

**FCC FACT SHEET**\*

**Modernization of Media Regulation Initiative: Revision of the Commission's Part 76 Review Procedures; Revision of the Commission's Program Carriage Rules**

Notice of Proposed Rulemaking – MB Docket Nos. 17-105 and 20-70;

Further Notice of Proposed Rulemaking – MB Docket No. 11-131

**Background:** For a program carriage complaint to be considered timely, a complainant must satisfy one of the three prongs of the statute of limitations set forth in section 76.1302(h) of the Commission's rules. In the *2011 Program Carriage NPRM*, the Commission expressed concern that the third prong of the program carriage statute of limitations, section 76.1302(h)(3), could be read to mean that a complaint is timely if it is filed within one year of the date the complainant notified the defendant MVPD of its intention to file a program carriage complaint, regardless of when the act alleged to have violated the rules occurred, and accordingly proposed to revise it.

The program carriage rules also provide that initial decisions issued by an administrative law judge (ALJ) shall become effective upon release, and remain in effect pending review, unlike the Commission's generally applicable procedures in section 1.276(d), that automatically stay an ALJ's initial decision pending review. These rules governing when an ALJ's initial decision in a program carriage dispute takes effect and whether it remains in effect pending review have caused confusion for both parties and adjudicators, and ultimately can create inconsistent outcomes pending appeal.

**What the Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking Would Do:**

- Seek comment on whether to modify the third prong of the time limit requirements for filing program carriage complaints to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer and a defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage;
- Seek comment on whether to revise the parallel time limit requirements for filing program access, open video system (OVS), and good-faith retransmission consent complaints so that the triggering event for each would be the denial or failure to acknowledge a request, rather than a notice of intent to file a complaint on that basis, as we propose to do with the program carriage rules here;
- Seek comment on whether to revise the rules governing the effective date and review procedures for initial decisions issued by an ALJ in program carriage proceedings so that they are consistent with the Commission's generally applicable procedures for review of ALJ initial decisions, and extend this change to ALJ initial decisions in program access and OVS proceedings;
- Propose to adopt one technical edit to the program carriage statute of limitations from the *2011 Program Carriage NPRM* to replace the term "video programming distributor" with "video programming vendor."

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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 Nos. 11-131 and 20-70, 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 )
Revision of the Commission's Part 76 Review ) MB Docket No. 20-70
Procedures )
Modernization of Media Regulation Initiative ) MB Docket No. 17-105
Revision of the Commission's Program Carriage ) MB Docket No. 11-131
Rules )

FURTHER NOTICE OF PROPOSED RULEMAKING IN MB DOCKET NO. 11-131 AND
NOTICE OF PROPOSED RULEMAKING IN MB DOCKET NO. 20-70\*

Adopted: []

Released: []

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission:

I. INTRODUCTION

1. This Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking (FNPRM) proposes changes to the Commission's rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs).1 Specifically, we propose to modify one of the time limit requirements for filing program carriage complaints in order to make it consistent with the time limits for other types of complaints.2 For

\* 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 MB Docket No. 11-131 concerns the Commission's program carriage rules. This item proposes changes to the Commission's program access, open video system, and good-faith retransmission consent rules, in addition to changes to the program carriage rules. To ensure that we provide interested parties with adequate notice, we adopt this item as both an FNPRM in MB Docket No. 11-131 and an NPRM in MB Docket No. 20-70.

2 47 CFR § 76.1302(h). The 2011 Program Carriage NPRM in this proceeding sought comment on revising this rule. See Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket Nos. 11-131, 07-42, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, 11522, para. 38 (2011) (2011 Program Carriage NPRM). However, based on comments filed in response to that NPRM, we propose an alternative revision of section 76.1302(h) here. Separately, we propose to

(continued....)

consistency, we also propose to revise the parallel time limit requirements for filing program access, open video system (OVS), and good-faith retransmission consent complaints.<sup>3</sup> We also propose to revise the effective date and review procedures of initial decisions issued by an administrative law judge (ALJ) in program carriage proceedings so they comport with the Commission's generally applicable procedures for review of ALJ initial decisions.<sup>4</sup> We propose to extend this change to program access and OVS proceedings as well.<sup>5</sup> We believe that these changes will help ensure an expeditious program access, program carriage, retransmission consent, and OVS complaint process and provide additional clarity to both potential complainants and defendants, as well as adjudicators, consistent with the Communications Act of 1934, as amended (the Act). With this proceeding, we continue our efforts to modernize our media regulations.<sup>6</sup>

## II. BACKGROUND

2. Congress passed the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) to, among other goals, "ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers."<sup>7</sup> Congress was concerned that the local market power then held by cable operators along with increasing vertical integration in the industry would hinder diversity and competition in the video programming market.<sup>8</sup> To address these concerns, Congress instructed the Commission in section 616 of the Act to adopt regulations governing program carriage agreements between MVPDs and video programming vendors.<sup>9</sup> Specifically, section 616 directed the Commission to prohibit several anti-competitive practices,<sup>10</sup> and to adopt procedures for expedited review of program carriage complaints.<sup>11</sup> In this FNPRM, we propose changes to two of these procedural provisions: first, the statute of limitations, and second, the rule governing the effective date of program carriage decisions.

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adopt one simple technical edit from the *2011 Program Carriage NPRM* to replace the term "video programming distributor" with "video programming vendor." *Id.* at 11523, para. 40.

<sup>3</sup> 47 CFR §§ 76.65(e)(3), 76.1003(g)(3), 76.1513(g)(3).

<sup>4</sup> 47 CFR §§ 76.10(c), 76.1302(j)(1).

<sup>5</sup> 47 CFR §§ 76.1003(h)(1), 76.1513(h)(1). As discussed below, this means that initial decisions by ALJs in program carriage, program access, and OVS proceedings will not be effective for 50 days after release and will be stayed automatically upon the filing of exceptions by an aggrieved party. 47 CFR § 1.276(d).

<sup>6</sup> *See Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (MB 2017) (*Media Modernization Public Notice*) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary, or unduly burdensome).

<sup>7</sup> Cable Television Consumer Protection and Competition Act of 1992, § 2(b)(5), Pub. L. No. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act) (codified at 47 U.S.C. § 521 note (Congressional Findings and Policy for Pub. L. 102-385)).

<sup>8</sup> *See 2011 Program Carriage NPRM*, 26 FCC Rcd at 11497-98, para. 4.

<sup>9</sup> 47 U.S.C. § 536. Section 616 defines video programming vendor as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(b). *See also* 47 CFR § 76.1300(e) (same).

<sup>10</sup> *See* 47 U.S.C. § 536(a)(1)-(3) (instructing that the program carriage rules should prohibit (1) an MVPD from requiring a financial interest in a program service as a condition for carriage, (2) an MVPD from coercing a video programming vendor to provide or retaliating for failing to provide exclusive rights against other MVPDs as a condition of carriage, and (3) an MVPD from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution of the basis of affiliation or nonaffiliation of vendors).

<sup>11</sup> 47 U.S.C. § 536(a)(4).

