

**FCC FACT SHEET\*****Modernization of Media Regulation Initiative: Significantly Viewed Stations**

Notice of Proposed Rulemaking – MB Docket Nos. 17-105 and 20-73

**Background:** Local television broadcast stations typically hold exclusive rights to distribute network or syndicated programming within their local markets. The Commission’s network nonduplication and syndicated exclusivity rules protect these exclusive rights by generally precluding cable operators and satellite carriers from carrying a duplicating network or syndicated program broadcast by an out-of-market station. Cable operators and satellite carriers are required to delete duplicative network or syndicated programming carried on any out-of-market signals they import into a local market where exclusivity provisions exist in the contractual agreements between broadcasters and networks or syndicators. However, under the significantly viewed exception to the exclusivity rules, cable operators and satellite carriers are not required to delete the duplicating network or syndicated programming of an otherwise distant station that is determined to be significantly viewed in the relevant community. The significantly viewed exception is based on a demonstration, made using over-the-air viewership surveys conducted by Nielsen Company (Nielsen), that an otherwise distant station receives a “significant” level of over-the-air viewership in a particular community and therefore should be considered “local” with respect to that community.

The existing process for determining whether a television broadcast station is significantly viewed in a community outside of its local market was adopted nearly 50 years ago. Given audience measurement changes since that time, the *Notice of Proposed Rulemaking (Notice)* examines whether this process has become outdated or overly burdensome, particularly for smaller entities.

**What the Notice Would Do:**

- Seek comment on whether to update the methodology for determining a station’s significantly viewed status set forth in section 76.54(b) of the Commission’s rules and relevant case law.
- In light of changes in audience measurement practices, seek comment on the extent to which Nielsen, or another organization or entity, is able to provide the community-specific or system-specific over-the-air viewership data needed to demonstrate a station’s significantly viewed status today, particularly in smaller markets.
- Seek comment on what, if any, modifications or updates should be made to the current methodology for establishing whether a station is significantly viewed in a community outside of its local market.
- Seek comment on whether to update the definitions of the terms “full network station,” “partial network station,” and “independent station” in section 76.5 of the Commission’s rules to reflect marketplace changes.
- Seek comment on whether the Commission has the statutory authority to modify the significantly viewed rules with respect to satellite carriers in light of section 122(a)(2)(A) of the Copyright Act, which limits application of the statutory copyright license for satellite carriers to stations that are determined by the Commission to be significantly viewed pursuant to FCC rules in effect on April 15, 1976.
- Propose to interpret section 340 of the Communications Act as allowing the Commission to amend the methodology for determining a station’s significantly viewed status and the network definitions in section 76.5 of the Commission’s rules, provided that satellite carriers and cable operators are subject to the same rules.

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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-XX, 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 )
Significantly Viewed Stations ) MB Docket No. 20-73
Modernization of Media Regulation Initiative ) MB Docket No. 17-105

NOTICE OF PROPOSED RULEMAKING\*

Adopted: []

Released: []

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking, we seek comment on modernizing our methodology for determining whether a television broadcast station is "significantly viewed" in a community outside of its local television market and thus may be treated as a local station in that community, permitted under the Commission's rules to be carried by cable systems and satellite operators. The existing process for determining a station's significantly viewed status was adopted nearly fifty years ago, and marketplace changes during this period lead us to examine whether this process has become outdated or overly burdensome, particularly for smaller entities. Our actions are taken in furtherance of the Commission's efforts in its Modernization of Media Regulation Initiative proceeding to update our media regulations.

\* This document has been circulated for tentative consideration by the Commission at its March 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 47 CFR § 76.54(b). We note that in a 2014 Further Notice of Proposed Rulemaking seeking comment on whether to modify or eliminate the network nonduplication and syndicated exclusivity rules, the Commission sought comment on whether any modifications should be made to the process for obtaining or challenging significantly viewed status. Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3395, para. 72 (2014). No commenters in that proceeding addressed the issue. We address this issue in the instant proceeding.

2 Commission Launches Modernization of Media Regulation Initiative, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (2017) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary, or unduly burdensome).

## II. BACKGROUND

2. Local television broadcast stations typically hold exclusive rights to distribute network or syndicated programming within their local markets.<sup>3</sup> Generally, a television station's "local market" is defined by the Designated Market Area (DMA) in which it is located, as determined by the Nielsen Company (Nielsen).<sup>4</sup> The Commission's network nonduplication and syndicated exclusivity rules protect these exclusive rights by generally precluding cable operators and satellite carriers from carrying a duplicating network or syndicated program broadcast by a distant station.<sup>5</sup> Cable operators and satellite carriers are required to delete duplicative network or syndicated programming carried on any out-of-market signals that they import into a local market where exclusivity provisions exist in the relevant contractual agreements between broadcasters and networks or syndicators.<sup>6</sup> But under the significantly viewed exception to the network nonduplication and syndicated exclusivity rules, cable operators and satellite carriers are not required to delete the duplicating network or syndicated programming where the signal of the otherwise distant station is determined to be significantly viewed in the relevant community.<sup>7</sup> The significantly viewed exception is based on a demonstration, made using over-the-air viewership surveys, that an otherwise distant station receives a "significant" level of over-the-air viewership in a particular cable or satellite community<sup>8</sup> and therefore should be considered "local" with respect to that community.<sup>9</sup> The Commission originally adopted the significantly viewed exception to balance concerns about the economic impact to local stations resulting from cable system importation of competing distant stations with concerns that a station be available in full on cable systems in communities where the station is available over the air.<sup>10</sup>

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<sup>3</sup> A network program is "any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial." 47 CFR § 76.5(m). A syndicated program is "any program sold, licensed, distributed, or offered to television station licensees in more than one market within the United States other than as network programming as defined in § 76.5(m)." *Id.* § 76.5(ii).

<sup>4</sup> 47 CFR § 76.55(e)(2); *see also* 17 U.S.C. § 122(j)(2)(A).

<sup>5</sup> 47 CFR §§ 76.92 and 76.101 (cable network nonduplication and syndicated exclusivity rules), 76.122 and 76.123 (satellite network nonduplication and syndicated exclusivity rules). A "distant" station is a station not assigned to the local station's DMA (i.e., an "out-of-market" station). *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3376 n.143 (2014) (*2014 Retransmission Consent Order*).

<sup>6</sup> *2014 Retransmission Consent Order*, 29 FCC Rcd at 3376, para. 41.

<sup>7</sup> 47 CFR §§ 76.92(f) and 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity rules), 76.122(j) and 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity rules). Cable operators and satellite carriers are not required to carry significantly viewed stations, but if they do, retransmission consent is required. 47 U.S.C. §§ 325(b)(1), 340(d)(2).

<sup>8</sup> *See* 47 CFR §§ 76.5(dd) (defining cable "community unit") and 76.5(gg) (defining a "satellite community").

<sup>9</sup> *Id.* § 76.54. In general, significantly viewed status applies to only some communities or counties in a DMA and does not apply throughout an entire DMA. In contrast, the "local" station designation based on Nielsen's assignment to a particular DMA applies to the entire market. *Implementation of the Satellite Television and Extension and Localism Act of 2010 (STELA)*, MB Docket No. 10-148, Report and Order and Order on Reconsideration, 25 FCC Rcd 16383, 16385, para. 2 (2010) (*STELA Significantly Viewed Report and Order*). Stations designated as significantly viewed are also treated as "local" for copyright purposes and therefore subject to reduced copyright fees. *See* 17 U.S.C. §§ 111(a), (c), and (f), 122(a)(2).

<sup>10</sup> *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems*, Docket No. 19995, Memorandum Opinion and Order, 67 FCC 2d 1303, 1305, para. 8 (1978) (*1978 Network Exclusivity Order*) (*sub. history omitted*).

3. Although cable operators have had carriage rights for significantly viewed stations under the Commission's rules since 1972,<sup>11</sup> satellite carriers did not obtain carriage rights for significantly viewed stations until 2004. The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) changed the Communications Act of 1934, as amended (Act), to "increas[e] regulatory parity by extending to satellite operators the same type of authority cable operators already have to carry 'significantly viewed' signals into a market."<sup>12</sup> SHVERA added new section 340 of the Act, which authorized satellite carriage of significantly viewed stations subject to certain subscriber eligibility restrictions.<sup>13</sup> The Satellite Television Extension and Localism Act of 2010 (STELA) amended section 340 to modify the subscriber eligibility restrictions.<sup>14</sup> SHVERA also amended the Copyright Act to establish a compulsory copyright license for satellite carriage of significantly viewed signals to subscribers.<sup>15</sup>

4. In 1972, the Commission established a list of significantly viewed stations based on viewership surveys for the periods May 1970, November 1970, and February/March 1971.<sup>16</sup> The Commission's rules define a network station as significantly viewed if over-the-air viewership surveys

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<sup>11</sup> *Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Docket No. 18397, Cable Television Report and Order, 36 FCC 2d 143, 174, para. 83 (1972) (*Cable Television Report and Order*) (adopting the concept of "significantly viewed" signals to differentiate between otherwise out-of-market television stations "that have sufficient audience to be considered local and those that do not").

<sup>12</sup> SHVERA, Pub. L. No. 108-447, 118 Stat. 2809, 3393 (2004) (codified in scattered sections of 17 and 47 U.S.C.); H.R. Rep. No. 108-634, at 2 (2004).

