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

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004	)	MB Docket No. 05-49
	)	
Implementation of Section 340 of the Communications Act	)	
	)	
	)	

REPORT AND ORDER

Adopted: November 2, 2005 **November 3, 2005**

By the Commission:

TABLE OF CONTENTS

I. INTRODUCTION

1. With this Report and Order ("R&O"), we adopt rules to implement Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").[1] Section 202 of the SHVERA created Section 340 of the Communications Act of 1934, as amended ("Communications Act"

[1] The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, § 202, 118 Stat 2809, 3393 (2004) (codified at 47 U.S.C. § 340). The SHVERA was enacted on December 8, 2004 as title IX of the "Consolidated Appropriations Act, 2005." This proceeding to implement Section 202 of the SHVERA (entitled "Significantly Viewed Signals Permitted To Be Carried") is one of many Commission proceedings required to implement the SHVERA. The other proceedings are being undertaken and should be largely completed by the end of this year; *see* Sections 202, 204, 205, 207, 208, 209 and 210 of the SHVERA; s*ee also Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, MB Docket No. 05-89, Report and Order, FCC 05-119 (rel. Jun. 7, 2005) ("*Reciprocal Bargaining Order"*) (adopting rules to implement Section 207 of the SHVERA and impose a reciprocal good faith retransmission consent bargaining obligation on multichannel video programming distributors); *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Docket No. 05-181, FCC 05-159 (rel. Aug. 23, 2005) (implementing Section 210 of the SHVERA and requiring satellite carriers to carry both the analog and digital signals of television broadcast stations in local markets in noncontiguous states); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Procedural Rules*, 20 FCC Rcd 7780 (2005) ("*Procedural Rules Order*") (adopting procedural rules required by Sections 202, 205, and 209 of the SHVERA); *Public Notice*, "Media Bureau Seeks Comment For Inquiry Required By the on Rules Affecting Competition In the Television Marketplace," MB Docket No. 05-28, 20 FCC Rcd 1572 (2005) (opening inquiry required by Section 208 of the SHVERA concerning the impact of certain rules and statutory provisions on competition in the television marketplace).

or "Act"), which provides satellite carriers with the authority to offer Commission-determined "significantly viewed" signals of out-of-market (or "distant") broadcast stations to subscribers. Within 60 days of enactment, the SHVERA required the Commission to (1) publish and maintain a list of stations eligible for "significantly viewed" status and the related communities (as determined by the Commission),[2] and (2) commence a rulemaking proceeding to implement Section 340, thus enabling satellite carriage of such "significantly viewed" signals.[3] These mandates were satisfied by the Commission's Notice of Proposed Rulemaking ("NPRM") in this proceeding.[4] We received 49 comments (from 46 commenters) and six replies in response to our NPRM.[5] With this R&O, we satisfy the SHVERA's mandate that the Commission adopt rules implementing Section 340 within one year of the statute's enactment.[6]

2. With the SHVERA, Congress took another step toward "moderniz[ing] satellite television policy and enhanc[ing] competition between satellite and cable operators."[7] The SHVERA adopted for satellite carriers and subscribers the concept of "significantly viewed" signals, which has applied in the cable context for more than 30 years. In 1972, the Commission adopted the concept of "significantly viewed" signals to differentiate between otherwise out-of-market television stations "that have sufficient audience to be considered local and those that do not."[8] The Commission concluded at that time that it would not be reasonable if choices on cable were more limited than choices over the air,

[2] *See* 47 U.S.C. § 340(c)(1)(A)(i).

[3] *See* 47 U.S.C. § 340(c)(1)(A)(ii).

[4] *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 20 FCC Rcd 2983 (2005) ("*NPRM*").

[5] The list of commenters is identified in Appendix A.

[6] *See* 47 U.S.C. § 340(c)(1)(B). We have already adopted some rules to implement new Section 340(h). *See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 20 FCC Rcd 7780 (2005) ("*Procedural Rules Order"*) (revising 47 C.F.R. § 76.66 to add rules for carriage elections on a county basis, unified retransmission consent negotiations, and notifications by satellite carriers to local broadcasters concerning carriage of significantly viewed signals); 47 U.S.C. § 340(h).

[7] *See* House Commerce Committee Report dated July 22, 2004, accompanying House Bill, H.R. 4501, 108th Cong. (2004), H.R. Rep. No. 108-634, at 2 (2004) ("*House Commerce Committee Report*"). There was no final Report issued to accompany the bill as it was enacted. *See* House Bill, H.R. 4818, 108th Cong. (2004) (enacted). Therefore, we look to the House Commerce Committee Report accompanying the House Bill, H.R. 4501, for the relevant legislative history for Section 202 of the SHVERA. Although certain changes were made to H.R. 4501 before it was enacted, the House Commerce Committee Report language remains relevant with respect to those provisions such as Section 202 that were unchanged. Also relevant in terms of the SHVERA legislative history, particularly as it relates to the changes in the copyright laws in 17 U.S.C. § 119, is the House Judiciary Committee Report dated September 7, 2004, accompanying House Bill, H.R. 4518, 108th Cong. (2004), H.R. Rep. No. 108-660 (2004) ("*House Judiciary Committee Report*"). Finally, also relevant are certain remarks made in "floor statements" by Rep. Joe Barton (Chairman, House Energy and Commerce Committee) and Rep. Fred Upton, (Chairman, House Subcommittee on Telecommunications and the Internet) regarding H.R. 4518, 108th Cong. (2004). H.R. 4518 was amended to combine its copyright provisions with the Communications Act provisions of H.R. 4501 pursuant to a compromise between the House Energy and Commerce Committee and the House Judiciary Committee. *See* The Honorable Joe Barton, Chairman, House Energy and Commerce Committee, "Floor Statement" (dated Oct. 6, 2004) to H.R. 4518 (The Satellite Home Viewer Extension and Reauthorization Act of 2004) ("*Barton Floor Statement*"); The Honorable Fred Upton, Chairman, House Subcommittee on Telecommunications and the Internet, "Floor Statement" (dated Oct. 6, 2004) to H.R. 4518 (The Satellite Home Viewer Extension and Reauthorization Act of 2004) ("*Upton Floor Statement*").

[8] *Cable Television Report and Order*, 36 FCC 2d 143, 174, ¶ 83 (1972) ("*1972 R&O*").

and gave cable carriage rights to out-of-market stations in communities where they had significant over-the-air (non-cable) viewing.[9]

3. The copyright provisions that apply to cable systems have recognized the Commission's designation of stations as "significantly viewed" and treated them, for copyright purposes, as "local," and therefore subject to reduced copyright payment obligations.[10] The copyright provisions governing satellite carriers did not, however, provide a statutory copyright license for significantly viewed signals, and such signals were not, as a practical matter, generally available via satellite distribution outside of their Designated Market Areas ("DMAs").[11] Recognizing that the reach of a station's over-the-air signal is not constrained by the boundary of a DMA,[12] the SHVERA allowed a satellite carrier to treat a signal as "local" in a community where such signal is "significantly viewed" by consumers in that community.[13] In this way, the statutory provisions governing satellite carriage of broadcast stations move closer to the provisions that have long governed cable carriage.

II. SUMMARY

4. The following are the key rule changes and conclusions adopted by this R&O.

- We adopt the Significantly Viewed List ("SV List") published in the NPRM as the final SV List, changed only to correct errors appropriately demonstrated by commenters. The SV List will be published as Appendix C to the Report and Order. Moreover, this SV List will be made available to the public on our website, and we will update this list within 10 business days if it is modified in the future. [IV.A.1.]
- We will apply Section 76.54 of our rules to satellite carriers. Revised Section 76.54 will now reference satellite carriers and the new SV List, but will not alter the procedures as in effect

[9] At the time the Commission adopted the significantly viewed rules, the cable television carriage rules were generally based on mileage zones from the relevant stations. A television station was generally considered "local" for cable carriage purposes if the relevant community served was within 35 miles of the station's city of license or within its Grade B contour but not within the 35 mile zone of another market. Cable system carriage of significantly viewed stations, however, was based on audience viewership levels in the relevant communities rather than by strict mileage zones. This afforded significantly viewed stations carriage when they otherwise would have been considered distant stations. *See 1972 R&O*, 36 FCC 2d 143; *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972) ("*1972 Recon Order*"); *see also* 47 C.F.R. § 76.5(i) (defining "significantly viewed" as "Viewed in other than cable television households as follows: (1) For a full or partial network station – a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station – a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent"); 47 C.F.R. § 76.54.

[10] *See* 17 U.S.C. § 111(a), (c), and (f).

[11] *See* 17 U.S.C. § 119 (statutory copyright license for satellite carriage of "distant" network stations, limited to "unserved households") and 17 U.S.C. § 122 (statutory copyright license for satellite carriage of "local" stations, defined as stations and subscribers in the same Designated Market Area).

[12] A DMA generally identifies a television station's "local market." Section 340(i)(1), as established by the SHVERA, defined the term "local market" using the definition contained in 17 U.S.C. §122(j)(2) ("The term 'local market', in the case of both commercial and noncommercial television broadcast stations, means the designated market area in which a station is located, and – (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area are within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station." 17 U.S.C. §122(j)(2)(A)); *see* 47 U.S.C. § 340(i)(1).

[13] *House Commerce Committee Report* at 10.

on April 15, 1976. Thus, we now require satellite carriers or broadcast stations seeking significantly viewed status to follow the same petition process in place for cable operators, as required by Sections 76.5, 76.7 and 76.54 of our rules. [IV.A.3.]

- With respect to the application of the Commission's network non-duplication and syndicated exclusivity rules to the carriage of significantly viewed stations, we implement the SHVERA provision to create a limited right for a station or distributor to assert exclusivity with respect to a station carried by a satellite carrier as significantly viewed; allow that significantly viewed station to assert the significantly viewed exception, just as a station would with respect to cable carriage; and allow the station or distributor asserting exclusivity to petition us for a waiver from the exception. Under this rule, stations are not removed from the SV List, but rather blackout deletions may be imposed. [IV.A.5.]
- A satellite carrier may create a new community for purposes of the SV List by reference to an existing community as a separate and distinct community or municipal entity (*e.g.*, political jurisdiction, incorporated city or town); however, in the absence of a separate and distinct community or municipal entity (*e.g.*, an unincorporated area), a satellite community may be defined by one or more adjacent five-digit zip code areas. [IV.A.6.]
- We find that Sections 340(b)(1) and (2) require that a subscriber must receive a specific local network station as part of local-into-local service in order to be eligible to receive a significantly viewed station that is affiliated with the same network as the local station, subject to the statutory exemption in markets in which a particular network affiliate does not exist or in which the waiver provisions in Section 340(b)(4) apply. [IV.B.2. and IV.B.3.]
- As a condition to offering a significantly viewed digital signal, satellite carriers must comply with the "equivalent bandwidth" and "entire bandwidth" requirements, which permit satellite carriage of a significantly viewed station only if the amount of bandwidth used to carry such station is equivalent to the amount of bandwidth used to carry the signal or signals of the affiliated local network station, or the entire amount of bandwidth used by the local station. [IV.B.3.]
- We affirm our tentative conclusion that determinations of bad faith or frivolousness will be made on a case-by-case basis. We will use our existing procedures for Petitions for Special Relief as the procedural framework for complaints concerning significantly viewed status. [IV.D.1.]

III. BACKGROUND

A. Satellite Home Viewer Act (SHVA)

5. In 1988, Congress passed the Satellite Home Viewer Act ("1988 SHVA"),[14] which established a statutory copyright license for satellite carriers to offer subscribers, who could not receive the signal of a broadcast station over the air, access to broadcast programming via satellite. The 1988 SHVA reflected Congress' intent to protect the role of local broadcasters in providing over-the-air television by limiting satellite delivery of network broadcast programming to subscribers who were "unserved" by over-the-air signals. The 1988 SHVA also permitted satellite carriers to offer distant "superstations" to subscribers.[15]

B. Satellite Home Viewer Improvement Act of 1999 (SHVIA)

6. In 1999, in the Satellite Home Viewer Improvement Act ("SHVIA"),[16] Congress expanded on the 1988 SHVA by amending both the copyright laws[17] and the Communications Act[18] to permit satellite carriers to retransmit local broadcast television signals directly to subscribers. The Commission implemented the SHVIA by adopting rules for satellite carriers with regard to carriage of broadcast signals, retransmission consent, and program exclusivity that paralleled the requirements for cable service.[19]

7. A key element of the SHVIA was to provide satellite carriers with a statutory copyright license to facilitate the retransmission of local broadcast programming, or "local-into-local" service, to subscribers. A satellite carrier provides "local-into-local" service when it retransmits a local television signal back into the local market of that television station for reception by subscribers.[20] Generally, a television station's "local market" is the DMA in which it is located.[21] DMAs, which describe each

[14] The Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) (codified at 17 U.S.C. §§ 111, 119). The 1988 SHVA was enacted on November 16, 1988, as an amendment to the copyright laws. The 1988 SHVA gave satellite carriers a statutory copyright license to offer distant signals to "unserved" households. 17 U.S.C. § 119(a).

[15] *See id*. § 119(a)(1). A superstation is defined as a television station, other than a network station, licensed by the Commission that is retransmitted by a satellite carrier. Thus, superstations are not considered "network stations" for copyright purposes. *See* 17 U.S.C. § 119(d)(9), as amended by Section 105 of the SHVERA.

[16] The Satellite Home Viewer Improvement Act of 1999, Pub.L. No 106-113, 113 Stat. 1501 (1999) (codified in scattered sections of 17 and 47 U.S.C.). The SHVIA was enacted on November 29, 1999, as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers).

[17] 17 U.S.C. §§ 119 and 122.

[18] *See* 47 U.S.C. §§ 325, 338 and 339.

[19] *See* Implementation of the Satellite Home Viewer Improvement Act 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues, 16 FCC Rcd 1918 (2000) ("*SHVIA Signal Carriage Order*"); Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act, 15 FCC Rcd 24321 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals, 15 FCC Rcd 21688 (2000) ("*Satellite Exclusivity Order*"); Implementation of the Satellite Home Viewer Improvement Act of 1999, Enforcement Procedures for Retransmission Consent Violations, 15 FCC Rcd 2522 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, 15 FCC Rcd 5445 (2000).

[20] 47 C.F.R. § 76.66(a)(6).

[21] *See* 17 U.S.C. §122(j)(2)(A); 47 U.S.C. § 340(i)(1).

television market in terms of a unique geographic area, are established by Nielsen Media Research based on measured viewing patterns.[22] Each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that has made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA or the station does not provide a good quality signal to the carrier's local receive facility.[23] This is commonly referred to as the "carry one, carry all" requirement.

C. Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA)

8. In December 2004, Congress passed and the President signed the SHVERA,[24] which again amended the 1988 copyright laws[25] and the Communications Act[26] to further aid the competitiveness of satellite carriers and expand program offerings for satellite subscribers. Specifically, SHVERA distinguished between out-of-market (*i.e.,* "significantly viewed") signals and truly "distant" signals for purposes of the statutory copyright licenses in Sections 119 and 122 of title 17.[27] The SHVERA established a copyright license that gives satellite carriers the option to offer Commission-determined "significantly viewed" signals to subscribers.[28]

IV. DISCUSSION

9. The SHVERA created Section 340 of the Communications Act and expanded the statutory copyright license for satellite carriers to establish the framework for satellite carriage of Commission-determined "significantly viewed" signals.[29] As required by the SHVERA, we opened this proceeding on February 7, 2005 with the release of the NPRM.[30] In the NPRM, we published the existing list of significantly viewed stations and sought comment on implementation of Section 340 and the specific rule proposals and tentative conclusions contained in the NPRM.

---

[22] *See* 17 U.S.C. § 122(j)(2)(A)-(C).

[23] *See* 47 U.S.C. § 338.

[24] The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat 2809, 3393 (2004) (codified in scattered sections of 17 and 47 U.S.C.); *see also, supra*, n. 1.

[25] Section 102 of the SHVERA created a new 17 U.S.C. § 119(a)(3) to provide satellite carriers with a statutory copyright license to offer "significantly viewed" signals as part of their local service subscribers. 17 U.S.C. § 119(a)(3).

[26] *See* 47 U.S.C. §§ 325, 338, 339 and 340.

[27] 17 U.S.C. §§ 119 and 122.

[28] Section 102 of the SHVERA extended the statutory copyright license contained in 17 U.S.C. § 119(a) to "apply to the secondary transmission of the primary transmission of a network station or a superstation to a subscriber who resides outside the station's local market … but within a community in which the signal has been determined by the Federal Communications Commission, to be significantly viewed in such community, pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community." 17 U.S.C. § 119(a)(3)(A).

[29] Section 102 of the SHVERA amends 17 U.S.C. § 119(a) to create new subsection (a)(3), entitled "secondary transmissions of significantly viewed signals." 17 U.S.C. § 119(a)(3). Section 202 of the SHVERA amends the Communications Act to create a new Section 340, entitled "Significantly Viewed Signals Permitted To Be Carried." 47 U.S.C. § 340.

[30] *NPRM*, 20 FCC Rcd 2983.

A. Station Eligibility For Satellite Carriage As "Significantly Viewed"

10. In the NPRM, we considered which stations are now eligible for "significantly viewed" status in which communities pursuant to the statutory copyright license contained in 17 U.S.C. § 119(a). We also considered how stations and the related communities can be added to the list of significantly viewed stations ("SV List"). We discussed the interplay of the Section 340 requirements with the Commission's network non-duplication and syndicated exclusivity rules and considered how to define a satellite community.

1. Significantly Viewed Stations and Related Communities

11. Section 340(a) of the Act requires the Commission to determine which stations a satellite carrier can retransmit as significantly viewed, as well as which subscribers in which communities can receive these stations.[31] Section 340(a)(1) confers "significantly viewed" status in the satellite context to a station, and the communities in which the station has been determined by the Commission to be "significantly viewed" in the cable television context.[32] Section 340(a)(2) provides for future determinations of a station's "significantly viewed" status by the Commission, consistent with the Commission's existing rules and procedures for cable television.[33] There is no statutory limit on the number of significantly viewed signals a satellite carrier may carry.[34]

12. Section 340(c) of the Act directs the Commission to publish and maintain a unified list of stations, and the communities in which such stations are considered "significantly viewed," that will apply to both cable operators and satellite carriers.[35] In the NPRM, we compiled and published a list of stations that have been determined to be significantly viewed in specified counties and communities pursuant to the Commission's cable television rules.[36] This SV List, which was attached to the NPRM as

---

[31] Section 340(a) of the Act, as created by the SHVERA, authorizes a satellite carrier "to retransmit to a subscriber located in a community the signal of any station located outside the local market in which such subscriber is located, to the extent such signal –

> (1) has, before the date of enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004, been determined by the Federal Communications Commission to be a signal a cable operator may carry as significantly viewed in such community, except to the extent that such signal is prevented from being carried by a cable system in such community under the Commission's network non-duplication and syndicated exclusivity rules; or
>
> (2) is, after such date of enactment, determined by the Commission to be significantly viewed in such community in accordance with the same standards and procedures concerning shares of viewing hours and audience surveys as are applicable under the rules, regulations, and authorizations of the Commission to determining with respect to a cable system whether signals are significantly viewed in a community." 47 U.S.C. § 340(a).

[32] *Id.* § 340(a)(1).

[33] *Id.* § 340(a)(2).

[34] *See* 47 U.S.C. § 340(a), which states that satellite carriers may retransmit such signals "[i]n addition to the broadcast signals that subscribers may receive under Section 338 [governing carriage of local signals] and 339 [governing carriage of distant signals]." The exemption for significantly viewed signals is necessary because Section 339 of the Communications Act (47 U.S.C. § 339) prohibits a satellite carrier from providing a household with the signals of more than two distant affiliates of a particular network per day. *House Commerce Committee Report* at 10.

[35] 47 U.S.C. § 340(c)(1).

[36] Section 76.54 of our rules describes the basis for deeming a station's signal "significantly viewed." *See* 47 C.F.R. § 76.54; *see also* 47 C.F.R. 76.5(i).

Appendix B, identified these stations, counties and communities, combining the Commission's original 1972 list of significantly viewed stations by county with stations added on a county or community-wide basis over the intervening years.[37]

13. We sought comment on the SV List to solicit corrections and have changed the list only to correct errors appropriately demonstrated by commenters.[38] The SV List is attached as Appendix C. Pursuant to Section 340(c), this SV List will be available to the public on our website,[39] and we will update this list within 10 business days if we modify it in the future.[40]

14. Some stations on the SV List have been the subject of petitions resulting in program deletions based on network non-duplication or syndicated exclusivity. The SV List indicates by a pound sign (#) the stations and related communities subject to programming deletions.[41] Cable operators and satellite carriers must be aware of these required programming deletions ("blackouts") and abide by them in their carriage of these stations in the communities so indicated.[42] Since releasing the NPRM, we have granted one pending request for programming deletion based on the network nonduplication and syndicated exclusivity rules[43] and we have updated the SV List accordingly.[44]

15. In the NPRM, we acknowledged that the SHVERA allowed satellite carriers to immediately begin using the SV List to expand their carriage offerings so that their subscribers could start experiencing the benefits of the SHVERA as soon as possible.[45] We permitted satellite carriers to rely on the SV List's accuracy to commence service, consistent with the other requirements set out in the

---

[37] The Commission's initial list of significantly viewed stations was released in 1972. S*ee* Appendix B of the *1972 Recon Order*, 36 FCC 2d 326 (1972). The SV List also includes stations granted significantly viewed status subsequent to 1972. The SV List indicates by a plus sign (+) those that have been added to the 1972 list after its publication to distinguish them from those stations and communities derived from the original 1972 list. Although we do not believe that this distinction is meaningful, for informational purposes we have retained this designation for the final SV List, attached here as Appendix C.