3. For a program carriage complaint to be considered timely, a complainant must satisfy one of the three prongs of the statute of limitations set forth in section 76.1302(h) of the Commission's rules.<sup>12</sup> The first prong provides that a complaint is timely if it is filed within one year of the date that the defendant MVPD enters into a program carriage contract that a party alleges to violate the program carriage rules.<sup>13</sup> The second prong provides that a complaint is timely if it is filed within one year of the date that the defendant MVPD presents a carriage offer that a party alleges violates the program carriage rules.<sup>14</sup> The third prong of the statute of limitations for program carriage complaints provides that a complaint "must be filed within one year of the date on which . . . [a] party has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section."<sup>15</sup> As originally adopted in the *1993 Program Carriage Order*, this third prong included additional limiting language. In particular, it provided that a complaint would be timely if it was filed within one year of the date on which "the complainant has notified [an MVPD] that it intends to file a complaint with the Commission *based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged*, allegedly in violation of one or more of the rules contained in this subpart."<sup>16</sup> In the *1994 Program Carriage Order*, however, the Commission removed this limiting language without providing a rationale for this specific modification.<sup>17</sup> Subsequently, in 1999, while discussing an amendment made to the second prong of the statutes of limitations for program access, program carriage, and OVS complaints, the Commission suggested that the third prong of these statutes of limitations is triggered when a "defendant unreasonably refuses to negotiate with [the] complainant."<sup>18</sup> We note that these three statutes of limitations were

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<sup>12</sup> 47 CFR § 76.1302(h).

<sup>13</sup> 47 CFR § 76.1302(h)(1).

<sup>14</sup> 47 CFR § 76.1302(h)(2).

<sup>15</sup> 47 CFR § 76.1302(h)(3).

<sup>16</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642, 2676, Appendix D (1993) (*1993 Program Carriage Order*) (emphasis added). As originally adopted, the statute of limitations provision mirrored substantially the statute of limitations for program access complaints. See 47 CFR § 76.1003(g). See also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, First Report and Order, 8 FCC Rcd 3359, 3522, Appendix E (1993) (*1993 Program Access Order*). The Commission later adopted the same statute of limitations construction for OVS complaints. See 47 CFR § 76.1513. See also *Implementation of Section 302 of the Telecommunications Act of 1996*, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 18223, 18386-87, Appendix B (1996) (*1996 OVS Order*). Finally, the Commission once again used the same statute of limitations construction in its rules governing complaints related to good faith negotiation of retransmission consent. See 47 CFR § 76.65. See also *Implementation of the Satellite Home Viewer Improvement Act of 1999*, CS Docket No. 99-363, First Report and Order, 15 FCC Rcd 5445, 5489, Appendix B (2000).

<sup>17</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket 62-265, Memorandum Opinion and Order, 9 FCC Rcd 4415, 4418, para. 24 (1994) (*1994 Program Carriage Order*), amended by Erratum, 1994 WL 445419 (1994) (amending rules). The *1994 Program Carriage Order* did note that the overarching purpose of the order was to amend the program carriage rules to explicitly afford standing to MVPDs to file complaints. See *id.* That overarching purpose, however, does not appear to have any relevance to the modification of the third prong of the statute of limitations.

<sup>18</sup> *1998 Biennial Regulatory Review—Part 76 – Cable Television Service Pleading and Complaint Rules*, CS Docket No. 98-54, Order on Reconsideration, 14 FCC Rcd 16433, 16435, para. 5 (1999) (*1998 Biennial Regulatory Review Order on Reconsideration*).

functionally identical when originally adopted by the Commission.<sup>19</sup> But while the 1994 amendment to section 76.1302 removed any reference to a denial or non-acknowledgement of a request to negotiate from the text of the provision, the third prong of the other statutes of limitation was not similarly modified. And although the Commission suggested in 1999 that the third prong of the program carriage statute of limitations should be interpreted consistent with the statutes of limitation for program access and OVS complaints, in a series of decisions beginning in 2008, the Media Bureau and Commission applied the third prong in a manner consistent with the language of the rule.<sup>20</sup>

4. Most recently, in the *2011 Program Carriage NPRM*, the Commission expressed concern that the third prong of the statute of limitations could be read to mean that a complaint is timely if filed within one year of when the complainant notified the defendant MVPD of its intention to file, regardless of when the actual act alleged to have violated the rules occurred.<sup>21</sup> The Commission recognized that an interpretation of the program carriage statute of limitations that allows filing within one year of notice of intent to file, regardless of when the allegedly unlawful conduct occurred, “undermines the fundamental purpose of a statute of limitations.” Thus, the Commission proposed to revise the rule in the *2011 Program Carriage NPRM* by replacing the three-pronged statute of limitations with a single provision providing “that a complaint must be filed within one year of the act that allegedly violated the program carriage rules.”<sup>22</sup>

5. The program carriage procedural rules also provide that the Chief of the Media Bureau may refer a carriage dispute case to an ALJ after determining that the complainant has established a *prima facie* violation of section 76.1301.<sup>23</sup> Section 76.1302(j) then specifies that a decision issued by an ALJ on

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<sup>19</sup> See *supra* note 16 (discussing the original implementation of the program carriage statute of limitations and the related program access, OVS, and retransmission consent good faith negotiation complaint statutes of limitations).

<sup>20</sup> See *Herring Broadcasting, Inc. d/b/a WealthTV et al.*, MB Docket No. 08-214, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14820, 14834, paras. 70, 105 (MB 2008) (*2008 Program Carriage Complaints HDO*) (finding several complaints filed against Comcast timely because they were filed within one year of the pre-filing notice and within one year of the acts that allegedly violated the rules). Both of these complaints were settled by the parties before a decision on the merits by an ALJ or the full Commission. *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149, 14157, n.63 (MB 2010) (*Tennis Channel HDO*). See also *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, Memorandum Opinion and Order, 27 FCC Rcd 8508, 8520, para. 30 (2012) (*Tennis Channel Order*) (affirming the Media Bureau’s interpretation of the statute of limitations consistent with the text of the rule). The D.C. Circuit subsequently granted Comcast’s petition for review of the *Tennis Channel* decision on other grounds. Comcast raised the statute of limitations issue, but the panel did not address it in its opinion because “the limitations period doesn’t constitute a jurisdictional barrier.” *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 984 (D.C. Cir. 2013). However, one of the judges on the panel in a concurrence explored the evolution of the third prong of the program carriage statute of limitations, suggesting that, despite the text of the regulation, the original language of the third prong was still controlling, meaning that it was only triggered when a defendant unreasonably refuses to negotiate with the complainant. *Id.* at 999 (Edwards, J. concurring). The opinion of the D.C. Circuit and the concurrence both noted the Commission had initiated a proceeding to fix the confusion surrounding the third prong, which this FNPRM aims to do. *Id.* at 984, 995.

<sup>21</sup> *2011 Program Carriage NPRM*, 26 FCC Rcd at 11522, para. 38.

<sup>22</sup> *Id.* Reply Comments in response to the *2011 Program Carriage NPRM* were due in January 2012. Commenters in that proceeding generally agreed that the statute of limitations needed revision but differed on what form a revised statute of limitations should take. The Commission later noted that while the revision to this rule was pending, it would “read subsection 76.1302(f)(3) consistent with the doctrine of laches to impliedly require notification of an intent to file a complaint within a reasonable time period of discovery of the allegedly unlawful conduct.” *Tennis Channel Order*, 27 FCC Rcd at 8520, para. 30, n.105.