<sup>13</sup> SHVERA § 202; *see also Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278 (2005) (*SHVERA Significantly Viewed Report and Order*) (adopting rules implementing the significantly viewed provisions of section 340).

<sup>14</sup> STELA § 203, Pub. L. No. 111-175 (2010); *see also STELA Significantly Viewed Report and Order*, 25 FCC Rcd 16383 (adopting rules implementing the significantly viewed provisions of STELA). The satellite subscriber eligibility restrictions are intended to prevent satellite carriers from favoring a significantly viewed network station over the in-market (local) station affiliated with the same network. *STELA Significantly Viewed Report and Order*, 25 FCC Rcd at 16386, para. 2; *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17314, para. 94. Under the subscriber eligibility restrictions, a satellite subscriber must receive local-into-local service as a precondition to receiving significantly viewed network stations. 47 U.S.C. § 340(b)(1); 47 CFR § 76.54(g)(1). Moreover, in order to carry a significantly viewed network station in high definition (HD) format, a satellite carrier must carry the local station affiliated with the same network in HD whenever such format is available from the local station. 47 U.S.C. § 340(b)(2); 47 CFR § 76.54(g)(2). STELA also moved the statutory copyright license for significantly viewed signals from 17 U.S.C. § 119(a)(3) to 17 U.S.C. § 122(a)(2), thus defining significantly viewed signals as another type of local signal, rather than as an exception to distant signals. STELA § 103.

<sup>15</sup> SHVERA § 102. Section 102 of SHVERA extended the statutory copyright license contained in 17 U.S.C. § 119(a) to "apply to the secondary transmission of the primary transmission of a network station or a superstation to a subscriber who resides outside the station's local market ... but within a community in which the signal has been determined by the Federal Communications Commission, to be significantly viewed in such community, pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community." *Id.* SHVERA distinguished between out-of-market stations that had significant over-the-air viewership in another market (*i.e.*, significantly viewed stations) and truly "distant" stations, allowing satellite carriers to treat a signal as "local" in a community where such signal is "significantly viewed." *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17284, para. 8.

<sup>16</sup> *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Docket No. 18397, Memorandum Opinion and Order on Reconsideration, 36 FCC 2d 326, 378, Appx. B (1972). *See* 47 CFR § 76.54(a).

demonstrate that the station exceeds a three percent share of viewing hours and a net weekly circulation of 25 percent, by at least one standard error.<sup>17</sup> An independent station is defined as significantly viewed if over-the-air viewership surveys demonstrate that the station exceeds a two percent share of viewing hours and a net weekly circulation of five percent, by at least one standard error.<sup>18</sup> A television station, or a cable operator or satellite carrier that seeks to carry the station, may petition the Commission to obtain “significantly viewed” status for the station in a particular community or communities and placement on the Significantly Viewed List.<sup>19</sup> Under section 76.54(d) of the Commission’s rules, signals of television stations not encompassed by the 1970-1971 surveys (i.e., not on-the-air at the time the surveys were taken) may be demonstrated as significantly viewed on a county-wide basis by independent professional audience surveys which cover three separate, consecutive four-week periods during the first three years of the subject station’s operation and are otherwise comparable to the surveys used in compiling the 1972 list.<sup>20</sup> Alternatively, section 76.54(b) of the Commission’s rules provides that significant viewing in a cable or satellite community:

may be demonstrated by an independent professional audience survey of over-the-air television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level. If a cable television system serves more than one community, a single survey may be taken, provided that the sample includes over-the-air television homes from each community that are proportional to the population. A satellite carrier may demonstrate significant viewing in more than one community or satellite community through a single survey, provided that the sample includes over-the-air television homes from each community that are proportional to the population.<sup>21</sup>

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<sup>17</sup> 47 CFR § 76.5(i). For purposes of the “significantly viewed” definition, “share of viewing hours” means the total hours that over-the-air television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period. “Net weekly circulation” means the number of over-the-air television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total over-the-air television households in the survey area. *Id.* Note to § 76.5(i). A “standard error” is a statistical measure used to assess, at a specified probability, that the sample estimate reflects the actual result had the entire universe been surveyed. Using one standard error, we can be approximately 70 percent certain that the actual audience statistic is the reported statistic plus or minus one standard error. The calculation of the standard error takes into account the sampling procedure, the sample size, and the sample result. *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Notice of Proposed Rulemaking, 20 FCC Rcd 2983, 2993 n.53 (2005).

<sup>18</sup> 47 CFR § 76.5(i). To determine whether to use the network or non-network standard for audience share, the Commission relies on the definitions of network and independent stations in the rules. Affiliates of the ABC, CBS, and NBC networks are treated as “network stations.” *See id.* § 76.5(j) and (k). Other stations are treated as “independent stations” for this limited purpose. *See id.* § 76.5(l).

<sup>19</sup> A television station, cable operator, or satellite carrier that seeks to have a station designated significantly viewed must file a petition in accordance with the pleading requirements in section 76.7(a) of the Commission’s rules, 47 CFR § 76.7(a).

<sup>20</sup> *Id.* § 76.54(d).

<sup>21</sup> *Id.* § 76.54(b). Under section 76.54(c), the party sponsoring a survey conducted pursuant to section 76.54(b) must serve notice of the survey at least 30 days prior to the survey period “on all licensees or permittees of television broadcast stations within whose predicted noise limited service contour, as defined in § 73.622(e) of this chapter, the cable or satellite community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities.” Such notice must include the

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The Commission maintains an updated list of significantly viewed stations on its website.<sup>22</sup>

5. A station may also lose its significantly viewed status if another station petitions for a waiver of the significantly viewed exception to reinstate its exclusivity rights vis-à-vis the significantly viewed station.<sup>23</sup> In *KCST-TV*, the Commission held that in order to obtain such a waiver, a petitioner would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in section 76.54(b).<sup>24</sup> The burden of proof is on the petitioner to show that the station is no longer significantly viewed.<sup>25</sup>

6. Following the Commission's decision in *KCST-TV*, the methodology required by section 76.54(b) of the rules for an entity seeking a change in a station's significantly viewed status or a petitioner seeking a waiver of the significantly viewed exception evolved through case law.<sup>26</sup> Over time, Nielsen became the primary organization through which entities seeking changes to the Significantly Viewed List could obtain television viewership surveys.<sup>27</sup> Until recently, Nielsen, which surveys television markets to

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name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures must be served on the sponsoring party within 20 days after receipt of the notice. *Id.* § 76.54(c).

<sup>22</sup> See Significantly Viewed List (last modified Mar. 8, 2019), <https://www.fcc.gov/files/significantlyviewedstations030819pdf>. The stations on the Significantly Viewed List are listed by state and subdivided by the county in which they are significantly viewed. Stations added on a community-by-community basis after 1972 are listed at the end of each state next to the community in which they obtained significantly viewed status. Stations with a plus sign (+) under individual counties are those stations added to the list after the publication of the Commission's original 1972 list. Stations listed with a pound sign (#) have been the subject of application of the Commission's exclusivity rules and are subject to programming deletions in the indicated communities. *Id.* It should be noted that such stations are not removed from the Significantly Viewed List and may continue to be carried, provided that the necessary network or syndicated programming deletions are made. *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17296, para. 41.

<sup>23</sup> *KCST-TV Inc.*, Memorandum Opinion and Order, 103 FCC 2d 407, 413, para. 11 (1986) (*KCST-TV*).

<sup>24</sup> *Id.* at 412, para. 10.

<sup>25</sup> *Desert Empire Corp.*, Memorandum Opinion and Order, 86 FCC 2d 644, 649, para. 11 (1981) ("In adopting [the significantly viewed exception], the Commission held that the burden of proof now has shifted to the broadcast licensee seeking nonduplication protection against a significantly viewed signal."); *1978 Network Exclusivity Order*, 67 FCC 2d at 1305, para. 10 ("Where a signal is significantly viewed, we shall give it full local status for purposes of cable carriage. Naturally, an aggrieved station can obtain protection via our special relief procedures. As such, the burden now has shifted to the broadcast licensee seeking nonduplication protection against a significantly viewed signal.").

<sup>26</sup> See, e.g., *WHP Licensee, LLC*, MB Docket No. 15-232, Memorandum Opinion and Order, 33 FCC Rcd 3467, 3468-69, para. 4 (MB 2018) (*WHP Licensee*); *Chesapeake Television Licensee, LLC*, MB Docket No. 13-181, Memorandum Opinion and Order, 30 FCC Rcd 6455, 6456, para. 4 (MB 2015) (*Chesapeake*); *Gulf-California Broadcast Company*, Memorandum Opinion and Order, 26 FCC Rcd 15027, 150278, para. 4 (MB 2011) (*Gulf-California Broadcast*).