[38] *See infra* Section IV.A.2. DIRECTV has requested that the Commission convert this list into an MS Excel format. DIRECTV at 20. Unfortunately, this is not a simple conversion and would require significant time and staff resources that are not justified by the arguments put forth by DIRECTV. The current list in MS Word format is sufficiently searchable for interested parties to find the information they are looking for.

[39] *See* http://www.fcc.gov/mb.

[40] Section 340(c)(2) requires that the Commission "make readily available to the public in electronic form, on the Internet website of the Commission or other comparable facility, a list of the stations that are eligible for retransmission under subsection (a) and the communities in which such stations are eligible for such retransmission. The Commission shall update such list within 10 business days after the date on which the Commission issues an order making any modification of such stations and communities." 47 U.S.C. § 340(c)(2).

[41] The exclusivity rules permit a station or syndicator that has exclusive rights to network or syndicated programming to prohibit a cable operator from carrying such programming on another station. The exclusivity rules are subject to an exception if the station in question is significantly viewed. This exception is, in turn, subject to waiver if the party petitioning for the programming deletion shows that the station is no longer significantly viewed. *See* 47 C.F.R. §§ 76.92, 76.101 and 76.106; *see also KCST Petition for Special Relief,* 103 FCC 2d 407 (1986) ("*KCST*").

[42] 47 C.F.R. §§ 76.122 and 123; *see infra* Section IV.A.5.

[43] *See* CSR-6383-N (subjecting Station WAVE-TV (NBC, Channel 3), Louisville, Kentucky to programming deletions if carried in the community of Columbia, Kentucky).

[44] *See* updated SV List at Appendix C.

[45] *NPRM*, 20 FCC Rcd at 2990-1, ¶ 14.

SHVERA and this proceeding, prior to the adoption of a final list.[46] This decision was consistent with Congress' intent.[47] To the extent necessary, satellite carriers must now come into compliance with our final rules when they become effective.

2. Accuracy of SV List

16. In the NPRM, we asked interested parties to confirm the accuracy of the SV List. Our request for comment, however, was limited to "whether the SV List accurately reflects such existing significantly viewed determinations, and not about whether the SV List should be modified because of a change in a station's circumstances subsequent to its placement on the SV List." We received numerous comments about the accuracy of the SV List; however, only a handful of these comments offered evidence of specific errors.[48]

17. To the extent that commenters are seeking specific additions or deletions to the list absent proof that these stations were or were not previously determined by the Commission to be significantly viewed,[49] we reject these comments for failing to comply with Section 76.54 of our rules. Moreover, we also agree with EchoStar that these comments are beyond the scope of this proceeding.[50] The SHVERA created a mechanism for parties to subsequently seek modification of the SV List.[51] Requests to modify the SV List based on changed circumstances must follow this process. Therefore, requests for modification that fail to demonstrate an existing error to the list or fail to offer documentary evidence supporting the requested correction are rejected. We note that the only parties originally eligible to request that we declare a station significantly viewed were the station itself, or the cable operator.[52] Satellite carriers will now be included as eligible parties.

---

[46] Cable operators have been relying on this SV List for more than 30 years. We agree with EchoStar that "the significantly viewed provision is self executing." EchoStar at 2. NAB, in an *ex parte*, expressed concern that DBS operators were providing notices to stations of their intent to carry significantly viewed stations. NAB *ex parte* dated May 24, 2005. We note that use of the list must be consistent with the other requirements set out in the SHVERA and this proceeding.

[47] We published the SV List with the NPRM in accordance with the SHVERA's mandate in new Section 340(c)(1)(A)(i). 47 U.S.C. § 340(c)(1)(A)(i). The purpose of the SV List is to identify "the stations that are eligible" for significantly viewed status, meaning those stations already determined to be significantly viewed by the Commission. *Id.* The House Commerce Committee intended that the Commission publish the SV List within 180 days of enactment, and provided for "interim eligibility" for stations on the list. The intent was for satellite carriers to "start carrying the signals on the list pending adoption of the rules." *House Commerce Committee Report* at 13. Although the "interim eligibility" language did not survive, the enacted provision required even faster publication of the SV List (*i.e.*, within 60 days). This indicates Congress' intent to permit immediate use of the SV List upon publication. *See also Barton Floor Statement* at 2 (satellite carriers authorized to carry significantly viewed signals "upon enactment").

[48] *See, e.g.*, comments of: DIRECTV, WGAL; WHEC-TV; Brittain.

[49] *See, e.g.*, the following comments: Adams, Bacon, Beauchamp, Calhoun, Carson, Coffey, Coleman, Elrod of Flovilla, GA, Elrod of York, PA, Forbes, Garrison, Goering, Hughes, Kimberley, Koralja, Maddox, Mather, Metzger, Midlick, Moore, Murdoch, Paszko, Pinkerton, Rutland, Shaddox, Smith, Stancil, Stevens, Torres and Tvardy; *see also* late-filed comments of Brittain and Gassmann.

[50] EchoStar Reply at 12.

[51] 47 U.S.C. § 340(c)(3).

[52] *See 1972 R&O*, 36 FCC 2d at 176.

18. We will correct the SV List based on comments by DIRECTV, WGAL and WHEC-TV. We will also address the corrections proposed by the comments of Saga and Saga Quad, although we reject their request.

19. *DIRECTV*. The SV List is corrected, pursuant to DIRECTV's comments, to reflect new call letters for certain stations.[53] Staff review of Commission records indicates that, with respect to the stations questioned by DIRECTV, all but three of these stations' call letters have been changed since the time they were added to the list. The new call letters of these stations will now be reflected on the list, with a notation of the former call letters for consistency. The three stations that were not among this group, WJJY (Channel 14, Jacksonville, IL), KVFD (Channel 21, Fort Dodge, IA) and KFIZ (Channel 34, Fond du Lac, WI), have apparently gone dark and a notation has been made on the list to reflect this. There were 22 changes in station call letters.

20. In addition, we resolve two questions raised by DIRECTV: (1) whether station WTCT, Channel 27, Marion, Illinois should be listed as significantly viewed for Marshall County, Kentucky and not Marshall County, Illinois; and (2) whether station KSAS-TV, Channel 24, Wichita, Kansas should be listed as significantly viewed in Butler County, Kentucky as well as Butler County, Kansas.[54] Staff review of Commission records indicates that, by letter dated May 24, 1995, the Consumer Protection Division of the former Cable Services Bureau granted significantly viewed status to WTCT-TV in Marshall County, Illinois. Further, by letters dated February 18, 1998, the Consumer Protection Division of the former Cable Services Bureau granted significantly viewed status to KSAS-TV in both Butler County, Kansas and Butler County, Kentucky. Therefore, our list is correct with respect to these questions. Finally, we correct 12 typographical errors pointed out by DIRECTV.[55]

21. *WHEC-TV*. The SV List is corrected, pursuant to WHEC-TV's comments, to reflect that stations WCBS-TV, WNBC, WNYW, WABC-TV and WWOR-TV are not significantly viewed for the city of Rochester, NY, but rather are significantly viewed for the town of Rochester, located in Ulster County, New York.[56] Staff review of Commission records indicates that, by letter dated March 8, 1990, the Chief of Video Services Division, Mass Media Bureau, granted Simmons Communications Company's request to declare the above-listed stations significantly viewed for the Villages of Ellenville and Woodridge, NY, and the towns of Wawarsing, Rochester, Fallsburg, and Mamakating, NY.

22. *WGAL*. The SV List is also corrected, pursuant to WGAL's comments, to delete all references to WKBS-TV, Channel 47, Altoona, PA, as being significantly viewed in the counties of Berks, Bucks, Chester, Delaware, Montgomery and Philadelphia, PA; the communities of East Hempfield Township, East Lampeter Township, East Petersburg, Lancaster, Lancaster Township, Manheim Township, Manor Township, Millersville, Mountville, West Hempfield Township and West Lampeter Township; the counties of Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, NJ; and New Castle County, DE.[57] Staff review of Commission records confirms that WKBS-TV is currently the satellite of station WPCB-TV, Greensburg, PA, and did not become operational until 1985. Television broadcast station WGTW, Channel 48, Philadelphia, PA is the successor to the station that originally had the call sign "WKBS-TV" and that was granted significantly viewed status for the named counties on the basis of the 1971-1972 surveys and in the named communities based on community-specific surveys after 1972. Although WGTW itself went dark for a period of time, it

[53] DIRECTV at Appendix 1.

[54] *Id*.

[55] *See id*.

[56] WHEC-TV at 1-2.

[57] WGAL at 2-3.

nonetheless retains the significantly viewed status originally granted to WKBS-TV. Accordingly, we will list WGTW as significantly viewed, and delete all references to WKBS-TV, for the named counties and communities.

23. *Saga and Saga Quad.* We reject the corrections to the SV List proposed by Saga Broadcasting, LLC ("Saga") and Saga Quad States Communications, LLC ("Saga Quad"). We disagree with Saga and Saga Quad that errors were made in 1972 with respect to the following counties: Greenville, MS; Pittsburg, KS/Joplin, MO; and Victoria, TX. Staff review of the Commission's records indicates that the 1971-1972 survey data relied upon in the publication of the 1972 significantly viewed list was accurately performed in accordance with Section 76.54 of the rules. More specifically, the data for each station indicated by Saga and Saga Quad was double-checked to ensure that the 1971-1972 audience statistics demonstrated that the criteria for significantly viewed status were met, that the 1972 significantly viewed list correctly reflected the survey results, that the significant viewing list was consistent with these documents and they were found to support the station's inclusion on the significantly viewed list. Moreover, we do not find Saga's request to use current Nielsen data as a means of deletion to be acceptable. We agree with the comments of Mission Broadcasting (KOLR),[58] Meredith Corporation (KCTV) and Media General Communications, Inc. (WJTV),[59] that the Saga submissions do not comply with the Section 76.54 petition process and exceed the scope of this proceeding. As a result, Saga's and Saga Quad's requests for deletion are rejected.

3. Procedures for Determining or Modifying Significantly Viewed Status

24. Section 340(c) provides a procedure for modifying the SV List with respect to satellite carriers, either to add eligible stations or communities, or to restrict carriage of eligible stations through application of the Commission's network non-duplication or syndicated exclusivity rules.[60] This provision permits a satellite carrier or station to petition the Commission to include a particular station and related community on the significantly viewed list. Section 119(a)(3) of the copyright provisions in title 17 requires that the Commission use the same rules in considering such petitions that were in effect as of April 15, 1976.[61] In the NPRM, we described the existing rules in place for cable carriage and proposed rule amendments to implement the SHVERA's requirements for satellite carriage.[62]

25. As proposed in the NPRM, we amend Section 76.54 to apply the rule to satellite carriers.[63] As intended by Congress,[64] this provision – essentially unchanged since April 15, 1976[65] – will now govern the process for qualifying new signals for significantly viewed status in both the cable and

[58] Mission Reply at 2-3.

[59] Meredith and Media General Reply at 2-3.

[60] 47 U.S.C. § 340(c)(3) requires that the Commission "permit a satellite carrier to petition for decisions and orders – (A) by which stations may be added to those that are eligible for retransmission under subsection (a), and by which communities may be added in which such stations are eligible for such retransmission; and (B) by which network non-duplication or syndicated exclusivity regulations are applied to the retransmission in accordance with subsection (e)."

[61] 17 U.S.C. § 119(a)(3).

[62] *NPRM*, 20 FCC Rcd at 2991-95, ¶¶ 16-20.

[63] *See* Appendix B, Section 76.54 (revising subsections (a)-(d) and adding subsections (e)-(h)).

[64] *See* 17 U.S.C. § 119(a)(3); *see also House Commerce Committee Report* at 1 (purpose of the SHVERA includes "increasing regulatory parity by extending to satellite carriers the same type of authority cable operators already have to carry 'significantly viewed' signals into a market").

[65] No changes were made to the procedures as in effect on April 15, 1976.

satellite context. Revised Section 76.54 will now reference satellite carriers and the new SV List, but will not alter the procedures as in effect on April 15, 1976.[66] The rules will operate for satellite carriage in the same fashion as they have for cable carriage. Thus, satellite carriers or broadcast stations seeking satellite carriage must follow the same petition process now in place for cable carriage, as required by Sections 76.5, 76.7 and 76.54 of our rules.[67] We do not need to amend Sections 76.5 and 76.7 in order to permit the filing of such petitions for significantly viewed status by satellite carriers or broadcast stations seeking satellite carriage.[68] Thus, a station, satellite carrier or cable operator that wishes to have a station designated significantly viewed would file a petition pursuant to the pleading requirements in Section 76.7(a)(1) and use the method described in Section 76.54 to demonstrate that the station is significantly viewed as defined in Section 76.5(i). Most of the comments support this decision.[69]

26. Section 76.5(i) of the rules provides that a network affiliated station is considered to be significantly viewed if it obtains at least a three percent share of viewing hours in television homes in the community and has a net weekly circulation share of at least 25 percent.[70] For independent stations, the test is a share of at least two percent viewing hours and a net weekly circulation of at least five percent.[71]

27. Section 76.54 provides that parties may demonstrate that signals are significantly viewed either on a county-wide basis or on a community basis.[72] Under Section 76.54(b) of the rules, adopted in 1972,[73] parties may demonstrate significantly viewed status based on an independent professional audience survey which is conducted by a professional organization that is independent from the cable systems or television stations ordering the surveys.[74] The surveys must include the results of two weekly periods separated by at least 30 days, but no more than one of which shall be a week between April and September (*i.e.*, outside the summer viewing period). The Commission recognized that the results of

---

[66] *See* Appendix B revised rule Section 76.54(a) (referencing the new SV List), (b), and (c) (referencing a satellite community).

[67] *See* 47 C.F.R. §§ 76.5, 76.7, 76.54. A fee may be required for the filing of certain petitions to change a station's significantly viewed status; 47 C.F.R. §§ 1.1104, 1.1117, 76.7.

[68] We do, however, amend Section 76.5 in another context. We revise our definition of subscriber in Section 76.5(ee) to add a definition for a satellite subscriber, *see infra* Section IV.B.1. and Appendix B revised rule Section 76.5(ee), and add a definition for satellite community in Section 76.5(gg), *see infra* Section IV.A.6. and Appendix B revised rule Section 76.5(gg), 47 C.F.R. §§ 76.5(ee) and (gg). Because Section 76.7 of our rules currently provides for the filing of special relief petitions by multichannel video programming distributors (MVPDs), such as satellite carriers, we need not amend this rule. *see* 47 C.F.R. § 76.7.

[69] *See, e.g.*, EchoStar at 3-4; NAB at 3-4.

[70] 47 C.F.R. § 76.5(i)(1). Share of weekly viewing hours means the total hours that over-the-air television households in the community viewed a station during the week, expressed as a percentage of the total hours these households viewed all stations during the period surveyed. Net weekly circulation means the number of over-the-air television households that viewed a station for five minutes or more during the week, expressed as a percentage of the total over-the-air television households in the survey area; 47 C.F.R. § 76.5(i) note. *See 1972 R&O*, 36 FCC 2d at 175-6, ¶ 84, n.43.

[71] 47 C.F.R. § 76.5(i)(2).

[72] 47 C.F.R. § 76.54(b), (d).

[73] *See 1972 R&O,* 36 FCC 2d at 176, ¶ 86.

[74] *See* 47 C.F.R. § 76.54(b). Initially, the Commission suggested that parties undertaking surveys under this provision inform other interested parties regarding the survey and its methodology. On reconsideration, the Commission adopted Section 76.54(c) requiring such prior notification. *See 1972 R&O,* 36 FCC 2d at 176, ¶ 86; *1972 Recon Order,* 36 FCC 2d at 349, ¶ 62.

sample surveys can only be determinative within a given probability. Therefore, to assure that the survey errs on the side of excluding stations that are not actually significantly viewed, the Commission decided to require that the sample results exceed the significantly viewed standard, currently specified in Section 76.5(i), by at least one standard error.[75] Initially, the Commission required separate surveys for each cable community, but the rule was revised to allow a single survey where a cable system served multiple communities. Thus, if a cable system serves more than one community, a single survey may be taken, provided that the sample includes over-the-air television homes from each community that are proportional to the population.[76]

28. Section 76.54(d), adopted in 1975, permits parties to demonstrate significantly viewed status for a new station using county-wide audience surveys in lieu of the more burdensome community-by-community method.[77] Under Section 76.54(d), significantly viewed status may be demonstrated on a county-wide basis using independent professional audience surveys which cover three separate, consecutive four-week periods and are otherwise comparable to the surveys used to compile the 1972 Appendix B list. Under this rule, a demonstration that a station is significantly viewed must be based on audience survey data from the station's first three years of operation. Where surveys are conducted pursuant to Section 76.54(d), the Commission concluded that the potential for an unrepresentative sample was considerably lessened by the adoption of a longer survey period. Accordingly, the Commission decided not to require that the results be subject to the standard error requirement and the survey results must simply meet the significantly viewed standard for the station type specified in Section 76.5(i).[78]

29. We reject the proposals by commenters seeking to substantively modify the Section 76.54 process for making significantly viewed determinations, including the proposals to add to the SV list those stations that could deliver a Grade B or better signal to a subscriber's home.[79] The SHVERA did not authorize any approach that would presume that such stations are significantly viewed. Such modifications to the Section 76.54 process would be inconsistent with the SHVERA's requirement that we use the same rules for making significantly viewed determinations that were in effect as of April 15, 1976. Stations or carriers must demonstrate significantly viewed status through the existing Section 76.54 petition process.

30. In the NPRM, we stated that the digital signal of a television broadcast station will be accorded the same significantly viewed status as that of the analog signal, except that where a station is broadcasting only a digital signal, the station must petition for significantly viewed status using the analog requirements in Section 76.54.[80] EchoStar has requested that we clarify that we will continue our

[75] A "standard error" is a statistical measure used to assess, at a specified probability, that the sample estimate reflects the actual result had the entire universe been surveyed. Using one standard error, we can be approximately 70 percent certain that the actual audience statistic is the reported statistic plus or minus one standard error. The calculation of the standard error takes into account the sampling procedure, the sample size and the sample result.

[76] *See* 47 C.F.R. § 76.54(b).

[77] *Amendment of Part 76 of the Commission's Rules and Regulations to Permit Showings that Certain Television Broadcast Stations are Significantly Viewed Based on County-Wide Surveys*, 56 FCC 2d 265, ¶ 1 (1975) ("*1975 R&O*").

[78] *1975 R&O*, 56 FCC 2d at 270, ¶ 12. This was intended to place the survey methodology for newer stations on par with the methodology used in the original Commission surveys. *See* 47 C.F.R. § 76.54(b). Moreover, the rules require that the survey be undertaken by an independent professional audience survey organization and be subject to Commission review.

[79] *See, e.g.*, comments of Adams, Bellaire, Crosby, Lass, Torres and Withers.

[80] *NPRM*, 20 FCC Rcd at 2993-4, ¶ 20.

"present practice of according the digital signal of a broadcast station the same 'significantly viewed' status as the analog signal," and that we only meant to require new digital stations – those without a significantly viewed analog predecessor – to make showings pursuant to Section 76.54.[81] EchoStar is correct; we did not mean to suggest that stations would lose their significantly viewed status when they begin operating only in digital.[82] Stations that have been listed as significantly viewed in a given community based on their analog signal will also be accorded significantly viewed status for their digital signal, even if their analog signal subsequently goes off the air.[83] Moreover, stations with both analog and digital signals may continue to demonstrate significantly viewed status based on their analog signal. We recognize, however, that, in the future, stations will be operating only in digital. Therefore, new digital stations (without an existing analog companion) must demonstrate that their digital signals are significantly viewed.[84]

31. We amend Section 76.54, as proposed,[85] to update the existing reference to "Grade B contour," which applies to analog stations, to add "noise limited service contour," the service contour relevant for a station's digital signal.[86] We further amend Section 76.54 to eliminate an outdated reference and correct a typographical error, neither of which change in any way the substance or the process of the rule.[87] The commenters on this issue support these rule changes.[88]

32. Finally, Gulf and NAB and Network Affiliates ("NAB") requested that we clarify that the independent professional audience surveys required by Section 76.54 must include surveys only from households that receive broadcast signals via an over-the-air antenna.[89] We agree, and, thus, we will amend Section 76.54 to reflect the rule's true meaning.[90] Section 76.54 currently uses the term "non-cable,"[91] but such term was meant to indicate over-the-air viewing.[92] In the *1972 Order*, we adopted the

[81] EchoStar at 4.

[82] *See Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2642, ¶ 100 (2001) ("[W]e believe that the public interest is best served by according the digital signal of a television broadcast station the same significantly viewed status accorded the analog signal. We note, however, that DTV-only television stations must petition the Commission for significantly viewed status under the same requirements for analog stations in Section 76.54 of the Commission's rules.").

[83] We intend to allow licensees to transfer their significantly viewed status from their analog station to their digital station.

[84] This is the reason we amend our rule to add "noise limited service contour," the service contour relevant for a station's digital signal. *See* Appendix B revised rule Section 76.54(c).

[85] *NPRM*, 20 FCC Rcd at 2994, ¶ 20.

[86] *See* Appendix B revised rule Section 76.54(c).

