

**FCC FACT SHEET\***

**Modernization of Media Regulation Initiative:**

**Amendment of Commission Rule Requiring Records of Cable Operator Interests in Video Programming**

Notice of Proposed Rulemaking – MB Docket Nos. 17-105 and 20-35

**Background:** Section 76.1710 of the FCC's rules requires that cable operators maintain records in their online public inspection files regarding: 1) the nature and extent of their attributable interests in video programming services, and 2) their carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest. The original purpose of this rule was to aid in the enforcement of the Commission's channel occupancy limits, but the order implementing those limits was reversed and remanded by the U.S. Court of Appeals for the D.C. Circuit in 2001. Therefore, commenters in the *Modernization of Media Regulation Initiative* proceeding have identified section 76.1710 as a regulation that no longer serves any useful purpose.

**What the Notice of Proposed Rulemaking (NPRM) Would Do:**

- Seek comment on whether the cable operator interests in video programming recordkeeping rule remains useful or relevant given marketplace changes and the 2001 decision of the D.C. Circuit regarding the Commission's channel occupancy limits.
- Seek comment on other potential sources of this information and whether alternative sources would be adequate substitutes for the information currently provided by cable operators. Seek comment on other methods of disclosing this information that would be more efficient or less burdensome for cable operators than compiling and placing it in a public inspection file.
- Seek comment on the regulatory burden for cable operators to file this information and whether the burdens and costs on cable operators outweigh the utility of the information, as well as information and data on the benefits and costs associated with the rule.
- Seek comment on whether to eliminate or modify section 76.1700(a)(7), which lists cable operator interests in video programming as one of the records to be maintained by cable system operators in their public inspection file.

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\* This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in MB Docket No. 20-35, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission's *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. See 47 CFR § 1.1200 *et seq.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Amendment of Commission Rule Requiring
Records of Cable Operator Interests in Video
Programming
Modernization of Media Regulation Initiative
MB 20-35
MB 17-105

NOTICE OF PROPOSED RULEMAKING\*

Adopted: []

Released: []

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (45 days after date of publication in the Federal Register)

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on whether to eliminate or modify section 76.1710 of the Commission’s rules, which requires that cable operators maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services.1 The rule also requires that their online public inspection file contain information regarding cable operators’ carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest.2 We also seek comment on whether to eliminate or modify section 76.1700(a)(7), which lists cable operator interests in video programming as one of the records to be maintained by cable system operators in their public inspection file.3 In conjunction with the Commission’s Modernization of Media Regulation Initiative (Media

\* This document has been circulated for tentative consideration by the Commission at its February 2020 open meeting. The issues referenced in this document and the Commission’s ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

1 See 47 CFR § 76.1710 (“Cable operators are required to maintain records in their public file for a period of three years regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest. These records must be made available to local franchise authorities, the Commission, or members of the public on reasonable notice and during regular business hours.”).

2 47 CFR § 76.1710. We refer herein to both parts of this rule collectively as the “cable operator interests in video programming recordkeeping” requirement.

3 See 47 CFR § 76.1700(a)(7). In addition, we seek comment on whether to eliminate or modify Note 2 to section 76.504, which cross-references section 76.1710. See 47 CFR § 76.504.

Modernization),<sup>4</sup> parties have urged us to re-examine several categories of information in the online public inspection file that may be outdated, including records regarding cable operators' interests in video programming.<sup>5</sup> Our analysis of this rule indicates that its original purpose was to aid in the compliance of a Commission regulation that was reversed and remanded over eighteen years ago by the U.S. Court of Appeals for the District of Columbia Circuit. Accordingly, we seek comment on whether to eliminate or modify this rule. Through this NPRM, we advance our efforts to modernize our media regulations and eliminate outdated or unnecessary requirements.