<sup>27</sup> *WHP Licensee*, 33 FCC Rcd at 3468, para. 4; *Chesapeake*, 30 FCC Rcd at 6456, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4. Entities seeking changes to the Significantly Viewed List on occasion have used sources other than Nielsen for television viewership surveys. See, e.g., *Silverton Broadcasting Co., LLC*, MB Docket No. 15-46, Memorandum Opinion and Order, 30 FCC Rcd 6448, 6449, para. 3 (MB 2015) (licensee of station KTWO-TV, Casper, Wyoming, sought a ruling that the station is significantly viewed in the Wyoming communities of Rock Springs and Gillette based on an over-the-air audience survey conducted by Eastlan Ratings, LLC); *Mark III Media Inc.*, MB Docket No. 15-45, Memorandum Opinion and Order, 30 FCC Rcd 6426, 6427, para. 3 (MB 2015) (licensee of KGWC-TV, Casper, Wyoming, sought a ruling that the station is significantly viewed in the Wyoming communities of Rock Springs and Gillette based on an over-the-air audience survey conducted by Eastlan Ratings, LLC).

obtain television stations' viewership, conducted four-week audience surveys four times a year (i.e., during February, May, July, and November "sweep periods").<sup>28</sup> In light of these quarterly surveys, the Media Bureau found that replacing each week required under section 76.54(b) with a sweep period is acceptable and added to the accuracy of the audience statistics because of the increased sample size.<sup>29</sup> Thus, an entity seeking to change a station's significantly viewed status was permitted to submit the results from two sweep periods in each year and purchase survey data from Nielsen on either a community-specific or system-specific basis.<sup>30</sup> In order to produce the required data, Nielsen re-tabulated the over-the-air data that it collected for its routine audience sweep periods, using in-tab diaries<sup>31</sup> from its database for the area served by a cable system or an individual cable community.<sup>32</sup> Notably, there have been recent cases where an entity seeking to make changes to the Significantly Viewed List could not make the showing required under section 76.54(b) and relevant case law for certain communities because Nielsen was unable to provide the requisite over-the-air viewership data for those communities.<sup>33</sup>

7. In 2019, Nielsen completed a multi-year overhaul of the way it measures television viewing in its 210 DMAs, replacing the paper diaries that Nielsen families used to record what they watched on television in the smallest 140 DMAs entirely with electronic measurement.<sup>34</sup> Nielsen now uses a combination of people meters, set meters, code readers, and return path data (RPD) from cable and satellite set-top boxes to measure television viewing.<sup>35</sup> Nielsen then applies statistical modeling,

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<sup>28</sup> *WHP Licensee*, 33 FCC Rcd at 3468, para. 4; *Chesapeake*, 30 FCC Rcd at 6456, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4; see also *infra* note 34 and accompanying text.

<sup>29</sup> *WHP Licensee*, 33 FCC Rcd at 3468, para. 4; *Chesapeake*, 30 FCC Rcd at 6456-57, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4.

<sup>30</sup> *Id.*

<sup>31</sup> In-tab diaries are the number of diaries included in the tabulation of audience shares. Of the returned diaries, some are discarded after editing as being unusable. Thus, it is the number of in-tab diaries in the sample used to calculate the audience statistics. *Meredith Corp.*, Memorandum Opinion and Order, 25 FCC Rcd 12932, 12935 n.22 (MB 2007).

<sup>32</sup> *WHP Licensee*, 33 FCC Rcd at 3468-69, para. 4; *Chesapeake*, 30 FCC Rcd at 6456-57, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4.

<sup>33</sup> See, e.g., *United Communications Corp.*, MB Docket No. 17-224, Memorandum Opinion and Order, 33 FCC Rcd 8048, 8052-53, paras. 12-13 (MB 2018) (*United*) (denying a petition for waiver of the significantly viewed exception to the exclusivity rules for certain communities where Nielsen did not regularly receive over-the-air viewership diaries in consecutive years for those communities); *Chesapeake*, 30 FCC Rcd at 6462, para. 15 (denying a petition for waiver of the significantly viewed exception to the exclusivity rules where the Nielsen data provided by the petitioner was out of date and Nielsen did not have more recent data for the relevant communities).

<sup>34</sup> *Nielsen Completes Overhaul of Local TV Business, Achieves Milestone in Multiyear Effort to Transform Measurement in 208 Markets Across the U.S.*, Press Release, Oct. 3, 2019, <https://www.nielsen.com/us/en/press-releases/2019/nielsen-completes-overhaul-of-local-tv-business-achieves-milestone-in-multiyear-effort-to-transform-measurement-in-208-markets-across-the-us/>; *Nielsen to Deliver All-Electronic Measurement in Local TV Markets in 2017 and Retire Paper TV Diaries in 140 Local Markets*, Press Release, Sept. 14, 2016, <https://www.nielsen.com/us/en/press-releases/2016/nielsen-to-deliver-all-electronic-measurement-to-local-tv-market-retire-tv-paper-diaries/>.

<sup>35</sup> People meters, set meters, and code readers are different types of meters that connect to or sit near a television and measure all video content playing on the screen. In people meter homes, Nielsen knows which individual member of the household is watching because each member uses a remote to log in via the people meter each time he or she watches television. In homes using set meters and code readers, Nielsen applies a statistical model to identify which members of the household are watching TV. Through partnerships with several major cable and satellite providers, Nielsen also collects non-personally identifiable RPD from set-top box homes and applies a statistical model to determine who is viewing in those homes. See <http://ratingsacademy.nielsen.com/>. In DMAs where it uses RPD from set-top boxes, Nielsen also uses code readers to capture over-the-air viewership data that is missed by set-top boxes. See Wayne Freidman, *Nielsen Completes Local TV Ratings Reboot*, TelevisionNewsDaily, Oct. 3 2019,

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weighting, and other data science techniques to the representative samples obtained through its electronic measurement to calculate over-the-air viewership data for a larger population.<sup>36</sup> Additionally, instead of measuring local television viewership only four times a year during sweep months, Nielsen now provides electronic measurements every month of the year.<sup>37</sup>

### III. DISCUSSION

8. As we explain above, there have been recent instances where petitioners seeking to change a station's significantly viewed status for certain communities were unable to rely upon Nielsen to provide the over-the-air viewership data required under our rules and applicable case law. In addition, given Nielsen's changes to its process for measuring television viewing in its DMAs, it is unclear whether the shift to electronic measurement will sufficiently capture over-the-air viewing and enable Nielsen to provide would-be petitioners the requisite over-the-air viewership information for certain communities. Thus, we seek comment on the need for modifications or updates to the existing methodology for determining whether a station is significantly viewed in a community outside of its local television market. Specifically, we seek comment on whether the methodology for determining a station's significantly viewed status set forth in section 76.54(b) of the Commission's rules and relevant case law has become outdated or overly burdensome. What are the costs and other burdens associated with making the showing currently required to establish a station's significantly viewed status? To what extent do such costs and burdens discourage or deter entities, particularly entities in smaller markets, from seeking changes to the Significantly Viewed List? To the extent that our current methodology as set forth in the rules and developed through case law discourages entities from seeking changes to the Significantly Viewed List, what impact does this have on the affected stations and on viewers in the relevant communities?

9. As discussed above, Nielsen has been the primary organization through which entities seeking to establish a station's significantly viewed status or a waiver of the significantly viewed exception may obtain television viewership surveys. We seek comment on whether the over-the-air viewership data gathered by Nielsen today through electronic measurement techniques satisfies the requirement in section 76.54(b) of our rules for an "audience survey of over-the-air television homes." Why or why not? We also seek specific comment on the extent to which Nielsen is able to provide the community-specific or system-specific over-the-air viewership data needed to demonstrate a station's significantly viewed status, particularly in smaller markets. Has the number of communities for which Nielsen is able to provide the required data changed substantially since it replaced its paper diaries entirely with electronic measurement? If Nielsen does not collect this community-specific or system-specific over-the-air viewership data, are there other sources from which broadcasters can obtain it? We request comment on whether there are a significant number of communities today for which Nielsen or other companies are unable to provide the over-the-air viewership data required under our rules. To the extent there are no commercially available sources for this information, does the expense to a station or other entity of commissioning over-the-air viewership surveys in a community or communities for which there is no data available deter such entities from seeking changes to the Significantly Viewed List?<sup>38</sup> What are the expenses associated with commissioning such surveys? Would the costs exceed the benefits?

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<https://www.mediapost.com/publications/article/341539/nielsen-completes-local-tv-ratings-reboot.html>; Michael Steinberg, *The ABCs of RPD (Return Path Data)*, Katz Media Group, Apr. 24, 2019, <https://blog.katzmedia.com/on-measurement/the-abc-of-rpd-return-path-data>;

<sup>36</sup> See <https://www.nielsen.com/us/en/about-us/panels/>; <https://www.nielsen.com/us/en/about-us/panels/ratings-and-families/>.

<sup>37</sup> See <https://www.tvb.org/Public/PlanningBuying/BroadcastCalendarNielsenSurveyDates.aspx>.

<sup>38</sup> As noted above, entities seeking changes to the Significantly Viewed List on occasion have used sources other than Nielsen for television viewership surveys. See *supra* note 27.



10. In addition, we seek comment on what, if any, specific modifications or updates should be made to the current methodology for establishing whether a station is significantly viewed in a community outside of its local market. For example, is it necessary to modify the current rule to reflect the fact that Nielsen now measures over-the-air viewership data electronically? If Nielsen or other companies are unable to provide the community-specific or system-specific over-the-air viewership data required under our rules for certain communities, how should we modify our rules to take account of this? Are there other modifications that can be made to make the current process less costly or burdensome to entities seeking to make changes to a station's significantly viewed status? How should we address the challenges of relying on the requirements for sample size, given the diminished fraction of over-the-air viewers since 1972? Commenters who propose specific modifications should discuss the costs and benefits of their proposals, including the impact of the proposal on affected stations, especially small market stations, and viewers.