[87] Section 76.54(a) refers to "Appendix A" when it should refer to "Appendix B" of the *1972 Recon Order*. Section 76.54(c) contains an out-of date reference to Section "76.33(a)(2)(i)" of the rules. Revised Section 76.54 corrects these issues; s*ee* Appendix B revised rule Section 76.54(a), (c).

[88] *See, e.g.*, EchoStar at 3-4; and NAB at 3-4.

[89] NAB at 9; Gulf at 8.

[90] We replace the term "non-cable" with "over-the-air" – rather than "non-MVPD" as suggested by NAB – to more accurately reflect the rule's true meaning.

[91] 47 C.F.R. § 76.54.

[92] We have already noted this meaning in another context. *See* 47 C.F.R. § 76.1506 (television stations are significantly viewed for carriage by open video systems "when they are viewed in households that do not receive television signals from multichannel video programming distributors…"). NAB *ex parte* dated Jul. 26, 2005.

concept of significant viewing to apply to over-the-air households, which at the time essentially meant households without cable (*i.e.*, non-cable households).[93] Thus, amending Section 76.54 to change "non-cable" to "over-the-air" reflects the true intent of the rule as it was in 1976, and is more consistent with the SHVERA's intent to establish parity between cable and satellite. It would also be inconsistent with the original intent of the SV process to permit satellite carriers to use their own subscribers in audience surveys to demonstrate SV status. It would also be largely pointless as satellite carriers have had no way to offer such signals to subscribers in out-of-market communities except as "distant" signals to "unserved" households.

4. Definition of "Network Station"

33. Our rules define network station as one of the "three major national television networks."[94] This definition is expressly relied upon to select the correct standard for determining whether a station is significantly viewed.[95] The standard applies only to commercial stations.[96] We mentioned in the NPRM that, for purposes of subscriber eligibility, the SHVERA relied on the definition of "network station" that is used in the copyright provisions of title 17,[97] which provides that a "network station" is:

> (A) a television broadcast station, including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or (B) a "noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934 [47 U.S.C. § 397]).[98]

---

[93] *See 1972 R&O,* 36 FCC 2d at 175-6, ¶ 83-6.

[94] *See* 47 C.F.R. § 76.5(j) and (k).

[95] *See* 47 C.F.R. § 76.5(i) (the "share" required to achieve significantly viewed status depends upon whether the station in question is a network station or an independent station); *see also* 47 C.F.R. § 76.5(j) (full network station is: "A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the three major national television networks with which it has a primary affiliation (*i.e.*, right of first refusal or first call)"; 47 C.F.R. § 76.5(k) (partial network station is: "A commercial television broadcast station that generally carries in prime time more than 10 hours of programming per week offered by the three major national television networks, but less than the amount specified in paragraph (j) of this section"; 47 C.F.R. § 76.5(l) (independent station is: "A commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks.").

[96] *See* 47 C.F.R. §§ 76.5(i)-(l) (definitions of significantly viewed stations limited to "commercial"); *1972 R&O*, 36 FCC 2d at 180; *1972 Recon Order*, 36 FCC 2d at 330 (educational stations were given mandatory carriage throughout their Grade B signal contour but were not given significantly viewed status because the low ratings for NCE stations made it difficult to develop a significantly viewed standard for them and to avoid "an unwarranted profusion of educational signals" to which the educational stations objected due to possible erosion or dilution of local subscriber support); *see also* 17 U.S.C. § 119(a)(3)(A) (limits significantly viewed to the Commission's rules in effect on April 15, 1976).

[97] *NPRM*, 20 FCC Rcd at 2995, ¶ 21; *see also* 47 U.S.C. § 340(i)(2); 17 U.S.C. §119(d)(2).

[98] 17 U.S.C. §119(d)(2). The SHVERA also relies on Section 339(d) for the definition of "television network," which is slightly different from the "network" definition in title 17. *See* 47 U.S.C. § 340(i)(2); 47 U.S.C. § 339(d)(5); *see also* 47 C.F.R. § 76.66(a)(5) (defining television network in the context of satellite broadcast signal (continued….)

34. In the NPRM, we tentatively concluded that the SHVERA prevented us from updating our significantly viewed rules because it requires that we retain the standard we have used since April 15, 1976.[99] Therefore, we proposed to harmonize the apparent inconsistencies by continuing to use the definition of network and independent station in our rules for purposes of determining whether a station is significantly viewed for placement on the SV List, which thereby excludes noncommercial stations from eligibility for the SV List. However, as also required by the SHVERA, we proposed to use the copyright definition of network station and superstation for purposes of subscriber eligibility and the other applications of the significantly viewed provisions.

35. We adopt our proposal in the NPRM to harmonize the conflicting definitions of network station. Most commenters on this issue support our proposal.[100] The SHVERA required use of the rules in effect as of April 15, 1976, and thus precludes us from applying definitions of "full network station," "partial network station" and "independent station" different from the April 15, 1976, standard incorporated by reference in the statute. Thus, as proposed in the NPRM, we will use our rule's definitions for purposes of determining whether a station is significantly viewed and use the Copyright Act's definitions for purposes of determining subscriber eligibility.

36. We reject, at this time, NAB's request to change the definitions of "full network station," "partial network station," and "independent station" in Section 76.5(j), (k), and (l) to track the Copyright Act definitions of "network station" and "superstation" in 47 U.S.C § 119(d). We recognize that our rules will treat stations owned by Fox or affiliated with the Fox Network as "independent stations" under the Commission's definitions in Section 76.5, and not as network stations, whereas these stations are treated as "network stations" under the Copyright Act definition.[101] (Similarly, other networks[102] that may satisfy the copyright definition of "network," will be treated as "independent stations" under our rules.) But the statute requires that we use the rules in effect as of April 15, 1976, which would include our rule's definition of network station.

37. We also take this opportunity to respond to an *ex parte* question raised by Capitol Broadcasting Company, Inc. (CBC).[103] CBC asks, with respect to a petition to impose network non-duplication and syndicated exclusivity on a station on the SV List, what standard applies if the station has subsequently changed its status to or from a network station.[104] In addressing such petitions, we have

(Continued from previous page)
carriage). Section 339(d)(5) provides: "a television network in the United States which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more States." 47 U.S.C. § 339(d)(5). We note the difference in language between "affiliated television licensees" in title 17 compared with "affiliated broadcast stations" in Section 339 of the Communications Act, but we do not find the difference significant. *See NPRM*, 20 FCC Rcd at 2995, ¶ 21, n.69.

[99] *NPRM*, 20 FCC Rcd at 2996, ¶ 23; 17 U.S.C. § 119(a)(3)(A), as amended by Section 102 of the SHVERA (the statutory copyright license applies to retransmission of significantly viewed network station or superstation to a subscriber in a community on the Commission's list and limits significantly viewed to the Commission's rules in effect on April 15, 1976).

[100] EchoStar and MPAA agree with our proposed harmonization of definitions. EchoStar at 5-6; MPAA Reply at 3. NAB asks that we update the definition in our rules to track the definitions in the Copyright Act; NAB at 4. But NAB says that it would otherwise support our proposal. NAB at 7. MPAA opposes NAB's proposed definition change. MPAA Reply at 2.

[101] As noted, our rule, Section 76.5(j) and (k), defines a major network as one of the three major networks.

[102] For example, WB, UPN, Telemundo and/or Paxson.

[103] CBC *ex parte* dated Jun. 2, 2005.

[104] *Id.*

found that petitioners seeking to demonstrate that a station no longer meets the significantly viewed criteria (and that therefore a waiver of the exemption from network non-duplication and syndicated exclusivity is warranted) must use the standard that applies to the listed station at the time the survey is conducted. The initial determination that a station is significantly viewed is based on a comparison of the submitted audience data with the significantly viewed standard applicable to the station affiliation status. Thus, when challenging whether a station is still entitled to invoke the significant viewing exemption under the network non-duplication and/or syndicated exclusivity rules, it is appropriate for a petitioner to make the determination of whether a waiver is warranted based on the criteria applicable to the station's affiliation at the time the survey was conducted. So, in CBC's example in which a listed station changed from a network station when initially listed to an independent station at the time of the survey to show the station is no longer significantly viewed, the petitioner should apply the independent standard to determine if the listed station no longer meets the criteria for significantly viewed status.[105]

5. Limitations on Carriage of Significantly Viewed Stations Based on Network Non-duplication and Syndicated Exclusivity

38. Section 340(a)(1) limits satellite carriage of a station included on the SV List "to the extent such signal is prevented from being carried by a cable system in such community under the Commission's network non-duplication and syndicated exclusivity rules."[106] In the NPRM, we noted the complexity of applying the network non-duplication and syndicated exclusivity rules to the satellite context.[107] The exclusivity rules do not apply to satellite carriage of network stations, but only to carriage of "nationally distributed superstations," as provided by Section 339(b)(1)(A), which was enacted by the SHVIA in 1999.[108] Section 340(e) maintains the status quo by providing that the exclusivity rules shall not apply to distant network stations.[109] Section 340(e)(1), however, authorizes the Commission to adopt rules to permit assertion of the exclusivity rules by stations and distributors with respect to stations carried by satellite carriers pursuant to the new significantly viewed provisions.[110]

39. In the NPRM, we said this provision required us to (1) create a limited right for a station or distributor to assert exclusivity with respect to a station carried by a satellite carrier as significantly viewed; (2) allow that significantly viewed station to assert the significantly viewed exception, just as a

[105] CBC *ex parte* dated Jun. 2, 2005.

[106] Section 340(a)(1) as enacted by Section 202 of the SHVERA.

[107] *NPRM*, 20 FCC Rcd at 2996-8, ¶¶ 24-26.

[108] *See* 47 U.S.C. § 339(b)(1)(A); *see also Satellite Exclusivity Order,* 15 FCC Rcd 21688 (2000); *Order on Reconsideration*, 17 FCC Rcd 27875, (2002). The existing satellite exclusivity rules provide for an exception to their application in the event that the nationally distributed superstation is also a station that is significantly viewed in the area in which the satellite carrier is offering them. *See* 47 C.F.R. §§ 76.122(j)(ii) and 76.123(k)(2); *see also Satellite Exclusivity Order,* 15 FCC Rcd at 21716-7, ¶¶ 56-7.

[109] *See* 47 U.S.C. § 340(e)(2), enacted by Section 202 of the SHVERA: "(2) LIMITATION. Nothing in this subsection or Commission regulations shall permit the application of network non-duplication or syndicated exclusivity regulations to the retransmission of distant signals of network stations that are carried by a satellite carrier pursuant to a statutory license under Section 119(a)(2)(A) or (B) of title 17, United States Code, with respect to persons who reside in unserved households, under Section 119(a)(4)(A), or under Section 119(a)(12), of such title."

[110] *See* Section 340(e)(1), enacted by Section 202 of the SHVERA: "(1) NOT APPLICABLE EXCEPT AS PROVIDED BY COMMISSION REGULATIONS. Signals eligible to be carried under this section are not subject to the Commission's regulations concerning network non-duplication or syndicated exclusivity unless, pursuant to regulations adopted by the Commission, the Commission determines to permit network non-duplication or syndicated exclusivity to apply within the appropriate zone of protection." 47 U.S.C. § 340(e)(1).

station would with respect to cable carriage; and (3) allow the station or distributor asserting exclusivity to petition us for a waiver from the exception.[111] Thus, Congress directs the Commission to ensure parity between cable operators and satellite carriers so that a station's programming that is subject to blackout deletions with respect to a cable system serving a cable community would also be subject to deletions for a satellite carrier's subscribers within the same cable community or within a satellite community.[112]

40. In the NPRM, we proposed to implement these SHVERA requirements, first, by denoting on the SV List which stations in which communities have been subjected to deletions such that duplicating programming must be blacked out by cable operators.[113] Satellite carriers using the SV List may carry these stations, but are subject to the same programming deletions that apply to cable systems. Second, we proposed to amend our rules so that stations and distributors may assert exclusivity rights with respect to satellite carriage of significantly viewed stations but only insofar as they can prove that the conditions supporting a waiver of the significantly viewed exception from the exclusivity rules would apply.[114]

41. As proposed, we adopt a rule for satellite carriage that mirrors the rules for cable carriage.[115] Specifically, the new rule allows a station or distributor with exclusive rights to network or syndicated programming to petition the Commission to require satellite carriers to delete such programming from stations that are carried because they are on the SV List.[116] Such SV stations may respond to such petitions by claiming the exception to the network nonduplication and syndicated exclusivity rules that applies to significantly viewed stations ("the significantly viewed exception").[117] The party petitioning for network nonduplication or syndicated exclusivity protection may request a waiver of the significantly viewed exception by demonstrating that the station is no longer significantly viewed in a particular community or communities.[118] If the waiver is granted, the duplicating programming must be deleted by a cable operator or satellite carrier if the station is carried in a community in which the station has been shown to no longer be significantly viewed. The station is not removed from the SV List and may continue to be carried, provided the necessary programming deletions are made.[119]

42. Commenters split on this issue, with NAB supporting it and EchoStar seeking a simpler de-listing procedure instead. We agree with NAB that broadcast stations or program suppliers should be able to petition the Commission for waiver of the significantly viewed exception to the network non-duplication and syndicated exclusivity rules for satellite carriers in the same manner as is permissible in the cable context.[120] We reject EchoStar's proposed de-listing procedure[121] because the network non-

[111] *NPRM*, 20 FCC Rcd at 2997-8, ¶ 26.

[112] *Id.*

[113] *NPRM*, 20 FCC Rcd at 2998, ¶ 27. In Appendix B, SV List, we used a pound sign (#) to indicate the stations and communities subjected to programming deletions pursuant to the Commission's exclusivity rules.

[114] *NPRM*, 20 FCC Rcd at Appendix A, proposed Sections 76.122 and 76.123.

[115] *See* 47 C.F.R. § 76.92(f).

[116] *See* Appendix B revised rule Sections 76.122(a) and 76.123(a).

[117] *See, e.g.*, 47 C.F.R. §§ 76.122(j)(2) and 76.123(k)(2).

[118] *See* Appendix B revised rule Sections 76.122(j)(2) and 76.123(k)(2). *See also generally KCST,* 103 FCC 2d 407.

[119] *House Commerce Committee Report* at 14-15 (noting that stations are not removed from the SV List but rather that blackout deletions are re-imposed).

[120] NAB at iii.

duplication and syndicated exclusivity deletions only apply to specific programming, and not the entire signal. Thus, it would not be appropriate to remove the signal from the list. Accordingly, we will revise Sections 76.122 and 76.123, as proposed.[122]

6. Definition of "Satellite Community"

43. The SHVERA required the Commission to define "community" in the satellite context. Under the SHVERA, a "community" is either (1) a county or a cable community under the Commission's rules (applicable to significantly viewed signals), or (2) a satellite community as defined by the Commission in implementing the statute.[123] The concept of a "community" is important in the SHVERA because the term describes the geographic area where a subscriber is permitted to receive a significantly viewed signal. In the NPRM, we considered both how to apply SV determinations for existing communities to satellite, and how to define future communities for both satellite and cable.[124]

a. Existing Communities

44. The first issue concerns how best to apply existing cable communities to the satellite context. Existing significantly viewed determinations are limited to cable communities because our rules have previously applied only to cable carriage of significantly viewed signals. In the cable context, the Commission defined a community unit in terms of a "distinct community or municipal entity" where a cable system operates or will operate.[125] Due to the localized nature of cable systems, cable communities were easily defined by the geographic boundaries of a given cable system, which were often, but not always, coincident with a municipal boundary and varied as determined on a case-by-case basis.[126]

(Continued from previous page)

[121] EchoStar at 6-7. EchoStar would remove a station from the list if it is shown to no longer qualify for significantly viewed status.

[122] *See* Appendix B revised rule Sections 76.122(a) and (j); and Sections 76.123(a) and (k). We also revise these rule provisions to refer to Section 76.66, with respect to local station carriage, and to add "noise limited service contour" to update the references to Grade B contour. See Appendix B revised rule Sections 76.122(j) and (j)(3) and 76.123(k) and (k)(3).

[123] 47 U.S.C. § 340(i)(3) states that "[t]he term 'community' means – (A) a county or a cable community, as determined under the rules, regulations, and authorizations of the Commission applicable to determining with respect to a cable system whether signals are significantly viewed; or (B) a satellite community, as determined under such rules, regulations, and authorizations (or revisions thereof) as the Commission may prescribe in implementing the requirements of this section."

[124] *NPRM*, 20 FCC Rcd at 2998-3000, ¶¶ 28-32.

[125] 47 C.F.R. § 76.5(dd) defines "community unit" as: "A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas)." *See also Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, 63 FCC 2d 956, 966 (1977) (defining "community unit" for, *inter alia*, the significantly viewed rules, as that part of a cable system that is located within a single community).

[126] *See id.* at n. 5, (citing *Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals By Community Antenna Television Systems, and Related Matters, Docket 15971*, 2 FCC 2d 725, 785-6, ¶ 149 (1966)) ("community" as used in the rules must be determined case-by-case depending on the circumstances involved); *Telerama, Inc.*, 3 FCC 2d 585 (1966), *Mission Cable TV Inc.,* 4 FCC 2d 236 (1966), *Calvert Telecommunications Corp.*, 49 FCC 2d 200 (1974), and *St. Louis Telecast, Inc.*, 12 RR 1289, 1369 (1957).

45. The SHVERA required satellite carriers to use the existing defined cable communities on the SV List.[127] Most of the listings on the SV List are by county because the study to establish significantly viewed signals was based on a survey of every station existing in 1972 and its audience on a county-wide basis.[128] Where a station satisfied the requirements to be considered significantly viewed in a county, the Commission provided that this status was applicable to every community within that county. Following the creation of the initial SV List in 1972, significantly viewed determinations generally were made based on community listings. In rare circumstances, though, a petitioner could show that a county could be a community containing a significantly viewed station under Section 76.54(b). Further, the Commission's rules (as in effect as of April 15, 1976) permit county-wide showings for new stations not included in the initial SV List pursuant to Section 76.54(d). Unlike community showings, in order to make such a showing on a county-wide basis, parties must include audience survey data from the station's first three years of operation, regardless of when the station, cable operator or satellite carrier decide to make the showing. Thus, the existing list includes counties, communities, such as cities or municipalities, and unincorporated areas. In the NPRM, the Commission asked whether satellite carriers would be able to determine which of their subscribers are in existing communities and, if not, how best to apply existing cable communities to the satellite context.[129]

46. We find that the statute requires satellite carriers to use existing listings in offering significantly viewed signals, whether defined as a county, a non-county community (*e.g.*, a city or municipality), or as an unincorporated area. Thus, satellite carriers may provide a station to a subscriber as significantly viewed if that station is on the SV List for the community in which the subscriber is located. DIRECTV states, however, that it would have a problem using existing community listings that are not county-wide or that do not follow zip code boundaries.[130] No other commenters express any problems with using such non-county listings. Although DIRECTV says it cannot provide service to subscribers based on non-county listings, DIRECTV says it can determine which zip codes are contained within a non-county boundary and provide service to subscribers based on those zip codes.[131]

47. We recognize that DIRECTV may face a subscriber identification issue[132] in situations where zip codes may cross over community lines and may be only partially contained within an existing SV community listing. We find, however, that the statute requires that only subscribers within existing SV community listings are eligible to receive significantly viewed stations associated with these communities.[133] DIRECTV, itself, acknowledges the validity of this statutory interpretation.[134] We recognize that limiting significantly viewed carriage to subscribers within an existing community listing would mean that DIRECTV would not be able to serve some subscribers eligible to receive a SV station because they are in a zip code which partially extends beyond the existing community boundary. But this result is due to DIRECTV's limitations and appears unavoidable in light of the statute. EchoStar does not suggest that it is similarly affected by DIRECTV's technical limitation, but nevertheless disagrees with

[127] *See* 47 U.S.C. §§ 340(a)(1).

[128] *See 1972 R&O*, 36 FCC 2d at 175-6, ¶ 85; *1972 Recon Order*, 36 FCC 2d at 162-63, ¶ 53.

[129] *NPRM*, 20 FCC Rcd at 2999, ¶ 30.

[130] *Id*. at 5. DIRECTV states it can now only authorize service to subscribers based on residences in cable communities identified by county or zip code.

[131] *Id*. at 6.

[132] DIRECTV cannot differentiate between subscribers in the same zip code but in different communities. *Id*. at 6.

[133] 47 U.S.C. § 340(a).