## II. BACKGROUND

2. The Commission originally adopted the cable operator interests in video programming recordkeeping requirement in 1993 as a method of monitoring compliance with the Commission's cable channel occupancy limits, which restricted the number of channels that could be occupied on a vertically integrated cable system by video programmers in which the cable operator had an attributable interest.<sup>6</sup> Under this requirement, cable operators are required to maintain in their public inspection files, for a period of at least three years, records regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they also have an attributable interest.<sup>7</sup> The Commission stated that such records would enable local franchise authorities to aid the Commission in monitoring compliance with the channel occupancy limits in their respective franchise areas.<sup>8</sup> Specifically, the Commission asserted that a franchise authority could request to inspect a local cable operator's records should the franchise authority have questions as to whether the cable operator was in violation of the channel occupancy limits.<sup>9</sup> After such inspection, if a franchise authority believed that a

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<sup>4</sup> *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (2017).

<sup>5</sup> Verizon Comments, MB Docket No. 17-105, at 8 (rec. July 7, 2017) (Verizon Comments); Verizon Reply, MB Docket No. 17-105, at 4 (rec. Aug. 4, 2017); *see also* Frontier Communications Reply, MB Docket No. 17-105, at 4-5 (rec. Aug. 4, 2017) (Frontier Reply); Independent Telephone and Telecommunications Alliance (ITTA) Reply, MB Docket No. 17-105, at 4-5 (rec. Aug. 4, 2017) (ITTA Reply) (agreeing with Verizon that the cable operator interests in video programming record is information that is of no use or interest to consumers and that the Commission should eliminate some categories in the cable public inspection file if it does not eliminate the filing obligation altogether); National Cable and Telecommunications Association (NCTA) Comments, MB Docket No. 17-105, at 22 (rec. July 5, 2017) (NCTA Comments) (arguing that the Commission should eliminate or modernize several parts of the public file, which are unnecessary, duplicative, or unduly burdensome).

<sup>6</sup> *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, MB Docket No. 92-264, Second Report and Order, 8 FCC Rcd 8565, 8606, para. 98 (1993) (*Channel Occupancy Order*). The Commission's channel occupancy limits placed a 40% cap on the number of channels that could be occupied on a vertically integrated cable system (with up to 75 channels) by video programmers in which the cable operator had an attributable interest. *Id.* at 8567, para. 4. For systems with more than 75 channels, the rule required that at least 45 channels be devoted to unaffiliated programming. *Id.* at para. 84 n.107. The Commission adopted channel occupancy limits consistent with Section 11 of the Cable Television Consumer Protection and Competition Act of 1992. *Id.* at 8583, para. 41; 47 U.S.C. § 533(f)(1)(B) (requiring the establishment of reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an attributable interest).

<sup>7</sup> *Channel Occupancy Order*, 8 FCC Rcd at 8606, para. 98. The Commission initially proposed to enforce channel occupancy limits through a process of certification whereby cable operators would certify annually to the Commission that their cable systems are in compliance with the channel occupancy limits but, after receiving comments, the Commission determined that the recordkeeping requirement would be a preferable and less burdensome approach. *Id.* at 8605-06, paras. 95-98.

<sup>8</sup> *Id.* at 8606, para. 99.

<sup>9</sup> *Id.*

violation existed, it could file a complaint with the Commission.<sup>10</sup> The Commission also stated that other parties seeking to report potential violations of the channel occupancy limits could also contact the local franchise authority or report the matter directly to the Commission.<sup>11</sup>

3. The Commission reorganized its public file rules in 1999 to reduce the regulatory burden faced by cable operators with regard to the recordkeeping requirements.<sup>12</sup> At that time, the cable operator interests in video programming recordkeeping requirement was moved from the channel occupancy limits provision in Subpart J of Part 76 of the Commission's rules—where it was originally placed upon adoption—to its own section in Subpart U, which consolidated for ease of administration the documents to be maintained by multichannel video and cable television services for public inspection.<sup>13</sup>