11. Moreover, we seek comment on whether there are alternative methodologies for demonstrating a station's significantly viewed status outside of its local market. For example, it has been suggested that a petitioner should be permitted to establish a station's significantly viewed status in a particular community by making a technical showing, such as by using a Longley-Rice analysis,<sup>39</sup> demonstrating that the station's signal reaches or does not reach a certain percentage of the population in that community. If so, what showing should be required and what percentage of the community's population should the station's signal be required to reach in order to be considered significantly viewed? We note that such a showing would reflect potential rather than actual viewing in the community at issue. We seek comment on whether it is reasonable to infer that if a station's signal reaches a certain percentage of the population in a community that the station is significantly viewed in the community. Why or why not? We further note that section 340(a)(2) of the Act, which applies to satellite carriers, requires the use of "standards and procedures concerning *shares of viewing hours and audience surveys*."<sup>40</sup> We seek comment on whether a methodology that allowed a petitioner to establish a station's significantly viewed status in a particular community based on a technical showing of coverage area, rather than viewership data, would comply with the requirements of section 340(a)(2). We seek comment on the costs and benefits of any proposed alternative methodologies, including the impact of the proposal on affected stations, especially small market stations, and viewers.

12. Further, we seek comment on whether and to what extent the Commission has the statutory authority to modify the significantly viewed rules with respect to satellite carriers. Section 122(a)(2)(A) of the Copyright Act provides that the statutory copyright license for satellite carriers applies to stations that are "determined by the Federal Communications Commission to be significantly viewed in such community, pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community."<sup>41</sup> The Commission previously has interpreted this statutory provision as precluding it from making substantive modifications to the

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<sup>39</sup> See OET Bulletin No. 69, *Longley-Rice Methodology for Evaluating TV Coverage and Interference*, <https://transition.fcc.gov/bureaus/oet/info/documents/bulletins/oet69/oet69.pdf>.

<sup>40</sup> 47 U.S.C. § 340(a)(2) (emphasis added).

<sup>41</sup> 17 U.S.C. § 122(a)(2)(A). We note that the definition of "local service area of a primary transmitter" contained in section 111 of the Copyright Act also refers to the "rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976." See 17 U.S.C. § 111(f)(4); see also H.R. Rep. 94-1476, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5714 (explaining that local service is determined by reference to "FCC rules in effect on April 15, 1976. The purpose of this limitation is to insure that any subsequent rule amendments by the FCC that either increase or decrease the size of the local service area for its purposes do not change the definition for copyright purposes. The Committee believes that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute.").

section 76.54 process for making significantly viewed determinations.<sup>42</sup> We seek comment on whether there is any basis for revisiting this interpretation.

13. In particular, we note that section 340 of the Act authorizes satellite carriers to retransmit the signal of an out-of-market station to a subscriber where such signal “is, after December 8, 2004, determined by the Commission to be significantly viewed in such community in accordance with the same standards and procedures concerning shares of viewing hours and audience surveys as are applicable under the rules, regulations, and authorizations of the Commission to determining with respect to a cable system whether signals are significantly viewed in a community.”<sup>43</sup> Unlike section 122(a)(2)(A) of the Copyright Act, there is no requirement in section 340 that the Commission apply rules that were in effect on a certain date in determining whether a station is significantly viewed. Section 122(a)(2)(A) of the Copyright Act and section 340 of the Act serve two distinct purposes. Section 122(a)(2)(A) of the Copyright Act establishes the test for when satellite carriage of a significantly viewed station qualifies for the statutory copyright license: a station must be determined by the Commission to be significantly viewed in such community pursuant to the rules in effect on April 15, 1976.<sup>44</sup> In contrast, section 340 of the Act establishes that a satellite carrier may carry a significantly viewed signal as defined by the Commission,<sup>45</sup> and that the network nonduplication and syndicated exclusivity rules do not apply to a significantly viewed signal (unless a station successfully petitions to have a significantly viewed station removed from the Significantly Viewed List).<sup>46</sup> Accordingly, since section 340 does not require that the Commission apply rules that were in effect on a certain date in determining whether a station is significantly viewed, we propose to interpret section 340 as allowing the Commission to amend its significantly viewed rules, provided that satellite carriers and cable operators are subject to the same rules.<sup>47</sup> We seek comment on this proposed reading of section 340.<sup>48</sup>

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<sup>42</sup> See *STELA Significantly Viewed Report and Order*, 25 FCC Rcd at 16409-10, para. 48 (rejecting DISH’s proposal to amend the Commission’s rules for determining when a station qualifies for significantly viewed status in order to address the “orphan county” problem, noting that “any changes to the Commission’s existing rules for determining significantly viewed status would be inconsistent with the statute’s requirement that we use the same rules for making significantly viewed determinations that were in effect for cable operators as of April 15, 1976”); *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17291, para. 29 (rejecting proposals by commenters seeking to substantively modify the section 76.54 process for making significantly viewed determinations, finding that such modifications “would be inconsistent with the SHVERA’s requirement that [the Commission] use the same rules for making significantly viewed determinations that were in effect as of April 15, 1976”).

<sup>43</sup> 47 U.S.C. § 340(a)(2).

<sup>44</sup> 17 U.S.C. § 122(a)(2)(A).

<sup>45</sup> 47 U.S.C. § 340(a).

<sup>46</sup> *Id.* § 340(e)(1) (“Signals eligible to be carried under this section are not subject to the Commission’s regulations concerning network nonduplication or syndicated exclusivity unless, pursuant to regulations adopted by the Commission, the Commission determines to permit network nonduplication or syndicated exclusivity to apply within the appropriate zone of protection.”); see also *KCST-TV*, 103 FCC 2d at 413, para. 11 (finding that a station may petition for a waiver of the significantly viewed exception to reinstate its exclusivity rights vis-à-vis a significantly viewed station).

<sup>47</sup> See 47 U.S.C. § 340(a)(2) (requiring the Commission to apply to satellite carriers “the same standards and procedures concerning shares of viewing hours and audience surveys as are applicable under the rules, regulations, and authorizations of the Commission to determining with respect to a cable system whether signals are significantly viewed in a community”).

<sup>48</sup> We note that where a station qualifies for significantly viewed status under the Commission’s rules but not under the Copyright Act, making the satellite carrier ineligible for a compulsory copyright license, the carrier could either negotiate the rights to retransmit the station’s programming from each individual copyright holder or choose not to carry the station. See *infra* para. 15.

14. We note that this reading of section 340 could result in one set of procedures being applied in determining whether a station is significantly viewed for purposes of the Communications Act and a different set of procedures being applied in determining whether a station is significantly viewed for purposes of the Copyright Act. In other words, any modifications adopted by the Commission to the procedures for determining whether a station is significantly viewed would apply for purposes of the Commission's signal carriage and exclusivity rules, while the procedures that were in effect as of April 15, 1976, would continue to apply for purposes of determining whether satellite carriage of a station qualifies for the statutory copyright license. We seek comment on whether section 122(a)(2)(A) of the Copyright Act—which applies only in determining whether satellite carriage of a significantly viewed station qualifies for the statutory copyright license—limits the Commission's discretion to have a different set of procedures for determining whether a station is significantly viewed for purposes of signal carriage and exclusivity under section 340 of the Act. We also seek comment on whether there is any reason to have one set of procedures for both purposes. What are the benefits and burdens of having two different sets of procedures? Commenters should address the benefits and burdens from a number of perspectives, such as those of broadcast stations, cable operators, satellite carriers, and consumers. In addition, we seek comment on whether updating the procedures for determining whether a station is significantly viewed would allow a more accurate determination of which stations should legitimately be accorded significantly viewed status. We note that exclusivity protections depend on the Significantly Viewed List being as accurate as possible.<sup>49</sup>

15. We recognize that having two different procedures could produce odd results in some cases and seek comment on the implications of such an approach. For example, a station could qualify as significantly viewed under the Commission's procedures, thus making satellite carriage of the station permissible under section 340 of the Act, but not under the procedures required to be applied by the Copyright Act. Under such circumstances, where a satellite carrier does not qualify for the section 122 compulsory copyright license, would the satellite carrier nonetheless choose to carry the significantly viewed station? If so, how would the satellite carrier obtain the rights to retransmit the station's programming from each individual copyright holder? We seek comment on the impact of having two different procedures on regulatory parity between cable operators and satellite carriers. What would be the impact of having two different procedures on the congressional goals underlying section 340 and the Copyright Act?

16. Moreover, we note that in 1977, the Commission made a substantive revision to the methodology in section 76.54(b) to be used by cable operators in determining a station's significantly viewed status.<sup>50</sup> We seek comment on what significance the 1977 modification of the significantly viewed rules for cable operators has on the question of the Commission's statutory authority to modify the significantly viewed rules for satellite carriers. Given that Congress's intent in enacting SHVERA was to create parity between cable operators and satellite carriers,<sup>51</sup> we also seek comment on the impact

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<sup>49</sup> As discussed above, the network nonduplication and syndicated exclusivity rules protect local stations' exclusive rights to distribute network or syndicated programming within their local markets by generally precluding cable operators and satellite carriers from carrying a duplicating network or syndicated program broadcast by a distant station. 47 CFR §§ 76.92 and 76.101 (cable network nonduplication and syndicated exclusivity rules), 76.122 and 76.123 (satellite network nonduplication and syndicated exclusivity rules). If the Significantly Viewed List is out of date or otherwise inaccurate, these exclusive rights cannot be adequately protected.