<sup>23</sup> 47 CFR § 76.1302(i).

the merits shall become effective upon release, except in limited circumstances.<sup>24</sup> If review of an ALJ decision is sought, the rules require that the decision remain in effect pending review, unlike the generally applicable procedures of Section 1.276(d), that automatically stay an ALJ's initial decision pending review.<sup>25</sup> We note that while Congress instructed the Commission to adopt procedures for expedited review of program carriage complaints, there is no specific statutory requirement mandating that ALJ initial decisions take immediate effect, nor that they remain in effect pending review.<sup>26</sup> These rules governing when an ALJ's initial decision in a program carriage matter takes effect and whether it remains in effect pending review have caused confusion for both parties and adjudicators, and ultimately can create inconsistent outcomes pending appeal.<sup>27</sup> In this FNPRM, we propose rule changes to eliminate this confusion.

6. The procedural rules for program access complaints and OVS complaints contain parallel provisions requiring that orders take immediate effect and remain in effect pending review. Section 628 of the 1992 Cable Act instructed the Commission to adopt procedures for the expedited review of program access complaints.<sup>28</sup> Accordingly, in the *1993 Program Access Order*, the Commission adopted regulations providing for the expedited review of program access complaints, including a provision that ALJ initial decisions would take effect upon release.<sup>29</sup> The Commission subsequently adopted nearly

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<sup>24</sup> 47 CFR § 76.1302(j). If the defendant MVPD seeks review of any order for mandatory carriage that would require it to delete existing programming from its system to accommodate carriage, the order is stayed unless and until the Commission upholds the initial decision. *Id.* The Commission elaborated in the *1993 Program Carriage Order* that, “[i]n the absence of a stay, any relief or remedies imposed therein, with the exception of an order for mandatory carriage that would require deletion of other programming, will remain in effect pending appeal.” *1993 Program Carriage Order*, 9 FCC Rcd at 2656, para. 34. The Commission additionally emphasized that, “[s]tays will not be routinely granted.” *Id.*

<sup>25</sup> See 47 CFR § 76.10(c)(2) (“Any party to a part 76 proceeding aggrieved by any decision on the merits by an [ALJ] may file an appeal of the decision with the Commission, in accordance with §§ 1.276(a) and 1.277(a) through (c) of this chapter, except that in proceedings brought pursuant to §§ 76.1003, 76.1302, and 76.1513 of this part, unless a stay is granted by the Commission, the decision by the [ALJ] will become effective upon release and will remain in effect pending appeal.”). Unlike the Part 76 rules, the Commission’s Part 1 procedures dictate that ALJ initial decisions do not become effective before 50 days after the public release of the decision, unless otherwise ordered by the Commission, and that ALJ initial decisions are automatically stayed upon the timely filing of exceptions. 47 CFR § 1.1276(d). The Commission did not offer any explicit rationale for departing from the Part 1 procedures for ALJ initial decisions when it adopted the program carriage rules. See *1993 Program Carriage Order*, 9 FCC Rcd at 2656, para. 34.

<sup>26</sup> See 47 U.S.C. § 536. See also 47 U.S.C. §§ 548, 573.

<sup>27</sup> For example, in the *Game Show Network* proceeding, the ALJ incorrectly applied the Commission’s generally applicable procedures from Part 1 of the rules instead of the Part 76 rules. *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Memorandum Opinion and Order, 32 FCC Rcd 6160, 6188, para. 86 (2017) (*GSN Order*). This led to confusion among the parties and dueling motions before the Commission seeking compelled compliance or a stay, respectively relying on different procedural provisions. *Id.* at 6188, para. 86. Ultimately, the Commission clarified in its order reversing the initial decision that ALJ initial decisions in program carriage complaints are governed by the special rules in Part 76 and therefore take immediate effect and remain in effect pending review. *Id.* at 6188, para. 87. A similar error occurred in the *Tennis Channel* initial decision, but it was not addressed in subsequent Commission or Court decisions. See *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 26 FCC Rcd 17160, 17213, para. 125, n.361 (ALJ 2011) (*Tennis Channel ALJ Initial Decision*).

<sup>28</sup> 47 U.S.C. § 548(f)(1).

<sup>29</sup> *1993 Program Access Order*, 8 FCC Rcd 3359, para. 138 n.233 and 3522, Appendix E. The Commission offered no explicit rationale for why initial decisions issued by an ALJ in program access proceedings should take immediate effect and remain in effect pending review, though the complaint resolution procedures were adopted in response to the congressional “directive that Section 628 complaints be resolved expeditiously.” *Id.* at 3364, para. 17.

identical procedures for the filing of OVS complaints pursuant to section 653 of the Act, including the rule providing that ALJ initial decisions would take immediate effect.<sup>30</sup> In 1999, the Commission consolidated review procedures from the program carriage, program access, and OVS rules into a newly created section, which provides that review of an initial decision on the merits by an ALJ in any Part 76 proceeding will be handled in accordance with the Commission's general procedures, except that orders issued pursuant to the program carriage, program access, and OVS rules will remain in effect pending review.<sup>31</sup>

7. In May 2017, the Commission launched a proceeding to review its media regulations to eliminate or modify regulations that are outdated, unnecessary, or unduly burdensome.<sup>32</sup> Commenters in that proceeding suggested that the program carriage rules should be reviewed and updated as part of this initiative.<sup>33</sup>

### III. DISCUSSION

8. This FNPRM seeks comment on two different proposals to amend the Part 76 procedural rules. First, we propose to revise the program carriage statute of limitations provision in section 76.1302(h) to modify subsection (3) of that provision. As explained below, this proposal differs from the proposal in the *2011 Program Carriage NPRM* to revise this same provision.<sup>34</sup> Second, we propose to amend sections 76.10(c)(2), 76.1003(h)(1), 76.1302(j)(1), and 76.1513(h)(1) to provide that review of all initial decisions issued by an ALJ pursuant to the program access, program carriage, and OVS complaint rules will be handled in accordance with the Commission's generally applicable procedures for review of ALJ initial decisions. We believe that amending these provisions as proposed will make the Commission's procedures more consistent and encourage the timely resolution of program carriage disputes.

9. *Program Carriage Statute of Limitations.* The third prong of the program carriage statute of limitations provides that a complaint is timely as long as it is filed within one year of the complainant notifying the defendant of its intent to file a complaint with the Commission, regardless of when the actual act alleged to have violated the rules occurred.<sup>35</sup> As discussed above, the Commission has previously expressed concern that this undermines "the fundamental purpose of a statute of limitations 'to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after

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<sup>30</sup> *1996 OVS Order*, 11 FCC Rcd at 18387, Appendix B. The Commission modeled the OVS rules on the program access rules and offered no explicit rationale for why initial decisions issued by an ALJ in OVS proceedings should take immediate effect and remain in effect pending review. *Id.* at 18342, para. 237.

<sup>31</sup> *1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, CS Docket No. 98-54, Report and Order, 14 FCC Rcd 418, 435, Appendix A (1999) (*1998 Biennial Regulatory Review Order*). See also 47 CFR § 76.10(c).