4. In 2001, the channel occupancy limits were reversed and remanded to the Commission by the U.S. Court of Appeals for the D.C. Circuit.<sup>14</sup> However, despite that decision, the cable operator interests in video programming recordkeeping requirement has remained part of the public file requirements for cable operators.<sup>15</sup> The Commission transitioned the public file requirements for cable operators to an online format in 2016, when the Commission expanded the list of entities required to post public inspection files to the Commission's online database.<sup>16</sup> Since then, the cable operator interests in video programming recordkeeping requirement has been part of the online public inspection file to be maintained by cable system operators.<sup>17</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *1998 Biennial Regulatory Review—Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, CS Docket No. 98-132, Report and Order, 14 FCC Rcd 4653, 4653, para. 1 (1999) (“*1999 Streamlining Order*”). As part of the reorganization proceeding, the Commission sought comment on whether to remove or consolidate any public file requirements. *1998 Biennial Regulatory Review—Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, CS Docket No. 98-132, Notice of Proposed Rulemaking, 13 FCC Rcd 15219, 15220, para. 4 (1998) (noting that certain information cable operators are required to maintain “may be difficult to collect and inefficient to maintain, especially when that information is infrequently used or readily available through another source”).

<sup>13</sup> *1999 Streamlining Order*, 14 FCC Rcd 4653, Appx. D.

<sup>14</sup> *See Time Warner*, 240 F.3d at 1139. The court found that the Commission failed to justify its channel occupancy limits as not burdening substantially more speech than necessary. *Id.*

<sup>15</sup> The Commission has sought comment on reinstating the channel occupancy limits but, to date, has found the record inadequate to support adopting a specific vertical limit on the ownership of video programming sources by owners of cable systems. *See generally Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order and Further Notice of Proposed Rulemaking, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, CS Docket Nos. 98-82 and 96-85, 23 FCC Rcd 2134, 2192, para. 135 (2008) (noting that the record contained no proposals for a specific limit, no evidence to support a specific limit, no methodology to help determine a specific limit, and no demonstration of any a link between the harms of vertical integration and a specific limit designed to prevent these harms); *Commission's Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, 9381-82, para. 9 (2005) (finding no sound evidentiary basis for setting vertical limits as required by the D.C. Circuit) (*Second Channel Occupancy FNPRM*); *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, CS Docket Nos. 98-82 and 96-85, 16 FCC Rcd 17312, 17350-52 paras. 81-84 (2001) (seeking comment on vertical limit proposals after reversal by the D.C. Circuit).

<sup>16</sup> *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No., 14-127, Report and Order, 31 FCC Rcd 526, 528, para. 4, Appx. B (2016).

<sup>17</sup> 47 CFR § 76.1700(a)(7).

5. In its comments to the Commission's Media Modernization proceeding, Verizon listed cable operator interests in video programming as one of several categories of information that should be eliminated from the online public inspection file.<sup>18</sup> Verizon stated that such information is of no use or interest to consumers and, further, that few people access the public inspection file, given that it does not provide the kind of information typically sought by consumers.<sup>19</sup> Verizon instead contended that the Commission can request this information, if needed, upon reasonable notice and time for production.<sup>20</sup> No commenter in the Media Modernization proceeding argued in favor of retaining the cable operator interests in video programming recordkeeping requirement specifically or described the utility of such information in particular.<sup>21</sup>

### III. DISCUSSION

6. We seek comment on whether to eliminate or modify the cable operator interests in video programming recordkeeping rule. Specifically, as discussed below, we seek comment on whether there is any remaining purpose for this rule, other potential sources for this information, the burdens this requirement places on cable operators, and possible modifications to the rule.

7. We note that the cable operator interests in video programming recordkeeping requirement was adopted in order to assist in the enforcement of the Commission's cable channel occupancy limits. Given that those limits were reversed and remanded by the D.C. Circuit over eighteen years ago, should this requirement be eliminated? If not, what purpose does this rule serve today that would justify its retention?

8. We seek comment on whether and how this information regarding cable operator interests in video programming is used today, if at all. Do local franchising authorities, consumers, or other parties currently inspect the cable operator interests in video programming records in the online public inspection file? Are these records being utilized by local franchising authorities, consumers, or other parties to keep track of vertical integration? If so, for what purpose? We note that, as the recordkeeping requirement does not apply to other video programming distributors, the information in these records would only be useful for monitoring vertical integration in cable operators. Given the many video programming options from which consumers can choose today, have marketplace changes rendered this requirement less useful or relevant?

