

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
Report and Order – MB Docket Nos. 20-70, 17-105, 11-131

Background: For a program carriage complaint against a multichannel video programming distributor (MVPD) to be considered timely, a video programming vendor must satisfy one of the three prongs of the statute of limitations set forth in the Commission's rules. However, the third prong of the program carriage statute of limitations permits a complaint to be filed within one year of the date the complainant notifies the defendant MVPD of its intention to file a program carriage complaint. Such notice could potentially be given years after the alleged rule violation occurred, undermining the fundamental purpose of a statute of limitations. 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 that automatically stay an ALJ's initial decision pending review. This inconsistency has caused confusion for both parties and adjudicators.

In March 2020, the Commission issued a Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking (FNPRM) in this proceeding as a part of our ongoing Modernization of Media Regulation Initiative. The FNPRM proposed changes to the statute of limitations and ALJ rules governing the resolution of program carriage disputes between video programming vendors and MVPDs and parallel procedural rules which govern program access, open video system (OVS), and good-faith retransmission consent complaints.

What the Report and Order Would Do:

- Amend the third prong of the statute of limitations for filing program carriage complaints to clarify that the one-year statute of limitations begins to run when a defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage.;
- Amend the parallel prongs in the statutes of limitations for program access, OVS, and good-faith retransmission consent complaints so that they run from the date that a potential defendant has denied or failed to acknowledge an offer or a request to negotiate;
- Harmonize the procedures governing the effective date and review of initial decisions by an ALJ in program carriage, program access, and OVS proceedings with the generally applicable procedures in Part 1 of the Commission's rules, meaning that ALJ initial decisions in these contexts will not take effect for at least 50 days following release and will be stayed automatically upon the filing of exceptions with the Commission;
- Establish a 180-day aspirational shot-clock for circulating to the Commission a ruling on review of an initial ALJ decision in program access, program carriage, and OVS proceedings that commences from the date that an aggrieved party appeals such initial decision; and
- Delete from the Commission's rules the program carriage standstill provision, which was vacated by the U.S. Court of Appeals for the Second Circuit in 2013.

* This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in MB Docket No. 20-70, 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)

REPORT AND ORDER*

Adopted: []

Released: []

By the Commission:

I. INTRODUCTION

1. In this Report and Order (Order), we adopt proposed changes to the rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs) and parallel procedural rules in Part 76 of our Rules, which govern program access, open video system (OVS), and good-faith retransmission consent complaints.1 Specifically, we amend the third prong of the statute of limitations for filing program carriage complaints so that it no longer undermines the fundamental purpose of a statute of limitations.2 To harmonize our rules, we similarly amend the statutes of limitations for filing program access, OVS, and good-faith retransmission consent complaints.3 We also revise the effective date and review procedures for initial decisions issued by an administrative law judge (ALJ) in program carriage, program access, and OVS proceedings to make them consistent with the Commission’s generally applicable procedures and adopt an aspirational shot clock to encourage quick resolution of appeals of such decisions.4 We find that these

* This document has been circulated for tentative consideration by the Commission at its November 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 Revision of the Commission’s Part 76 Review Procedures, MB Docket Nos. 20-70, 17-105, and 11-131, Further Notice of Proposed Rulemaking in MB Docket No. 11-131 and Notice of Proposed Rulemaking in MB Docket No. 20-70, 35 FCC Rcd 3140 (2020) (FNPRM).

2 47 CFR § 76.1302(h).

3 47 CFR §§ 76.65(e)(3), 76.1003(g)(3), 76.1513(g)(3).

4 47 CFR §§ 76.10(c)(2), 76.1003(h)(1), 76.1302(j)(1), 76.1513(h)(1). Additionally, we delete from the text of the CFR the program carriage standstill rule, 47 CFR § 76.1302(k), which was vacated by the United States Court of Appeals for the Second Circuit (Second Circuit) on procedural grounds in 2013. See infra para. 18.

changes will help to ensure a clear and expeditious program access, program carriage, retransmission consent, and OVS complaint process for potential complainants and defendants. With this proceeding, we continue our efforts to modernize our media regulations.⁵

II. BACKGROUND

2. Section 616 of the Communications Act of 1934, as amended (the Act), directs the Commission to adopt regulations governing program carriage agreements between MVPDs and video programming vendors that prohibit certain anti-competitive practices⁶ and provide for expedited review of program carriage complaints.⁷ Congress passed section 616 as part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), which was designed to preserve diversity and competition in the video programming market.⁸ Two sets of rules adopted pursuant to the 1992 Cable Act principally are addressed in this Report and Order: the statute of limitations for filing a program carriage complaint⁹ and the rules governing the effective date and review procedures for initial decisions issued by an ALJ in program carriage cases.¹⁰ We discuss these rules, in turn, below.

3. First, for a program carriage complaint to be timely filed under our rules, it must be brought within one year of the date on which any of the following events occurs: (1) the defendant MVPD enters into a contract with a video programming vendor that a party alleges to violate the program carriage rules, (2) the defendant MVPD makes a carriage offer that allegedly violates the program carriage rules, and such offer is unrelated to any existing contract between the complainant and the MVPD; or (3) “[a] party has notified [an MVPD] that it intends to file a complaint with the Commission” based on a violation of the program carriage rules.¹¹ As noted in the *FNPRM* in this proceeding, the third prong of the statute of limitations, as originally adopted in the *1993 Program Carriage Order*, contained additional limiting language that made it functionally identical to the current statutes of limitations governing program access, OVS, and good-faith negotiation of retransmission consent complaints.¹² In particular, the original language provided that a program carriage complaint was timely if filed within one

⁵ 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). In response to this notice, several commenters recommended that section 76.1302 be updated. See, e.g., NCTA – The Internet & Television Association Comments, MB Docket No. 17-105, at 15 (rec. July 5, 2017) (encouraging the Commission to clarify the program carriage statute of limitations); 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).

⁶ See 47 U.S.C. § 536(a)(1)-(3) (instructing that the program carriage rules should prohibit an MVPD from (1) requiring a financial interest in a program service as a condition for carriage, (2) coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other MVPDs as a condition of carriage, and (3) 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 on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions of carriage).

⁷ 47 U.S.C. § 536(a)(4).

⁸ Congress’s goal was to “ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers.” Cable Television Consumer Protection and Competition Act of 1992, § 2(b)(5), Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 521 note (Congressional Findings and Policy for Pub. L. 102-385)).

⁹ 47 CFR § 76.1302(h)(1)-(3).

¹⁰ 47 CFR §§ 76.1302(j)(1) and 76.10(c)(2).

¹¹ 47 CFR § 76.1302(h)(1)-(3).

¹² *FNPRM*, 35 FCC Rcd at 3142, para. 3 & n.16; see 47 CFR §§ 76.1003(g), 76.1513(g), and 76.65(e).