<sup>32</sup> See *Media Modernization Public Notice*, 32 FCC Rcd at 4406.

<sup>33</sup> See e.g., NCTA – The Internet & Television Association Comments, MB Docket No. 17-105, at 15 (rec. July 5, 2017) (NCTA Media Modernization Comments) (encouraging the Commission to clarify the program carriage statute of limitations as a part of the Media Modernization Initiative); INSP Reply, MB Docket No. 17-105, at 10 (rec. Aug. 4, 2017) (asking the Commission to carefully consider the impact of any changes to the program carriage statute of limitations on independent networks).

<sup>34</sup> We do propose however to adopt a proposal from the *2011 Program Carriage NPRM* to make a simple technical edit to section 76.1302(h)(1) to replace the term "video programming distributor" with the term "video programming vendor" as this is a defined term in both the Act and the rules. See *2011 Program Carriage NPRM*, 26 FCC Rcd at 11523, para. 40. See also 47 U.S.C. § 536(b); 47 CFR § 76.1300(e).

<sup>35</sup> 47 CFR § 76.1302(h)(3).

a reasonable period of time has elapsed.”<sup>36</sup> We propose to revise the third prong of the program carriage statute of limitations to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer and a defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage.<sup>37</sup> The revised rule will provide that, “in instances where there is no existing contract or an offer for carriage,” program carriage complaints relying on the third triggering event must be filed within one year of the date on which “[an MVPD] has denied or failed to acknowledge a request by a video programming vendor for carriage or to negotiate for carriage of that video programming vendor’s programming on defendant’s distribution system, allegedly in violation of one or more of the [program carriage rules].”<sup>38</sup> With this proposed revision, we intend to ensure that parties file program carriage complaints on a timely basis and provide certainty to both MVPDs and prospective complainants. We seek comment on the potential effects of this proposal on the program carriage complaint process and the parties involved.

10. We tentatively find persuasive comments responding to the *2011 Program Carriage NPRM* suggesting that the Commission should reincorporate limiting language that would make clear that the third prong applies only in instances where an MVPD denies or fails to acknowledge either a request for carriage or a request to negotiate for carriage, similar to the language of the rule as originally adopted in 1993,<sup>39</sup> rather than adopt the single statute of limitations provision proposed in that item.<sup>40</sup> We tentatively agree with commenters that this revision would provide clarity as to when an MVPD’s alleged violation occurred and eliminate the possibility of an open-ended interpretation of the program carriage statute of limitations, a concern raised by the Commission itself and by multiple commenters in the 2011 proceeding.<sup>41</sup> Commenters in the 2011 proceeding argued that the proposal to replace the three-pronged statute of limitations with a single provision would not alleviate the problems caused by the current statute of limitations, as it would “effectively eliminate any time limitation by allowing complaints to be filed within one year of any ‘alleged violation’ of the rules without any limitation on what ‘alleged violations’ program carriage claims may be based on.”<sup>42</sup> We seek comment on this analysis. Would the revision proposed herein better fulfill the general aim of a statute of limitations by protecting potential

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<sup>36</sup> *2011 Program Carriage NPRM*, 26 FCC Rcd at 11523, para. 38 (quoting *Bunker Ramo Corp.*, Memorandum Opinion and Order, 31 FCC 2d 449, 453, para. 12 (Review Board 1971)).

<sup>37</sup> This construction of the third prong would encompass instances where an MVPD refuses to renew or to negotiate for renewal of a contract.

<sup>38</sup> See *infra* Appendix A.

<sup>39</sup> See *supra* note 17 (explaining that the Commission did not provide a clear rationale for deleting the limiting language in the third prong of the program carriage statute of limitations in the *1994 Program Carriage Order* and that the primary purpose of that order was to explicitly extend standing to MVPDs to file complaints under the program carriage rules).

<sup>40</sup> See, e.g., Comcast Corporation Comments, MB Docket No. 11-131, at 77 (rec. Nov. 28, 2011) (Comcast Comments) (“In order for the statute of limitations rules to provide the necessary clarity and finality that businesses need to function, the Commission should simply clarify, consistent with the original understanding and promulgation of the rule, that the third prong only permits complaints regarding an MVPD’s refusal to deal separate from any existing carriage contract.”).

<sup>41</sup> See Cox Communications, Inc. Comments, MB Docket No. 11-131, at 3 (rec. Nov. 28, 2011) (Cox Comments) (“These rules should both improve the process of negotiating carriage agreements and promote the resolution of complaints when disputes arise.”); The National Cable & Telecommunications Association Comments, MB Docket No. 11-131, at 27 (rec. Nov. 28, 2011) (NCTA Comments) (“[I]t is most important that the Commission make clear that, for purposes of the statute of limitations, there is a fixed point at which an MVPD’s action . . . allegedly occurred.”); Time Warner Cable, Inc. Comments, MB Docket No. 11-131, at 13 (rec. Nov. 28, 2011) (TWC Comments) (“ . . . TWC supports the establishment of an appropriate limitations period for complaints. Such action would provide some protection for MVPDs against unwarranted attacks on their editorial discretion. . . .”).

<sup>42</sup> Comcast Comments at 75.

MVPD defendants against “stale and vexatious” claims? Relatedly, would it provide greater certainty for potential complainants regarding when their claims expire? How should we determine when a potential defendant has failed to acknowledge a request? Should we specify a set number of days (*e.g.*, 30 or 60) after the initial request for program carriage is made by which the MVPD must acknowledge the request or else the statute of limitations begins to run? If we specify a time period, should that time period instead run from the date that the initial request is received by the MVPD? What evidence should the Commission rely on in determining when that request is made or received? What are other ways that we could determine whether an MVPD has failed to acknowledge a request? Are there other objective means by which we can make this determination or is it inherently fact specific and thus better determined on a case-by-case basis? How, if at all, would making the changes discussed above affect the ability of MVPDs to file program carriage complaints?<sup>43</sup> What would the effect of this revision be on the expeditious resolution of program carriage complaints by Commission staff or an ALJ, an explicit goal of section 616? We encourage commenters to provide specific examples where possible of how this proposed revision, if adopted, would affect the resolution of program carriage complaints.

11. We note that the statutes of limitations for program access, OVS, and good-faith retransmission consent complaints contain a similar triggering event that runs from the moment that a potential complainant notifies a defendant that it intends to file a complaint based on a denial or failure to acknowledge a request.<sup>44</sup> For consistency, we propose to revise those provisions so that the triggering event for each would be the denial or failure to acknowledge a request, rather than notice of intent to file a complaint on that basis.<sup>45</sup> We seek comment on this proposal. We propose to determine when a potential defendant has failed to acknowledge a request with regard to program access, OVS, and good-faith retransmission consent complaints in the same way we would make this determination in the context of program carriage complaints. Or are there reasons why these determinations should differ in the context of these different types of substantive disputes?