9. UCC et al. assert generally that the online public inspection file database is used to research and analyze how the entities required to maintain such files are serving their communities and meeting their obligations under the Commission's rules.<sup>22</sup> If evidence of a particular use exists, commenters are encouraged to cite specific examples of how the information is being used currently, or has been used recently, by any party for any related purpose. We note that, in the over 26 years since the requirement was adopted, we are aware of only one instance in which the rule has been invoked.<sup>23</sup> Commenters should inform us as to the utility of the rule in today's competitive media marketplace.

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<sup>18</sup> Verizon Comments at 8.

<sup>19</sup> *Id.* See also Frontier Reply at 5; ITTA Reply at 5 (agreeing with Verizon's characterization of cable operator interests in video programming as a category of information that is of no use or interest to consumers).

<sup>20</sup> Verizon Comments at 8. See also NCTA Comments at 26 (stating that cable operators do not object to the need to provide certain information to the public but question the imposition of recordkeeping costs when much of the public information is already available on cable company websites).

<sup>21</sup> UCC et al. argue for maintaining the online public inspection file as a whole but do not refer specifically to the cable operator interests in video programming recordkeeping requirement. UCC et al. Reply at 1.

<sup>22</sup> UCC et al. Reply at 2.

<sup>23</sup> We are aware of only one complaint—which was subsequently withdrawn—alleging violation of the rule. See *Communications Workers of America v. AT&T Broadband LLC*, Order, 16 FCC Rcd 11012 (CSB 2001) (granting

(continued....)

10. If the Commission were to eliminate the cable operator interest in video programming recordkeeping rule, we seek comment on whether the Commission or interested parties could access such information through other methods that would be more efficient or less burdensome for cable operators than compiling such information and placing it in a public inspection file.<sup>24</sup> Would it be more cost effective for the Commission to undertake targeted information collections to acquire such information, if needed, as it does in the merger context?<sup>25</sup> We also seek comment on whether and to what extent such information is redundant with or superfluous to information the Commission otherwise collects.<sup>26</sup> Can such information be found readily online? Is there a publicly available database for such information? If so, are such alternative sources accurate and current? Are there costs associated with accessing these alternative sources? And are these sources adequate substitutes for information provided directly by cable operators themselves?

11. We also seek comment on the regulatory burden for cable operators to file this information, including the amount of time and resources required to complete each filing. Notably, there is no standard form filed by cable operators pursuant to this rule, and the rule does not state how frequently cable operators should file or update their information, instead stating only that they must maintain records regarding the nature and extent of their interests in their file for a period of three years.<sup>27</sup> How frequently are cable operators filing such information today? Is the information being provided and the filing frequency being adhered to consistent among different cable operators? Do the burdens and costs on cable operators outweigh the utility of the information? Do any burdens associated with this requirement place cable operators at a disadvantage vis-à-vis their video programming competitors?

12. If the Commission finds that the cable operator interests in video programming recordkeeping rule should be retained, we seek comment on whether modifications to the rule would be

(Continued from previous page) \_\_\_\_\_

the parties' joint request for withdrawal of the complaint). In one other instance, the Commission discovered an apparent violation of the rule but only took action based on other public inspection file violations. *See Time Warner Entertainment - Advance/Newhouse Subsidiary, LLC d/b/a Time Warner Cable 3701 N. Sillect Avenue Bakersfield, California 93308*, Forfeiture Order, 19 FCC Rcd 10412, 10413, para. 5 & n.10 (EB 2004) (stating that the public inspection file did not contain a statement of the operator's interest in video programming, in violation of Section 76.1710, but noting that the Notice of Apparent Liability for Forfeiture was based only on section 76.1700 violations).