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 a defendant’s distribution system that has been denied or unacknowledged,” allegedly in violation of the program carriage rules.¹³ In a subsequent 1994 amendment, the Commission modified section 76.1302(h)(3) to eliminate this limiting language without setting forth an explicit rationale for doing so.¹⁴ After several program carriage decisions in which the third prong of the statute of limitations had been interpreted in a manner consistent with the plain meaning of the 1994 rule language,¹⁵ the Commission expressed concern in the *2011 Program Carriage NPRM* that the third prong could be read to mean that a complaint would be deemed timely filed under our rules if brought within one year of the date on which a complainant notified the defendant MVPD of its intention to file a complaint, regardless of when the alleged violation of the rules had occurred, thereby “undermining the fundamental purpose of a statute of limitations.”¹⁶ In the *FNPRM*, we proposed to reinsert in the program carriage rules statute of limitations language similar to that adopted in the *1993 Program Carriage Order*, which would make the triggering event for the statute of limitations the denial or failure to acknowledge a request for carriage or to negotiate for carriage, and to clarify that the third prong applies only in instances where there is no existing contract or offer of carriage.¹⁷ For consistency, we also proposed to modify the similar third prongs of the statutes of limitations governing program access, OVS, and good-faith retransmission consent complaints to make the triggering event for each the denial or failure to acknowledge a request.¹⁸

4. Second, program carriage disputes may be referred by the Chief of the Media Bureau to an ALJ for a hearing on the merits if a complainant establishes that a *prima facie* violation of section 76.1301 has occurred.¹⁹ A program carriage decision issued by an ALJ becomes effective upon release except in certain circumstances.²⁰ If a party seeks review, the decision remains in effect pending Commission review,²¹ unlike the generally applicable procedures of section 1.276(d) that automatically

¹³ *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).

¹⁴ *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 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415, para. 24 (1994), amended by Erratum, 1994 WL 445419 (1994) (amending rules). The order’s purpose was to amend the program carriage rules to explicitly afford MVPDs standing to file complaints. See *id.* However, that purpose does not appear to have any relevance to the modification of the third prong of the statute of limitations.

¹⁵ See *FNPRM*, 35 FCC Rcd at 3142, para. 3 & n.20 (referencing adjudicatory proceedings in which the Commission or Media Bureau found program carriage complaints to be timely under the rules when filed within one year of the complainant’s pre-filing notice).

¹⁶ *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*).

¹⁷ *FNPRM* at 3145-46, para. 9 & n.37 (stating also that the proposed construction of the third prong “would encompass instances where an MVPD refuses to renew or to renegotiate for renewal of a contract”).

¹⁸ *Id.* at 3147, para. 11.

¹⁹ 47 CFR § 76.1302(i).

²⁰ 47 CFR § 76.1302(j). In particular, if an order of mandatory carriage would require a defendant MVPD to delete existing programming from its system to accommodate carriage, the order is stayed unless and until the Commission upholds the initial decision.

²¹ Likewise, the procedural rules applicable to program access and OVS complaints contain parallel provisions with the goal of providing expeditious review. See 47 CFR § 76.10(c)(2) (“Any party to a part 76 proceeding aggrieved

(continued....)

stay an ALJ's initial decision pending Commission review.²² In the *FNPRM*, we noted that although Congress instructed the Commission to adopt procedures for the expedited review of program carriage complaints, there is no specific statutory requirement for ALJ decisions to take immediate effect, nor that they remain in effect pending Commission review.²³ We observed that, in the past, the incongruous provisions in Part 76 and Part 1 of our rules have caused confusion for both parties and adjudicators, and can create inconsistent outcomes pending appeal.²⁴ Therefore, we proposed to harmonize our Part 76 and Part 1 rules so that review of an ALJ's initial decision in program carriage, program access, and OVS proceedings is subject to the same procedural rules as other complaints adjudicated by the Commission.²⁵

5. Additionally, the *FNPRM* proposed to make several technical edits to the Part 76 rules.²⁶ The *FNPRM* also sought comment on whether, given the amount of time that has passed, the Commission should consider any of the substantive proposals from the *2011 Program Carriage NPRM*, which considered a range of substantive and procedural revisions to the program carriage rules.²⁷

6. As further discussed below, MVPDs responding to the *FNPRM* generally support our proposals and advocate for simplifying the regulatory framework for program carriage disputes.²⁸ MVPDs assert that the rationale for protecting consumers from vertically-integrated distributors is outdated, given the increased competition in the video marketplace.²⁹ On the other hand, independent video programming vendors oppose the rule revisions proposed in the *FNPRM*.³⁰ In general, such programmers advocate for program carriage rules more favorable for programmers, citing the practical and financial hardships they face when bringing a complaint under our rules and alleging that the negotiation practices of vertically-integrated MVPDs continue to restrain their ability to compete.

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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.”).

²² Compare 47 CFR §§ 76.1302(j)(1) and § 76.10(c)(2) with § 1.276(d). 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.

²³ *FNPRM*, 35 FCC Rcd at 3143-44, para. 5; see also 47 U.S.C. § 536.

²⁴ *FNPRM*, 35 FCC Rcd at 3144, para. 5 & n.27.

²⁵ *Id.* at 3129, para. 15.

²⁶ *Id.* at 3145, para. 8 & n.34 (proposing to adopt a proposal from the *2011 Program Carriage NPRM* to replace the term “video program distributor” in section 76.1302(h)(1) with the term “video programming vendor”); *id.* at 3149-50, para. 17 (proposing to revise the 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); see 47 CFR §§ 76.11003(h)(1), 76.1302(j)(1), 76.1513(h)(1).

²⁷ *FNPRM*, 35 FCC Rcd at 3150, para. 18; see also *2011 Program Carriage NPRM*, 26 FCC Rcd at 11521, para. 37.

²⁸ See, e.g., Comments of Comcast Corporation at 1-7 (Comcast); Comments of NCTA – The Internet and Television Association at 3-6 (NCTA); Reply Comments of AT&T Services, Inc. at 1-5 (AT&T).

²⁹ See, e.g., Comcast Comments at 7-10; NCTA Comments at 3; AT&T Reply at 6.

³⁰ See, e.g., Comments of AMC Networks, Inc. at 4-6 (AMCN); Comments of beIN Sports, LLC at 19-22; Comments of RIDE Television Network, Newsmax TV, HDNET, LLC, WeatherNation TV, and KSE Outdoor Sportsman at 6-9 (Independent Programmers).

III. DISCUSSION

7. For the reasons discussed below, we adopt our proposals to amend the third prong of the statute of limitations for program carriage, program access, OVS, and good-faith retransmission consent complaints, as well as the rules governing the effective date and review procedures for initial decisions issued by an ALJ in program access, program carriage, and OVS proceedings. Additionally, in order to ensure prompt resolution of appeals in program access, program carriage, and OVS proceedings, we adopt an aspirational 180-day shot clock for circulating a final Commission decision of ALJ initial decision appeals in such proceedings. We also make other revisions to our Part 76 rules to ensure consistency among parallel provisions, clarify existing language, and eliminate inoperative language. Finally, we decline at this time to adopt other proposals from the *2011 Program Carriage NPRM*. We find that the rule revisions adopted herein will serve the public interest by clarifying and harmonizing the Commission's rules and encouraging the timely resolution of program carriage disputes.

A. Program Carriage Statute of Limitations

8. We adopt our proposal 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 carriage offer and the defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage.³¹ We find that this rule revision will provide certainty to both MVPDs and prospective complainants and foreclose the possibility that the third prong could be read to allow the filing of a program carriage complaint at essentially any time, regardless of when the alleged violation of the rules occurred.³²

9. As explained above, the third prong of the program carriage statute of limitations currently 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.”³³ We agree with those commenters who assert that we should adopt our proposal because the current rule could be read to “undermine[] 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 a reasonable period of time has elapsed.’”³⁴ NCTA asserts, for example, that under the existing statute of limitations a complainant could file a program carriage complaint years after

³¹ *FNPRM*, 35 FCC Rcd at 3145, para. 9. The third prong of the program carriage statute of limitations currently provides that a program carriage complaint can be brought 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 a violation of the program carriage rules. 47 CFR § 76.1302(h)(3); *see supra* para. 3.