<sup>50</sup> See *Amendment of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, Docket No. 20561, First Report and Order, 63 FCC2d 956, 971, para. 31 (1977) (revising section 76.54(b) to provide that if a cable system serves more than one community, a single survey may be taken, provided that the sample includes non-cable television homes from each community that are proportional to the population.).

<sup>51</sup> H.R. Rep. No. 108-660 at 17 (2004) ("The section also permits satellite carriers to retransmit 'significantly viewed' signals to subscribers who receive retransmissions of their local signals from their satellite carrier under the § 122 license. 'Significantly viewed' signals are television stations that are located in adjacent television markets

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any limitation on Commission authority to modify the significantly viewed rules for satellite carriers should have on our decision on whether to modify the significantly viewed rules for cable operators. Could the Commission modify the significantly viewed rules only as to cable systems consistent with section 340(a)(2) of the Act? If the record amassed in this proceeding indicates that there are no entities, including Nielsen, that can provide the community-specific or system-specific over-the-air viewership data required to demonstrate significantly viewed status pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, in a significant number of communities,<sup>52</sup> how should this determination impact the Commission's decision as to whether to revise our rules pursuant to our authority under section 340, in light of the limitation contained in section 122 of the Copyright Act? That is, if it is infeasible to make the showing required under the existing rules because those rules are outdated or no longer relevant in today's marketplace, does that support our proposed reading of section 340 to allow the Commission to amend its significantly viewed rules?

17. Additionally, we seek comment on whether to update the definitions of the terms "full network station," "partial network station," and "independent station" in section 76.5 of the Commission's rules to reflect marketplace changes since these definitions were adopted.<sup>53</sup> Under these definitions, a commercial television broadcast station is classified as either a full network station, partial network station, or independent station depending on how many hours per week it carries of prime time programming offered by one of the "three major national television networks"—i.e., ABC, CBS, or NBC.<sup>54</sup> The Commission relies on these definitions to select the correct standard for determining whether a station is significantly viewed.<sup>55</sup> We note that the Commission has recognized the Fox network as a

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that are received over-the-air by a significant number of viewers in the local market but are technically considered to be distant signals. The § 111 cable license permits cable operators to retransmit significantly viewed signals to their subscribers royalty-free. Section 102 amends the § 119 license to permit satellite carriers to retransmit these signals royalty-free to create parity between the two licenses."); H.R. Rep. No. 108-634 at 2 (stating that the purpose of SHVERA is "to modernize satellite television policy and enhance competition between satellite and cable operators" by "increasing regulatory parity by extending to satellite operators the same type of authority cable operators already have to carry 'significantly viewed' signals into a market").

<sup>52</sup> Under the current rules, where community-specific or system-specific over-the-air viewership data is not available for a particular community from Nielsen or another source, a petition seeking a change in a station's significantly viewed status with respect to that community would be denied. *See, e.g., United*, 33 FCC Rcd at 8052-53, paras. 12-13 (denying a licensee's request to consider the predicted viewability of a station in certain communities where Nielsen did not regularly receive viewership diaries in consecutive years for those communities, finding that "[o]ur rules accord us no such flexibility and require that petitioners follow the traditional methodology outlined in [s]ection 76.54(b) of our rules").

<sup>53</sup> *See* 47 CFR § 76.5(j) (defining "full network station" as "[a] commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the *three* major national television networks with which it has primary affiliation (*i.e.*, right of first refusal or first call"); (k) (defining "partial network station" as "[a] commercial television broadcast station that generally carries in prime time more than 10 hours of programming per week offered by the *three* major national television networks, but less than the amount specified in paragraph (j) of this section"); (l) (defining "independent station" as "[a] commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the *three* major national television networks").

<sup>54</sup> *Id.*

<sup>55</sup> As noted above, a full or partial network station is defined as significantly viewed if over-the-air viewership surveys demonstrate that the station exceeds a three percent share of viewing hours and a net weekly circulation of 25 percent, by at least one standard error, while an independent station is defined as significantly viewed if over-the-air viewership surveys demonstrate that the station exceeds a two percent share of viewing hours and a net weekly circulation of five percent, by at least one standard error. *Id.* § 76.5(i).

fourth major national television network.<sup>56</sup> We seek comment on whether to modify the definitions of “full network station,” “partial network station,” and “independent station” in section 76.5 to accurately reflect that there are now four rather than three major national television networks. What impact does the current treatment of Fox owned and affiliated stations as independent rather than network stations have on the process for determining a station’s significantly viewed status and on affected stations and television viewers? Alternatively, we seek comment on whether to update these definitions to track with the definition of “network station” set forth in the Copyright Act. Under this definition, “network station” means “a television station licensed by the Federal Communications Commission . . . that is owned or operated by, or affiliated with, one or more of the television networks in the United States that offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States.”<sup>57</sup> Stations owned by or affiliated with Fox and a number of other networks, such as The CW, MyNetwork TV, Univision, and Telemundo, would be considered “network stations” under this definition.<sup>58</sup>

18. We note that the Commission previously has rejected requests to update the definitions of “full network station,” “partial network station,” and “independent station” in section 76.5 to track with the definition of “network station” in the Copyright Act, concluding that the Copyright Act requires use of the rules in effect as of April 15, 1976, including these definitions.<sup>59</sup> Although section 340 of the Act requires that the Commission use the definition in the Copyright Act in determining subscriber eligibility to receive significantly viewed stations from satellite carriers,<sup>60</sup> the Commission found that it was

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<sup>56</sup> See, e.g., *id.* § 73.658(g) (providing that “[a] television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were ‘networks’ as defined in § 73.3613(a)(1) of the Commission’s regulations (that is, ABC, CBS, Fox, and NBC)”; 79.1(e)(3) (providing that “[t]he major national broadcast television networks (i.e., ABC, CBS, Fox and NBC), affiliates of these networks in the top 25 television markets as defined by Nielsen’s Designated Market Areas (DMAs) and national nonbroadcast networks serving at least 50% of all homes subscribing to multichannel video programming services shall not count electronic newsroom captioned programming towards compliance with [the closed captioning rules]”; 79.3(b)(1) (stating that “commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 60 DMAs . . . must provide 50 hours of video description per calendar quarter, either during prime time or on children’s programming, and . . . 37.5 additional hours of video description per calendar quarter between 6 a.m. and 11:59 p.m. local time, on each programming stream on which they carry one of the top four commercial television broadcast network”); see also *Annual Assessment in the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, Sixteenth Report, 30 FCC Rcd 3253, 3321, para. 147 (2015) (*Sixteenth Annual Competition Report*) (“Whether or not a station is affiliated with one of the four major networks (ABC, CBS, FOX, or NBC) has a significant impact on the composition of the station’s revenues, expenses, and operations.”).

<sup>57</sup> 17 U.S.C. § 119(d)(2)(A). Various Commission rules use a similar definition of “network.” See, e.g., 47 CFR §§ 73.3613(a)(1) (“For the purposes of this paragraph the term network means any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation.”); 76.55(f) (“For purposes of the must-carry rules, a commercial television network is an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states.”).

<sup>58</sup> See *Sixteenth Annual Competition Report*, 30 FCC Rcd at 3321, para. 148.

<sup>59</sup> *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17294, para. 36. See *supra* para. 17 (seeking comment on whether to update the definitions of “full network station,” “partial network station,” and “independent station” to track with the definition of “network station” set forth in the Copyright Act).

<sup>60</sup> 47 U.S.C. §§ 340(i)(2) (“The terms ‘network station’ and ‘television network’ have the meanings given such terms in section 339(d) of this title.”); 339(d)(3) (“The term ‘network station’ has the meaning given such term under section 119(d) of title 17.”); 339(d)(5) (“The term ‘television network’ means a television network in

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precluded by statute from conforming the definitions in its rules with the Copyright Act definition because section 122(a)(2)(1) of the Copyright Act requires use of the Commission rules in effect as of April 15, 1976.<sup>61</sup> The Commission therefore determined that it would continue to use the definitions of network station and independent station in our rules for purposes of determining whether a station is significantly viewed, but use the copyright definition of network station for purposes of subscriber eligibility and the other applications of the significantly viewed provisions.<sup>62</sup> We seek comment on whether we should revisit this interpretation. As discussed above, section 122(a)(2)(A) of the Copyright Act applies only in determining whether satellite carriage of a significantly viewed station qualifies for the statutory copyright license.<sup>63</sup> Furthermore, section 340 of the Act does not require that the Commission apply rules that were in effect on a certain date in determining whether a station is significantly viewed.<sup>64</sup> Accordingly, we propose to interpret section 340 as allowing the Commission to amend its significantly viewed rules to update the definitions of “full network station,” “partial network station,” and “independent station” in section 76.5. What impact would modification of these definitions have on affected stations, cable operators, satellite carriers, and consumers? What policy goals would be served by amending the significantly viewed rules to update these definitions? What impact, if any, would modification of these definitions have on the congressional goals underlying section 340 and the Copyright Act? Does it make sense from a legal or policy perspective to continue to treat Fox and certain other network owned and affiliated stations as “independent stations” for purposes of determining the station’s significantly viewed status but as network stations in all other respects? We seek comment on these issues.