[134] DIRECTV at 6-7 (conceding that the "SHVERA does not appear to anticipate automatic extension of those [existing community] boundaries to encompass all split zip codes").

this approach. EchoStar argues that this statutory interpretation is too conservative and suggests that satellite carriers should be able to serve subscribers in zip codes that extend beyond an established community or county boundary if 10 percent or more of the zip code's population is contained within the existing community listing.[135] We reject EchoStar's "10 percent overlap" proposal. We agree with MPAA and NAB[136] that EchoStar's proposal is contrary to the statute's limitations on station eligibility for SV carriage.[137]

48. We will not assign zip codes to each community identified in the SV List, as requested by EchoStar, because that would be unnecessarily burdensome on Commission resources.[138] It is much easier for satellite carriers to make such determinations on an as-needed basis. Thus, it is the satellite carrier's responsibility to determine whether a particular subscriber resides within a listed community and is eligible for significantly viewed status, whether by use of zip code, street address or other means.

b. Future Communities

49. The second issue concerns how best to define communities in the future when stations seek carriage by satellite carriers as significantly viewed, while satisfying Congress' intent for regulatory parity between satellite and cable. In the NPRM, we provided that cable operators would continue to define future cable communities as they always have. But the statute authorizes the Commission to define a "satellite community" in a manner appropriate for the nature of satellite service where there is no existing cable community.[139] In the NPRM, we proposed two options for defining future satellite communities.[140] The first option would allow a satellite carrier to seek significantly viewed status for a given station with respect to one or more specified five-digit zip code areas.[141] The second option proposed to define a satellite community based on a separate and distinct community or municipal entity.[142]

50. We adopt our second option. Thus, where there is no pre-existing cable community (*i.e.*, no cable system serving the community as defined in Section 76.5(dd)[143]), a satellite carrier may define a new community for purposes of the SV List by reference to an existing separate and distinct community or municipal entity (*e.g.*, political jurisdiction, incorporated city or town). In the absence of a separate and distinct community or municipal entity (*e.g.*, an unincorporated area), a satellite community may be defined by one or more adjacent five-digit zip code areas. In addition, satellite carriers (like cable operators) may also demonstrate significantly viewed status for a new station on a county-wide basis, pursuant to Section 76.54(d).[144]

---

[135] EchoStar at 10.

[136] MPAA Reply at 1; NAB Reply at 2.

[137] 47 U.S.C. § 340(a).

[138] EchoStar at 10.

[139] 47 U.S.C. § 340(i)(3)(B).

[140] *NPRM*, 20 FCC Rcd at 2999-3000, ¶¶ 31-32, Appendix A proposed rule Section 76.5(gg) (option one) and (option two).

[141] *Id*. (option one).

[142] *Id*. (option two).

[143] 47 C.F.R. § 76.5(dd).

[144] A county showing under Section 76.54(d) is separate from the community showing under 76.54(b). Unlike community showings, in order to make such a showing on a county-wide basis, parties must include audience survey data from the station's first three years of operation, regardless of when the station or cable operator or satellite (continued….)

51. Our definition of a "satellite community" best balances the statutory requirement of regulatory parity with the unique nature of satellite service. Unlike cable service, which reaches subscribers via local franchises across the country, satellite service is generally a national service. Moreover, satellite service is offered in areas of the country that do not have cable service, and thus are not cable communities. We agree with Gulf and NAB[145] that regulatory parity requires that a satellite community resemble existing cable communities as much as possible. We also agree with MPAA about the importance of applying consistent rules to both satellite and cable.[146] Our definition will also make it more likely that a cable system subsequently built in such an area would serve a "community" similar to the satellite community, thus making the SV List more easily used by both cable and satellite providers.[147]

52. We reject our first proposal that would allow use of one or more zip codes to define a satellite community. Commenters split on this issue. While some commenters favored the use of zip codes to offer "greater certainty to consumers,"[148] others expressed concerns about regulatory parity and cherry-picking communities.[149] We are persuaded that our first proposal is not the preferred choice. As we noted in the NPRM, it would ignore an existing town, village, municipality or other geopolitical entity that constitutes a "community" in the more traditional sense. As noted by NAB, zip codes would unfairly allow satellite carriers to cherry-pick areas of traditional communities in a manner cable operators may not do.[150] In contrast to traditional communities, we do not share this concern with respect to unincorporated areas that do not track a traditional community. We agree with DIRECTV that unincorporated areas may not constitute a community in the traditional sense any more than would a zip code.[151] Thus, we find, in this limited circumstance, satellite carriers may use one or more adjacent five-digit zip code areas to define an unincorporated area. We are requiring that, if multiple five-digit zip code areas are to be used, then such areas must be adjacent to each other to prevent carriers from cherry-picking their service to these areas. It is also permissible to demonstrate significant viewing in an individual zip code or in several zip codes as long as each one is shown to have significant viewing.[152]

53. We disagree with NAB's contention that an additional demonstration is required by satellite carriers to show that the "community" satisfies the Section 307(b) concept of community.[153] Our definition ensures that a satellite community will resemble a community in a traditional sense, and

(Continued from previous page)

carrier decides to make the showing. Because the statute requires the Commission to use the rules in effect as of April 15, 1976, application of the county-wide standard in Section 76.54(d) must apply to the satellite context as it applies to cable. *See* Section IV.A.3., *infra*.

[145] *See, e.g.*, Gulf at 7-8; NAB at 12-14.

[146] MPAA at 2.

[147] In the NPRM, we asked what we should do if a cable operator subsequently offers cable service in a community after it has been defined as a "satellite community." We believe our definition of satellite community avoids the need to redefine the community to the extent it overlaps with the franchise area of the new cable community.

[148] *See, e.g.*, DIRECTV at 7; EchoStar Reply at 6-7; *see also* Bellaire at 3.

[149] *See, e.g.*, Gulf at 7-8; NAB at 12-14; *see also* MPAA at 2 (supports "consistently applied definition of community").

[150] We note that cable operators are not permitted under Section 76.54(b) to demonstrate significantly viewed status for only a portion of a recognized community.

[151] DIRECTV at 7.

[152] If a satellite carrier aggregates more than one zip code, a single survey may be taken, provided that the sample includes over-the-air television homes from each zip code that are proportional to the population. *See* Appendix B revised rule Section 76.54(b).

[153] NAB at 14. *See also* 47 U.S.C. § 307(b).

alleviates concern about the creation of "artificial communities." Our definition will also adequately prevent local broadcast stations from being subject to cherry-picking or so-called "Swiss-cheesing" of their program exclusivity rights because it requires carriers to use community boundaries and would not allow carriers to use zip codes to exclude portions of a traditional community.

c. Natural growth of communities

54. In the NPRM, we recognized that communities may grow or change over time, either through annexation or other means, and tentatively concluded that these communities should generally be interpreted to encompass the area of natural growth of the community.[154] This concept applies to both existing communities now on the SV List, as well as both cable and satellite communities that may be created in the future. We will affirm our conclusion, which was supported by EchoStar, the sole commenter on this issue.[155] It would be unnecessarily burdensome for the Commission to determine community boundaries based on when they were accorded SV status. It has been our practice to recognize the area of natural growth of communities, and we will continue to do so. Thus, we will apply the community listing or description on the SV List to the community so denominated today, or as it may become in the future.

7. Significantly Viewed Carriage Not Mandatory; Retransmission Consent Rights Not Affected

55. The SHVERA did not require satellite carriers to carry significantly viewed stations.[156] The SHVERA also did not change the requirements for retransmission consent.[157] Based on the statutory language, we tentatively concluded in the NPRM that carriage of significantly viewed stations will require retransmission consent under Section 325(b) of the Act, unless an exception to the requirement applies.[158]

56. Based on the SHVERA's statutory language, we affirm our conclusions in the NPRM. Satellite carriers are not required to carry significantly viewed stations. The statute is clearly permissive in this regard.[159] The statute is also clear that it does not change any retransmission consent requirements.[160] Thus, it follows that, like a cable operator, a satellite carrier must obtain retransmission consent to carry a station as a significantly viewed signal.[161]

---

[154] *NPRM*, 20 FCC Rcd at 2991, ¶ 15.

[155] EchoStar at 2-3.

[156] *See* 47 U.S.C. § 340(d)(1) ("Carriage of a signal under this section is not mandatory, and any right of a station licensee to have the signal of such station carried under section 338 is not affected by the eligibility of such station to be carried under this section."). This provision also makes clear that any right of a station to have its signal carried in a local market under the "carry-one, carry-all" satellite must carry requirement is not affected by the significantly viewed status of the signal in another market.

[157] 47 U.S.C. § 340(d)(2) ("The eligibility of the signal of a station to be carried under this section does not affect any right of the licensee of such station to grant (or withhold) retransmission consent under section 325(b)(1).").

[158] *NPRM*, 20 FCC Rcd at 3000-1, ¶ 33.

[159] 47 U.S.C. § 340(d)(1).

[160] 47 U.S.C. § 340(d)(2).

[161] In the NPRM, we noted that a satellite carrier is exempt under Section 325(b) from having to obtain retransmission consent when providing a distant signal of a network to an unserved subscriber who cannot receive an over-the-air signal from an affiliate of the same network. *Id.*; 47 U.S.C. § 325(b).

8. Significantly Viewed Signals and the Single Dish Requirement

57. Pursuant to Section 338(g) of the Act, satellite carriers must carry all local stations on a single dish by June 8, 2006.[162] In the NPRM, we asked whether the SHVERA required satellite carriers to carry both local and significantly viewed stations on a single dish.[163]

58. We find that the SHVERA did not impose a requirement on satellite carriers to carry both local and significantly viewed stations on a single dish. The only two commenters on this issue, DIRECTV and EchoStar, support such a finding. Section 340 does not specify any such requirement. Rather, the single dish requirement is found only in Section 338(g), amended by Section 203 of the SHVERA, and refers to the retransmission of only "local" signals.[164] We, thus, agree with DIRECTV that the single-dish restriction is limited to local – and not significantly viewed – signals.[165] In this regard, the statutory framework is instructive. As noted by DIRECTV, Section 338 of the Act governs the retransmission of local signals, Section 339 of the Act governs the retransmission of distant signals, and new Section 340 of the Act governs the retransmission of significantly viewed signals. In addition, carriage of "local" signals is governed by Section 122 of the copyright provisions;[166] but carriage of significantly viewed signals is based on the Section 119 statutory copyright license that governs distant signals.[167]

9. Definition of "Satellite Carrier"

59. The SHVERA defined the term "satellite carrier" in new Section 338(k) by reference to the definition in 17 U.S.C. §119.[168] This definition includes entities providing services as described in 17 U.S.C. § 119(d)(6) using the facilities of a satellite or satellite service licensed under Part 25 of the Commission's rules to operate in Direct Broadcast Satellite (DBS) or Fixed-Satellite Service (FSS) frequencies.[169] As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These carriers using FSS facilities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers

[162] *See* 47 U.S.C. § 338(g)(1), as amended by Section 203 of the SHVERA (analog local television stations in a market must be carried by means of a single reception antenna and associated equipment).

[163] *NPRM*, 20 FCC Rcd at 3001, ¶ 34.

[164] 47 U.S.C. § 338(g)(1) ("Each satellite carrier that retransmits the analog signals of local television broadcast stations in a local market shall retransmit such analog signals in such market by means of a single reception antenna and associated equipment.").

[165] DIRECTV at 13. DIRECTV also argues that carriage of significantly viewed signals on one dish would be unduly burdensome to satellite carriers. *Id*. at 15.

[166] 17 U.S.C. § 122.

[167] 17 U.S.C. § 119.

[168] *See* 47 U.S.C. § 340(i)(1); 47 U.S.C. § 338(k)(3), as amended by the SHVERA, and 17 U.S.C. §119(d)(6).

[169] Part 100 of the Commission's rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed pursuant to Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

in the United States pursuant to a blanket earth station license.[170] In the NPRM, we tentatively concluded that the definition of "satellite carrier" would include all three types of entities described above.[171]

60. We will adopt our proposed interpretation of a satellite carrier. Our interpretation flows directly from the statute. The commenters on this issue, EchoStar and NAB,[172] support our conclusion.

B. Subscriber Eligibility to Receive "Significantly Viewed" Signals

61. In addition to the statutory requirements concerning station eligibility, the SHVERA also limited the subscribers who are eligible to receive the signals of significantly viewed stations. In general, subscribers are not eligible to receive out-of-market significantly viewed signals of a network station unless they are already receiving the local signal of an affiliate of the same network via satellite.[173] Application of this general principle differs, however, depending on whether the significantly viewed signal is analog or digital, with additional restrictions imposed on digital signals. The subscriber eligibility limitations also provide for an exception where there is no local network station present in the relevant market or when a local network station waives the subscriber eligibility requirements.

1. Definition of "Subscriber"

62. The SHVERA defined the term "subscriber" in new Section 338(k) by reference to the definition in 17 U.S.C. § 122(j)(4), which provides that a subscriber is "a person who receives a secondary transmission service from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor."[174] The NPRM said the definition in 17 U.S.C. § 122 differs slightly from the definition of subscriber contained in 17 U.S.C. § 119, which establishes the significantly viewed compulsory copyright license for satellite carriers. We noted that the definition in 17 U.S.C. § 119 limits "subscribers" to individuals in private homes, [175] but said that Congress intended to use the broader definition in 17 U.S.C. § 122 for significantly viewed signals.

63. However, the definition in 17 U.S.C. § 119 was amended by Section 107 of the SHVERA to strike the reference to "private home viewing."[176] Thus, we agree with DIRECTV and MPAA that the two Copyright Act definitions (in 17 U.S.C. §§ 119 and 122) are for present purposes largely the same, and there is no need to distinguish between them.[177]

---

[170] *See, e.g., Application Of DIRECTV Enterprises, LLC, Request For Special Temporary Authority for the DIRECTV 5 Satellite; Application Of DIRECTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DIRECTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location,* 19 FCC Rcd. 15529 (Sat. Div. 2004).

[171] *NPRM*, 20 FCC Rcd at 3001, ¶ 35.

[172] EchoStar at 12; NAB at 15.

[173] *See* 47 U.S.C. § 340(b); 17 U.S.C. § 119(a)(3)(B).

[174] *See* 47 U.S.C. § 340(i)(1); 47 U.S.C. § 338(k)(3), as amended by the SHVERA.

[175] 17 U.S.C. § 119(d)(8).

[176] Section 107 of the SHVERA amends 17 U.S.C. § 119(d)(8) to define a subscriber as "an individual or entity that receives a secondary transmission service by means of a secondary transmission from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor in accordance with the provisions of this section." This definition is not identical to the definition in 17 U.S.C. § 122, but is essentially the same after the SHVERA's amendment.

[177] DIRECTV at 20-21; MPAA at 2-3.

64. In the NPRM, we proposed to amend the definition of subscriber in our rules to include subscribers to satellite service.[178] We will adopt our proposed amendment to the definition contained in Section 76.5(ee) of our rules.[179] Defining a satellite subscriber for our rules is consistent with the SHVERA and furthers regulatory parity. We received no comments on this proposal.

2. Analog Service Limitations; Receipt of Local Affiliate Required

65. Section 340(b)(1) of the Act explains the nature of subscriber eligibility to receive an out-of-market significantly viewed analog signal as follows:

> With respect to a signal that originates as an analog signal of a network station, this section shall apply only to retransmissions to subscribers of a satellite carrier who receive retransmissions of a signal that originates as an analog signal of a local network station from that satellite carrier pursuant to section 338.[180]

In the NPRM, we generally interpreted Section 340(b)(1) to mean that subscribers receiving "local-into-local" service from their satellite carrier are eligible to also receive significantly viewed signals.[181] We tentatively concluded that, as a general rule, a satellite carrier must be offering local-into-local service and a subscriber must be receiving this service as a pre-condition to offering an out-of-market significantly viewed station's signal to that subscriber.[182]

66. We also tentatively concluded that the SHVERA, as a whole, contemplated that subscribers in a market in which "local-into-local" service is not being offered are not eligible for significantly viewed stations retransmitted by satellite carriers, except where there is no affiliate of a given network in the market as provided for in Section 340(b)(3).[183] And we tentatively concluded that satellite subscribers would not qualify for significantly viewed signals if they obtain local stations via an over-the-air TV antenna, including one that is integrated with a satellite dish.[184]

67. Finally, we asked what happens if a local network station fails to request local carriage, refuses to grant retransmission consent, or is otherwise ineligible for local carriage. If a subscriber subscribes to and receives the satellite carrier's local-into-local service, but does not receive a particular local network station because such station is not carried by the satellite carrier, is that subscriber eligible to receive the significantly viewed station affiliated with that network? We said the result was not clear, but tentatively concluded that, as an exception to the general rule, "a subscriber should not be deprived of access to a significantly viewed station because the local station refused to grant retransmission consent or was otherwise ineligible for local carriage."[185]

68. *Subscription to and receipt of "local-into-local" service generally required.* We conclude that Section 340(b)(1) of the Act allows a subscriber to receive a significantly viewed signal

[178] *NPRM*, 20 FCC Rcd at 3002, ¶ 37.

[179] *See* Appendix B revised rule Section 76.5(ee).

[180] 47 U.S.C. § 340(b)(1).

[181] *NPRM*, 20 FCC Rcd at 3002-3, ¶ 38.

[182] *Id.*

[183] *Id.* at 3003, ¶ 40.

[184] *Id.* at 3003, ¶ 39.

[185] *Id*.

provided that the subscriber receives local-into-local service from its satellite carrier. This conclusion flows from the language in the statute, which expressly permits the retransmission of significantly viewed signals only to subscribers "who receive retransmissions of a signal … of a local network station…."[186] While the commenters disagree on the ultimate meaning and intent of this language, they all agree on this initial premise that local-into-local service must be offered in a market (DMA[187]) before significantly viewed signals may be offered to subscribers in that market and that individual subscribers must receive the local package to be eligible for out-of-market significantly viewed signals.[188]

69. *Subscriber receipt via satellite required.* We find that satellite subscribers do not qualify for significantly viewed signals if they are receiving local stations via an over-the-air TV antenna, including one that is integrated with a satellite dish. Such subscribers are not receiving their local service via satellite as required by the statute. The statute specifically applies to the receipt of local service "pursuant to Section 338." Section 338 of the Act applies only to local stations retransmitted by satellite and delivered to the subscriber via the satellite antenna.[189] The commenters on this issue support this conclusion.[190]

70. *Subscriber receipt of local affiliate required.* We find that Section 340(b)(1) requires that subscribers receive a specific local network station before they may receive a significantly viewed station that is affiliated with the same network as the local station, subject to the statutory exemption described below.[191] Subscriber receipt of "local-into-local" service is unambiguously required by the statute. Subscriber receipt of a specific local network affiliate, as a condition precedent for eligibility to receive the significantly viewed signal of an out-of-market affiliate of that network, is the best reading of Section 340(b)(1) in the overall context of Section 340. NAB comments that Section 340(b)(1) creates a "condition precedent to delivery of a duplicating significantly viewed out-of-market station" that a subscriber must "receive" the local affiliate before receiving an out-of-market significantly viewed signal.[192] DIRECTV and EchoStar disagree and contend that the statute merely requires receipt of "*a*" local signal, which they say equates to local-into-local service, and that the statute does not require receipt of "*the*" local station affiliated with the same network as the significantly viewed station.[193] In explaining this "definite article" argument, EchoStar states that "the references to '*a*' signal of '*a*' local network station mean that this signal may originate from any of the local network stations that the satellite carrier

[186] 47 U.S.C. § 340(b)(1).

[187] We note that Nielsen changes the DMAs to which counties are assigned based on viewing patterns that vary from year to year. We anticipate that such adjustments would be consistent with significant viewing patterns as well. To the extent, however, that such changes result in compliance problems, we will address these on a case-by-case basis. In the cable context, we permit established service to continue in the absence of a complaint. *See Definition of Markets for Purposes of the Cable Television Signal Carriage Rules*, 14 FCC Rcd 8366, 8381, ¶ 35 (1999); *see also* 47 C.F.R. § 76.55(e)(5). To the extent permitted by the statutes involved, we will follow the same procedures here. *See also SHVIA Signal Carriage Order*, 16 FCC Rcd at 1935-36, ¶ 39.

[188] *See, e.g.*, NAB at 16.

[189] 47 U.S.C. § 338. Coincidental receipt of local signals over-the-air does not constitute satellite carriage of local signals pursuant to Section 338. *Id*.

[190] *See, e.g.*, NAB at 16.

[191] *See* Section IV.B.4., *infra*, discussing Section 340(b)(3), which applies where there is no affiliate of a given network in the market; 47 U.S.C. § 340(b)(3).

[192] NAB at 17.

[193] DIRECTV Reply at 8; EchoStar at 2-3.

carries – not that that the signal must emanate from a particular station, namely the one affiliated with the same network as the significantly viewed station."[194]

71. We believe the better reading of the statute is that receipt of the local network station is required before a subscriber may receive the significantly viewed station affiliated with the same network. The meaning of Section 340(b)(1) becomes clear when considered in context with related statutory provisions[195] and legislative history. First, the legislative history repeatedly reflects Congressional concern that the amendments permitting carriage of out-of-market significantly viewed signals not detract from localism.[196] Specifically, the House Commerce Committee Report said "absent section 340(b)(1), a satellite operator could retransmit into a market a distant significantly viewed signal of a network affiliate without also retransmitting a signal of any local affiliate of the network."[197] Moreover, the satellite carriers' "definite article" argument[198] overlooks the language in Sections 340(b)(3) and (4).[199] As described below, Section 340(b)(3) permits subscribers to receive a significantly viewed signal of an out-of-market network affiliate if there is no local affiliate of that network in the subscriber's local market.[200] It states that the limitation in Section 340(b)(1) "shall not prohibit a retransmission under this section to a subscriber located in a local market in which there are no network stations *affiliated with the same television network* as the station whose signal is being retransmitted pursuant to this section."[201] If Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving significantly viewed signals, as opposed to receiving the local affiliate of the network with which the significantly viewed station is affiliated, there would be no need for Section 340(b)(3) to apply to Section 340(b)(1). Using similar contextual reasoning, we consider Section 340(b)(4), which provides authority for the network station in the local market in which the subscriber is located, and that is *affiliated with the same television network*, to grant station-specific waivers.[202] If Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving significantly viewed signals, there would be no reason for Congress to allow for waivers from specific network stations. Statutory requirements should be read to have meaning and not be superfluous.[203] The best reading of subsection (b)(1), therefore, is to

[194] EchoStar at 3.