³² *See 2011 Program Carriage NPRM*, 26 FCC Rcd at 11522, para. 38 (explaining the Commission's concern that the third prong of the program carriage statute of limitations “could be read to provide that, even if the act alleged to have violated the program carriage rules occurred many years before the filing of the complaint, the complaint is nonetheless timely if filed within one year of when the complainant notified the defendant MVPD of its intention to file”).

³³ 47 CFR § 76.1302(h)(3).

³⁴ *Id.* (quoting *Bunker Ramo Corp.*, Memorandum Opinion and Order, 31 FCC 2d 449, para. 12 (Review Board 1971)); *see also* Comcast Comments at 1-2; NCTA Comments at 4; AT&T Reply at 2-3. Specifically, the third prong as currently written would allow parties to file a “timely” complaint at essentially any time. For example, under our current rule, a video programming vendor and an MVPD could sign a carriage contract and then, at any time while the contract is in effect, such as in year two, the video programming vendor could notify the MVPD of its intent to file a program carriage complaint. Then, under our rules, the actual complaint could be filed with the Commission, in year three. Thus, although that complaint would be filed nearly three years after the carriage agreement was executed, under the third prong as written, that complaint would be deemed timely filed because it was brought within one year of the date of the complainant's pre-filing notice.

a contract is entered into with the goal of “belatedly modify[ing] the agreed-upon terms of a contract.”³⁵ As explained previously, the third prong originally contained language limiting its application to circumstances in which there is an unreasonable refusal to negotiate, and this language was stricken by the Commission in 1994 without explanation.³⁶ We agree with Comcast that this limiting language made clear that the statute of limitations contained “three distinct and mutually exclusive paths for a program carriage complaint”³⁷ and that the “ambiguity in the language of the revised rule has led to . . . interpretations of the third prong as an exception that swallows the other two prongs of the rule.”³⁸ We therefore clarify that the third prong applies only in circumstances where there is no existing contract or carriage offer, and the MVPD has denied or failed to acknowledge a request for carriage or a request to negotiate for program carriage allegedly in violation of the program carriage rules, consistent with the program carriage rules as originally adopted and with Congress’s directive in section 616.³⁹

10. We are not persuaded that the public interest would be better served by abandoning our proposed changes in favor of alternative revisions advocated for by commenters. As an initial matter, we affirm our tentative conclusion from the *FNPRM* that reincorporating the limiting language originally contained in the third prong is preferable to adopting a single provision that would run for one year from the date on which a violation of the program carriage rules allegedly occurred.⁴⁰ No commenter supported this latter option. Rather, we conclude that revising the third prong of the rule strikes an appropriate balance between the interest of MVPDs in ensuring that program carriage complaints are brought in a timely manner, unaffiliated programmers’ interest in securing relief for alleged violations of the program carriage rules, and the interest of all parties in having greater procedural certainty.

³⁵ NCTA Comments at 4; *see also* Comcast Comments at 3 (suggesting that some programmers may use the threat of program carriage complaints “to modify their agreements to their advantage”). And, as several commenters contend, eliminating the possibility that the program carriage rules could be used in this way may shield consumers from unexpected price increases that result from the threat of litigation arising from such complaints. *See* Comcast Comments at 3; AT&T Reply at 3.

³⁶ *See supra* para. 3; *see also* AT&T Reply at 3 (observing that “the Commission altered this rule in 1994 by removing that additional limiting language in what may have been a simple drafting error”). Independent Programmers contend that the current language of the third prong is “not an oversight.” *See* Independent Programmers Comments at 5-8. However, in the 1994 order where this language was removed, the Commission did not discuss any intent to alter the statute of limitations in practice, but rather to make clear that MVPDs had standing to file program carriage complaints against other MVPDs. *See supra* note 14; *see also Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 999 (D.C. Cir. 2013) (Edwards, J. concurring) (discussing the evolution of the third prong of the program carriage statute of limitations and suggesting that, despite the text of the regulation, the original language of the third prong is still controlling).

³⁷ Comcast Reply at 8.

³⁸ Comcast Comments at 2-3. Indeed, some independent programmers acknowledge that the current language of the third prong is open-ended. *See* AMCN Comments at 4 (agreeing with the Commission “that the program carriage rules’ statute of limitations provision is currently very open-ended”); Starz Reply at 4 (concurring that “the third prong of the current statute of limitations needs clarifying”).

³⁹ *See supra* para. 3; 47 U.S.C. § 536; *see also* Comcast Comments at 4 (contending that this amendment “will ensure that parties file program carriage complaints on a timely basis and will provide necessary clarity and finality to all parties, which will in turn serve the goal of Section 616 to facilitate the expeditious resolution of program carriage complaints”); NCTA Comments at 4 (asserting that “this common sense revision of the statute of limitations will serve the goal of Section 616 to encourage expeditious resolution of program carriage complaints”). We note that this rule revision would foreclose the type of claims brought in the *Tennis Channel* and *Game Show Network* program carriage disputes that alleged the discriminatory exercise of a contractual right more than one year after the contract between the defendant MVPD and complainant video programming vendor was executed. *See Tennis Channel Order*, 27 FCC Rcd at 8519-22, paras. 28-34; *Game Show Network, LLC v. Cablevision Sys. Corp.*, Hearing Designation Order, 27 FCC Rcd 5113, 5121-25, paras. 12-16 (MB 2012).

⁴⁰ *FNPRM*, 35 FCC Rcd at 3146, para. 10.

11. We also decline to adopt alternative proposals raised by commenters in the record because we find that none would provide greater certainty to parties and adjudicators. First, Independent Programmers oppose our proposal, asserting that instead we should revise the statute of limitations to permit claims submitted within one year of the date that a programmer becomes aware, or should have become aware through the exercise of reasonable diligence, of an alleged program carriage violation.⁴¹ They assert that MVPDs often “do not clearly decline or refuse carriage proposals” during negotiations, making it difficult to determine when a denial of carriage occurs.⁴² However, given the inherent uncertainty in determining whether and when a potential complainant knew or should have known of an alleged violation of the program carriage rules, we agree with NCTA and AT&T that this option would not provide greater certainty and finality to the parties.⁴³ Independent Programmers also assert that limiting the third prong to instances where a contract does not exist opens the door for MVPD misconduct in pre- or post-offer renewal negotiations.⁴⁴ However, as noted in the *FNPRM*, our intent is that this revised third prong will “encompass instances where an MVPD refuses to renew or to negotiate for renewal of a contract.”⁴⁵ Accordingly, we revise the rule to make clear that the third prong also applies in such instances.⁴⁶ Other commenters do not directly oppose revising the third prong as proposed, but assert that if we were to do so, we should adopt a new fourth prong that would run from the date that a potential complainant learns that a contractual right has been exercised in a discriminatory manner by an MVPD.⁴⁷ Commenters supporting this proposal contend that such a fourth prong is necessary because a contract provision may be consistent with the rules at the time it is entered into, but subsequently may be exercised by an MVPD in a manner that is unlawfully discriminatory.⁴⁸ We decline to adopt this proposal. We agree with Comcast that such a proposal, if adopted, would create “ongoing uncertainty and litigation risk for material decisions [MVPDs] make pursuant to existing agreements,” and would fail to provide finality to the parties as virtually any conduct by an MVPD during the course of a carriage agreement could become the basis for a claim of allegedly impermissible discrimination.⁴⁹ We also find merit in Comcast’s assertion that allowing claims based on an MVPD’s exercise (or non-exercise) of rights that a programmer has agreed to contractually would deprive the MVPD of the “benefit of its bargain.”⁵⁰

12. We also reject beIN’s proposal that we amend the rules so that the one-year period is separately triggered by each materially different offer made by an unaffiliated programmer to a vertically integrated MVPD.⁵¹ beIN contends that this would reflect the reality that program carriage negotiations

⁴¹ Independent Programmers Comments at 6 (asserting that revising the rule as proposed would align with common law and address the lack of access to information needed for an independent programmer to bring a program carriage complaint).