12. We note that the Commission or Bureau has previously entertained several program carriage complaints which involved a contract that provided a defendant MVPD with the discretion to re-tie a complainant programmer or to carry the complainant programmer on additional systems. In those proceedings, the complainant programmer had alleged that the defendant MVPD exercised its discretion in a way that violated the program carriage statute and rules.<sup>46</sup> The Commission or Bureau found that such complaints were timely filed under the third prong of the program carriage statute of limitations.<sup>47</sup> Would similar complaints be timely filed under any of the three prongs of the program carriage statute of

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<sup>43</sup> The *1994 Program Carriage Order* revised the program carriage rules, including this provision, to explicitly extend standing to MVPDs to file complaints under the program carriage rules, which we intend to preserve in the revised rule. *See 1994 Program Carriage Order*, 9 FCC Rcd at 4418, para. 24.

<sup>44</sup> *See* 47 CFR §§ 76.65(e)(3), 76.1003(g)(3), 76.1513(g)(3). *See also supra* note 17.

<sup>45</sup> We note that the third prong of the statute of limitations for good-faith retransmission consent complaints contains a third triggering event, unreasonable delay, that is not found in the other parallel provisions. *Compare* 47 CFR § 76.65(e)(3) *with* 47 CFR §§ 76.1003(g)(3), 76.1302(h)(3), 76.1513(g)(3). “Acting in a manner that unreasonably delays retransmission consent negotiations” is one of the *per se* violations of the good-faith negotiation standard for retransmission consent. 47 CFR § 76.65(b)(1)(iii). Thus, we do not propose to alter this language in the good-faith retransmission consent statute of limitations.

<sup>46</sup> *See Tennis Channel Order*, 27 FCC Rcd at 8519-22, para. 28-34. *See also 2008 Program Carriage Complaints HDO*, 23 FCC Rcd at 14820, 14834, paras. 70, 105; *Game Show Network, LLC v. Cablevision Sys. Corp.*, Hearing Designation Order, 27 FCC Rcd 5113, 5121-25, paras. 12-16 (MB 2012).

<sup>47</sup> *See, e.g., Tennis Channel Order*, 27 FCC Rcd at 8520-21, para. 32-33 (stating that the “complaint does not allege that the 2005 contract was improperly discriminatory, but instead focuses on [the defendant’s] 2009 conduct [in refusing to re-tie]. . . . [The defendant] had an obligation to exercise that discretion consistent with Section 616. . . . [The complainant] was asking that the existing contract be performed—that Comcast exercise its contractual discretion—consistent with its obligations under Section 616.”).

limitations if we were to adopt the rule revisions proposed herein? If not, how would complainant programmers be impacted? We propose to add language to the third prong to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer. Having agreed to a contractual provision that provides an MVPD with the discretion to take future carriage actions unilaterally, what basis, if any, would there be for allowing such programmer to file a program carriage complaint when an MVPD exercises that discretion?<sup>48</sup>

13. We recognize that determining when an MVPD has denied or failed to acknowledge a request for carriage or a request to negotiate for carriage may require a fact-specific analysis and that parties may view circumstances giving rise to the dispute differently. To the extent necessary, we expect that the adjudicator will be able to resolve such issues on a case-by-case basis.<sup>49</sup> Relatedly, we tentatively disagree with suggestions from comments to the *2011 Program Carriage NPRM* that complainants would manufacture triggering events, resulting in a statute of limitations that lacks any clarity for defendant MVPDs.<sup>50</sup> We tentatively conclude that Part 76's general pleading requirements, which prohibit the filing of false or frivolous claims and provide for sanctions against parties doing so, would sufficiently dissuade parties from filing vexatious claims in the program carriage context.<sup>51</sup> We seek comment on this tentative conclusion.

14. Some commenters responding to the *2011 Program Carriage NPRM* argued that the statute of limitations should not begin to run until discriminatory conduct that is alleged to violate the program carriage rules has become apparent to video programming vendors.<sup>52</sup> Video programming vendors suggested that they are at an information disadvantage because they do not have access to all of the terms offered by MVPDs to comparably situated vendors making it difficult to determine whether they have a meritorious claim of discrimination.<sup>53</sup> We seek additional comment on this argument. For discriminatory conduct to violate the program carriage rules, it must be "on the basis of affiliation or non-affiliation of" programmers and it must "unreasonably restrain the ability of an unaffiliated video

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<sup>48</sup> *Comcast Cable*, 717 F.3d at 1003-04 (Edwards, J. concurring) (stating that "in demanding 'that [the defendant MVPD] exercise its contractual discretion' to reassign [the complainant programmer] to a different tier, [the complainant programmer] was simply insisting on a material change in the contract's terms," meaning that the complaint should have been filed within one year of entering into the contract).

<sup>49</sup> The Commission similarly expressed confidence in adjudicators' abilities to resolve similar factual disputes in the *2011 Program Carriage NPRM*. *2011 Program Carriage NPRM*, 26 FCC Rcd at 11523, para. 39.

<sup>50</sup> Comcast Comments at 75.

<sup>51</sup> 47 CFR § 76.6(a)(4), (c). We note that section 616 specifically instructs the Commission to "provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section." 47 U.S.C. § 536(a)(6).

<sup>52</sup> See, e.g., TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network, MB Docket No. 11-131, at 20 (rec. Nov. 28, 2011) (MASN Comments) ("In reforming the statute of limitations for program carriage complaints, the Commission should ensure that program vendors have clear notice of when their claims accrue."); Bloomberg Reply, MB Docket No. 11-131, at 5 ("... [T]he statute of limitations should not begin to run from the date of carriage denial, but from the date it becomes reasonably apparent that a defendant MVPD has denied carriage or otherwise engaged in prohibited discrimination."); Current TV LLC, NFL Enterprises LLC, and the Tennis Channel, Inc. Reply, MB Docket No. 11-131, at 11 (rec. Jan. 11, 2012) (Joint Commenters Reply) ("Accordingly, the Joint Commenters support MASN's recommendation that the Commission clarify that the limitations period would not begin to run until it becomes 'reasonably apparent' that an MVPD is violating the rules, or has violated them . . ."); HDNet Entertainment LLC Reply, MB Docket No. 11-131, at 2 (rec. Jan. 11, 2012) (HDNet Reply) ("However, taking into account the disparities of information between independent programmers and MVPDs, the revised regulations should specify a generous 'statute of limitations' that would begin to run only when an alleged program carriage violation is *discovered* or *should have been discovered* by the complainant.") (emphasis in original).

<sup>53</sup> See HDNet Entertainment LLC Comments, MB Docket No. 11-131, at 3-5 (rec. Nov. 29, 2011) (HDNet Comments).

programming vendor to compete fairly.”<sup>54</sup> If an MVPD makes an offer or the parties enter into a contract that discriminates “on the basis of affiliation or non-affiliation of” programmers and to an extent that it unreasonably restrains the ability of an unaffiliated video programming vendor to compete fairly, then the video programming vendor has one year from the date on which that offer was made or that contract was executed to file a complaint with the Commission.<sup>55</sup> Does this preclude video programming vendors from being eligible to file meritorious program carriage complaints because of their alleged information disadvantage? Other commenters alleged that MVPDs “have historically strung out negotiations with unaffiliated programmers, permitting them to discriminate against unaffiliated vendors without ever having to issue a formal denial.”<sup>56</sup> We seek comment on this argument. Are there alternative proposals that would address these issues, while still foreclosing stale and vexatious claims?