[195] *See* 47 U.S.C. §§ 340(b)(2), (3) and (4).

[196] *See, e.g., House Commerce Committee Report* at 12.

[197] *House Commerce Committee Report* at 12.

[198] DirecTV Reply at 8 (asserting that legislative history requires receipt of any local-into-local service), citing *House Commerce Committee Report* at 12 ("Section 340(b)(1) provides that a satellite operator may retransmit a significantly viewed distant analog signal to a subscriber in a local market only if the subscriber also receives local-into-local service."); and *Barton Floor Statement* at 2 ("Section 340(b)(1) provides that a satellite operator may retransmit a significantly viewed analog signal of a distant network station to a subscriber in a local market only if the subscriber also receives local-into-local service under section 338 of the Communications Act."). *See also* 17 U.S.C. § 119(a)(3); *House Judiciary Committee Report* at 17 (stating that Section 102 of the SHVERA "permits satellite carriers to retransmit significantly viewed signals to subscribers who receive retransmissions of their local signals from their satellite carrier under the § 122 license.").

[199] *See* Sections IV.B.4. and IV.B.5., *infra*.

[200] *See* 47 U.S.C. § 340(b)(3) and Section IV.B.4., *infra*.

[201] 47 U.S.C. § 340(b)(3) (*emphasis in text added*).

[202] *Id*. § 340(b)(4) (*emphasis in text added*).

[203] *See Zimmerman v. Cambridge Credit Counseling Corp*., 409 F.3d 473, 476 (1st Cir. 2005) (recognizing principle of statutory construction that "all words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, (continued….)

require subscriber receipt of the local station affiliated with the same network as the significantly viewed signal sought to be carried.

72. In addition, as described below, Section 340(b)(2)(A) plainly requires that, as a prerequisite to receiving a significantly viewed digital signal, a subscriber must receive "the digital signal of a network station in the subscriber's local market *that is affiliated with the same television network.*"[204] The legislative history indicates that Congress intended Sections 340(b)(1) and 340(b)(2)(A) to achieve similar ends.[205] The House Commerce Committee Report provides: "*Like section 340(b)(1)*, section 340(b)(2)(A) protects localism by helping ensure that the satellite operator cannot retransmit into a market a significantly viewed digital signal of a network broadcast station from a distant market without also retransmitting into the market a digital signal of any local affiliate *from the same network.*"[206]

73. In sum, we are persuaded that the statute does not allow a satellite carrier to retransmit a significantly viewed signal to a subscriber receiving local-into-local service but which local service does not include an affiliate of the network with which the significantly viewed station is affiliated, unless the exemption in Section 340(b)(3) or the waiver provision in Section 340(b)(4) applies. We thus revise our proposed rule to reflect our conclusion.[207]

74. NAB, Gulf, DIRECTV, and EchoStar advocated policy considerations to influence the interpretation of Section 340(b)(1) based on the impact of the interpretation on retransmission consent and on smaller market stations.[208] In light of our reading of the statutory requirements, it is not necessary to rely on these policy issues. We also note that DIRECTV raised concerns about bad faith retransmission consent negotiations,[209] and remind all parties of their obligation to negotiate in good faith.[210] We decline

(Continued from previous page)
redundant, or superfluous"); *see also Preston v. State*, 735 N.E.2d 330, 334 (Ind.App. 2000) (noting that "there is a strong presumption that the legislature did not enact a useless provision").

[204] 47 U.S.C. § 340(b)(2) (*emphasis in text added*).

[205] *Davaz v. Priest River Glass Co., Inc*., 125 Idaho 333, 870 P.2d 1292 (1994) ("In construing a statute, not only must we examine the literal wording of the statute...but we also must study the statute in harmony with its objective"); *see also Tallman v. Brown*, 7 Vet. App. 453, 99 Ed. Law Rep. 467 (1995) ("When the language of a statute is ambiguous…the task of interpreting the statute's meaning may require recourse to the legislative history to decipher Congress' intended purpose in enacting the legislation").

[206] *House Commerce Committee Report* at 12 (*emphasis in text added*). This supports NAB's point that this provision is intended to "prevent satellite carriers from by-passing local stations or using the threat of delivery of out-of-market stations to extract more favorable retransmission consent terms." NAB at 17.

[207] *See* Appendix B revised rule Section 76.54(g). Specifically, in light of the decision made here, we delete 76.54(g)(2), as proposed. *See* NPRM, Appendix A proposed rule Section 76.54(g)(2). *See also* discussion in Section IV.B.6., *infra* (adding a new Section 76.54(g)(2)).

[208] *See, e.g.,* NAB at 13, 17 (arguing there is no statutory exception for failure to reach retransmission consent agreement and that the satellite carriers' proposed interpretation would allow carriers to by-pass or threaten local stations); DIRECTV at 17; DIRECTV Reply at 7; *see also* EchoStar at 4 (NAB's interpretation would "empower broadcasters to completely thwart satellite subscribers' access to [significantly viewed] signals."). *See also* NAB *ex parte* dated Jun. 22, 2005*;* Gulf at 8 (fearing impact on Class A and Low Power stations).

[209] DIRECTV at 17-18.

[210] *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, FCC 05-119 (rel. Jun. 7, 2005) (*Reciprocal Bargaining Order*) (extending the good faith retransmission consent bargaining obligation to multichannel video programming distributors); *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) (*Good Faith Order*).

at this time, as sought by DIRECTV, to find that broadcast stations would violate their duty to negotiate in good faith if they make demands to limit the carriage of other stations. We will consider such issues on a case-by-case basis.

3. Digital Service Limitations; Receipt of Local Digital Affiliate Required[211]

75. Similar to Section 340(b)(1), Section 340(b)(2) limits satellite delivery of significantly viewed digital signals only to statutorily eligible subscribers. Section 340(b)(2) provides:

> With respect to a signal that originates as a digital signal of a network station, this section shall apply only if – (A) the subscriber receives from the satellite carrier pursuant to section 338 the retransmission of the digital signal of a network station in the subscriber's local market that is affiliated with the same television network ….[212]

76. In the NPRM, we generally interpreted Section 340(b)(2)(A) to mean that a satellite subscriber must be receiving a digital signal from a local affiliate of a network via satellite in order to be eligible to receive a significantly viewed digital signal from a station affiliated with the same network. As we found in the analog context, we find that receipt of the local station's digital signal is required before a subscriber may receive the digital signal of an affiliated significantly viewed station. Unlike the ambiguity in its sister analog provision, Section 340(b)(2)(A) is clear in requiring a subscriber to receive "the digital signal of a network station in the subscriber's local market *that is affiliated with the same television network*."

4. Exception to Subscriber Eligibility Limitations; Rule Not Applicable Where No Local Network Affiliates Being Retransmitted

77. The SHVERA provided for a statutory exception to the subscriber eligibility requirements in Sections 340(b)(1) and (2). Section 340(b)(3) provides:

> The limitations in paragraphs (1) and (2) shall not prohibit a retransmission under this section to a subscriber located in a local market in which there are no network stations affiliated with the same television network as the station whose signal is being retransmitted pursuant to this section.[213]

Thus, the subscriber eligibility requirements in Sections 340(b)(1) and (2) do not apply to the receipt of the signal of a significantly viewed network station for which there is no local network affiliate broadcasting in the relevant local market.[214] This exception permits a satellite carrier to retransmit a significantly viewed station to a subscriber when there is no local affiliate of the same network present in that market.

78. The statutory copyright license for significantly viewed carriage, however, does not

---

[211] The "bandwidth" limitations on digital service set forth in Section 340(b)(2)(B) are discussed later; *see* Section IV.A.6., *infra*.

[212] 47 U.S.C. § 340(b)(2); *see House Commerce Committee Report* at 12; *Barton Floor Statement* at 2 ("[S]ection 340(b)(2)(A) conditions retransmission to a subscriber of a significantly viewed digital signal of a distant network broadcast station on retransmission to that subscriber of a digital signal broadcast by a local affiliate of the same network.").

[213] 47 U.S.C. § 340(b)(3).

[214] *Id*.

include language comparable to the exception in Section 340(b)(3).[215] Instead, Section 119(a)(3)(B) of title 17 provides that the statutory copyright license contained in Section 119(a)(3)(A):

> shall apply only to secondary transmissions of the primary transmissions of network stations and superstations to subscribers who receive secondary transmissions from a satellite carrier pursuant to the statutory license under section 122.[216]

79. The NPRM asked whether we should require that local-into-local service be offered to subscribers in a market as a pre-condition to offering the signal of a significantly viewed station affiliated with a network that has no affiliate in the market in question.[217] We sought comment on the effect of the difference between the copyright and Communications Act provisions on subscriber eligibility for significantly viewed signals. Finally, we considered the situation where a local network station is present in the market but is not broadcasting in digital format.

80. We find that a satellite carrier may retransmit a significantly viewed station to a subscriber when there is no local affiliate of the same network present in that market, provided that the subscriber subscribes to and receives the carrier's local-into-local service. Although Section 340(b)(3) does not require local-into-local service, we conclude that we should read this provision together with the compulsory license restriction in Section 119(a)(3)(B) of title 17, which does require the subscriber's receipt of local-into-local service. We agree with NAB that the compulsory license restriction compels this finding.[218] EchoStar argues that this finding would deny the effect of Section 340(b)(3),[219] but any authority conferred by Section 340(b)(3) would mean little without the authority of a compulsory copyright license. Instead, we agree with NAB that the better reading of the statute requires us to consider both provisions together.[220]

81. We affirm our conclusion that where a local network station is not broadcasting in a digital format, for reasons recognized as legitimate by the Commission, then the local network station should not be penalized by having an out-of-market significantly viewed digital signal imported into its market.[221] We recognize that, in this case, subscribers will not have the opportunity to receive local digital service from a significantly viewed network station.[222] Nevertheless, the local station may have a legitimate reason for not broadcasting in digital format. Because the station is present in the market, we find the statute prohibits subscribers from receiving the digital signal of a significantly viewed station unless the subscriber is receiving the local station's digital signal. We note that the legislative history suggests an intention to treat differently stations whose reason for failing to broadcast in digital is not

---

[215] 17 U.S.C. § 119(a)(3)(B).

[216] *Id*. § 119(a)(3)(B).

[217] *NPRM*, 20 FCC Rcd at 3006, ¶ 48.

[218] NAB at 17.

[219] EchoStar at 14.

[220] NAB at 17.

[221] *NPRM*, 20 FCC Rcd at 3007, ¶ 49.

[222] We note that most stations are broadcasting a digital signal. As of June 2, 2005, 100 percent of the network affiliates in the Top 30 markets are broadcasting in digital, and 87 percent of all other commercial network affiliates are broadcasting in digital. *See* http://www.fcc.gov/mb/video/files/dtvonairsum.html.

excused by the Commission.[223] We will consider carriage of significantly viewed digital signals on a case-by-case basis in situations in which the satellite carrier shows that the local station has not been excused or has been sanctioned by the Commission with respect to its digital build-out.

5. Privately Negotiated Waivers

82. The SHVERA permited a satellite carrier to privately negotiate with the local network station to obtain a waiver of the subscriber eligibility restrictions in Sections 340(b)(1) and 340(b)(2). Section 340(b)(4) provides:

> Paragraphs (1) and (2) shall not prohibit a retransmission of a network station to a subscriber if and to the extent that the network station in the local market in which the subscriber is located, and that is affiliated with the same television network, has privately negotiated and affirmatively granted a waiver from the requirements of paragraph (1) and (2) to such satellite carrier with respect to retransmission of the significantly viewed station to such subscriber.[224]

Thus, if such negotiations are successful, a satellite subscriber who is not receiving the local network affiliate via satellite may nevertheless receive the signal of a significantly viewed station affiliated with that same network. In the NPRM, we tentatively concluded that local broadcasters could determine the scope of such a waiver.[225]

83. We affirm our conclusion that a waiver pursuant to this provision may be as broad or as narrow as desired by the local network affiliate.[226] As noted by the House Commerce Committee Report, Section 340(b)(4) enables a local network affiliate to waive the subscriber eligibility restrictions of Sections 340(b)(1) or 340(b)(2) with respect to one or more consumers in the local market, and with respect to one or more specific significantly viewed affiliates of the same network. The local network affiliate may do so as part of a negotiated agreement and for any reason, including common ownership among the stations.[227]

84. In addition, the statutory copyright provisions contained in 17 U.S.C. § 119, as amended by the SHVERA, describe the waiver process in greater detail. Section 102 of the SHVERA provided:

> (i) IN GENERAL. A subscriber who is denied the secondary transmission of the primary transmission of a network station under subparagraph (B) may request a waiver from such denial by submitting a request, through the subscriber's satellite carrier, to the network station in the local market affiliated with the same network where the subscriber is located. The network station shall accept or reject the subscriber's

[223] Notably, the House Commerce Committee Report: states: "Section 340(b)(3) does not allow provision of an out-of-market significantly viewed digital signal of a network broadcast station if a local affiliate from the same network is present in the market but not yet broadcasting a digital signal. Section 340(b)(3) operates in this fashion to ensure that a satellite carrier may not retransmit the out-of-market significantly viewed digital signal of a network broadcast station if an affiliate of that network is present in the local market but has never begun to offer a digital signal for a reason excused by the FCC." *House Commerce Committee Report* at 12.

[224] 47 U.S.C. § 340(b)(4).

[225] *NPRM*, 20 FCC Rcd at 3007, ¶ 50.

[226] *Id.*; *see House Commerce Committee Report* at 13 ("The waiver can be as broad or as narrow as the affiliate wants.").

[227] *House Commerce Committee Report* at 13.

> request for a waiver within 30 days after receipt of the request. If the network station fails to accept or reject the subscriber's request for a waiver within that 30-day period, that network station shall be deemed to agree to the waiver request. Unless specifically stated by the network station, a waiver that was granted before the date of the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004 under section 339(c)(2) of the Communications Act of 1934 shall not constitute a waiver for purposes of this subparagraph.[228]
>
> (ii) SUNSET. The authority under clause (i) to grant waivers shall terminate on December 31, 2008, and any such waiver in effect shall terminate on that date."[229]

In the NPRM, we sought comment on the effect, if any, of this statutory copyright license waiver provision, in particular the sunset provision, on waivers granted pursuant to Section 340(b)(4).[230] We also tentatively concluded not to intervene in the Section 340(b)(4) waiver process, and that such waivers are not subject to the Section 325 good-faith negotiation requirement.[231]

85. To carry a significantly viewed station via a privately negotiated waiver, a satellite carrier must have both the authority under Section 340(b)(4) and the statutory copyright license under 17 U.S.C. § 119(a)(3)(C).[232] Section 340(b)(4) requires that a local station *affirmatively grant* a waiver request to a satellite carrier. We agree with NAB that Section 340(b)(4) is clear on this point.[233] The statutory copyright license waiver provision in 17 U.S.C. § 119 requires that a local station act on such waiver requests within 30 days, and will deem that the local station agrees to the copyright license waiver request if it does not act within that time frame.[234] EchoStar argues that finding a requirement that a local station affirmatively act on a request for a Section 340(b)(4) waiver would in effect nullify this provision.[235] While this may be true as a practical matter, we believe that the SHVERA will require an affirmative grant of authority under Section 340(b)(4), even though it will grant a statutory copyright license through inaction under 17 U.S.C. § 119(a)(3)(C). Both provisions must be given effect.

86. In addition, we find that the copyright waiver provision in 17 U.S.C. § 119 terminates the authority to grant a waiver on December 31, 2008, and also terminates all existing waivers on that date.[236] We agree with NAB that carriage of a significantly viewed station via a waiver granted pursuant to

---

[228] 17 U.S.C. § 119(a)(3)(C)(i). *See House Judiciary Committee Report* at 17.

[229] 17 U.S.C. § 119(a)(3)(C)(ii). *See House Judiciary Committee Report* at 17.

[230] *NPRM*, 20 FCC Rcd at 3007-8, ¶ 51.

[231] *Id.*at 3008, ¶ 52.

[232] As a practical matter, both of these provisions must be satisfied, because a significantly viewed station cannot be carried without the authority under Section 340(b)(4) and the statutory copyright license in 17 U.S.C. § 119.

[233] NAB at 23 (arguing that the Section 340 requirement that waivers be "affirmatively granted" trumps the Section 119 requirement that requires a local network station to respond to the request within 30 days or the waiver request is deemed granted); 47 U.S.C. § 340(b)(4).

[234] 17 U.S.C. § 119(a)(3)(C), as amended by Section 102 of the SHVERA.

[235] EchoStar at 10-11 (stating a broadcaster should be "deemed to agree" to a waiver request if it fails to respond within 30 days).

[236] 17 U.S.C. § 119(a)(3)(C)(ii), as amended by Section 102 of the SHVERA.

Section 340(b)(4) is subject to the sunset provision in 17 U.S.C. § 119 because the right to carriage under Section 340(b)(4) would essentially be meaningless without the statutory copyright license.[237]

87. We affirm our decision not to intervene in the waiver process. We agree with NAB that the statute is clear that waivers are to be "privately negotiated."[238] Language in the House Commerce Committee Report is equally clear: "The Committee does not intend the FCC to grant these waivers or preside over the waiver process." The decision to grant a waiver is a decision to be made solely by the local network station based on its own business judgment. Because such waivers are voluntary and expressly outside the Commission's purview, we find there is no need for rules or procedures concerning waiver arrangements between stations and satellite carriers.[239] Thus, we reject EchoStar's request to intervene in the waiver process.[240] We will not grant waivers pursuant to Section 340(b)(4), nor will we preside over the waiver process. We note, however, that the presence or absence of a waiver may be relevant in an enforcement proceeding concerning significantly viewed carriage.

88. We also affirm our conclusion that waivers or agreements pursuant to Section 340(b)(4) are not subject to the Section 325 good-faith negotiation requirement. Because such privately negotiated waivers do not pertain to retransmission consent for the signal of the station that would be granting the waiver, we agree with NAB that the Section 325 good-faith negotiation requirement does not apply to any waiver privately negotiated between a local network station and a satellite carrier.[241] Language in the House Commerce Committee Report supports this finding: "Nor does the Committee intend such waivers or agreements to be subject to the Section 325 good-faith negotiation requirement."[242]

89. We revise our proposed rule, Section 76.54(g), to add a new Section 76.54(g)(2) to expressly provide for the exception created by Section 340(b)(4)'s waiver provision.[243]

6. Additional Digital Service Limitations; Definitions of "Equivalent Bandwidth" and "Entire Bandwidth"

90. In addition to the digital service limitations in Section 340(b)(2)(A), the SHVERA specified certain "bandwidth" requirements in Section 340(b)(2)(B) for the retransmission of the local network station's digital signal when a satellite carrier opts to retransmit the digital signal of a significantly viewed affiliate station. Section 340(b)(2)(B) provides:

> With respect to a signal that originates as a digital signal of a network station, this section shall apply only if – … (B) either – (i) the retransmission of the local network station occupies at least the equivalent bandwidth as the digital signal retransmitted pursuant to this

[237] NAB at 24 (arguing that the sunset provision in Section 119 trumps the lack of a sunset provision in Section 340). EchoStar offers no alternative reading on this point. EchoStar Reply at 10-11.

[238] NAB Reply at 18; *see* 47 U.S.C. § 340(b)(4).

[239] *House Commerce Committee Report* at 13.

[240] EchoStar at 16.

[241] NAB at 24.

[242] *House Commerce Committee Report* at 13-14.

[243] *See* Appendix B revised rule Section 76.54(g)(2). *See also* Bellaire at 2 (proposing to add an exception to Section 76.54(g): "[a satellite carrier may retransmit a significantly viewed signal of a television broadcast station to a subscriber located in a local market in which] a local network station has granted a waiver in accordance with 47 U.S.C. § 340(b)(4) to the extent that such waiver(s) apply."). As noted in our discussion, *supra,* in Section IV.B.2., our proposed Section 76.54(g)(2) was deleted in accordance with our changed tentative conclusion.

> section; or (ii) the retransmission of the local network station is comprised of the entire bandwidth of the digital signal broadcast by such local network station.[244]

91. The SHVERA directed the Commission to define the terms "equivalent bandwidth" and "entire bandwidth,"[245] and provided that a satellite carrier not be: (1) prevented from using compression technology; (2) required to use the identical bandwidth or bit rate as the local or distant broadcaster whose signal it is retransmitting; or (3) required to use the identical bandwidth or bit rate for a local network station as it does for a distant network station.[246]

92. In the NPRM, we sought comment generally on these concepts of "equivalent bandwidth" and "entire bandwidth." Our proposed rule, Section 76.54(h), required only that satellite carriers abide by the "equivalent bandwidth" and "entire bandwidth" requirements.[247] We also explained the relationship between the format of the digital signal of the significantly viewed network affiliate and the format of the digital signal of the local network station.[248] Finally, we asked whether satellite carriers must use the same compression techniques for both the local network station and the significantly viewed network affiliate. We noted that doing so may result in differences in real bandwidth and bit rate, depending on the programming content carried in the signals.[249] We asked whether only comparable content that uses a comparable bit rate should be afforded equivalent bandwidth. We also asked whether we should require only that the same amount of bandwidth be made available to the local network station, allowing the local station to choose the amount of bandwidth it needs.[250]

93. We adopt new Section 76.54(h) to require that satellite carriers comply with the "equivalent bandwidth" and "entire bandwidth" requirements.[251] DIRECTV and NAB offer the most extensive comments on these concepts. Both agree that the Commission should not strictly define these concepts, but, instead, should offer examples of how these concepts would apply in certain circumstances.[252] We agree. Our definition tracks the language of the statute.[253] In addition, pursuant to the statute,[254] and in response to the comments,[255] we will offer additional guidance concerning how these

---

[244] 47 U.S.C. § 340(b)(2)(B).