⁴² *Id.*

⁴³ See NCTA Comments at 5; AT&T Reply at 4.

⁴⁴ See Independent Programmers Comments at 6.

⁴⁵ See *supra* note 17 (citing *FNPRM* at 3145, para. 9, n.37).

⁴⁶ See *infra* Appendix A.

⁴⁷ See AMCN Comments at 5 (urging the Commission to “add a provision allowing complaints to be filed for a period of one year following the time that a programmer learns that a distributor has exercised a contractual right in a discriminatory manner”); see also beIN Reply at 2-3; Starz Reply at 4-5.

⁴⁸ AMCN Comments at 5. We note that parties are free to negotiate contractual provisions that address such events or short-term deals that would minimize the harm from such events. See Comcast Reply at 12.

⁴⁹ Comcast Reply at 10.

⁵⁰ *Id.* at 4.

⁵¹ beIN Comments at 20-21.

often run longer than a single calendar year, and thus a programmer absent such an amendment may feel that it needs to resort to filing a program carriage complaint before necessary.⁵² However, we are persuaded that such a rule appears to give programmers the unilateral power to restart the limitations period at any point by making a new offer to an MVPD on whose platform they are seeking carriage.⁵³ Thus, we find that such a rule would be administratively unworkable and be susceptible to gaming by programmers seeking carriage.

13. We also conclude that determining when an MVPD has denied or failed to acknowledge a request for carriage or a request to negotiate for carriage is an inherently fact-specific exercise and, therefore, such a determination should be made on a case-by-case basis.⁵⁴ beIN asks that we amend the rule so that “the third prong of the statute of limitations does not begin to run until the vertically integrated MVPD provides a written and substantiated rejection of the unaffiliated programmer’s carriage offer or request to negotiate.”⁵⁵ beIN suggests that such a rule is necessary to encourage MVPDs to “be responsive to the offers and requests of unaffiliated programmers” and to provide clarity about where such programmers stand in carriage negotiations.⁵⁶ To the extent that it may be unclear whether an MVPD has denied or failed to respond to a request for carriage or to negotiate for carriage, we agree with commenters who assert that it would be appropriate for a programmer to request an answer by a reasonable date, after which it may consider an MVPD’s failure to respond to constitute a denial of its request for purposes of triggering the third prong of the statute of limitations.⁵⁷ We are not persuaded, however, that MVPDs should be required to substantiate in writing their denial of a request for carriage or to negotiate for carriage in order to trigger the third prong, as beIN requests.⁵⁸ Because, as noted, an MVPD’s failure to respond to a carriage request within a reasonable date specified by the programmer would be deemed a denial of such request, we find that requiring MVPDs to provide denials in writing is unnecessary and that the burdens imposed by such a requirement would outweigh any purported benefits.

14. Finally, we adopt our proposal to amend the parallel prongs in the statutes of limitations for program access, OVS, and good-faith retransmission consent complaints so that they run from the date that a potential defendant has denied or failed to acknowledge an offer or a request to negotiate, rather than from the date a potential complainant provides notice of its intent to file on that basis.⁵⁹ Every

⁵² *Id.*

⁵³ See Comcast Reply at 13 (opposing beIN’s proposal to give programmers “the ability to restart the statute of limitations with each new offer”).

⁵⁴ See Comcast Comments at 3 (asserting that “[b]ecause all negotiations are different and involve significant back-and-forth between the parties, such determinations necessarily require a fact-based analysis and are best made on a case-by-case basis”); NCTA Comments at 5 (contending that given the inherently fact-specific nature of carriage negotiations “it would be prudent not to adopt a rigid framework for determining when an MVPD has failed to acknowledge a carriage request”); AT&T Reply at 4 (agreeing “with Comcast and NCTA that such determinations are best made on a case-by-case basis since carriage negotiations are inherently fact specific and no two negotiations are the same”).

⁵⁵ beIN Comments at 21.

⁵⁶ *Id.*

⁵⁷ See NCTA Comments at 5 (suggesting that in instances where denial is unclear, “the programmer can request a response by a reasonable date, after which it may consider lack of a response to reflect a denial of carriage”); Comcast Reply at 13 (agreeing with beIN “that programmers that want a definitive ‘no’—for purposes of triggering the statute of limitations or otherwise—should be able to request and reasonably expect to receive this”).

⁵⁸ beIN Comments at 21.

⁵⁹ See *FNPRM*, 35 FCC Rcd at 3147, para. 11. We also adopt a simple technical edit first proposed in the *2011 Program Carriage NPRM* to replace the term “video programming distributor” with the defined term “video programming vendor” in section 76.1302(h)(1). *Id.* at 3145, para. 8, n.34. As explained in the *2011 Program Carriage NPRM*, both the Act and the rules pertain to agreements between MVPDs and video programming

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commenter who addressed this proposal voiced support for maintaining consistency between the statutes of limitations for program carriage, program access, OVS, and good-faith retransmission consent complaints, and also ensures a finite limitations period.⁶⁰

B. Part 76 ALJ Initial Decision Effective Date and Review Procedures

15. We also adopt our proposal to harmonize the procedures governing the effective date and review of initial ALJ decisions in program carriage, program access, and OVS proceedings with the generally applicable procedures in Part 1 of the Commission's rules.⁶¹ In practice, this means that rather than taking immediate effect and remaining in effect pending Commission review, ALJ initial decisions in these contexts will not take effect for at least 50 days following release and will be stayed automatically upon the filing of exceptions.⁶² We find that this action will simplify and streamline the Commission's procedures, which in turn will reduce uncertainty and confusion for both parties and adjudicators.⁶³ Further, we agree with Comcast and AT&T that this action will benefit consumers by avoiding "carriage whipsaw" in the event that an ALJ initial decision mandating carriage is reversed by the Commission.⁶⁴

16. Although programmers express concern that any additional delays in implementing ALJ initial decisions would harm unaffiliated programmers, we disagree that this concern is best remedied by abandoning our proposal. Specifically, Independent Programmers contend that further delaying an order for mandatory carriage amplifies the harms to programmers by extending the length of time during which their programming is not carried.⁶⁵ Independent Programmers further suggest that delaying the effectiveness of an ALJ initial decision pending appeal would incentivize MVPDs to pursue frivolous appeals for the purpose of delay.⁶⁶ We are not persuaded that the potential harms to programmers from

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vendors, not distributors. 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).

⁶⁰ See Comcast Comments at 4-5; NCTA Comments at 5-6; AT&T Reply at 3-4. We note that those commenters who oppose our proposed revision to the third prong did not address our proposal to extend this change to the parallel provisions in the program access, OVS, and good-faith retransmission consent rules.