15. *Review of Initial ALJ Decisions.* The differences between the Part 1 and Part 76 review procedures for ALJ initial decisions have caused confusion for both adjudicators and parties in program carriage proceedings.<sup>57</sup> The Part 76 review procedures for ALJ initial decisions contain two major differences from the Part 1 procedures. First, ALJ decisions following the Part 1 procedures do not take effect for at least 50 days following release, while Part 76 provides that they take immediate effect.<sup>58</sup> Second, Part 1 provides that ALJ decisions are stayed automatically upon the filing of exceptions, while Part 76 provides that ALJ decisions will remain in effect pending review.<sup>59</sup> To address this confusion, we propose to amend the program access, program carriage, and OVS procedural rules so that review of initial decisions issued by an ALJ is handled in accordance with the Commission’s generally applicable procedures in Part 1 of our rules for review of ALJ initial decisions.<sup>60</sup> In practice, this will mean that decisions on the merits issued by an ALJ in program access, program carriage, and OVS proceedings will not take effect before 50 days after issuance and decisions will be automatically stayed upon the filing of exceptions by an aggrieved party.

16. We tentatively conclude that this revision would reduce the potential for confusion by making the Part 76 procedures consistent with the Commission’s generally applicable procedures in Part 1 of our rules for review of ALJ initial decisions. We seek comment on this proposal. Are there valid reasons for requiring that ALJ initial decisions in program access, program carriage, and OVS proceedings take effect upon release, but delaying the effectiveness of ALJ initial decisions in other contexts?<sup>61</sup> Further, what are the reasons, if any, for allowing ALJ initial decisions in program access, program carriage, and OVS proceedings to remain in effect while the parties seek review?<sup>62</sup> Would there be any potential negative effects for consumers from making this change? Are there any potential negative effects for complainants? Would there be any harms to complainants from staying the effect of ALJ initial decisions during review that could not be alleviated by extending the effect of the remedial

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<sup>54</sup> 47 CFR § 76.1301(c).

<sup>55</sup> 47 CFR § 76.1302(h).

<sup>56</sup> MASN Comments at 20.

<sup>57</sup> See *supra* note 27 (discussing the confusion surrounding when an initial program carriage decision takes effect).

<sup>58</sup> Compare 47 CFR § 1.276(d) with 47 CFR §§ 76.1003(h)(1), 76.1302(j)(1), 76.1513(h)(1).

<sup>59</sup> Compare 47 CFR § 1.276(d) with 47 CFR § 76.10(c)(2).

<sup>60</sup> 47 CFR §§ 76.10(c)(2), 76.1003(h)(1), 76.1302(j)(1), 76.1513(h)(1).

<sup>61</sup> See 47 CFR § 1.276(d).

<sup>62</sup> We note that there have been two program carriage disputes adjudicated by an ALJ where the Commission eventually issued decisions reversing the ALJ’s initial decision. See *GSN Order*, 32 FCC Rcd at 6161, para. 3 (reversing the ALJ’s initial decision and denying the complaint); *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, 30 FCC Rcd 849, 849-50, paras. 2-3 (2015) (reversing the ALJ’s initial decision after the Commission’s previous order upholding the initial decision was vacated by the D.C. Circuit).

order commensurate with the length of the stay? Would any potential costs to complainants resulting from our proposed rule revisions outweigh the benefits? Commenters are encouraged to provide specific examples where possible. What, if any, other technical rule revisions would reduce confusion in the application of these ALJ review procedures and aid in the efficient resolution of program access, program carriage, and OVS complaints by ALJs?

17. We also propose a simple technical edit in the respective program access, program carriage, and OVS provisions to make clear that decisions under those rules may be issued by the Commission, Commission staff, or an ALJ.<sup>63</sup> This revision does not reflect a substantive change to the rules and would merely increase the clarity of the program access, program carriage and OVS rules. Are there any additional proposals related to the effective date of program access, program carriage, and OVS complaint decisions issued by ALJs that we should consider as a part of this proceeding?

18. *Other Program Carriage Proposals.* The 2011 Program Carriage NPRM sought comment on a number of additional issues related to the Commission's program carriage rules, including: revising the discovery procedures; permitting the award of damages; adopting a best "final offer" dispute resolution model; heightening the evidentiary showing to obtain a mandatory carriage remedy; explicitly prohibiting retaliation for filing a complaint; adopting a good-faith negotiation rule; clarifying what constitutes discrimination; and codifying the burden of proof requirements for discrimination cases.<sup>64</sup> Given the significant amount of time that has passed since the 2011 Program Carriage NPRM and the vast changes in the media marketplace in the intervening years, we tentatively conclude that those proposals from 2011 are no longer necessary to ensure an efficient program carriage marketplace.

#### 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 FNPRM. The IRFA is set forth in Appendix B.

20. *Paperwork Reduction Act.* This document may result in new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501 through 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 of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). 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 specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

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. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte*, or otherwise, are generally prohibited. 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

<sup>63</sup> See 47 CFR §§ 76.1003(h)(1), 76.1302(j)(1), 76.1513(h)(1). See also *infra* Appendix A.

<sup>64</sup> 2011 Program Carriage NPRM, 26 FCC Rcd at 11496, para. 3.

<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).

during the presentation. Memoranda must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. 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 section 1.1206(b) of the rules. In proceedings governed by section 1.49(f) of the rules 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://fjallfoss.fcc.gov/ecfs2/>.
- 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> Street, SW, 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.

23. *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 FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

24. *Availability of Documents.* Comments and reply comments will be publicly available online via ECFS.<sup>66</sup> These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC

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<sup>66</sup> Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

Headquarters, 445 12<sup>th</sup> Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

25. *Additional Information.* For additional information on this proceeding, contact John Cobb, [John.Cobb@fcc.gov](mailto:John.Cobb@fcc.gov), of the Policy Division, Media Bureau, (202) 418-2120.

#### V. ORDERING CLAUSES

26. **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), 303(r), 616, 628, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 536, 548, and 573, this Further Notice of Proposed Rulemaking in MB Docket No. 11-131 and Notice of Proposed Rulemaking in MB Docket No. 20-70 **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 Further Notice of Proposed Rulemaking in MB Docket No. 11-131 and Notice of Proposed Rulemaking in MB Docket No. 20-70, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Proposed Rules

Part 76 of the Commission's rules is amended as follows:

## PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.10(c)(2) to read as follows:

(c) *Application for review.*

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(2) Any party to a part 76 proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with §§ 1.276(a) and 1.277(a) through (c) of this chapter, ~~except that in proceedings brought pursuant to §§ 76.1003, 76.1302, and 76.1513 of this part, unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.~~

3. Amend § 76.65(e)(3) to read as follows:

(e) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

\* \* \*

(3) ~~The complainant has notified the television broadcast station or multichannel video programming distributor that it intends to file a complaint with the Commission based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or ~~un~~ failed to acknowledge a request to negotiate retransmission consent~~ in violation of one or more of the rules contained in this subpart.