#### IV. PROCEDURAL MATTERS

19. *Initial Regulatory Flexibility Act Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>65</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to this NPRM. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>66</sup>

20. *Paperwork Reduction Act.* This document may result in new or modified information collections subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the *Federal Register* inviting the public to comment on the requirement, as required by the Paperwork Reduction Act. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), the Commission will seek comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

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the United States which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more States.”).

<sup>61</sup> *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 117294, para. 36.

<sup>62</sup> *Id.* at 117294, para. 35. Under this interpretation, Fox owned and affiliated stations and certain other network stations are treated as “independent stations” for purposes of determining whether the station is significantly viewed, but as “network stations” for purposes of subscriber eligibility for satellite carriage.

<sup>63</sup> *See supra* para. 13 (discussing purpose of section 122(a)(2)(A) of the Copyright Act).

<sup>64</sup> 47 U.S.C. § 340(a)(2).

<sup>65</sup> *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, 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>66</sup> *See* 5 U.S.C. § 603(a).

21. *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>67</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.

22. *Filing Requirements—Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- 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, DC 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, DC 20554.

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<sup>67</sup> 47 CFR §§ 1.1200 *et seq.*

23. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, SW, CY-A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

24. *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).

25. *Additional Information.* For additional information on this proceeding, please contact Kathy Berthot, [Kathy.Berthot@fcc.gov](mailto:Kathy.Berthot@fcc.gov), of the Media Bureau, Policy Division, (202) 418-7454.

## V. ORDERING CLAUSES

26. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 303, 325, 339, 340, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303, 325, 339, 340, and 534, this *Notice of Proposed Rulemaking* **IS ADOPTED**.

27. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Proposed Rulemaking*, 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

## 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 a substantial number of small entities by the policies and rules proposed in this 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 provided on the first page of 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. Local television broadcast stations typically hold exclusive rights to distribute network or syndicated programming within their local markets.<sup>4</sup> The Commission's network nonduplication and syndicated exclusivity rules protect these exclusive rights by generally precluding cable operators and satellite carriers from carrying a duplicating network or syndicated program broadcast by a distant station.<sup>5</sup> Under the significantly viewed exception to the network nonduplication and syndicated exclusivity rules, cable operators and satellite carriers are not required to delete the duplicating network or syndicated programming where the signal of the otherwise distant station is determined to be significantly viewed in the relevant community.<sup>6</sup> The significantly viewed exception is based on a demonstration, made using over-the-air viewership surveys, that an otherwise distant station receives a "significant" level of over-the-air viewership in a particular cable or satellite community<sup>7</sup> and therefore should be considered "local" with respect to that community.<sup>8</sup>

3. The Commission in 1972 established a list of significantly viewed stations based on

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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).

<sup>2</sup> 5 U.S.C. § 603(a).

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

<sup>4</sup> A network program is "any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial." 47 CFR § 76.5(m). A syndicated program is "any program sold, licensed, distributed, or offered to television station licensees in more than one market within the United States other than as network programming as defined in § 76.5(m)." *Id.* § 76.5(ii).

<sup>5</sup> *Id.* §§ 76.92 and 76.101 (cable network nonduplication and syndicated exclusivity rules), 76.122 and 76.123 (satellite network nonduplication and syndicated exclusivity rules). Generally, a television station's "local market" is defined by the Designated Market Area (DMA) in which it is located, as determined by the Nielsen Company (Nielsen). 47 CFR § 76.55(e)(2); *see also* 17 U.S.C. § 122(j)(2)(A). A "distant" station is a station not assigned to the local station's DMA (i.e., an "out-of-market" station). *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3376 n.143 (2014).

<sup>6</sup> 47 CFR §§ 76.92(f) and 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity rules), 76.122(j) and 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity rules). Cable operators and satellite carriers are not required to carry significantly viewed stations, but if they do, retransmission consent is required. 47 U.S.C. §§ 325(b)(1), 340(d)(2).

<sup>7</sup> *See* 47 CFR §§ 76.5(dd) (defining cable "community unit") and 76.5(gg) (defining a "satellite community").

<sup>8</sup> *Id.* § 76.54. Stations designated as significantly viewed are also treated as "local" for copyright purposes and therefore subject to reduced copyright fees. *See* 17 U.S.C. §§ 111(a), (c), and (f), 122(a)(2).

viewership surveys for the periods May 1970, November 1970, and February/March 1971.<sup>9</sup> The Commission's rules define a network station as significantly viewed if over-the-air viewership surveys demonstrate that the station exceeds a three percent share of viewing hours and a net weekly circulation of 25 percent, by at least one standard error.<sup>10</sup> An independent station is defined as significantly viewed if over-the-air viewership surveys demonstrate that the station exceeds a two percent share of viewing hours and a net weekly circulation of five percent, by at least one standard error.<sup>11</sup> A television station, or a cable operator or satellite carrier that seeks to carry the station, may petition the Commission to obtain "significantly viewed" status for the station in a particular community or communities and placement on the Significantly Viewed List.<sup>12</sup> Under section 76.54(d) of the Commission's rules, signals of television stations not encompassed by the 1970-1971 surveys (i.e., not on-the-air at the time the surveys were taken) may be demonstrated as significantly viewed on a county-wide basis by independent professional audience surveys which cover three separate, consecutive four-week periods during the first three years of the subject station's operation and are otherwise comparable to the surveys used in compiling the 1972 list.<sup>13</sup> Alternatively, section 76.54(b) of the Commission's rules provides that significant viewing in a cable or satellite community

may be demonstrated by an independent professional audience survey of over-the-air television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level. If a cable television system serves more than one community, a single survey may be taken, provided that the sample includes over-the-air television homes from each community that are proportional to the population. A satellite carrier may demonstrate significant viewing in more than one community or satellite community through a single survey, provided that the sample includes over-the-air television homes from each community that are proportional to the population.<sup>14</sup>

The Commission maintains an updated list of significantly viewed stations on its website.<sup>15</sup>

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<sup>9</sup> *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Docket No. 18397, Memorandum Opinion and Order on Reconsideration, 36 FCC 2d 326, 378, Appx. B (1972) (*Reconsideration of Cable Television Report and Order*). See 47 CFR § 76.54(a).

<sup>10</sup> 47 CFR § 76.5(i). For purposes of the "significantly viewed" definition, "share of viewing hours" means the total hours that over-the-air television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period. "Net weekly circulation" means the number of over-the-air television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total over-the-air television households in the survey area. *Id.* Note to § 76.5(i).

<sup>11</sup> *Id.* § 76.5(i). To determine whether to use the network or non-network standard for audience share, the Commission relies on the definitions of network and independent stations in the rules. Affiliates of the ABC, CBS, and NBC networks are treated as "network stations." See *id.* § 76.5(j) and (k). Other stations are treated as "independent stations" for this limited purpose. See *id.* § 76.5(l).

<sup>12</sup> A television station, cable operator, or satellite carrier that seeks to have a station designated significantly viewed must file a petition in accordance with the pleading requirements in section 76.7(a) of the Commission's rules, 47 CFR § 76.7(a).

<sup>13</sup> *Id.* § 76.54(d).

<sup>14</sup> *Id.* § 76.54(b).

<sup>15</sup> See Significantly Viewed List (last modified March 8, 2019), <https://www.fcc.gov/files/significantviewedstations030819pdf>.

4. A station also may petition for a waiver of the significantly viewed exception to reinstate its exclusivity rights vis-à-vis a significantly viewed station.<sup>16</sup> In *KCST-TV*, the Commission held that in order to obtain such a waiver, a petitioner would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in section 76.54(b).<sup>17</sup> The burden of proof is on the petitioner to show that the station is no longer significantly viewed.<sup>18</sup>

5. Over time, Nielsen became the primary organization through which entities seeking changes to the Significantly Viewed List could obtain television viewership surveys.<sup>19</sup> Until recently, Nielsen, which surveys television markets to obtain television stations' viewership, conducted four-week audience surveys four times a year (i.e., during February, May, July, and November "sweep periods").<sup>20</sup> The Media Bureau found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, added to the accuracy of the audience statistics because of the increased sample size.<sup>21</sup> Thus, a petitioner seeking to show that a station is no longer significantly viewed was permitted to submit the results from two sweep periods in each year and purchase survey data from Nielsen on either a community-specific or system-specific basis.<sup>22</sup> In order to produce the data required for exclusivity waivers, Nielsen re-tabulated the over-the-air data that it collected for its routine audience sweep periods, using in-tab diaries<sup>23</sup> from its database from the area served by a cable system or an individual cable community.<sup>24</sup> In 2019, Nielsen completed a multi-year overhaul of the way it measures television

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<sup>16</sup> *KCST-TV Inc.*, Memorandum Opinion and Order, 103 FCC 2d 407, 413, para. 11 (1986) (*KCST-TV*).

<sup>17</sup> *Id.* at 412, para. 10.