⁶¹ See *FNPRM*, 35 FCC Rcd at 3149, para. 15. Additionally, we adopt our proposed technical edit in the respective program access, program carriage, and OVS provisions to make clear that decisions in such proceedings may be issued by the Commission, Commission staff, or an ALJ. *Id.* at 17; see also 47 CFR §§ 76.1003(h)(1), 76.1302(j)(1), 76.1513(h)(1). No commenters expressed opposition to this simple technical edit, which merely codifies existing practice.

⁶² Compare 47 CFR §§ 76.10(c)(2), 76.1003(h)(1), 76.1302(j)(1), 76.1513(h)(1) with 47 CFR § 1.276(d).

⁶³ See NCTA Comments at 6 (agreeing that "[t]hese changes will eliminate confusion by treating Part 76 adjudications before the ALJ in the same manner as other cases"); AT&T Reply at 5 (asserting that "[c]onsistency among these procedural rules will reduce confusion among parties").

⁶⁴ See Comcast Comments at 6 (contending that "it is disruptive to an MVPD's relationship with its customers to require carriage of programming that subsequently could be removed upon reversal of an initial decision"); AT&T Reply at 5 (suggesting that harmonizing the review procedures for ALJ initial decisions "avoids carriage whipsaw in the event the ALJ orders carriage but the Commission reverses the ALJ's decision"). 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, Order, 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).

⁶⁵ See AMCN Comments at 5-6; beIN Comments at 19-20; Independent Programmers Comments at 8-9.

⁶⁶ See Independent Programmers Comments at 8. We note that the Commission's rules prohibit the filing of frivolous pleadings and any violation of this rule "constitute[s] an abuse of process subject to appropriate sanctions." 47 CFR § 76.6(a)(4), (c). Independent Programmers also contend that ALJ initial decisions in this context are owed

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delaying the effectiveness of ALJ initial decisions justify retaining the existing effective date and review procedures. As noted by AT&T and Comcast, the rules provide that if the Commission upholds a mandatory carriage decision that is stayed pending review in certain instances, the MVPD will be required to carry the relevant programming for an additional period of time equal to the length of the delay caused by the review.⁶⁷ Further, the Commission generally has the discretion to “order appropriate remedies” upon completion of program carriage proceedings.⁶⁸ We find that these remedies adequately address the potential harm to unaffiliated programmers from delaying the effectiveness of ALJ initial decisions pending appeal.

17. Recognizing “the logic” in harmonizing the Part 76 review procedures, but expressing concern about the effect of prolonged program carriage disputes on unaffiliated programmers, AMC Networks (AMCN) proposes that the Commission adopt a six-month “shot clock” for the Commission to review and issue an order upholding or overturning an ALJ initial decision when a party seeks review.⁶⁹ We note that no other commenters addressed AMCN’s proposal. Although the Commission is under no statutory obligation to review ALJ initial decisions within a specified timeframe, we agree with AMCN that such a timeframe would serve the public interest by limiting the harms to those programmers with finite litigation resources and expediting the resolution of complaints. We, therefore, establish a 180-day aspirational shot-clock for circulating to the Commission a proposed ruling on review of an initial ALJ decision in program access, program carriage, and OVS proceedings that commences from the date that an aggrieved party appeals such initial decision.⁷⁰ We believe that creating this aspirational shot-clock will establish clearer expectations for all parties involved and facilitate prompt review of ALJ initial decisions. As in other contexts where the Commission has established such shot clocks, “we intend to apply it in the ordinary course and only anticipate suspending it under special circumstances.”⁷¹

C. Other Proposals

18. *Standstill Rule.* We decline to reimpose the standstill provision in the program carriage rules, as requested by beIN. In 2013, the Second Circuit vacated this provision without prejudice, which provides that “[a] program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other

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“great deference” by the Commission, given that they are undertaken only after the Media Bureau has already found a *prima facie* case of discrimination. Independent Programmers Comments at 8. However, the Commission reviews ALJ initial decisions *de novo*. See, e.g., *Game Show Network, LLC v. Cablevision Sys. Corp.*, MB Docket No. 12-122, Memorandum Opinion and Order, 32 FCC Rcd 6160, 6161, para 3 (2017).

⁶⁷ AT&T Reply at 5; Comcast Reply at 14. We note that this provision applies only in instances in which “an order of mandatory carriage would require the defendant [MVPD] to delete existing programming from its system to accommodate carriage.” See 47 CFR § 76.1302(j)(1). However, we will take into consideration the length of delay caused by review of an ALJ initial decision in ordering any subsequent remedy. Comcast also contends that “it is not possible to make MVPDs whole for the First Amendment harms they suffer where they are wrongly forced to carry programming under an erroneous ALJ initial decision,” while the harms to programmers already have a remedy in the rules. Comcast Reply at 14.

⁶⁸ 47 CFR § 76.1302(j)(1).

⁶⁹ AMCN Comments at 5-6.

⁷⁰ See, e.g., *Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network*, PS Docket No. 16-269, Report and Order, 32 FCC Rcd 5311, 5323, paras. 43-44 (2017) (*Procedures for FirstNet Opt-Out Requests Order*) (establishing an aspirational 90-day shot clock for Commission action on states’ alternative plans for the nationwide public safety broadband network deployment if they choose to opt out of the plan established by FirstNet).

⁷¹ *Id.*, 32 FCC Rcd at 5323, para. 44 (“We reject the suggestion that no suspension of the shot clock should be allowed. To do so would tie the Commission’s hands in times of crisis with respect to allocation of resources, which is clearly contrary to the public interest.”).

conditions of the existing programming contract pending resolution of the complaint.”⁷² The Second Circuit found that the public did not have adequate notice under the APA when the Commission adopted the provision.⁷³ beIN asks that we initiate a notice-and-comment rulemaking to readopt this provision consistent with the APA.⁷⁴ Comcast opposes this request, asserting that such a rule would be inconsistent with the goal of expeditious resolution of program carriage complaints.⁷⁵ Because the absence of explicit standstill procedures in the program carriage rules does not preclude parties from filing a request for temporary injunctive relief with the Commission, we find it unnecessary to pursue readopting the standstill rule at this time.⁷⁶ As the rule was vacated by the Second Circuit, we will take this opportunity to delete the standstill provision, section 76.1302(k), from the text of the CFR.⁷⁷

19. *2011 Proposals.* We decline to address any of the remaining program carriage proposals put forth in the *2011 Program Carriage NPRM* at this time, but may consider them in a future order. As content and speaker neutral regulations on protected speech, the program carriage rules must advance an important government interest—here, fair competition and a diversity of voices in the video market—and be narrowly tailored to advance that interest.⁷⁸ The Commission has recently found that the video programming market has vastly changed in the past decade. Congress enacted section 616 to promote competition in the marketplace at a time when most Americans had access to only a single MVPD and their local broadcast stations for video programming.⁷⁹ Today, most Americans have access to at least

⁷² 47 CFR § 76.1302(k).

⁷³ See *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 171 (2d Cir. 2013); see also 47 CFR § 76.1302(k). The Second Circuit also questioned whether the Commission has the authority under the Act to promulgate a standstill order for the program carriage regime but did not opine on the matter given the failure to satisfy the APA’s notice-and-comment requirements. *Time Warner Cable*, 729 F.3d at 169.

⁷⁴ See beIN Comments at 18.