<sup>24</sup> For example, in the past, the Commission has used information from various sources, such as cable company websites, published articles, and SNL Kagan, to identify affiliations between programming services and MVPDs for its Video Competition Reports. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 577-78, paras. 22-24, Appx. B, Tbl. B-1, Appx. C, Tbl. C-1, and Appx. D (MB 2017); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, 31 FCC Rcd 4472, 4480-81, paras. 21-22, Appx. B, Tbl. B-1, Appx. C, Tbl. C-1, and Appx. D (MB 2016).

<sup>25</sup> We note that the Commission has collected information on the percentage of video programming channels attributed to cable operator merger applicants via information requests in the past. *See* Letter from William T. Lake, Chief, Media Bureau, to Michael H. Hammer, James H. Casserly, Michael D. Hurwitz and Brien C. Bell, Willkie Farr & Gallagher LLP, Counsel for Comcast, Attach. at 5-6 (May 21, 2010) (on file in MB Docket No. 10-56); Letter from Donna C. Gregg, Chief, Media Bureau, FCC, to Brad Sonnenberg and James N. Zerefos, Adelphia Communications Corp., and Philip L. Verveer, Michael H. Hammer and Francis M. Buono, Willkie Farr & Gallagher LLP, Attach. at 3-6 (Dec. 5, 2005) (on file in MB Docket No. 05-192).

<sup>26</sup> For example, the Commission regularly seeks information regarding, and subsequently reports on, the state of vertical integration in the video programming marketplace as part of its report on competition, albeit at the MVPD industry level rather than focusing on individual cable operators. *See Communications Marketplace Report*, Report, 33 FCC Rcd 12558, 12603, para. 67 (2018); *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, 32 FCC Rcd 6654, 6662-63 (MB 2017).

<sup>27</sup> *See* 47 CFR § 76.1710(a).

appropriate. If we were to modify the rule, what changes should we make to reduce the burden on cable operators? For instance, should the Commission clarify how often cable operators need to update their information? Should the Commission retain part of rule that requires reporting of attributable interests but eliminate the part of the rule that requires reporting of carriage, given that channel lineup information is widely available elsewhere?<sup>28</sup>

13. Finally, we seek information and data on the benefits and costs associated with possible elimination or modification of the cable operator interests in video programming recordkeeping rule. We ask commenters supporting retention, modification, or elimination of the rule to explain the anticipated economic impact of any proposed action, including the impact on small and independent entities, and, where possible, to quantify benefits and costs of proposed actions and alternatives.

#### IV. PROCEDURAL MATTERS

14. *Ex Parte Rules - Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>29</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

15. *Filing Requirements - Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules interested parties may file comments and reply comments on or before the dates indicated on the first page of this document.<sup>30</sup> Comments may be filed using ECFS.<sup>31</sup>

- Commenting parties may file comments in response to this Notice in MB Docket No. 18-349; interested parties are not required to file duplicate copies in the additional dockets listed in the caption of this notice.
- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

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<sup>28</sup> See *Channel Lineup Requirements – Sections 76.1705 and 76.1700(a)(4)*, Report and Order, 34 FCC Rcd 2636 (2019) (eliminating rules requiring cable operators to maintain a channel lineup at their local office and make their channel lineups available via their online public inspection file when this information is publicly available elsewhere).

<sup>29</sup> 47 CFR §§ 1.1200 *et seq.*

<sup>30</sup> 47 CFR §§ 1.415, 1.419.

<sup>31</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, D.C. 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington, D.C. 20554.

16. *Initial Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>32</sup> 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.<sup>33</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>34</sup>

17. With respect to this Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in the Appendix. Written public comments are requested on the IRFA and must be filed in accordance with the same filing deadlines as comments on this Notice of Proposed Rulemaking, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this Notice of Proposed Rulemaking and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the Federal Register.

18. *Paperwork Reduction Act.* This document seeks comment on whether the Commission should adopt new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

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<sup>32</sup> 5 U.S.C. § 603.

<sup>33</sup> *Id.* § 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>34</sup> 15 U.S.C. § 632.



19. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

20. *Additional Information.* For additional information on this proceeding, please contact Chad Guo of the Media Bureau, Industry Analysis Division, [Chad.Guo@fcc.gov](mailto:Chad.Guo@fcc.gov), (202) 418-0652.