4. Amend §§ 76.1003(g)(3) and (h)(1) to read as follows:

(g) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

\* \* \*

(3) ~~The complainant has notified a~~ A cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor **has denied or failed to acknowledge** ~~that it intends to file a complaint with the Commission based on a request to purchase or negotiate to purchase satellite cable programming, satellite broadcast programming, or terrestrial cable programming, or has made a request to amend an existing contract pertaining to such programming pursuant to §76.1002(f) of this part that has been denied or unacknowledged,~~ allegedly in violation of one or more of the rules contained in this subpart.

(h) *Remedies for violations*—(1) *Remedies authorized*. Upon completion of such adjudicatory proceeding, the Commission, **Commission staff, or Administrative Law Judge** shall order appropriate remedies, including, if necessary, the imposition of damages, and/or the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance, ~~and shall become effective upon release~~. **Such order issued by the Commission or Commission staff shall be effective upon release. See 47 CFR § 1.102(b); 1.103. The effective date of such order issued by the Administrative Law Judge is set forth in 47 CFR § 1.276(d).**

5. Amend §§ 76.1302(h) and (j)(1) to read as follows:

(h) *Time limit on filing of complaints*. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The multichannel video programming distributor enters into a contract with a video programming ~~distributor~~ **vendor** that a party alleges to violate one or more of the rules contained in this section; or

(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or

(3) **In instances where there is no existing contract or an offer for carriage, the multichannel video programming distributor has denied or failed to acknowledge a request by a video programming vendor for carriage or to negotiate for carriage of that video programming vendor's programming on defendant's distribution system,** ~~A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations~~ **allegedly in violation** of one or more of the rules contained in this section.

(j) *Remedies for violations*—(1) *Remedies authorized*. Upon completion of such adjudicatory proceeding, the Commission, **Commission staff, or Administrative Law Judge** shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance. **The effective date of such order issued by the Administrative Law Judge is set forth in 47 CFR § 1.276(d). Such order issued by the Commission or Commission staff shall become effective upon release, see 47 CFR § 1.102(b), 1.103,** unless any order of mandatory carriage **issued by the staff** would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff, ~~or administrative law judge~~ decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff ~~or the administrative law judge~~ is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, ~~the defendant MVPD will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.~~

6. Amend §§ 76.1513(g)(3) and (h)(1) to read as follows:

(g) *Time limit on filing of complaints*. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

\* \* \*

(3) ~~The complainant has notified a~~ An open video system operator **has denied or failed to acknowledge that it intends to file a complaint with the Commission based on** a request for such operator to carry the complainant's programming on its open video system ~~that has been denied or unacknowledged~~, allegedly in violation of one or more of the rules contained in this part.

(h) *Remedies for violations*—(1) *Remedies authorized*. Upon completion of such adjudicatory proceeding, the Commission, **Commission staff, or Administrative Law Judge** shall order appropriate remedies, including, if necessary, the requiring carriage, awarding damages to any person denied carriage, or any combination of such sanctions. Such order shall set forth a timetable for compliance, ~~and shall become effective upon release~~. **Such order issued by the Commission or Commission staff shall be effective upon release. See 47 CFR § 1.102(b); 1.103. The effective date of such order issued by the Administrative Law Judge is set forth in 47 CFR § 1.276(d).**

## APPENDIX B

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking (FNPRM). 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 FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the FNPRM 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. Congress passed the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) to, among other goals, “ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers.”<sup>4</sup> Congress was concerned that the local market power held by cable operators along with increased vertical integration in the industry would hinder diversity and competition in the video programming market.<sup>5</sup> To address these concerns, Congress instructed the Commission in section 616 of the 1992 Cable Act to adopt regulations governing program carriage agreements between MVPDs and video programming vendors.<sup>6</sup> Section 616 directed the Commission to adopt procedures for expedited review for complaints filed pursuant to section 616 and provide for penalties and remedies for violations of the same.<sup>7</sup>

3. This FNPRM seeks comment on two different proposals to amend the Part 76 procedural rules. First, we propose to revise the program carriage statute of limitations provision in section 76.1302(h) to revise subsection (3) to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer and a defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage. For consistency, we propose to revise the parallel program access,<sup>8</sup> OVS,<sup>9</sup> and good-faith retransmission

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

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> Cable Television Consumer Protection and Competition Act of 1992, § 2(b)(5), Pub. L. No. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act) (codified at 47 U.S.C. § 521 note (Congressional Findings and Policy for Pub. L. 102-385)).

<sup>5</sup> See *Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB. Docket Nos. 11-131, 07-42, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, 11497-98, para. 4. (2011) (*2011 Program Carriage NPRM*).

<sup>6</sup> 47 U.S.C. § 536. Section 616 defines video programming vendor as “a person engaged in the production, creation, or wholesale distribution of video programming for sale. 47 U.S.C. § 536(b).

<sup>7</sup> 47 U.S.C. § 536(a)(4), (a)(5). Section 616 also directed the Commission to provide for penalties for the filing of frivolous complaints pursuant to these rules. 47 U.S.C. § 536(a)(6).

<sup>8</sup> 47 CFR § 76.1003(g)(3).

<sup>9</sup> 47 CFR § 76.1513(g)(3).

consent rules,<sup>10</sup> so that the triggering event for each would be the denial or failure to acknowledge a request, rather than notice of intent to file a complaint on that basis, as we propose to do with the program carriage rules here. Second, we propose to amend sections 76.10(c)(2), 76.1003(h)(1), 76.1302(j)(1), and 76.1513(h)(1) to provide that all initial decisions issued by an administrative law judge (ALJ) pursuant to the program access, program carriage, and OVS rules will not take effect before 50 days after issuance and decisions will be automatically stayed upon the filing of exceptions by an aggrieved party in accordance with the Commission's generally applicable procedures for review of ALJ decisions. We believe that amending these provisions as proposed will better ensure that program access, program carriage, OVS, and good-faith retransmission consent complaints are addressed expeditiously by providing additional clarity to both potential complainants and defendants, consistent with Congress's intent in the Act, and will apply existing Commission procedures uniformly.

## **B. Legal Basis**

4. The proposed action is authorized pursuant to 1, 4(i), 4(j), 616, 628, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 536, 548, and 573.

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

5. 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>11</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>12</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>13</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>14</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Cable Companies and Systems (Rate Regulation Standard)* The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.<sup>15</sup> Industry data indicate that, of 4,200 cable operators nationwide, all but 9 are small under this size standard.<sup>16</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000

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<sup>10</sup> 47 CFR § 76.65(e)(3).

<sup>11</sup> 5 U.S.C. § 603(b)(3).

<sup>12</sup> 5 U.S.C. § 601(6).

<sup>13</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

<sup>14</sup> 15 U.S.C. § 632.

<sup>15</sup> 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>16</sup> The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on November 16, 2018. See FCC, Cable Operations and Licensing Systems (COALS), [www.fcc.gov/coals](http://www.fcc.gov/coals) (last visited Nov. 16, 2018).

or fewer subscribers.<sup>17</sup> Industry data indicate that, of 4,200 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records.<sup>18</sup> Thus, under this second size standard, the Commission believes that most cable systems are small.