⁷⁵ See Comcast Reply at 18-19. Comcast also asserts that the rule would be inconsistent with sections 616 and 624 of the Act. *Id.* Because we are not seeking in this proceeding either to reimpose the standstill rule or to order a standstill of an existing carriage agreement, we need not resolve at this time the question whether the Commission has authority under sections 616 or 624 to impose a standstill of program carriage agreements.

⁷⁶ See, e.g., Petition of AMC Networks Inc. for Temporary Relief Pending Resolution of Program Carriage Complaint, MB Docket No. 20-254, CSR-8993, at 1 (filed Aug. 5, 2020), <https://ecfsapi.fcc.gov/file/10805219678224/Standstill%20Petition%20-%20Public%20Version.pdf> (requesting that the Commission grant a temporary standstill of the agreement between AT&T and AMCN during the pendency of its program carriage complaint). We note that the Media Bureau denied this petition for a standstill on the grounds that AMCN had failed to demonstrate that it would suffer irreparable harm absent a standstill and that the equities weighed against granting it injunctive relief. *AMC Networks Inc. v. AT&T*, MB Docket No. 20-254, CSR-8993, Order, DA 20-1004, 2020 WL 5247234, at *2, para. 7 (MB Aug. 31, 2020).

⁷⁷ We find that notice and comment is unnecessary for deletion of the vacated standstill rule under 5 U.S.C. § 553(b), because this ministerial order merely implements the mandate of the Second Circuit, and the Commission lacks discretion to depart from this mandate. 5 U.S.C. § 553(b)(B); see also *EME Homer City Generation LP v. EPA*, 795 F.3d 118, 134 (D.C. Cir. 2015) (affirming agency good cause determination that notice and comment were unnecessary when a court order invalidated a rule); *Amendment of Part 95*, Order, 3 FCC Rcd 5032, 1988 WL 488084 *2 (1988) (notice and comment unnecessary when revisions in an order “merely...delete redundant or obsolete rules”).

⁷⁸ *Time Warner Cable*, 729 F.3d at 160.

⁷⁹ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, CS Docket No. 91-290, Report and Order, 17 FCC Rcd 12124, 12132, para. 20 (2002) (noting that cable operators accounted for 95% of all multichannel subscribers in 1992). Cable operators “generally exist in non-overlapping franchise areas and, as a result, do not compete directly with one another for the same subscriber, so most consumers have access to only one cable MVPD.” *Communications Marketplace Report et al.*, GN Docket No. 18-231, Report, 33 FCC Rcd 12558, 12597, para. 51 (2018) (2018

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three MVPDs, in addition to broadcast and online video distributor (OVD) offerings.⁸⁰ Consumers now have a competitive choice of multiple delivery systems offering more programming options of more diverse types from more diverse sources than was envisioned when the 1992 Cable Act was enacted nearly 30 years ago. Significantly, in 2013, the last time the program carriage statute was considered in federal court, the United States Court of Appeals for the Second Circuit observed that “there is no denying that the video programming industry is dynamic and that the level of competition has rapidly increased in the last two decades.”⁸¹ The court elaborated that in light of these changes “some of the Cable Act’s broad prophylactic rules may no longer be justified” and that it considered the “possibility more real than speculative” that developments in the market would erode the justification for the program carriage regime.⁸²

20. Commenters disagree starkly on the degree of competition and vertical integration in today’s video programming market and the need for these proposals. On one hand, MVPDs assert that competition is at an all-time high in the video programming market as a result of the advent of alternative video programming options since the passage of the 1992 Cable Act, and therefore generally oppose the adoption of any additional program carriage rules.⁸³ On the other hand, programmers contend that MVPDs retain outsized market power in the video marketplace and thus have the ability to engage in behavior detrimental to programmers.⁸⁴ Accordingly, programmers voice support for several of the 2011 proposals that they claim would create a more competitive video programming market, including: adopting an anti-retaliation rule;⁸⁵ allowing for the award of damages in successful program carriage complaints;⁸⁶ implementing limited automatic discovery at the *prima facie* stage;⁸⁷ shifting the burden of proof after the *prima facie* stage;⁸⁸ and applying a good-faith negotiation rule to vertically integrated MVPDs in program carriage negotiations.⁸⁹ Given the lack of consensus in the record, we are not persuaded that this procedure-focused proceeding is the appropriate vehicle through which to fully consider these proposals that, if adopted, would substantially alter the existing program carriage framework. Therefore, we decline to address these proposals at this time and instead may consider them in a future order.

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_____ *Communications Marketplace Report*). However, since 1992, direct broadcast satellite (DBS) and telephone company MVPDs have increased their market share, resulting in cable operators accounting for only 55.2% of multichannel subscribers as of 2017. *Id.* at 12598, para. 54; *see also supra* note 8.

⁸⁰ *See 2018 Communications Marketplace Report*, 33 FCC Rcd at 12597, para. 51. As noted in the *2018 Communications Marketplace Report*, while MVPDs, OVDs, and television broadcasters “are similar in the sense that they offer video programming to consumers, there are significant differences in the products they offer, the geographic availability of their services, and how consumers view their products.” *Id.* at 114.

⁸¹ *Time Warner Cable*, 729 F.3d at 167.

⁸² *Id.*

⁸³ *See* Comcast Comments at 7-8; AT&T Reply at 6; Comcast Reply at 4-7; NCTA Reply at 2-3.

⁸⁴ *See* AMCN Comments at 2; beIN Comments at 9; Independent Programmers Comments at 3.

⁸⁵ *See* AMCN Comments at 6; beIN Comments at 14; Starz Reply at 5. *But see* AT&T Reply at 7-8; NCTA Reply at 9-10.

⁸⁶ *See* Independent Programmers Comments at 12. *But see* AT&T Reply at 8; Comcast Reply at 17; NCTA Reply at 8-9.

⁸⁷ *See* beIN Comments at 16-17. *But see* AT&T Reply at 7; NCTA Reply at 7-8; Comcast Reply at 17-18.

⁸⁸ *See* beIN Comments at 17. *But see* Comcast Reply at 17-18.

⁸⁹ *See* beIN Comments at 15; Independent Programmers Comments at 11; Starz Reply at 6. *But see* Comcast Reply at 16; NCTA Reply at 11.

21. *Other Proposals.* Commenters urge that we consider broader amendments to the program carriage rules to address, among other things, the imposition of most favored nation clauses by MVPDs,⁹⁰ the challenges faced by smaller stations seeking to obtain carriage on virtual MVPDs (vMVPDs),⁹¹ and the effect of the retransmission consent rules on the program carriage market.⁹² We concur with those commenters who suggest that these other proposals fall outside the scope of this narrow procedure-focused proceeding, and therefore we decline to consider those proposals here.⁹³

IV. PROCEDURAL MATTERS

22. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁹⁴ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this Order. The FRFA is set forth in Appendix B.

23. *Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

24. *Congressional Review Act.* [The Commission will submit this draft Report & Order to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is “major” or “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2).] The Commission will send a copy of this Report & Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

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

⁹⁰ Commenters assert that MVPDs demand the use of most favored nation (MFN) clauses through which they obtain information regarding the lowest rates paid to independent programmers and therein prevent small independent programmers from obtaining higher rates. See AMCN Comment at 3; Ellen Schned Comments at 2; Independent Programmer Comments at 9-10; beIN Reply at 5. They further argue that MVPDs then demand nondisclosure of the terms of their carriage agreement, creating an informational asymmetry by which MVPDs know every programmer’s worst deal, and programmers do not know the details of any deal but their own. See Schned Comments at 2; Independent Programmer Comments at 9-10; beIN Reply at 5.