## V. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), 303(r), and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and 533, this Notice of Proposed Rulemaking **IS ADOPTED**.

22. **IT IS FURTHER ORDERED** that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking in MB Docket Nos. 20-35 and 17-105 on or before thirty (30) days after publication in the *Federal Register* and reply comments on or before forty five (45) days after publication in the *Federal Register*.

23. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A****Proposed Rule**

Part 76 of Title 47 of the U.S. Code of Federal Regulations is amended to read 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, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend Section 76.504 by removing Note 2.

3. Amend Section 76.1700 by removing and reserving paragraph (a)(7).

Section 76.1710 is removed and reserved.

## APPENDIX B

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Act Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this *Notice of Proposed Rulemaking* (NPRM). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. This NPRM seeks comment on whether to eliminate or modify the requirement that cable operators maintain records in their online public inspection file regarding the nature and extent of their attributable interests<sup>4</sup> in all video programming services as well as information regarding their carriage of such vertically integrated video programming<sup>5</sup> services on cable systems in which they have an attributable interest for a period of at least three years. The rule's original purpose was to aid in the enforcement of the Commission's channel occupancy limits, which have been reversed and remanded by the U.S. Court of Appeals for the D.C. Circuit. Eliminating or modifying this rule would reduce the burden of maintaining the public inspection file on cable operators.

**B. Legal Basis**

3. The proposed action is authorized under sections 1, 4(i), 4(j), 303(r), and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and 533.

**C. 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 rule revisions, if adopted.<sup>6</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>7</sup> In addition, the term "small business" has

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>2</sup> 5 U.S.C. § 603(a).

<sup>3</sup> *Id.*

<sup>4</sup> An attributable interest is an ownership interest in, or relationship to, an entity that gives the interest holder a certain degree of influence or control over the entity as defined in the Commission's rules. *See* 47 CFR § 76.501, Note 2.

<sup>5</sup> Vertically integrated video programming is video programming carried by a cable system and produced by an entity in which the cable system's operator has an attributable interest.

<sup>6</sup> 5 U.S.C. § 603(b)(3).

<sup>7</sup> 5 U.S.C. § 601(6); *see infra* note 8 (explaining the definition of "small business" under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, 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(5) (defining "small governmental jurisdiction" as "governments of cities,

(continued....)

the same meaning as the term “small business concern” under the Small Business Act (SBA).<sup>8</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 SBA.<sup>9</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Cable Companies and Systems (Rate Regulation Standard)*. The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.<sup>10</sup> Industry data indicate that, of 4,200 cable operators nationwide, all but 9 are small under this size standard.<sup>11</sup> In addition, under the Commission’s rate regulation rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>12</sup> Industry data indicate that, of 4,200 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records.<sup>13</sup> Thus, under this standard, we estimate that most cable systems are small entities.

6. *Cable System Operators (Telecom Act Standard)*. 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 one 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>14</sup> As of 2018, there were approximately 50,504,624 cable video subscribers in the United States.<sup>15</sup> Accordingly, an operator serving fewer than 505,046 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.<sup>16</sup> Based on available data, we find that all but six incumbent cable

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counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register”).

<sup>8</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), 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.” *Id.*

<sup>9</sup> 15 U.S.C. § 632(a)(1)-(2)(A).

<sup>10</sup> 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, para. 28 (1995).

<sup>11</sup> The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on January 2, 2020. *See* FCC, Cable Operations and Licensing Systems (COALS), [www.fcc.gov/coals](http://www.fcc.gov/coals) (last visited Jan. 2, 2020).

<sup>12</sup> 47 CFR § 76.901(c).

<sup>13</sup> *See infra* note 17.

<sup>14</sup> 47 U.S.C. § 543(m)(2); *see* 47 CFR § 76.901(f) & nn.1–3.

<sup>15</sup> S&P Global Market Intelligence, *U.S. Cable Subscriber Highlights, Basic Subscribers(actual) 2018, U.S. Cable MSO Industry Total*, <https://platform.marketintelligence.spglobal.com/>.