7. *Cable System Operators (Telecommunications Act Standard)*. The Act 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 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>19</sup> There are approximately 49,011,210 cable subscribers in the United States today.<sup>20</sup> Accordingly, an operator serving fewer than 490,112 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>21</sup> Based on the available data, we find that all but five independent cable operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>22</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, 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>23</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under the definition in the Communications Act.

8. *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>24</sup> The SBA determines that a wireline business is small if it has fewer than 1,500 employees.<sup>25</sup> Economic census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer

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<sup>17</sup> 47 CFR § 76.901(c).

<sup>18</sup> See *supra* note 16 (discussing the number of active, registered cable systems).

<sup>19</sup> 47 U.S.C. § 543(m)(2). See also 47 CFR § 76.901(e) & nn.1–3.

<sup>20</sup> See SNL Kagan at <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/multichannelIndustryBenchmarks>.

<sup>21</sup> 47 CFR § 76.901(e); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bur. 2001).

<sup>22</sup> See SNL Kagan at <http://www.snl.com/interactivex/TopCableMSOs.aspx>.

<sup>23</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(e) of the Commission’s rules.

<sup>24</sup> See U.S. Census Bureau, *2017 North American Industry Classifications System (NAICS) Definitions*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (2012 NAICS Definitions) (NAICS Code 517110).

<sup>25</sup> 13 CFR § 121.201 (2012) (NAICS Code 517110).

than 1,000 employees.<sup>26</sup> Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. Currently, however, only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network.<sup>27</sup> DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Accordingly, we conclude that, in general, DBS service is provided only by large firms.

9. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”<sup>28</sup> We notes that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$35,000,000 or less in annual revenue.<sup>29</sup> To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census Bureau for the year 2012. Census Bureau data for 2012 show that there were 8,203 firms in this category that operated for the entire year.<sup>30</sup> Of these, 8075 firms had annual receipts of \$24,999,999 or less, and 61 firms had annual receipts exceeding \$50,000,000.<sup>31</sup> 67 firms had annual receipts between \$25,000,000 and \$49,000,000.<sup>32</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

10. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.”<sup>33</sup> We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category which is: all such firms having \$34,500,000 million or less in annual revenue.<sup>34</sup> To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census Bureau for the year 2012. Census Bureau data for 2012

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<sup>26</sup> See U.S. Census Bureau, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012; 2012 Economic Census of the United States* (Jan. 8, 2016), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ5&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table).

<sup>27</sup> See *Communications Marketplace Report et al.*, GN Docket No. 18-231 et al., Report, FCC 18-131, 2018 WL 6839365, at \*20, paras. 50-51 (Dec. 26, 2018).

<sup>28</sup> U.S. Census Bureau, 2017 NAICS Definitions, “512110 Motion Picture and Video Production,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=512110&search=2017>.

<sup>29</sup> 13 CFR § 121.201 (NAICS Code 512110).

<sup>30</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (Jan. 8 2016), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> U.S. Census Bureau, 2017 NAICS Definitions, “512120 Motion Picture and Video Distribution,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=512120&search=2017>.

<sup>34</sup> 13 CFR § 121.201 (NAICS Code 512120).

show that there were 307 firms in this category that operated for the entire year.<sup>35</sup> Of these, 294 firms had annual receipts of \$24,999,999 or less, and 8 firms had annual receipts exceeding \$50,000,000.<sup>36</sup> 5 firms had annual receipts between \$25,000,000 and \$49,000,000.<sup>37</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

11. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”<sup>38</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>39</sup> These establishments also produce or transmit visual programming to affiliated broadcast television 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 \$41.5 million or less in annual receipts.<sup>40</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of less than \$25 million, 25 had annual receipts ranging from \$25 million to \$49,999,999, and 70 had annual receipts of \$50 million or more.<sup>41</sup> Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

12. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,374.<sup>42</sup> Of this total, 1,282 stations (or 94.2%) had revenues of \$41.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 15, 2019, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates the number of licensed noncommercial educational (NCE) television stations to be 388.<sup>43</sup> The Commission does not compile and 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.

13. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>44</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>35</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (Jan. 8 2016), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017>.

<sup>39</sup> *Id.*

<sup>40</sup> 13 CFR § 121.201 (2012) (NAICS Code 515120).

<sup>41</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (Jan. 8, 2016), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>42</sup> Press Release, FCC, Broadcast Station Totals as of December 31, 2019 (Jan. 3, 2020), <https://docs.fcc.gov/public/attachments/DOC-361678A1.pdf>.

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

<sup>44</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.

14. There are also 387 Class A stations.<sup>45</sup> Given the nature of these services, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard. In addition, there are 1,892 LPTV stations and 3,621 TV translator stations.<sup>46</sup> Given the nature of these services as secondary and in some cases purely a “fill-in” service, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

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

15. As discussed above, this FNPRM proposes two revisions to the Part 76 procedural rules. The first revision concerns the statute of limitations provision contained in section 76.1302(h) and would insert limiting language to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer and a defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage. For consistency, we propose to revise the parallel program access,<sup>47</sup> OVS,<sup>48</sup> and good-faith retransmission consent rules,<sup>49</sup> so that the triggering event for each would be the denial or failure to acknowledge a request, rather than notice of intent to file a complaint on that basis, as we propose to do with the program carriage rules here. The second would amend section 76.1302(j)(1) to provide that initial decisions by an administrative law judge are automatically stayed upon the filing of exceptions by an aggrieved party, rather than only in the event of an order mandating carriage of a video programming vendor’s content that requires a defendant MVPD to delete existing programming from its system to accommodate carriage. For consistency, we propose to extend this change to parallel provisions in program access, section 76.1003(h)(1), and OVS, section 76.1513(h)(1), proceedings as well. These revisions should result in a more streamlined and clear Part 76 complaint process, which would ultimately reduce the burden on entities potentially involved in Part 76 complaints.

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

16. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standard; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>50</sup>

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<sup>45</sup> See *supra* note 42 (discussing broadcast station totals as of December 31, 2019).

<sup>46</sup> *Id.*

<sup>47</sup> 47 CFR § 76.1003(g)(3).

<sup>48</sup> 47 CFR § 76.1513(g)(3).

<sup>49</sup> 47 CFR § 76.65(e)(3).

<sup>50</sup> 5 U.S.C. § 603(c).

17. Through this FNPRM, the Commission seeks to minimize the burdens associated with the resolution of program carriage, program access, OVS, and good-faith retransmission consent complaints, by clarifying that the third triggering for all four types of complaints is the denial or failure to acknowledge a request and providing for automatic stays of initial decisions by an ALJ pending review for program carriage, program access, and OVS complaints. It is our hope that these revisions will aid in the expeditious resolution of program access, program carriage, OVS, good-faith retransmission consent complaints consistent with the Act. These changes would reduce the costs associated with litigating program access, program carriage, OVS, good-faith retransmission consent complaints before the Commission by eliminating any confusion surrounding the statute of limitations in all four contexts and eliminating the need to seek a stay of an initial decision issued by an ALJ pending review for program carriage, program access, and OVS complaints. The Commission invites comment on alternative proposals that we should consider that would better minimize any adverse impact on small businesses, while still furthering the goal of reducing the costs associated with the efficient resolution of Part 76 complaints.

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

18. None.