⁹¹ One Ministries asks that we consider amending the program carriage rules to assist small independent stations gain carriage on vMVPDs. See One Ministries, Inc. Comments at 1; see also Independent Programmer Comments at 12-13 (asking the Commission to include vertically integrated vMVPDs in the program carriage rules). As the Commission explained in the *2018 Communications Marketplace Report*, vMVPDs are a specific type of OVD offering online packages of linear cable and broadcast channels. See *2018 Communications Marketplace Report*, 33 FCC Rcd at 12607-08, para. 81. These stand in contrast to most OVDs which, apart from those specializing in live sports, offer libraries of video content available on-demand. *Id.*

⁹² One commenter contends that the retransmission consent rules place the thumb on the scales in favor of network broadcasters, which ultimately leaves MVPDs with little room financially to consider offers from independent programmers. Schned Comments at 2.

⁹³ See AT&T Reply at 8-9. We similarly decline to consider beIN’s request to amend the program carriage rules to bar MVPDs from raising claims of legitimate commercial considerations until after consideration of the full evidentiary record. beIN Comments at 12-13. Not only is this outside the scope of this proceeding, but it also concerns arguments at issue in beIN’s pending application for review, the specifics of which we decline to address here.

⁹⁴ 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).

V. ORDERING CLAUSES

26. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 303(r), 325, 616, 628, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 325, 536, 548, and 573, this Report and Order **IS ADOPTED**.

27. **IT IS FURTHER ORDERED** that the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A and such amendments shall be effective 30 days after publication in the *Federal Register*.

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

29. **IT IS FURTHER ORDERED** that the Commission will send a copy of this Report and Order in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA).

30. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 20-70 **SHALL BE TERMINATED** and its docket **CLOSED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Part 76 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

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.*

(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, delete § 76.1302(k):

(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, or in instances where a party seeks renewal of an existing contract, 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.~~

* * *

(k) *Petitions for temporary standstill.* (1) ~~A program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the~~

complaint. To allow for sufficient time to consider the petition for temporary standstill prior to the expiration of the existing programming contract, the petition for temporary standstill and complaint shall be filed no later than thirty (30) days prior to the expiration of the existing programming contract. In addition to the requirements of §76.7, the complainant shall have the burden of proof to demonstrate the following in its petition:

- _____ (i) The complainant is likely to prevail on the merits of its complaint;
- _____ (ii) The complainant will suffer irreparable harm absent a stay;
- _____ (iii) Grant of a stay will not substantially harm other interested parties; and
- _____ (iv) The public interest favors grant of a stay.

~~(2) The defendant multichannel video programming distributor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.~~

~~(3) If the Commission grants the temporary standstill, the adjudicator deciding the case on the merits (i.e., either the Chief, Media Bureau or an administrative law judge) will provide for remedies that are applied as of the expiration date of the previous programming contract.~~

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

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking (FNPRM) in this proceeding.² The Commission sought written public comment on the proposals in the FNPRM, including comment on the IRFA. We received no comments specifically directed toward the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objective of, the Report and Order

2. In this Report and Order, we adopt changes to the rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs). Specifically, we amend the statute of limitations for program carriage complaints to make clear that the third triggering event applies only when a party seeks renewal of an existing contract or when 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 carriage or a request to negotiate for program carriage. This third prong of the program carriage statute of limitations originally contained similar limiting language concerning an unreasonable refusal to deal that appears to have been inadvertently stricken by the Commission in 1994. The Commission has previously expressed concern that without that language this provision could be read to mean that a complaint would be timely within one year of the date on which a complainant notified the defendant MVPD of its intention to file a complaint, regardless of when the actual violation of the rules had occurred, undermining the fundamental purpose of a statute of limitations. For consistency, we will similarly amend parallel provisions in the statutes of limitations for filing program access, open video system (OVS), and good-faith retransmission consent complaints so that they run from the date that a potential defendant denied an offer or a request to negotiate, rather than from the date a potential complainant provides notice of its intent to file on that basis. We find 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.

3. We also revise the effective date and review procedures for initial decisions issued by an administrative law judge (ALJ) in program carriage, program access, and OVS proceedings to make them consistent with the Commission's generally applicable procedures. In practice, this means that rather than taking immediate effect and remaining in effect pending review, ALJ initial decisions in these contexts will not take effect for at least 50 days following release and will be stayed automatically upon the filing of exceptions. As discussed fully in the FNPRM, the incongruous provisions concerning the effective date and review procedures for ALJ initial decisions in Part 76 and Part 1 of our rules have caused confusion for both parties and adjudicators and can create inconsistent outcomes pending appeal. We find that this action will simplify and streamline the Commission's procedures, which will reduce uncertainty and confusion for both parties and adjudicators.⁴ The rest of the existing rules governing the resolution of

¹ 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).

² See *Revision of the Commission's Part 76 Review Procedures*, MB Docket Nos. 20-70, 17-105, and 11-131, Further Notice of Proposed Rulemaking in MB Docket No. 11-131 and Notice of Proposed Rulemaking in MB Docket No. 20-70, 35 FCC Rcd 3140, 3156, Appendix B (2020) (FNPRM).

³ See 5 U.S.C. § 604.

⁴ Additionally, we eliminate from the text of the CFR the program carriage standstill rule, 47 CFR § 76.1302(k), vacated by the Second Circuit on procedural grounds in 2013.

program carriage, program access, OVS, and good-faith retransmission consent complaints remain unchanged by this Report and Order.⁵

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. There were no comments filed in response to the IRFA.

C. Response to comments by the Chief Counsel for Advocacy of the Small Business Administration

5. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.⁶

6. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

7. 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.⁷ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁸ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁹ 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.¹⁰ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

8. *Cable Companies and Systems (Rate Regulation Standard)* The Commission has also 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.¹¹ Industry data indicates that, of the 777 cable companies currently operating in the United States, 766 serve 400,000 or fewer subscribers.¹² Additionally, under the Commission’s rules, a “small system” is a

⁵ See 47 CFR §§ 76.65, 76.1003, 76.1302, 76.1513.

⁶ 5 U.S.C. § 604(a)(3).

⁷ 5 U.S.C. § 603(b)(3).

⁸ 5 U.S.C. § 601(6).

⁹ 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.”

¹⁰ 15 U.S.C. § 632.

¹¹ 47 CFR § 76.901(d). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket Nos. 93-215 and 92-266, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, para. 28 (1995).

¹² See S&P Global Market Intelligence, *MediaCensus, Operator Subscribers by Geography: National Report, Subscribers by Operator*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/mediaCensusHome> (last visited Jul. 28, 2020).

cable system serving 15,000 or fewer subscribers.¹³ According to industry data, there are currently 4,336 active cable systems in the United States.¹⁴ Of this total, 3,650 cable systems have fewer than 15,000 subscribers.¹⁵ Thus, the Commission believes that the vast majority of cable companies and cable systems are small entities.

9. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”¹⁶ As of 2019, there were approximately 48,646,056 basic cable video subscribers in the United States.¹⁷ Accordingly, an operator serving fewer than 486,460 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.¹⁸ Based on available data, we find that all but five cable operators are small entities under this size standard.¹⁹ 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.²⁰ Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

10. *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. For the purposes of economic classification, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in the Wired Telecommunications Carriers industry.²¹ 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

¹³ 47 CFR § 76.901(c).