[245] *See id*. § 340(i)(4).

[246] *Id*. § 340(i)(4)(A), (B) and (C); *see also House Commerce Committee Report* at 13 ("The Committee does not intend section 340(b)(2)(B) to prevent a satellite operator from using compression technology; to require a satellite operator to use the exact bandwidth or bit rate as the local or distant broadcaster whose signal it is retransmitting; or to require a satellite operator to use the exact bandwidth or bit rate for a local broadcaster as it does for a distant broadcaster.").

[247] *NPRM*, 20 FCC Rcd at 3005, ¶ 45 and Appendix A proposed rule Section 76.54(h).

[248] *Id.*, ¶ 45.

[249] *Id.* at 3005-6, ¶ 46. For example, we said that a significantly viewed network affiliate broadcasting a sporting event would use more bandwidth than a local network station broadcasting an interview (*i.e.*, talking head). In this example, we asked whether we should apply the same compression standard to both stations, thereby precluding the significantly viewed sporting event.

[250] *Id*.

[251] *See* Appendix B revised rule Section 76.54(h).

[252] DIRECTV at 8; NAB at 20; DIRECTV Reply at 3.

[253] 47 U.S.C. § 340(b)(2)(B).

[254] *Id*. § 340(i)(4) requires the Commission to define these concepts.

concepts will apply in certain situations. We recognize that we cannot anticipate every possible situation; therefore, we will resolve remaining questions about these concepts on a case-by-case basis. We also note that the SHVERA significantly viewed provisions are distinct from the local signal carriage requirements in Section 338.[256] Thus, our discussion in the context of significantly viewed is separate and apart from the digital signal carriage requirements that are under consideration in a separate proceeding.[257] Congress' focus in enacting Section 340 and our focus in its implementation are on the circumstances in which a satellite carrier may offer a significantly viewed signal to a subscriber. Issues related to material degradation and mandatory carriage of local signals are not within the scope of this proceeding.[258]

94. We agree with DIRECTV and NAB that the concepts of "equivalent bandwidth" and "entire bandwidth" were created to prohibit satellite carriers from using technological means to discriminate against the digital signals of local stations in favor of the digital signals of significantly viewed stations.[259] This seems clear given Congress' intent to prevent satellite carriage of a local network station's digital signal "in a less robust format" than the digital signal of the significantly viewed network affiliate.[260] Certain situations are clear, as the commenters agree.[261] For example: If the significantly viewed (SV) station and local station both transmit in HD, and a satellite carrier wishes to carry the HD signal of the SV station, then the carrier must also carry the local station in HD.

95. The SHVERA, however, recognized that not all local network stations will be broadcasting in HD or multicast format. Therefore, the statute permitted satellite carriage of a significantly viewed station's digital signal in HD or multicast format, while only carrying the affiliated local network station's digital signal in a single SD format, provided the local station only broadcasts in that single SD format.[262] Thus, we conclude that if the SV station transmits in HD and the local station transmits only a single SD stream, then a satellite carrier may carry the SV station's HD signal, while only carrying the local station's single SD stream. The comments agree with this result.[263] Likewise, it follows that if a SV station transmits several multicast streams and the local station transmits only a single SD stream, then a satellite carrier may carry the SV station's multicast streams, while only carrying the local station's single SD stream.

(Continued from previous page)

[255] DIRECTV at 8-13; NAB at 18-22; DIRECTV Reply at 3-7.

[256] 47 U.S.C. § 338 governs the carriage of local television signals whereas 47 U.S.C. § 340 governs the carriage of significantly viewed signals.

[257] *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516 (2005).

[258] *See* 47 U.S.C. § 340(d)(1); *House Commerce Committee Report* at 12 ("Section 340(d)(1) also makes clear that any right of a station to have its signal carried in a local market under the carry-one, carry-all provisions of section 338 is not affected by the significantly viewed status of the signal in another market.").

[259] DIRECTV at 8-9; NAB at 18-19; DIRECTV Reply at 3. DIRECTV, however, would only prohibit discrimination deemed "material."

[260] *House Commerce Committee Report* at 12.

[261] DIRECTV at 8; NAB at 20; DIRECTV Reply at 3-4.

[262] *See* 47 U.S.C. § 340(b)(2)(B)(ii) (permits satellite carriage where "the retransmission of the local network station is comprised of the entire bandwidth of the digital signal broadcast by such local network station"); *House Commerce Committee Report* at 12 ("the local affiliate's choice to multicast does not prevent the satellite operator from retransmitting a significantly viewed signal of a distant affiliate of the network that chooses to broadcast in high-definition").

[263] DIRECTV at 8; NAB at 20; DIRECTV Reply at 3-4.

96. Comparisons of the significantly viewed station's signal with the local station's multiplexed (multicast) signal present a more challenging problem for defining equivalent bandwidth. The statute expressly measured equivalency in terms of bandwidth,[264] which calls for an objective comparison.[265] We will base our comparisons on each station's use of its 6 MHz of bandwidth and a satellite carrier's carriage of the station in terms of megabits per second (mbps), or bit rate.[266] The statute expressly allowed satellite carriers to use compression technology, but carriers may not use such techniques in a manner that degrades the local station's signal more than the SV station's signal. NAB states the Commission should define equivalent and entire bandwidth to prevent satellite carriers from using technological means, including compression techniques, to discriminate against local digital signals or otherwise to favor significantly viewed distant digital signals.[267] NAB states this principle of nondiscrimination should also encompass material degradation, functionalities such as interactivity, and hours of HD programming across dayparts and in total. DIRECTV agrees that a satellite carrier may not use compression techniques to materially degrade a local station's signal compared to that of the SV station.[268] We will compare the appropriate bit rate under the circumstances. For example, we recognize that use of a higher compression technique (*e.g.*, MPEG-4 rather than MPEG-2) will result in a lower bit rate but with the same effective result.[269] To the extent a carrier wishes to use different compression techniques for the two stations, it may not do so in a way that is inconsistent with the equivalent bandwidth requirements described herein. We will consider whether carriers follow generally accepted engineering practices as well as any other relevant means to compare picture quality.

97. We will generally interpret equivalency to mean that a satellite carrier that wishes to carry a significantly viewed station must provide the local station with an opportunity to use the same amount of bandwidth as the significantly viewed station. Thus, a satellite carrier may carry the signal of a significantly viewed station only if the amount of bandwidth used to carry such station is *equivalent* to the amount of bandwidth used to carry the signal of the local station affiliated with the same network, unless of course the carrier is carrying the *entire* amount of bandwidth used by the local station for free over-the-air video programming. We must also consider that "equivalent" is not the same as identical, and that Congress has expressly stated that we should not impose a requirement for identical bandwidth or bit rate.[270] We believe the statute requires "equivalent" bandwidth and precludes "identical" bandwidth in recognition of the fact that bandwidth use (or bit rate) will fluctuate from moment to moment. We thus conclude that if the SV station transmits in HD and the local station transmits multiplexed (multicast) signal, then a satellite carrier may carry the SV station's HD signal, provided it also carries as many of the

[264] *See* 47 U.S.C. § 340(b)(2)(B).

[265] NAB favors an objective approach in which the satellite carrier compares the average bit rate. NAB Reply at 7.

[266] We note that the maximum bit rate DTV broadcasters can use over-the-air in 6 MHz of spectrum is 19.4 mbps. *See* Advanced Television Systems Committee (ATSC) standard A/53B, ATSC Digital Television Standard, Revision B (Annex D) (Aug. 7, 2001).

[267] NAB at 18-9.

[268] Although the Commission has defined what constitutes "material degradation" in the First Report and Order in the digital must carry proceeding, several parties have requested reconsideration of that decision; the reconsideration proceeding remains pending. *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 16 FCC Rcd 2598, 2628-29 (2001) (petitions for reconsideration pending).

[269] In this respect, we agree with DIRECTV that a satellite carrier could comply with the rule even if it used different compression technology (*e.g.*, MPEG-4 versus MPEG-2) or modulation technology (*e.g.*, 8PSK versus QPSK) for the two sets of signals, provided there is no greater degradation of the local station's signal. DIRECTV at 13.

[270] 47 U.S.C. § 340(i)(4)(A), (B) and (C).

local station's multicast channels as necessary to match the bandwidth provided to the SV station.[271] This equivalence applies to the local or significantly viewed programming carried at the same time.

98. In adopting the comparative bit rate approach, we are aware that DIRECTV claims that such comparisons are technically infeasible, both because of the difficulties in calculating them and because of the number of signals that must be compared by the carrier.[272] DIRECTV argues that we should interpret the concepts of equivalent and entire bandwidth only "to prohibit material discrimination as measured on an overall carriage (not program-by-program or minute-by-minute) basis."[273] DIRECTV states we should not require "equivalence" at any given moment, or require exact equality even when measured over a longer period of time.[274] For example, DIRECTV argues that it should be allowed to retransmit a significantly viewed station's HD programming even if such programming does not occur at the same time or in exactly the same number of hours as the local station's HD programming.[275] We disagree. Not only would this be contrary to the statute's language and intent,[276] but we agree with NAB that DIRECTV's proposed interpretation would cause the type of material discrimination that DIRECTV itself argues the statute prohibits because it would allow satellite carriers to carry a significantly viewed station in a more favorable format than that of the local station during different times of the day.[277]

99. We rest our conclusion on the statute, which speaks in terms of bandwidth, not material discrimination. Therefore, we will require satellite carriers to make an objective comparison, rather than a subjective one based on material discrimination. For example, if an SV station transmits an HD signal with a maximum bit rate of 15 mbps and the local station transmits six (multicast) channels each with a maximum bit rate of 3 mbps, then a satellite carrier may carry the SV station's HD signal, provided it also carries at least five of the local station's multicast signals. We will consider issues relating to comparisons on a case-by-case basis. If it is feasible and facilitates compliance, a satellite carrier may establish a "set bit rate" that will apply to the SV station's digital signal to ensure that the bandwidth devoted to the SV signal does not exceed the bandwidth devoted to the local station's signal, except for the normal fluctuations attributable to action or inaction in the programming.[278] For instance, if an SV

[271] Until the Commission addresses satellite carriage of digital signals in the pending DTV carriage rulemaking, the parties will privately determine which streams will be carried, since satellite carriage of local stations' digital signals is currently only pursuant to retransmission consent.

[272] DIRECTV Reply at 5; DIRECTV *ex parte* dated July 28, 2005.

[273] DIRECTV at 11.

[274] DIRECTV at 8-11 (material discrimination should be measured on an overall carriage (not program-by-program or minute-by-minute) basis). *See also* DIRECTV Reply at 5. DIRECTV states that it would be infeasible for it to monitor and compare "hundreds if not thousands" of stations, and "black out significantly viewed signals on a rolling basis to achieve absolute equality with the corresponding local signal."

[275] DIRECTV Reply at 4.

[276] *House Commerce Committee Report* at 12 ("Section 340(b)(2)(B) prevents the satellite operator from retransmitting a local affiliate's digital signal in a less robust format than a significantly viewed digital signal of a distant affiliate of the same network …").

[277] NAB Reply at 7-9.

[278] For example, a situation may occur where a satellite carrier "sets" its encoder to 12 mbps knowing that the encoder will deliver a stream within a range, such as +/- 5%, which would generate an output that would vary from 11.4 to 12.6 mbps. Even if the local and SV station were both "set" to 12 mbps, it is possible that the actual result would be two streams with different maximums and different averages, simply based on the type of programming (*e.g.*, sports versus drama). In practice, the SV station may generate a stream from 11.4 to 12.6 mbps and the local station may generate a stream from 11.7 to 12.1 mbps. In this case, as long as the carrier remains equitable in the treatment of both stations, it would meet the statutory requirement. We note that this would be consistent with the (continued….)

station transmits an HD signal with a maximum bit rate of 15 mbps and the local station transmits two (multicast) channels, one in HD with a maximum bit rate of 12 mbps and one in SD with a maximum bit rate of 3 mbps, and a satellite carrier wishes only to carry one signal for each station, then the carrier may not carry the SV station's HD signal, unless it caps (or "sets") the bit rate for such signal at a maximum of 12 mbps.

100. With respect to timing, if the SV station and local station are both multicasting, a satellite carrier may choose to carry only one channel for each station provided the signals are equivalent during the time they are carried. For example, assuming that the SV station and local station are both multicasting an HD and one or more SD channels at least sometime during the day, and a satellite carrier wants to carry only one channel for each station, if the SV station is transmitting its primetime programming in HD, and the carrier wants to carry that signal in HD, then it must also carry the local station's HD broadcast of primetime programming. However, if the local station is multicasting at 4:00 and singlecasting SD in primetime, the satellite carrier may carry the SV station's HD signal at 8:00, and is not required to carry the local station's multiplexed signal at 4:00.

101. EchoStar argues that requiring equivalency in terms of bandwidth would create an unconstitutional multicast must carry requirement, and that therefore we should only compare the primary feeds of both stations.[279] We disagree with EchoStar's argument, as well as its premise. The carriage requirement, as noted above, is separate and distinct from the optional carriage of significantly viewed stations.[280] The carrier is not required to carry local stations at all unless it chooses to do so.[281] If it wishes to offer significantly viewed stations, carriage of local stations is a statutory condition precedent. This statutory requirement is based on Congressional intent to make satellite carriage of significantly viewed stations comparable to cable carriage of significantly viewed stations in light of the "must carry" regime that requires cable to carry local stations in every market.[282] Carriage of local stations as a condition to carriage of out-of-market stations offers satellite carriers a choice, not a requirement.[283]

(Continued from previous page)
statute's requirement that we not require identical bandwidth or bit rate. NAB agrees that "the equivalent bandwidth requirement is satisfied if the local station is broadcasting an SD stream containing a comedy program and the significantly viewed distant station is broadcasting an SD stream containing a drama program and, at any given instant, the drama (say, a high-speed chase) requires more bits than the comedy, provided that, on average, both SD streams are provided equivalent bandwidth. Similarly, if the local station is broadcasting its local news in HD and the distant significantly viewed station is broadcasting a sporting event in HD, the equivalent bandwidth requirement is satisfied so long as the multiplexer is 'allocat[ing] bandwidth rationally as between [the] sports and 'talking head' programming.'" NAB Reply at 8.

[279] EchoStar at 15.

[280] 47 U.S.C. § 340(d)(1).

[281] Mandatory satellite carriage applies only in Alaska and Hawaii. *See Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Docket No. 05-181, FCC 05-159 (rel. Aug. 23, 2005). Elsewhere in the United States, satellite carriage of local stations is pursuant to "carry-one, carry-all," which applies if a satellite carrier chooses to use the statutory copyright license for carriage of one or more local stations. *See* 47 U.S.C. 338(a). *See also Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337 (2001), cert. denied, 536 U.S. 922 (2002) ("*SBCA*").

[282] *House Commerce Committee Report* at 1 (seeking "regulatory parity by extending to satellite operators the same type of authority cable operators already have to carry 'significantly viewed' signals into a market").

[283] *See, e.g., SBCA*, 275 F.3d at 354, 365 (upholding carry-one, carry-all due in part to the choice carriers have of when and where they will become subject to the carry one, carry all rule by choosing to carry local stations in a particular market pursuant to the statutory copyright license). "The primary difference between § 338 and the cable must-carry rules is that § 338's obligations are conditioned upon the satellite carrier's voluntary choice to make use (continued….)

Further, we agree with NAB that EchoStar's argument is not supported by the statute or legislative history.[284] The statute expressly requires a comparison of bandwidth, and not primary feeds.

102. We believe we have struck the appropriate balance between permitting the satellite delivery of a significantly viewed digital signal and protecting a local broadcaster against the delivery of its signal in a less favorable format than that of an out-of-market station, while adhering to the express language in the statute. We amend Section 76.54 accordingly.[285]

103. We noted in the NPRM that the SHVERA required that the same "equivalent bandwidth" definition developed pursuant to new Section 340(h)(4),[286] be used for purposes of Section 339(a)(2)(D)(iii)(II).[287] We did not receive comments on this issue. As required by the SHVERA, our definition in Section 76.54(h) for purposes of the provisions concerning "distant digital signals" of network stations must also be applied to new Section 339(a)(2)(D)(iii)(II).[288]

C. Section 341's Special Rules For Certain Counties and Markets

1. Section 341(a) Confers Significantly Viewed Status To Certain Counties in Oregon

104. Section 211 of the SHVERA created Section 341(a) of the Act, which authorizes the retransmission of certain stations deemed to be significantly viewed, in accordance with Section 76.54 of our rules, "to subscribers in an eligible county."[289] In the NPRM, we tentatively concluded that this

(Continued from previous page)
of the § 122 license in a particular television market, but the cable must-carry rules are mandatory in all markets." Id. at 351.

[284] *House Commerce Committee Report* at 12.

[285] *See* Appendix B revised rule Section 76.54(h).

[286] 47 U.S.C. § 340(h)(4).

[287] *NPRM*, 20 FCC Rcd at 3006, ¶ 46 n.126.

[288] *See* 47 U.S.C. § 339(a)(2)(D)(iii)(II), as amended by Section 204 of the SHVERA.

[289] 47 U.S.C. § 341(a) ("Carriage of television signals to certain subscribers") provides:

> (1) In General- A cable operator or satellite carrier may elect to retransmit, to subscribers in an eligible county –
>
> > (A) any television broadcast stations that are located in the State in which the county is located and that any cable operator or satellite carrier was retransmitting to subscribers in the county on January 1, 2004; or
> >
> > (B) up to 2 television broadcast stations located in the State in which the county is located, if the number of television broadcast stations that the cable operator or satellite carrier is authorized to carry under paragraph (1) is less than 3.
>
> (2) Deemed Significantly Viewed. Any station described in subsection (a) is deemed to be significantly viewed in the eligible county within the meaning of section 76.54 of the Commission's regulations (47 C.F.R. 76.54).
>
> (3) Definition of Eligible County. For purposes of this section, the term `eligible county' means any 1 of 4 counties that –
>
> > (A) are in a single State;
> >
> > (B) on January 1, 2004, were each in designated market areas in which the majority of counties were located in another State or States; and

(continued….)

provision applies only to certain counties in the State of Oregon, and requires that stations in these eligible counties be "deemed significantly viewed" and added to the SV list.[290] At the time of the NPRM, we were unable to identify which stations might qualify under this provision and so we did not include them in the SV List. We did, however, request comment to identify and confirm the stations that would qualify under this provision.[291]

105. We find that Section 341(a) applies to four counties in the State of Oregon – Grant, Malheur, Umatilla and Wallowa. Our determination, which is supported by the commenters on this issue,[292] is based on the fact that Section 341(a) explicitly limits an "eligible county" to "any one of four counties" "in a single state" that "as a group had a combined total of 41,340 television households according to the U.S. Television Household Estimates by Nielsen Media Research for 2003-2004."[293] A staff review of the U.S. Television Household Estimates by Nielsen Media Research for 2003-2004, as well as the comments on this issue, shows these four counties to be Grant (3,040 TV households), Malheur (10,350 TV households), Umatilla (25,050 TV households) and Wallowa (2,910 TV households), which have a combined total of 41,340 television households according to the U.S. Television Household Estimates by Nielsen Media Research for 2003-2004.[294]

106. At this time, we are still unable to identify which stations might qualify under Section 341(a) and so we will not include them in the SV List. No comments have identified any stations that would qualify for significantly viewed status pursuant to this provision. Thus, there is insufficient information in the record to make such determinations.[295] EchoStar has asked that we require the cable systems in the affected counties to provide information about which stations were carried on cable systems as of January 1, 2004.[296] We believe EchoStar and other interested parties should contact cable operators or stations directly. They may contact the Media Bureau on a case-by-case basis if cable systems are not cooperative with requests for such information. In terms of adding stations to the SV List, we will permit a station that qualifies for carriage under Section 341(a), or a cable operator or satellite carrier that seeks to carry such a station, to petition the Commission for significantly viewed status pursuant to this provision. Such a petition must demonstrate that the station qualifies for carriage under Section 341(a).[297]

(Continued from previous page)

> (C) as a group had a combined total of 41,340 television households according to the U.S. Television Household Estimates by Nielsen Media Research for 2003-2004.
>
> (4) Limitation. Carriage of a station under this section shall be at the option of the cable operator or satellite carrier.

[290] *NPRM*, 20 FCC Rcd at 3008-9, ¶ 53.

[291] *Id*.

[292] EchoStar at 16; NAB at 25. NPG of Oregon did not address this issue.

[293] *See* U.S.C. § 341(a)(3); *see also* 17 USC 119(a)(1)(C)(iii).

[294] *See* U.S. Television Household Estimates by Nielsen Media Research for 2003-2004; EchoStar at 16, n.31; NAB at 25.

[295] NAB agrees with this conclusion; NAB at 25-6.

[296] EchoStar at 16-17. EchoStar explains that "the ability to carry stations under Section 341(a)(1)(A) depends, in part, upon whether "any cable operator … was retransmitting [the station] to subscribers in the county on January 1, 2004."

[297] *See* Appendix B revised rule Section 76.54(j); 47 U.S.C. § 341(a).