<sup>18</sup> *Desert Empire Corp.*, Memorandum Opinion and Order, 86 FCC 2d 644, 649, para. 11 (1981) ("In adopting [the significantly viewed exception], the Commission held that the burden of proof now has shifted to the broadcast licensee seeking nonduplication protection against a significantly viewed signal."); *1978 Network Exclusivity Order*, 67 FCC 2d at 1305, para. 10 ("Where a signal is significantly viewed, we shall give it full local status for purposes of cable carriage. Naturally, an aggrieved station can obtain protection via our special relief procedures. As such, the burden now has shifted to the broadcast licensee seeking nonduplication protection against a significantly viewed signal.").

<sup>19</sup> *WHP Licensee*, 33 FCC Rcd at 3468, para. 4; *Chesapeake*, 30 FCC Rcd at 6456, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4. Entities seeking changes to the Significantly Viewed List on occasion have used sources other than Nielsen for television viewership surveys. See, e.g., *Silverton Broadcasting Co., LLC*, MB Docket No. 15-46, Memorandum Opinion and Order, 30 FCC Rcd 6448, 6449, para. 3 (MB 2015) (licensee of station KTWO-TV, Casper, Wyoming, sought a ruling that the station is significantly viewed in the Wyoming communities of Rock Springs and Gillette based on an over-the-air audience survey conducted by Eastlan Ratings, LLC); *Mark III Media Inc.*, MB Docket No. 15-45, Memorandum Opinion and Order, 30 FCC Rcd 6426, 6427, para. 3 (MB 2015) (licensee of KGWC-TV, Casper, Wyoming, sought a ruling that the station is significantly viewed in the Wyoming communities of Rock Springs and Gillette based on an over-the-air audience survey conducted by Eastlan Ratings, LLC).

<sup>20</sup> *WHP Licensee*, 33 FCC Rcd at 3468, para. 4; *Chesapeake*, 30 FCC Rcd at 6456, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4.

<sup>21</sup> *WHP Licensee*, 33 FCC Rcd at 3468, para. 4; *Chesapeake*, 30 FCC Rcd at 6456-57, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4.

<sup>22</sup> *WHP Licensee*, 33 FCC Rcd at 3468-69, para. 4; *Chesapeake*, 30 FCC Rcd at 6456-57, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4.

<sup>23</sup> In-tab diaries are the number of diaries included in the tabulation of audience shares. Of the returned diaries, some are discarded after editing as being unusable. Thus, it is the number of diaries in the sample used to calculate the audience statistics. *Meredith Corp.*, Memorandum Opinion and Order, 25 FCC Rcd 12932, 12935 n.22 (MB 2007).

<sup>24</sup> *WHP Licensee*, 33 FCC Rcd at 3468-69, para. 4; *Chesapeake*, 30 FCC Rcd at 6456-57, para. 4; *Gulf-California Broadcast*, 26 FCC Rcd at 15029, para. 4.

viewing in its 210 DMAs, replacing the paper diaries that Nielsen families used to record what they watched on television in the smallest 140 DMAs entirely by electronic measurement.<sup>25</sup> Nielsen now uses a combination of people meters, set meters, code readers, and return path data (RPD) from cable and satellite set-top boxes to measure television viewing.<sup>26</sup> Nielsen then applies statistical modeling, weighting, and other data science techniques to the representative samples obtained through its electronic measurement to calculate viewership data for a larger population.<sup>27</sup>

6. The NPRM seeks comment on whether the methodology for determining a station's significantly viewed status set forth in section 76.54(b) of the Commission's rules and relevant case law has become outdated or overly burdensome. In particular, the NPRM seeks comment on the costs and other burdens associated with making the showing required to establish a station's significantly viewed status under the current process and the extent to which such costs and burdens discourage or deter entities, particularly smaller entities, from seeking changes to the Significantly Viewed List. The NPRM seeks comment on whether the over-the-air viewership data gathered by Nielsen today through electronic measurement techniques satisfies the requirement in section 76.54(b) of our rules for an "audience survey of over-the-air television homes." Further, the NPRM notes that there have been recent cases where an entity seeking to make changes to the Significantly Viewed List could not make the showing required under section 76.54(b) and relevant case law for certain communities because Nielsen was unable to provide the requisite over-the-air viewership data for those communities.<sup>28</sup> The NPRM accordingly seeks comment on the extent to which Nielsen is able to provide the community-specific or system-specific over-the-air viewership data needed to demonstrate a station's significantly viewed status, particularly in smaller markets.

7. The NPRM seeks comment what, if any, specific modifications or updates should be made to the current methodology for establishing whether a station is significantly viewed in a community outside of its local market. In addition, the NPRM seeks proposals for new or alternative methodologies for establishing whether a station is significantly viewed in a community outside of its local market. Commenters who propose alternative methodologies should discuss the costs and benefits of their

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<sup>25</sup> *Nielsen Completes Overhaul of Local TV Business, Achieves Milestone in Multiyear Effort to Transform Measurement in 208 Markets Across the U.S.*, Press Release, Oct. 3, 2019, <https://www.nielsen.com/us/en/press-releases/2019/nielsen-completes-overhaul-of-local-tv-business-achieves-milestone-in-multiyear-effort-to-transform-measurement-in-208-markets-across-the-us/>; *Nielsen to Deliver All-Electronic Measurement in Local TV Markets in 2017 and Retire Paper TV Diaries in 140 Local Markets*, Press Release, Sept. 14, 2016, <https://www.nielsen.com/us/en/press-releases/2016/nielsen-to-deliver-all-electronic-measurement-to-local-tv-market-retire-tv-paper-diaries/>.

<sup>26</sup> People meters, set meters, and code readers are different types of meters that connect to or sit near a television and measure all video content playing on the screen. In people meter homes, Nielsen knows which individual member of household is watching because each member uses a remote to log in via the people meter each time they watch television. In homes using set meters and code readers, Nielsen applies a statistical model to identify which members of the household are watching TV. Through partnerships with several major cable and satellite providers, Nielsen collects non-personally identifiable RPD from set-top box homes and applies a statistical model to determine who is viewing in those homes. See <http://ratingsacademy.nielsen.com/>. In DMAs where it uses RPD from set-top boxes, Nielsen also uses code readers to capture over-the-air viewership data that is missed by set-top boxes. See Wayne Freidman, *Nielsen Completes Local TV Ratings Reboot*, TelevisionNewsDaily, Oct. 3 2019, <https://www.mediapost.com/publications/article/341539/nielsen-completes-local-tv-ratings-reboot.html>; Michael Steinberg, *The ABCs of RPD (Return Path Data)*, Katz Media Group, Apr. 24, 2019, <https://blog.katzmedia.com/on-measurement/the-abc-of-rpd-return-path-data/>;

<sup>27</sup> See <https://www.nielsen.com/us/en/about-us/panels/>; <https://www.nielsen.com/us/en/about-us/panels/ratings-and-families/>.

<sup>28</sup> See, e.g., *United Communications Corp.*, MB Docket No. 17-224, Memorandum Opinion and Order, 33 FCC Rcd 8048, 8052-53, paras. 12-13 (MB 2018) (*United*); *Chesapeake*, 30 FCC Rcd at 6462, para. 15.

proposals, including the impact of the proposal on affected stations, especially small market stations, and viewers.

8. The NPRM also seeks comment on whether to update the definitions of the terms “full network station,” “partial network station,” and “independent station” in section 76.5 of the Commission’s rules to reflect marketplace changes since these definitions were adopted.<sup>29</sup> In particular, the NPRM seeks comment on whether to modify these definitions to reflect that there are four rather than three major national television networks. Alternatively, the NPRM seeks comment on whether to update these definitions to conform with the definition of “network station” set forth in the Copyright Act. Under this definition, “network station” means “a television station licensed by the Federal Communications Commission . . . that is owned or operated by, or affiliated with, one or more of the television networks in the United States that offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States.”<sup>30</sup>

9. Further, the NPRM seeks comment on the Commission’s authority to modify the significantly viewed rules with respect to satellite carriers in light of section 122(a)(2)(A) of the Copyright Act, which explicitly limits application of the statutory copyright license for satellite carriers to stations that are “determined by the Federal Communications Commission to be significantly viewed . . . pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community.”<sup>31</sup> Although the Commission previously has interpreted this statutory provision as precluding it from making substantive modifications to the section 76.54 process for making significantly viewed determinations and to the definitions of “full network station,” “partial network station,” and “independent station” in section 76.5 of the Commission’s rules,<sup>32</sup> the NPRM seeks comment on whether

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<sup>29</sup> See 47 CFR § 76.5(j) (defining “full network station” as “[a] commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the *three* major national television networks with which it has primary affiliation (*i.e.*, right of first refusal or first call”); (k) (defining “partial network station” as “[a] commercial television broadcast station that generally carries in prime time more than 10 hours of programming per week offered by the *three* major national television networks, but less than the amount specified in paragraph (j) of this section”); (l) (defining “independent station” as “[a] commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the *three* major national television networks”).

<sup>30</sup> 17 U.S.C. § 119(d)(2)(A). Various Commission rules use a similar definition of “network.” See, *e.g.*, 47 CFR §§ 73.3613(a)(1) (“For the purposes of this paragraph the term network means any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation.”); 76.55(f) (“For purposes of the must-carry rules, a commercial television network is an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states.”).