¹⁴ See S&P Global Market Intelligence, *MediaCensus, Operator Subscribers by Geography: Headend by Headend Report, Subscribers by Headend*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/mediaCensusHome> (last visited Jul. 28, 2020).

¹⁵ *Id.*

¹⁶ 47 U.S.C. § 543(m)(2); see also 47 CFR § 76.901(e).

¹⁷ S&P Global Market Intelligence, *U.S. Cable Subscriber Highlights, Basic Subscribers(actual) 2019, U.S. Cable MSO Industry Total*, see also *U.S. Multichannel Industry Benchmarks, U.S. Cable Industry Benchmarks, Basic Subscribers 2019Y*, <https://platform.marketintelligence.spglobal.com>.

¹⁸ 47 CFR § 76.901(e).

¹⁹ S&P Global Market Intelligence, *Top Cable MSOs as of 12/2019*, <https://platform.marketintelligence.spglobal.com>. [The five cable operators all had more than 486,460 basic cable subscribers.](#)

²⁰ 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. See 47 CFR § 76.910(b).

²¹ See *2017 NAICS Definition*, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017%20NAICS%20Search> (last accessed Jul. 27, 2020).

wired broadband internet services.²² The SBA determines that a wireline business is small if it has fewer than 1,500 employees.²³ Economic census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer than 1,000 employees.²⁴ Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. However, currently only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network.²⁵ According to industry data, DIRECTV and DISH serve 14,831,379 and 8,957,469 subscribers respectively, and count the third and fourth most subscribers of any multichannel video distribution system in the U.S.²⁶ Given the capital required to operate a DBS service, its national scope, and the approximately one-third share of the video market controlled by these two companies,²⁷ we presume that neither would qualify as a small business.

11. *Motion Picture and Video Production.* This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.²⁸ The SBA has established a small size standard for businesses operating this industry, which consists of all such firms with gross annual receipts of \$35 million dollars or less.²⁹ U.S. Census Bureau data for 2012 show that there were 8203 firms operated for the entire year.³⁰ Of that number, 8,075 had annual receipts of less than \$25 million per year.³¹ Based on this data, we conclude that the majority of firms operating in this industry are small.

12. *Motion Picture and Video Distribution.* 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.”³² The Small Business Administration has developed a size standard for firms operating in this industry, which is that companies whose annual

²² *Id.*

²³ 13 CFR § 121.201 (NAICS Code 517311).

²⁴ See *Information: Subject Series - Estab and Firm Size: Employment Size of Firms for the U.S.: 2012, 2012 Economic Census of the United States, TableID: EC1251SSSZ5*, <https://data.census.gov/cedsci/table?q=EC1251&hidePreview=true&table=EC1251SSSZ5&tid=ECNSIZE2012.EC1251SSSZ5&lastDisplayedRow=28#> (last accessed Jul. 27, 2020) (NAICS Code 517110 applied at the time of the 2012 Economic Census).

²⁵ See *Communications Marketplace Report et al.*, GN Docket No. 18-231 et al., Report, 33 FCC Rcd 12558, 12597, paras. 50-51 (2018).

²⁶ See S&P Global Market Intelligence, *MediaCensus, Operator Subscribers by Geography: National Report, Subscribers by Operator*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/mediaCensusHome> (last visited Jul. 31, 2020).

²⁷ See S&P Global Market Intelligence, *Global Multichannel Top Operators, U.S.*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/multichannelIndustryBenchmarks> (last visited Jul. 31, 2020) (There were approximately 63,650,261 total multichannel subscribers in the U.S. in 2019).

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

²⁹ See 13 CFR § 121.201, NAICS Code 512110.

³⁰ See U.S. Census Bureau, *2012 Economic Census of the United States, Table ID: EC1251SSSZ4, Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 512110, <https://data.census.gov/cedsci/table?y=2012&n=512110&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

³¹ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

³² See U.S. Census Bureau, *2017 NAICS Definition, “512120 Motion Picture and Video Distribution”*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=512120&search=2017+NAICS+Search&search=2017>.

receipts are \$34.5 million or less are considered small.³³ U.S. Census Bureau data for 2012 indicate there were 307 firms that were operational throughout the entire year.³⁴ Of those, 294 firms had annual receipts of less than \$25 million.³⁵ Based on this data, we conclude that a majority of firms operating in the motion picture and video distribution industry are small.

13. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”³⁶ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. 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.³⁷ The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.³⁸ 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.³⁹ Based on this data, we estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

14. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1374.⁴⁰ Of this total, 1,282 stations (or 94.2%) had revenues of \$38.5 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 388.⁴¹ 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.

15. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations⁴² must be included. Our estimate, therefore,

³³ See 13 CFR § 121.201, NAICS Code 512120.

³⁴ See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1252SSSZ4, *Finance and Insurance: Subject Series - Estab and Firm Size: Summary Statistics by Revenue Size of Firms for the U.S.: 2012*, NAICS Code 512120, <https://data.census.gov/cedsci/table?y=2012&n=512120&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

³⁵ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

³⁶ *2017 NAICS Definition*, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515120&search=2017%20NAICS%20Search> (last accessed Jul. 27, 2020).

³⁷ *Id.*

³⁸ 13 CFR § 121.201 (NAICS Code 515120).

³⁹ See *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, *2012 Economic Census of the United States*, TableID: EC1251SSSZ4, <https://data.census.gov/cedsci/table?q=EC1251&hidePreview=true&table=EC1251SSSZ4&tid=ECNSIZE2012.EC1251SSSZ4&lastDisplayedRow=28#> (last accessed Jul. 27, 2020).

⁴⁰ Press Release, FCC, *Broadcast Station Totals as of December 31, 2019* (Jan. 3, 2020) <https://www.fcc.gov/document/broadcast-station-totalsdecember-31-2019>.

⁴¹ *Id.*

⁴² “[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).

likely overstates the number of small entities that might be affected by our action, because the revenue 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.

16. There are also 387 Class A stations.⁴³ 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.⁴⁴ 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.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

17. As discussed fully above, this Report and Order adopts revisions to the Part 76 procedural rules. These amendments do not create any new reporting or recordkeeping requirements.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

18. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”⁴⁵

19. The Report and Order, as stated in Section A of this FRFA, minimizes the burdens associated with the resolution of program carriage, program access, OVS, and good-faith retransmission consent complaints by amending the rules governing two procedural aspects of the complaint process. First, we clarify that the third prong of the statute of limitations for all four types of complaints is triggered by an MVPD’s denial or failure to acknowledge either a request for program carriage or a request to negotiate for program carriage, rather than delivery of a notice of intent to file a complaint on that basis. Second, we amend the rules to provide that initial decisions by an ALJ in program carriage, program access, and OVS proceedings will be automatically stayed upon the filing of exceptions, consistent with the Commission’s generally applicable procedures. The rest of the procedures governing the resolution of these complaints—e.g. deadlines for filing answers and replies, adjudication procedures, etc.—remain unchanged. We find 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 will 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 by 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. This change will benefit both small and large entities.

⁴³ Press Release, FCC, Broadcast Station Totals as of December 31, 2019 (Jan. 3, 2020) <https://www.fcc.gov/document/broadcast-station-totalsdecember-31-2019>.

⁴⁴ *Id.*

⁴⁵ 5 U.S.C. § 603(c)(1) – (c)(4).

G. Report to Congress

20. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁴⁶ In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.

⁴⁶ 5 U.S.C. § 801(a)(1)(A).