2. Section 341(b) Precludes Carriage Of Significantly Viewed Signals Into Palm Springs and Bakersfield DMAs

107. Section 211 of the SHVERA created Section 341(b) of the Act, which prevents a satellite carrier from carrying "the signal of a television station into an adjacent local market that is comprised of only a portion of a county, other than to unserved households located in that county."[298] In the NPRM, we said this provision applies only to the DMAs of Palm Springs and Bakersfield, because they are the only DMAs that appear to satisfy the definition.[299]

108. We find that Section 341(b) prevents a satellite carrier from retransmitting a significantly viewed signal into the DMAs of Palm Springs and Bakersfield, CA.[300] These are the only DMAs which satisfy the definition in Section 341(b). The commenters on this issue support this conclusion.[301] We thus adopt a new rule to implement this provision.[302]

D. Enforcement and Notice Provisions

1. Enforcement of Section 340

109. The SHVERA, in Section 340(f), created an enforcement mechanism for the new provisions regarding satellite delivery of significantly viewed signals.[303] Section 340(f)(1) states that the Commission will respond to a complaint by issuing a "cease and desist order" and may provide for damages if requested and proven by the station filing the complaint.[304] The SHVERA provided for monetary penalties up to $50 per subscriber, per station, per day if the station establishes that the satellite carrier committed the violation in bad faith, and provides that the Commission may impose similar damages on the complaining station if the Commission determines that the complaint was frivolous.[305]

---

[298] 47 U.S.C. § 341(b) ("Certain Markets") provides: "Notwithstanding any other provision of law, a satellite carrier may not carry the signal of a television station into an adjacent local market that is comprised of only a portion of a county, other than to unserved households located in that county."

[299] *NPRM*, 20 FCC Rcd 3009 at ¶ 54.

[300] This provision does not affect the ability of a satellite carrier to retransmit a distant station to unserved households in these counties. 47 U.S.C. § 341(b).

[301] EchoStar at 16; Gulf at 6; NAB at 25

[302] *See* Appendix B revised rule Section 76.54(k); 47 U.S.C. § 341(b).

[303] 47 U.S.C. § 340(f), as added by Section 202 of the SHVERA; *see* 47 U.S.C. § 339(a)(3), as amended by Section 204 of the SHVERA (requires Commission enforcement of the new provisions concerning distant digital signal carriage pursuant to the provisions of Section 340(f)).

[304] 47 U.S.C. § 340(f)(1) provides:

> "(1) ORDERS AND DAMAGES. Upon complaint, the Commission shall issue a cease and desist order to any satellite carrier found to have violated this section in carrying any television broadcast station. Such order may, if a complaining station requests damages –
>
> (A) provide for the award of damages to a complaining station that establishes that the violation was committed in bad faith, in an amount up to $50 per subscriber, per station, per day of the violation; and
>
> (B) provide for the award of damages to a prevailing satellite carrier if the Commission determines that the complaint was frivolous, in an amount up to $50 per subscriber alleged to be in violation, per station alleged, per day of the alleged violation.

[305] *Id.*

110. The statute does not define "bad faith" or "frivolous," but in the NPRM we noted some language in a floor statement by Subcommittee Chairman Upton to suggest that a Commission finding of damages would be warranted if (1) a satellite carrier lacks a good faith belief that the carriage of the challenged signal was lawful or (2) a broadcaster seeks damages in bad faith.[306] Chairman Upton further states that if the broadcaster filing the complaint does not seek damages, then a finding of damages against either party by the Commission would not be appropriate.[307]

111. In the NPRM, we tentatively concluded to address allegations of bad faith or frivolousness on a case-by-case basis.[308] We asked whether there were particular circumstances that would generally warrant such a finding.[309] We did, however, tentatively conclude that it would not constitute bad faith for a satellite carrier to carry a station listed as significantly viewed in a community on the SV List during the pendency of this proceeding, even if the listing is later shown to be incorrect, provided the carrier follows the other statutory and regulatory requirements.[310]

112. The SHVERA, in Section 340(f)(2), required the Commission to issue final determinations within 180 days of the filing of a complaint concerning Section 340.[311] The statute permited but did not require the Commission to hold hearings to resolve genuine disputes over material facts.[312] In the NPRM, we tentatively concluded to use our existing procedures for Petitions for Special Relief as the procedural framework for complaints concerning significantly viewed status.[313] We proposed that parties would follow the pleading requirements in Section 76.7(a)(1) and (b)(1) for petitions, which would allow us to issue a ruling on complaints.[314]

113. *Determinations of bad faith or frivolousness.* Because questions of bad faith or frivolousness often turn on the specific facts of a particular case, we affirm our tentative conclusion in the NPRM and will make determinations of bad faith or frivolousness on a case-by-case basis. The

[306] *See Upton Floor Statement* at 1 ("If a broadcast station seeks damages, section 340(f)(1)(A) authorizes the FCC to award the station up to $50 per subscriber illegally served, per station illegally carried, per day of the violation if the FCC finds that the satellite operator did not have a good-faith belief that provision of the signal was lawful. Conversely, if a broadcaster seeks damages and the FCC finds that the broadcaster's claims were made in bad faith, section 340(f)(1)(B) allows the FCC to award the satellite operator up to $50 per subscriber, per station, per day that the broadcaster alleged the satellite operator was serving in violation of Section 340.").

[307] *Id.*

[308] *See NPRM*, 20 FCC Rcd at 3010, ¶ 56.

[309] *See id.* ("For example, if the only violation of Section 340 were the failure to notify all broadcast stations in a market 60 days prior to commencing carriage of the significantly viewed stations, would such conduct constitute bad faith by the satellite carrier? Would seeking damages for failure to notify one station constitute a frivolous complaint by a broadcaster?")

[310] *See id.*

[311] 47 U.S.C. 340(f)(2) provides:

> (2) COMMISSION DECISION. The Commission shall issue a final determination resolving a complaint brought under this subsection not later than 180 days after the submission of a complaint under this subsection. The Commission may hear witnesses if it clearly appears, based on written filings by the parties, that there is a genuine dispute about material facts. Except as provided in the preceding sentence, the Commission may issue a final ruling based on written filings by the parties.

[312] *Id.*

[313] *See NPRM*, 20 FCC Rcd at 3010-11, ¶ 57.

[314] 47 C.F.R. § 76.7(a)(1), (b)(1).

commenters on this issue support our conclusion.[315] The commenters, however, split as to the amount of guidance we should offer at this time. NAB states that it would be premature to identify specific circumstances of bad faith or frivolousness.[316] DIRECTV and EchoStar seek confirmation about whether certain conduct would constitute bad faith.[317] DIRECTV and EchoStar argue that we should not find bad faith where a carrier inadvertently failed to make a required notice.[318] EchoStar also argues that complaints by broadcasters that are filed en masse without regard to the merits or that concern a third-party broadcaster should be considered frivolous.[319] In the absence of specific facts, we cannot come to definitive conclusions regarding what circumstances warrant a finding of bad faith. Nevertheless, in response to the comments of DIRECTV and EchoStar, we will note that, as a general rule, we will find bad faith where there has been some evidence of a dishonest belief or purpose and we will not find bad faith where there has been only an honest mistake.[320] Likewise, as a general rule, we will find a complaint to be frivolous upon evidence that a complaint was filed without regard to the merits or brought for an unreasonable purpose.[321]

114. We will affirm, however, our tentative conclusion that carriage instituted in reliance on the SV List, and otherwise in compliance with the SHVERA and the Commission's rules, should not be treated as a "bad faith" violation, notwithstanding a subsequent conclusion that the SV List was in error. We agree with EchoStar that such use of the SV List was contemplated by the SHVERA.[322]

115. *Enforcement procedures.* We will use our existing procedures for Petitions for Special Relief as the procedural framework for complaints concerning significantly viewed status, as proposed in the NPRM. Because Section 340(f) expressly provides for issuance of a cease and desist order to remedy violations of the significantly viewed provisions but does not require a hearing, we are not required to follow the provisions in Section 312(c) of the Communications Act.[323] The procedures for Petitions for Special Relief, which the Commission uses to process cable and satellite carriage complaints, as well as complaints concerning the exclusivity rules and other cable and satellite regulations, will afford the

[315] *See* DIRECTV at 19; EchoStar at 17; NAB at 26.

[316] NAB at 26.

[317] DIRECTV at 19-20; EchoStar at 17-18.

[318] Specifically, DIRECTV and EchoStar assert that a carrier's inadvertent failure to notify all broadcast stations in a market 60 days prior to carrying significantly viewed stations is not bad faith absent demonstration of actual bad faith. DIRECTV at 19; EchoStar at 17-18.

[319] EchoStar at 18.

[320] Black's Law Dictionary characterizes bad faith as having a dishonest belief or purpose. *See also, e.g.*, 47 C.F.R. § 76.65(d) (burden of proof is on the complainant to establish a good faith violation); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978, 17406, ¶ 706 (2003) (stating that a party's gamesmanship, refusal to negotiate, or actions causing unnecessary delay may lead to a finding of bad faith).

[321] Black's Law Dictionary characterizes a frivolous claim as one lacking legal basis or legal merit. *See also, e.g.* 47 C.F.R. § 73.3592 (a)(1) (stating that an application is not filed in good faith where its purpose is to delay or hinder grant of another application); William P. Johnson & Hollis P. Johnson, d/b/a Radio Carrollton, 69 FCC 2d 1139, 1150, ¶ 24 (1978) (explaining that a "strike pleading" is one filed in bad faith for the primary purpose of blocking, impeding, or delaying the grant of an application).

[322] Congress intended for satellite carriers to "start carrying the signals on the list pending adoption of the rules." *House Commerce Committee Report* at 13.

[323] 47 U.S.C. § 312(c) (requires service of an order to show cause and a hearing before revoking a license or issuing a cease and desist order pursuant to 47 U.S.C. § 312(b)).

parties ample opportunity to raise and respond to allegations while ensuring that the Commission can complete action within the 180 day statutory deadline. Parties must follow the pleading requirements in Section 76.7(a)(1) and (b)(1) for petitions. No commenters addressed this issue.

116. We affirm our finding that Sections 340(f)(3) and (4) provide that remedial actions taken by the Commission pursuant to Section 340 are in addition to and have no effect upon actions taken pursuant to the copyright provisions of title 17.[324] The meaning of these provisions is clear that neither action nor inaction by the Commission will have any effect on the filing of a copyright infringement or other action under title 17, nor on the remedies ordered by the appropriate forum thereunder.

2. Notice Concerning Retransmission of Significantly Viewed Stations

117. Section 340(g) requires satellite carriers to provide written notice to all television broadcast stations in a market at least 60 days before retransmitting a significantly viewed signal pursuant to Section 340 into that market.[325] The provision also requires satellite carriers to list on their websites all significantly viewed signals carried pursuant to Section 340.[326] In the NPRM, we tentatively concluded that these written notices must be sent to the station's principal place of business, as listed in the Commission's database, by certified mail, return receipt requested.[327] We also tentatively concluded that satellite carriers must publish a list on their websites that will identify all of the significantly viewed signals they are carrying, by market and community.

118. We adopt Section 76.54(e) to require, as proposed, that written notices must be sent by satellite carriers to a station's principal place of business, as listed in the Commission's database, by certified mail, return receipt requested.[328] Reliance on the information in the Commission's database is consistent with other provisions of the SHVERA.[329] Most commenters agree with this conclusion.[330]

---

[324] 47 U.S.C. § 340(f)(3) and (4) provide:

> (3) REMEDIES IN ADDITION. The remedies under this subsection are in addition to any remedies available under title 17, United States Code.
>
> (4) NO EFFECT ON COPYRIGHT PROCEEDINGS. Any determination, action, or failure to act of the Commission under this subsection shall have no effect on any proceeding under title 17, United States Code, and shall not be introduced in evidence in any proceeding under that title. In no instance shall a Commission enforcement proceeding under this subsection be required as a predicate to the pursuit of a remedy available under title 17.

[325] Section 340(g), entitled "Notices Concerning Significantly Viewed Stations" states that "[e]ach satellite carrier that proposes to commence the retransmission of a station pursuant to this section in any local market shall – (1) not less than 60 days before commencing such retransmission, provide a written notice to any television broadcast station in such local market of such proposal; and (2) designate on such carrier's website all significantly viewed signals carried pursuant to section 340 and the communities in which the signals are carried." 47 U.S.C. § 340(g).

[326] 47 U.S.C. § 340(g)(2).

[327] *See NPRM*, 20 FCC Rcd at 3011-12, ¶ 60.

[328] *See* Appendix B, revised rule Section 76.54(e), (f).

[329] *See*, *e.g.*, 47 U.S.C. § 338(h)(2)(c), as amended by SHVERA (requires the Commission to amend its rules to specifically require use of the Commission's consolidated database system for a television station licensee's address) .

[330] Bellaire; DIRECTV at 18-19; EchoStar at 18. DIRECTV does not disagree with reliance on the database, but says that P.O. box addresses in the database may complicate the delivery of notices using certified mail. DIRECTV at 19.

Licensees are encouraged to update the database to show where they want to receive notices.[331] We find that requiring that the notices be sent via certified mail, return receipt requested is consistent with our rules,[332] and ensures compliance with the statute.[333] We disagree with DIRECTV and EchoStar that delivery via certified mail, return receipt requested is unnecessary.[334] We find such delivery is necessary to evidence delivery of the notice.[335] Finally, we revise our proposed rule to clarify that satellite carriers must also provide the carriage election notifications described in Section 76.66(d)(5)(i).[336]

119. We will also require satellite carriers to publish a list on their websites that will identify all of the significantly viewed signals they are carrying, by market and community. EchoStar has asked us to consider whether its proposed zip-code look-up function which would permit a visitor to type in a zip code to retrieve a list of the significantly viewed stations available to viewers in that zip code, would satisfy this statutory requirement.[337] We find that it would not, unless this database would allow searchers to view a complete listing of all of EchoStar's significantly viewed signals, both by market and community. The statutory language clearly requires that a carrier post on its website all of its significantly viewed signals. We thus agree with NAB that EchoStar's proposed zip-code function would not satisfy the statute.[338]

120. EchoStar asks that satellite carriers should have 10 days to update their website listing with any changes. We find this is consistent with the time afforded the Commission in making updates to its website SV List.[339]

121. The SHVERA stated that notice must be afforded to "any television broadcast station in such local market of such proposal."[340] Given the breadth of this language, we tentatively concluded in the NPRM that satellite carriers must provide notice to stations in the relevant market even if they are not affiliated with the same network of the significantly viewed station whose signal is being carried, regardless of whether they are carried by the satellite carrier as local stations pursuant to Section 338. We recognized that stations seemingly unaffected by the significantly viewed status of unaffiliated stations

[331] We agree that licensees should be mindful of their database listings; however, we disagree with DIRECTV that delivery of notices to P.O. boxes via certified mail may cause difficulties. Staff inquiry to the United States Postal Service (USPS) has verified that certified mail may be sent to a P.O. box. Because certified mail requires a signature, a delivery notice will be left inside the P.O. box to make the addressee aware that the item is available to be signed for at their Post Office. For more information, visit the USPS website at http://www.usps.com/.

[332] *See*, *e.g.*, 47 C.F.R. § 76.66(d) (Commission rule with respect to notices for mandatory carriage requests.).

[333] Certified mail will provide the carrier with proof that it mailed the notice to the address listed in the database; Return Receipt will provide the carrier with proof that the notice was delivered to the appropriate address.

[334] DIRECTV at 18-19; EchoStar at 18.

[335] NAB Reply at 18.

[336] 47 C.F.R. § 76.66(d)(5)(i); *see also* 47 U.S.C. § 340(h). In the *Procedural Rules Order*, we revised Section 76.66 of our rules to provide for carriage elections on a county basis, unified retransmission consent negotiations, and notifications by satellite carriers to local broadcasters concerning carriage of significantly viewed signals; *Procedural Rules Order*, 20 FCC Rcd 7780, 7784-85, ¶ 10-11 (2005). *See* Appendix B, revised rule Section 76.54(e).

[337] EchoStar at 19.

[338] NAB Reply at 19.

[339] 47 U.S.C. § 340(c)(2).

[340] *Id*. § 340(g)(1).

would nonetheless be entitled to receive such notice under our rules. We affirm this tentative conclusion, based on the plain language of the statute. We received no comments on this issue.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

122. The Final Regulatory Flexibility Analysis is attached to this Report and Order as Appendix D.

B. Final Paperwork Reduction Act of 1995 Analysis

123. This Report and Order contains new and modified information collection requirements, which were proposed in the NPRM and are subject to the Paperwork Reduction Act of 1995 ("PRA").[341] These information collection requirements were submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA and approved by OMB on May 25, 2005. In addition, the general public and other Federal agencies were invited to comment on these information collection requirements in the NPRM.[342] We further note that pursuant to the Small Business Paperwork Relief Act of 2002,[343] we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." We received no comments concerning these information collection requirements. On June 16, 2005, the Commission announced that it had obtained OMB approval for these information collection requirements, encompassed by OMB Control Nos. 3060-0311, 3060-0888, and 3060-0960.[344] This Report and Order adopts the information collection requirements, as proposed.

124. *Further Information.* For additional information concerning the information collection requirements contained in this Report and Order, contact Cathy Williams at 202-418-2918, or via the Internet to Cathy.Williams@fcc.gov.

C. Congressional Review Act

125. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the General Accountability Office, pursuant to the Congressional Review Act.[345]

[341] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[342] *NPRM*, 20 FCC Rcd at 3012-13, ¶¶ 63-65.

[343] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

[344] 70 Fed. Reg. 11314 (2005).

[345] *See* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

126. Accordingly, IT IS ORDERED that pursuant to Sections 202, 204 and 211 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, and Sections 1, 4(i) and (j), 339(a), 340 and 341 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 339(a), 340 and 341, this Report and Order IS HEREBY ADOPTED and the Commission's rules ARE HEREBY AMENDED as set forth in Appendix B.

127. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix B WILL BECOME EFFECTIVE 30 days after publication in the Federal Register.

128. 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.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

A. Commenters

1. Adams, Michael
2. Bacon, Ed
3. Beauchamp, Matthew
4. Bellaire, James
5. Calhoun, Eric
6. Carson, Tim
7. Coffey, John
8. Coleman, Nathan
9. Crosby, Chris
10. DIRECTV, Inc. ("DIRECTV")
11. EchoStar Satellite L.L.C. ("EchoStar")
12. Elrod, Bobby
13. Elrod, Bobby D.
14. Forbes, Douglas M.
15. Garrison, Richard
16. Goering, Norman
17. Gulf Carolina Broadcasting Company ("Gulf")
18. Hughes, Mike
19. Kimberley, Neil
20. Koralja, Jason
21. Lass, Frederick E.
22. Maddux, Chad
23. Mather, Walt
24. Metzger, John R.
25. Midlick, Paul A.
26. Moore, Ann
27. Motion Picture Association of America ("MPAA")
28. Murdoch, Robert E.
29. National Association of Broadcasters ("NAB") and the ABC, CBS, FBC, and NBC Television Affiliate Associations ("Network Affiliates") (Joint Comments)
30. NPG of Oregon, Inc. ("NPG")
31. Paszko, Rich
32. Pinkerton, Brent
33. Rutland, Matthew
34. Saga Broadcasting, LLC ("Saga")
35. Saga Quad States Communications, LLC ("Saga Quad")
36. Shaddox, Michael Scott
37. Sinclair Broadcast Group, Inc. ("Sinclair")
38. Smith, Al
39. Snyder, Marcus
40. Stancil, CJ
41. Stevens, Alan
42. Torres, David
43. Tvardy, George
44. WHEC-TV, LLC ("WHEC-TV")
45. WGAL Hearst-Argyle Television, Inc. ("WGAL")
46. Withers Broadcasting Company of West Virginia (a.k.a. WDTV) ("Withers")

B. Replies

1. DIRECTV
2. EchoStar
3. Meredith Corporation ("Meredith") and Media General Communications, Inc. ("Media General") (Joint Reply Comments)
4. Mission Broadcasting, Inc. ("Mission")
5. MPAA
6. NAB and Network Affiliates(Joint Reply Comments)

C. Late-filed commenters

1. Brittain, Richard B.
2. Gassmann, Richard

D. Ex Parte Filers

1. Capitol Broadcasting Company, Inc. ("CBC")
2. DIRECTV
3. EchoStar
4. NAB

APPENDIX B

Rule Changes[1]

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

PART 76 – Multichannel Video and Cable Television Service.

1. The authority citation for Part 76 is revised to read as follows:

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

2. Amend §76.5 by revising paragraph (ee) and adding paragraph (gg) to read as follows:

§76.5 Definitions.

* * * * *

(ee) *Subscribers.*

(1) As used in the context of cable service, subscriber or cable subscriber means a member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it.

(2) As used in the context of satellite service, subscriber or satellite subscriber means a person who receives a secondary transmission service from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor.

* * * * *

(gg) ~~[Reserved]~~***Satellite community.*** **A separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). The boundaries of any such unincorporated community may be defined by one or more adjacent five-digit zip code areas. Satellite communities apply only in areas in which there is no pre-existing cable community, as defined in 76.5(dd).**

3. Amend §76.54 by revising paragraphs (a), (b) and (c), and adding paragraphs (e), (f), (g), (h), (i), (j) and (k) to read as follows:

§ 76.54 Significantly viewed signals; method to be followed for special showings.

(a) Signals that are significantly viewed in a county (and thus are deemed to be significantly viewed within all communities within the county) are those that are listed in Appendix ~~A~~**B** of the memorandum opinion and order on reconsideration of the Cable Television Report and Order (Docket 18397 et al.),

[1] Rule changes shown in bold.

