at the end of the lease term.

We allowed lessees of ITFS capacity to request waivers of the ITFS programming requirements in areas within the ITFS licensee's Protected Service Area where that ITFS licensee does not yet provide educational service.

As stated above, we extended our filing requirements to allow filings to the Commission to be submitted electronically and via CD-ROM. These provisions are intended to give an added measure of flexibility to applicants and at the same time provide for administrative convenience.

¹¹ 13 C.F.R. § 121.201.

¹² See 5 U.S.C. §§ 601 (3)-(5).

¹³ See 13 C.F.R. § 121.210 (SIC 4833, 4841, and 4899).

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The following steps were taken in the *Further Reconsideration Order* to minimize the significant economic impact on small entities:

We extended our filing requirements to allow filings to the Commission to be submitted electronically and via CD-ROM. These provisions are intended to give an added measure of flexibility to applicants and at the same time provide for administrative convenience.

VI. Report to Congress:

The Commission will send a copy of the *Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Reconsideration*, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604