<sup>16</sup> 47 CFR § 76.901(f) and notes ff. 1, 2, and 3.

operators are small entities under this size standard.<sup>17</sup> 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.<sup>18</sup> Therefore 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. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis.... These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”<sup>19</sup> The SBA size standard for this industry establishes as small, any company in this category which has annual receipts of \$38.5 million or less.<sup>20</sup> Census data for 2012 show that there were 367 firms that operated for that entire year. Of that number, 319 operated with annual receipts of less than \$25 million a year.<sup>21</sup> Thus, under this size standard, the majority of such businesses can be considered small entities.

8. *Motion Picture and Video Production.* These entities may be indirectly affected by our action. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”<sup>22</sup> We note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: those having \$32.5 million or less in annual receipts.<sup>23</sup> Census data for 2012 show that there were 8,203 firms that that operated that year.<sup>24</sup> Of that number, 8,075 had annual receipts of \$24,999,999 or less.<sup>25</sup> Thus, under this size standard, the majority of such businesses can be considered small entities.

9. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and

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<sup>17</sup> S&P Global Market Intelligence, *Top Cable MSOs as of 12/2018*, <https://platform.marketintelligence.spglobal.com/>. The six cable operators all had more than 505,046 basic cable subscribers.

<sup>18</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 CFR § 76.909(b).

<sup>19</sup> U.S. Census Bureau, 2012 NAICS Definitions, “515210 Cable and Other Subscription Programming,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>20</sup> 13 CFR § 121.201; 2012 NAICS code 515210.

<sup>21</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Tbl. EC1251SSSZ4, Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 515210, [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4//naics~515210](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515210). Available census data does not provide a more precise estimate of the number of firms that have receipts of \$38.5 million or less.

<sup>22</sup> U.S. Census Bureau, 2012 NAICS Definitions, “512110 Motion Picture and Video Production,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>23</sup> 13 CFR § 121.201; 2012 NAICS code 512110.

<sup>24</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Tbl. EC1251SSSZ4, Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 512110, [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4//naics~512110](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~512110).

<sup>25</sup> See *id.*

exhibitors.”<sup>26</sup> We note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: those having \$32.0 million or less in annual receipts.<sup>27</sup> Census data for 2012 show that there were 307 firms that operated for that entire year.<sup>28</sup> Of that number, 294 had annual receipts of \$24,999,999 or less.<sup>29</sup> Thus, under this size standard, the majority of such businesses can be considered small entities.

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

10. The NPRM seeks comment on whether to eliminate or revise the recordkeeping requirement, in section 76.1710 of the Commission’s rules, regarding cable operator interests in video programming. This rule requires cable operators maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services, as well as information regarding cable operators’ carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest. Elimination of these rules would reduce compliance requirements for cable operators. The NPRM also seeks comment on whether, if the rule is retained, it should be revised and, if so, how.

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

11. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed 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 or reporting requirements under the rule for 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 small entities.<sup>30</sup>

12. The NPRM seeks comment on whether to eliminate or modify a current requirement that cable operators maintain records in their online public inspection file, specifically the cable operator interests in video programming recordkeeping requirement. Eliminating or modifying this obligation would reduce the overall public inspection file burden on cable operators. There could also be an impact on small independent video programmers to the extent any programmers relied on the public file in question for information that is not easily available elsewhere. The NPRM seeks comment on eliminating or modifying this public file requirement, including any comments that might oppose eliminating or modifying this requirement.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

13. None.

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<sup>26</sup> U.S. Census Bureau, 2012 NAICS Definitions, “512120 Motion Picture and Video Distribution,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>27</sup> 13 CFR § 121.201; 2012 NAICS code 512120.

<sup>28</sup> See U.S. Census Bureau, 2012 *Economic Census of the United States*, Tbl. EC1251SSSZ4, Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 512120, [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4//naics~512120](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~512120).

<sup>29</sup> See *id.*

<sup>30</sup> See 5 U.S.C. § 603(c).