<sup>31</sup> 17 U.S.C. § 122(a)(2)(A). See *STELA Significantly Viewed Report and Order*, 25 FCC Rcd at 16409-10, para. 48 (rejecting DISH’s proposal to amend the Commission’s rules for determining when a station qualifies for significantly viewed status in order to address the “orphan county” problem, noting that any changes to the Commission’s existing rules for determining significantly viewed status would be inconsistent with the [Section 122(a)(2)] requirement that we use the same rules for making significantly viewed determinations that were in effect for cable operators as of April 15, 1976.”).

<sup>32</sup> See *STELA Significantly Viewed Report and Order*, 25 FCC Rcd at 16409-10, para. 48 (rejecting DISH’s proposal to amend the Commission’s rules for determining when a station qualifies for significantly viewed status in order to address the “orphan county” problem, noting that “any changes to the Commission’s existing rules for determining significantly viewed status would be inconsistent with the statute’s requirement that we use the same rules for making significantly viewed determinations that were in effect for cable operators as of April 15, 1976.”); *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17291, para. 29 (rejecting proposals by commenters seeking to substantively modify the section 76.54 process for making significantly viewed determinations, finding that such modifications “would be inconsistent with the SHVERA’s requirement that [the Commission] use the same rules for

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there is any basis for revisiting this interpretation. The NPRM notes that section 340 of the Act authorizes satellite carriers to retransmit the signal of an out-of-market station to a subscriber where such signal “is, after December 8, 2004, determined by the Commission to be significantly viewed in such community in accordance with the same standards and procedures concerning shares of viewing hours and audience surveys as are applicable under the rules, regulations, and authorizations of the Commission to determining with respect to a cable system whether signals are significantly viewed in a community.”<sup>33</sup> Unlike section 122(a)(2)(A) of the Copyright Act, there is no requirement in section 340 that the Commission apply rules that were in effect on a certain date in determining whether a station is significantly viewed. Section 122(a)(2)(A) of the Copyright Act and section 340 of the Act serve two distinct purposes. Section 122(a)(2)(A) of the Copyright Act establishes the test for when satellite carriage of a significantly viewed station qualifies for the statutory copyright license: a station must be determined by the Commission to be significantly viewed in such community pursuant to the rules in effect on April 15, 1976.<sup>34</sup> In contrast, section 340 of the Act establishes that a satellite carrier may carry a significantly viewed signal as defined by the Commission,<sup>35</sup> and that the network nonduplication and syndicated exclusivity rules do not apply to a significantly viewed signal (unless a station successfully petitions to have a significantly viewed station removed from the Significantly Viewed List).<sup>36</sup> Accordingly, since section 340 does not require that the Commission apply rules that were in effect on a certain date in determining whether a station is significantly viewed, the NPRM proposes to interpret section 340 as allowing the Commission to amend its significantly viewed rules, provided that satellite carriers and cable operators are subject to the same rules.<sup>37</sup>

#### **B. Legal Basis**

10. The proposed action is authorized pursuant to sections 303, 325, 339, 340, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303, 325, 339, 340, and 534.

#### **C. Description and Estimates of the Number of Small Entities to Which the Proposed Rules Will Apply**

11. 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>38</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small

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making significantly viewed determinations that were in effect as of April 15, 1976”), at 117294, para. 36. (rejecting requests to update the definitions of “full network station,” “partial network station,” and “independent station” in section 76.5 to track with the definitions of “network station” in the Copyright Act, concluding that the Copyright Act requires use of the rules in effect as of April 15, 1976, including these definitions).

<sup>33</sup> 47 U.S.C. § 340(a)(2).

<sup>34</sup> 17 U.S.C. § 122(a)(2)(A).

<sup>35</sup> 47 U.S.C. § 340(a).

<sup>36</sup> *Id.* § 340(e)(1) (“Signals eligible to be carried under this section are not subject to the Commission’s regulations concerning network nonduplication or syndicated exclusivity unless, pursuant to regulations adopted by the Commission, the Commission determines to permit network nonduplication or syndicated exclusivity to apply within the appropriate zone of protection.”); *see also KCST-TV*, 103 FCC 2d at 413, para. 11 (finding that a station may petition for a waiver of the significantly viewed exception to reinstate its exclusivity rights vis-à-vis a significantly viewed station).

<sup>37</sup> *See* 47 U.S.C. § 340(a)(2) (requiring the Commission to apply to satellite carriers “the same standards and procedures concerning shares of viewing hours and audience surveys as are applicable under the rules, regulations, and authorizations of the Commission to determining with respect to a cable system whether signals are significantly viewed in a community”).

<sup>38</sup> 5 U.S.C. § 603(b)(3).

organization,” and “small governmental jurisdiction.”<sup>39</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>40</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>41</sup>

12. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”<sup>42</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>43</sup> These establishments also produce or transmit visual programming to affiliated television broadcast stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.<sup>44</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of \$25 million or less.<sup>45</sup> Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

13. The Commission has estimated the number of licensed commercial television stations to be 1,374.<sup>46</sup> Of this total, 1,257 stations had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on January 8, 2018, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 388.<sup>47</sup> Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

14. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>48</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue

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<sup>39</sup> *Id.* § 601(6).

<sup>40</sup> *Id.* § 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 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.”

<sup>41</sup> *Id.* § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

<sup>42</sup> U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

<sup>43</sup> *Id.*

<sup>44</sup> 13 CFR § 121.201; 2012 NAICS Code 515120.

<sup>45</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting), [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4//naics~515120](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515120).

<sup>46</sup> *December 31, 2019 Broadcast Station Totals.*

<sup>47</sup> *Id.*

<sup>48</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 CFR § 21.103(a)(1).

figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

15. *Cable Companies and Systems (Rate Regulation)*. 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>49</sup> Industry data indicate that there are currently 4,600 active cable systems in the United States.<sup>50</sup> Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.<sup>51</sup> In addition, under the Commission’s rate regulation rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>52</sup> Current Commission records show 4,600 cable systems nationwide.<sup>53</sup> Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.<sup>54</sup> Thus, under this standard as well, we estimate that most cable systems are small entities.

16. *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 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.”<sup>55</sup> There are approximately 52,403,705 cable video subscribers in the United States today.<sup>56</sup> Accordingly, an operator serving fewer than 524,037 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>57</sup> Based on available data, we find that all but nine incumbent

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<sup>49</sup> 47 CFR § 76.901(e)

<sup>50</sup> Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission’s Cable Operations and Licensing System (COALS)). See [www.fcc.gov/coals](http://www.fcc.gov/coals).

<sup>51</sup> See SNL KAGAN at <https://www.snl.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8> (subscription required).

<sup>52</sup> 47 CFR § 76.901(c).

<sup>53</sup> Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission’s Cable Operations and Licensing System (COALS)). See [www.fcc.gov/coals](http://www.fcc.gov/coals).

<sup>54</sup> *Id.*

<sup>55</sup> 47 CFR § 76.901(f) and Notes to Paragraph (f) 1, 2, and 3.

<sup>56</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2016*, MD Docket No. 16-166, Notice of Proposed Rulemaking, 31 FCC Rcd 5757, 5790, Appx. E, para. 23 (2016) (*Regulatory Fees NPRM*) (citing Office of Management and Budget Memorandum M-10-06, Open Government Directive, Dec. 8, 2009).

<sup>57</sup> 47 CFR § 76.901(f).



cable operators are small entities under this size standard.<sup>58</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>59</sup> 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.

17. *Direct Broadcast Satellite (DBS) Service.* DBS Service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic dish antenna at the subscriber's location. DBS is now included in SBA's economic census category "Wired Telecommunications Carriers." The Wired Telecommunications Carriers industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.<sup>60</sup> The SBA determines that a wireline business is small if it has fewer than 1500 employees.<sup>61</sup> Census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer than 1,000 employees.<sup>62</sup> Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. However, currently only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network.<sup>63</sup> DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Accordingly, we must conclude that internally developed FCC data are persuasive that in general DBS service is provided only by large firms.

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

18. *Reporting and Recordkeeping Requirements.* The NPRM does not propose any new or modified reporting or recordkeeping requirements.

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<sup>58</sup> *Regulatory Fees NPRM*, 31 FCC Rcd at 5790, Appx. E, para. 23.

<sup>59</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 section 76.901(f) of the Commission's rules. See 47 CFR § 76.901(f).

<sup>60</sup> See U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>61</sup> NAICS Code 517110; 13 CFR § 121.201.

<sup>62</sup> See U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012; 2012 Economic Census of the United States*, [http://factfinder.census.gov/faces/tableservices.jasf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodTtype=table](http://factfinder.census.gov/faces/tableservices.jasf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodTtype=table).

<sup>63</sup> See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10507, para. 27 (2013).

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

19. The RFA requires an agency to describe any significant, specifically small business, 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 and reporting requirements under the rule for such 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>64</sup>

20. The NPRM seeks comment on modernizing the methodology set forth in the Commission's rules for determining whether a television broadcast station is significantly viewed in a community outside of its local television market. To the extent that the current methodology has become outdated or overly burdensome, it may discourage or deter entities, particularly entities in smaller markets, from seeking changes to the Significantly Viewed List. Any revisions to the current process, if adopted, would reduce the costs and burdens associated with establishing a station's significantly viewed stations by establishing a more viable and less burdensome process for seeking changes to the Significantly Viewed List. Thus, any such revisions are expected to benefit small entities.

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

21. None.

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<sup>64</sup> 5 U.S.C. § 603(c)(1)-(4).