FCC 72-530**, and those communities listed in the Significantly Viewed List as it appears on the official website of the Federal Communications Commission**.

(b) Significant viewing in a cable television **or satellite** community for signals not shown as significantly viewed under paragraphs (a) or (d) of this section may be demonstrated by an independent professional audience survey of **over-the-air** television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level. If a cable television system serves more than one community, a single survey may be taken, provided that the sample includes **over-the-air** television homes from each community that are proportional to the population. **A satellite carrier may demonstrate significant viewing in more than one community or satellite community through a single survey, provided that the sample includes over-the-air television homes from each community that are proportional to the population.**

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour **(and, with respect to a survey pertaining to a station broadcasting only a digital signal, the noise limited service contour, as defined in section 73.622(e))** the cable **or satellite** community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. ~~Furthermore, if a survey is undertaken pursuant to the provisions of § 76.33(a)(2)(i) of the rules, notice shall also be served on the franchising authority.~~Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

* * * * *

(e) Satellite carriers that intend to retransmit the signal of a significantly viewed television broadcast station to a subscriber located outside such station's local market, as defined by section 76.55(e), must provide written notice to all television broadcast stations that are assigned to the same local market as the intended subscriber at least 60 days before commencing retransmission of the significantly viewed station. Such satellite carriers must also provide the notifications described in section 76.66(d)(5)(i). Such written notice must be sent via certified mail, return receipt requested, to the address for such station(s) as listed in the consolidated database maintained by the Federal Communications Commission.

(f) Satellite carriers that retransmit the signal of a significantly viewed television broadcast station to a subscriber located outside such station's local market must list all such stations and the communities to which they are retransmitted on their website.

(g) Signals of analog or digital significantly viewed television broadcast stations may not be retransmitted by satellite carriers to subscribers who do not receive local-into-local service, including a station affiliated with the same network as the significantly viewed station, pursuant to section 76.66; except that a satellite carrier may retransmit a significantly viewed signal of a television broadcast station to a subscriber who receives local-into-local service but does not receive a local station affiliated with the same network as the significantly viewed station, if

(1) there is no station affiliated with the same television network as the station whose signal is significantly viewed; or

(2) the station affiliated with the same television network as the station whose signal is significantly viewed has granted a waiver in accordance with 47 U.S.C. § 340(b)(4).

(h) Signals of significantly viewed network stations that originate as digital signals may not be retransmitted to subscribers unless the satellite carrier retransmits the digital signal of the local network station, which is affiliated with the same television network as the network station whose signal is significantly viewed, in either (1) at least the equivalent bandwidth of the significantly viewed station or (2) the entire bandwidth of the digital signal broadcast by such local station.

(i) For purposes of subsections (g) and (h), television network and network station are as defined in 47 U.S.C. § 339(d).

(j) Notwithstanding the requirements of this section, the signal of a television broadcast station will be deemed to be significantly viewed if such station is shown to qualify for such status pursuant to 47 U.S.C. § 341(a).

(k) Notwithstanding the other provisions of this section, a satellite carrier may not retransmit as significantly viewed the signal of a television broadcast station into the Designated Market Areas identified in 47 U.S.C. § 341(b).

4. Amend §76.122 by revising paragraphs (a) and (j) to read as follows:

§ 76.122 Satellite network non-duplication.

(a) Upon receiving notification pursuant to paragraph (c) of this section, a satellite carrier shall not deliver, to subscribers within zip code areas located in whole or in part within the zone of protection of a commercial television station licensed by the Commission, a program carried on a nationally distributed superstation **or on a station carried pursuant to section 76.54** when the network non-duplication rights to such program are held by the commercial television station providing notice, except as provided in paragraphs (j), (k) or (l) of this section.

* * * * *

(j) A satellite carrier is not required to delete the duplicating programming of any nationally distributed superstation that is carried by the satellite carrier as a local station pursuant to § 76.**66 or as a significantly viewed station pursuant to § 76.54**

(~~i~~**1**) Within the station's local market;

(~~ii~~**2**) If the station is "significantly viewed," pursuant to § 76.54, in zip code areas included within the zone of protection **unless a waiver of the significantly viewed exception is granted pursuant to § 76.7**; or

(~~iii~~**3**) If the zone of protection falls, in whole or in part, within that signal's grade B contour **or noise limited service contour**.

5. Amend §76.123 by revising paragraphs (a) and (k) to read as follows:

§ 76.123 Satellite syndicated program exclusivity.

(a) Upon receiving notification pursuant to paragraph (d) of this section, a satellite carrier shall not deliver, to subscribers located within zip code areas in whole or in part within the zone of protection of a commercial television station licensed by the Commission, a program carried on a nationally distributed

superstation **or on a station carried pursuant to section 76.54** when the syndicated program exclusivity rights to such program are held by the commercial television station providing notice, except as provided in paragraphs (k), (l) and (m) of this section.

* * * * *

(k) A satellite carrier is not required to delete the programming of any nationally distributed superstation that is carried by the satellite carrier as a local station pursuant to § 76.**66 or as a significantly viewed station pursuant to § 76.54**:

(1) Within the station's local market;

(2) If the station is "significantly viewed," pursuant to § 76.54, in zip code areas included within the zone of protection **unless a waiver of the significantly viewed exception is granted pursuant to § 76.7**; or

(3) If the zone of protection falls, in whole or in part, within that signal's grade B contour **or noise limited service contour**.

APPENDIX C[1]

Significantly Viewed List

The stations listed below are "significantly viewed" in the relevant counties and/or communities as indicated. The stations are listed by state and subdivided by the county in which they are significantly viewed. Stations added on a community-by-community basis after 1972 are listed at the end of each state next to the community in which they obtained significantly viewed status. The station listing includes the current (and former) call signs, as well as the analog channel number and city of license. Stations with a plus sign (+) under individual counties are those stations added to the list after the publication of the Commission's original 1972 list. *See Reconsideration of the Cable Television Report and Order,* 36 FCC 2d 326 (1972). Stations listed with a pound sign (#) have been the subject of application of the Commission's exclusivity rules and are subject to programming deletions in the indicated communities.

* * * * *

[Note: Appendix C, The Significantly Viewed List ("SV List"), is 444 pages (numbered 56-499) and is attached as a separate document.]

[1] This list of significantly viewed stations will be published and maintained on the Commission's Internet website at http://www.fcc.gov/mb/. The Commission will update the list posted on the Internet within 10 business days after taking an action to modify the list.

APPENDIX D

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 *Notice of Proposed Rulemaking* ("*NPRM*") to this proceeding.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

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

2. This Report and Order ("R&O") adopts rules to implement Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").[4] Section 202 of the SHVERA created Section 340 of the Communications Act[5] and amended the copyright laws[6]to provide satellite carriers with the authority to offer Commission-determined "significantly viewed" signals[7] of out-of-market (or "distant") broadcast stations to subscribers. This R&O satisfies the SHVERA's mandate that the Commission adopt rules implementing Section 340 within one year of the statute's enactment.[8] For specific examples of rules adopted, see the Summary in Section III.A.5. of the R&O.

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

3. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

[1] *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. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 20 FCC Rcd 2983, Appendix C (2005) ("*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), Pub. L. No. 108-447, § 202, 118 Stat 2809, 3393 (2004) (to be codified at 47 U.S.C. § 340).

[5] 47 U.S.C. § 340.

[6] Section 102 of the SHVERA creates a new 17 U.S.C. § 119(a)(3) to provide satellite carriers with a statutory copyright license to offer out-of-market "significantly viewed" signals to subscribers. 17 U.S.C. § 119(a)(3).

[7] The SHVERA establishes for satellite carriers and subscribers the concept of "significantly viewed," which has applied in the cable context for more than 30 years. The concept of "significantly viewed" signals is used to differentiate between out-of-market television broadcast stations that have significant over-the-air viewing and those that do not. The designation of "significantly viewed" status is important because it will enable a broadcast station assigned to one market to be treated as a "local" station with respect to a particular cable or satellite community in another market, and thus enable its cable or satellite carriage into that market.

[8] *See* 47 U.S.C. § 340(c)(1)(B). We have already adopted some rules to implement new Section 340(h); *see Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 20 FCC Rcd 7780 (2005) (*Procedural Rules Order*) (revising 47 C.F.R. § 76.66 to add rules for carriage elections on a county basis, unified retransmission consent negotiations, and notifications by satellite carriers to local broadcasters concerning carriage of significantly viewed signals). *See* 47 U.S.C. § 340(h).

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

1. Entities Directly Affected By Proposed Rules

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[9] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," small organization," and "small government jurisdiction."[10] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[11] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[12]

5. The rules adopted by this R&O, as required by statute, will permit the distribution of Commission-determined "significantly viewed" signals by statutorily defined "satellite carriers" to consumers.[13] Therefore, "satellite carriers," which includes Direct Broadcast Satellite (DBS), will be directly and primarily affected by the rules adopted herein. In addition, the rules adopted herein will also directly affect television stations, which may be carried via satellite under the SHVERA if determined to be significantly viewed, and cable operators, which would share some of the new and revised rules with satellite carriers. We also believe that private cable operators (PCOs), also known as satellite master antenna television (SMATV) systems, may be directly affected because PCOs often use DBS video programming as part of their service package to subscribers. Therefore, in this FRFA, we consider the impact of the rules on small television broadcast stations, small cable and satellite operators and other small entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

6. *Satellite Carriers.* The SHVERA defined the term "satellite carrier" by reference to the definition in the copyright title 17.[14] This definition includes entities providing services as described in 17 U.S.C. § 119(d)(6) using the facilities of a satellite or satellite service licensed under Part 25 of the Commission's rules to operate in Direct Broadcast Satellite (DBS) or Fixed-Satellite Service (FSS) frequencies.[15] As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to

[9] 5 U.S.C. § 603(b)(3).

[10] *Id*. § 601(6).

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

[12] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[13] *See*, *supra*, Section III.A.8. of the *R&O*; *see also* 47 U.S.C. § 340(i)(1); 47 U.S.C. § 338(k)(3), as amended by the SHVERA, and 17 U.S.C. §119(d)(6).

[14] *See* 47 U.S.C. § 340(i)(1); 47 U.S.C. § 338(k)(3), as amended by the SHVERA, and 17 U.S.C. §119(d)(6).

[15] Part 100 of the Commission's rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed pursuant to Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.[16] In the *R&O*, we conclude that the definition of "satellite carrier" would include all three types of entities described above.

7. *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. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.[17] This definition provides that a small entity is one with $12.5 million or less in annual receipts.[18] Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DIRECTV[19] and EchoStar Communications Corporation ("EchoStar"),[20] report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of $12.5 million, and thus does not qualify as a small business.[21] The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.[22] The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated $12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

8. *Fixed-Satellite Service ("FSS")*. The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.[23] The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in revenue

[16] *See, e.g., Application Of DIRECTV Enterprises, LLC, Request For Special Temporary Authority for the DIRECTV 5 Satellite; Application Of DIRECTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DIRECTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location,* 19 FCC Rcd. 15529 (Sat. Div. 2004).

[17] 13 C.F.R. § 121.201, NAICS code 517510.

[18] *Id.*

[19] DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; *see* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, 20 FCC Rcd 2755, 2793, ¶ 55 (2005) ("*2005 Cable Competition Report*").

[20] EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id*.

[21] Rainbow DBS, which provides service under the brand name VOOM, reported an estimated 25,000 subscribers. *Id*.

[22] Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id*.

[23] *See* 47 C.F.R. § 2.1(c).

annually.[24] Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Two of the DBS licensees (EchoStar and DIRECTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

9. *Cable and Other Program Distribution.* Cable system operators fall within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in revenue annually.[25] According to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more, but less than $25 million.[26] In addition, limited preliminary census data for 2002 indicates that the total number of Cable and Other Program Distribution entities increased approximately 46 percent between 1997 and 2002.[27] The Commission estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

10. *Cable System Operators (Rate Regulation Standard).* The Commission has developed, with SBA's approval, its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[28] We last estimated that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.[29] Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules adopted in this *R&O*.

11. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for a "small cable operator," 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

[24] 13 C.F.R. § 121.201, NAICS code 517510.

[25] *Id*.

[26] U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of $10 million was used to estimate the number of small business firms because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

[27] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513220 (issued Nov. 2004). The preliminary data indicate that the number of total "establishments" increased from 4,185 to 6,118. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[28] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. For "regulatory simplicity," the Commission established the company size standard in terms of subscribers, rather than dollars; in the cable context, $100 million in annual regulated revenues equates to approximately 400,000 subscribers. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Doc. Nos. 92-266 and 93-215, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7408-7409, ¶¶ 28-30 (1995).

[29] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

exceed $250,000,000."[30] The Commission has determined that there are 67.7 million subscribers in the United States.[31] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[32] Based on available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[33] and therefore is unable at this time to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act.

12. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than $12 million in annual receipts.[34] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[35] According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on October 18, 2005, about 873 of the 1,307 commercial television stations[36] (or about 67 percent) have revenues of $12 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[37] must be included. Our estimate, therefore, 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. There are also approximately 2,098 licensed low power television (LPTV) stations, 4,491 licensed TV translators, 598 licensed Class A stations, and

[30] 47 U.S.C. § 543(m)(2).

[31] *See* Public Notice, "FCC Announces New Subscriber Count for the Definition of Small Cable Operator," 16 FCC Rcd 2225 (2001) ("*2001 Subscriber Count PN*"). In this Public Notice, the Commission established the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers, and determined that this threshold will remain in effect until the Commission issues a superceding Public Notice. We recognize that the number of cable subscribers was recently estimated by the Commission to be almost 66.1 million, as of June 2004; *see 2005 Cable Competition Report*, 20 FCC Rcd at 2759, 2768-69, ¶¶ 9, 21. However, because the Commission has not issued a public notice subsequent to the *2001 Subscriber Count PN,* we propose to rely on the subscriber count threshold established by the *2001 Subscriber Count PN*.

[32] 47 C.F.R. § 76.901(f).

[33] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 U.S.C. § 573.

[34] *See* 13 C.F.R. § 121.201, NAICS Code 515120.

[35] *Id*. This category description continues, "These establishments operate television broadcasting 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 studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[36] Although we are using BIA's estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1,368. *See News Release*, "Broadcast Station Totals as of June 30, 2005" (dated Aug. 29, 2005); *see* http://www.fcc.gov/mb/audio/totals/bt050630.html.

[37] "[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 to power to control both." 13 C.F.R. § 121.103(a)(1).

11 TV booster stations.[38] Given the nature of these services, we will presume that these licensees qualify as small entities under the SBA definition.

13. In addition, an element of the definition of "small business" is that the 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 station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

14. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems*. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $12.5 million or less in annual receipts.[39] Currently, there are approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[40] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers.[41] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO qualify as small entities.

2. Entities Not Directly Affected By Proposed Rules

15. Because the SHVERA authorized carriage of significantly viewed stations only by "satellite carriers," we find that our rules implementing the SHVERA will not directly affect other multichannel video programming distributors (MVPDs), such as home satellite dish (HSD) services, multipoint distribution services (MDS)/multichannel multipoint distribution service (MMDS), Instructional Television Fixed Service (ITFS), local multipoint distribution service (LMDS) and open video systems (OVS). In the NPRM, we invited comment on our tentative conclusion.[42] We received no comments on this issue. We confirm our conclusion that these entities fall outside the scope of this FRFA. Accordingly, we do not discuss these entities, which were listed in the IRFA.[43]

---

[38] *News Release*, "Broadcast Station Totals as of June 30, 2005" (dated Aug. 29, 2005); *see* http://www.fcc.gov/mb/audio/totals/bt050630.html.

[39] 13 C.F.R. § 121.201, NAICS code 517510.

[40] *See 2005 Cable Competition Report*, 20 FCC Rcd at 2816, ¶ 110. Previously, the Commission reported that IMCC had 250 members; *see* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*2004 Cable Competition Report*").

[41] *See 2005 Cable Competition Report*, 20 FCC Rcd at 2816, ¶ 110.

[42] *NPRM,* 20 FCC Rcd 2983, Appendix C, ¶ 15.

[43] *Id.,* ¶¶ 16-23.

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements

16. The SHVERA was enacted to permit satellite carriage of Commission-determined "significantly-viewed" signals of out-of-market broadcast stations to consumers. The SHVERA allowed satellite carriers and broadcast stations to obtain "significantly-viewed" status for satellite carriage pursuant to Section 340 of the Act. Therefore, it does not impose any mandatory reporting, recordkeeping and other compliance requirements, unless a satellite carrier and station choose to take advantage of the SHVERA's provisions.

17. The rules adopted which may directly affect reporting, recordkeeping and other compliance requirements are described below.[44] This *R&O* requires that satellite carriers and broadcast stations seeking a "significantly viewed" designation for a station and the community containing such station pursuant to Section 340 must follow the same petition process now in place for cable operators (and broadcast stations), as required by Sections 76.5, 76.7 and 76.54 of the Commission's rules.[45] Therefore, entities seeking a "significantly viewed" designation must file a petition pursuant to the pleading requirements in Section 76.7(a)(1) and use the method described in Section 76.54 to demonstrate that the station is significantly viewed as defined in Section 76.5(i). Parties filing such petitions must also comply with the existing notification requirements of Section 76.54(c).[46]

18. Furthermore, this *R&O* will (1) create a limited right for a station or distributor to assert non-duplication and exclusivity rights with respect to a station carried by a satellite carrier as significantly viewed; (2) allow that significantly viewed station to assert the significantly viewed exception, just as a station would with respect to cable carriage; and (3) allow the station or distributor asserting exclusivity to petition the Commission for a waiver from the exception.[47] The assertion of these rights will require affected parties to file Section 76.7 petitions.

19. This *R&O* also will rely on the Commission's existing Section 76.7 petition process as the procedural framework for the filing of complaints filed pursuant to new Section 340. Thus, interested parties that wish to report Section 340 violations must file a Petition for Special Relief under Section 76.7.[48]

20. As required by Section 340(g)(1), this *R&O* adds a new rule, Section 76.54(e), to require satellite carriers seeking to retransmit significantly viewed signals pursuant to new Section 340 to provide 60 days written notice to all stations located in the local market. As required by Section 340(g)(2), this *R&O* also adds a new rule, Section 76.54(f), to require satellite carriers retransmitting significantly viewed stations pursuant to new Section 340 to publish a list of all such stations on their website. These proposed rules do not impose any burden on broadcast stations, but rather are intended to protect the rights of broadcast stations, including small stations.

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

21. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1)

---

[44] *See* rules contained in Appendix B to this *R&O*.

[45] *See* 47 C.F.R. §§ 76.5, 76.7, 76.54; *see also, supra,* Section III.A.3. of the *R&O*.

[46] *See* 47 C.F.R. § 76.54(c) (requiring notice to certain broadcast stations); *see also* revised Section 76.54(c) contained in Appendix B to this *R&O*.

[47] *See, supra,* Section III.A.5. of the *R&O*.

[48] *See* 47 C.F.R. § 76.7; *see also, supra,* Section III.D.1. of the *R&O*.

the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[49]

22. With respect to the implementation of new Section 340, the SHVERA did not offer much flexibility with respect to minimizing its impact on small entities. In seeking regulatory parity with cable operators, Congress sought to apply to satellite carriers the existing regulatory framework concerning the distribution of significantly viewed signals.[50] Accordingly, the SHVERA authorized satellite carriage of significantly viewed stations using the same framework in place for the cable carriage context that has been in effect as of April 15, 1976.[51] Therefore, the Commission does not have discretion to choose an alternate means of implementing the SHVERA.

23. The absence of such discretion does not mean, however, that the likelihood of differential adverse impact on smaller entities is increased. This is because the nature of new Section 340 is permissive, meaning only satellite carriers that choose to carry significantly viewed stations would be impacted by our proposed implementation of the statute. Likewise, only television broadcast stations seeking carriage as significantly viewed will be impacted. The compliance requirements of cable operators with respect to carriage of significantly viewed stations are not changed.

24. The statute's compliance requirements primarily impact satellite carriers, such as DBS providers. As previously noted, there are now only four DBS licensees, none of which are small entities. Small businesses do not generally have the financial ability to become DBS licensees because of the high implementation costs associated with satellite services. Moreover, the statute confers a benefit to satellite carriers, enabling them to carry significantly viewed stations.

25. We believe that the SHVERA will benefit some number of small broadcast stations by offering them the opportunity to be significantly viewed stations that will be delivered to more viewers. We recognize, however, that there is also the possibility that small in-market stations will face a competitive impact from the entry of out-of-market significantly viewed stations. We do not believe it is possible to measure whether small stations are more or less likely to benefit in this regard.

26. While the statute does not impose any requirements on small cable operators, it is possible that such small entities could face a competitive impact because of the benefit conferred to satellite carriers. In fact, the express intent of the statute was to level the competitive playing field between cable operators and satellite providers.[52] Congress, however, recognized that the SHVERA may impact the competitiveness of small cable operators, and thus directed the Commission to conduct an inquiry in a separate proceeding on the impact of specific provisions of the Communications Act of 1934,

[49] 5 U.S.C. § 603(c)(1)-(c)(4)

[50] *See* 17 U.S.C. § 119(a)(3); *House Commerce Committee Report* at 1 (Purpose of the SHVERA includes "increasing regulatory parity by extending to satellite carriers the same type of authority cable operators already have to carry 'significantly viewed' signals into a market"); *see also, supra,* Section III.A.3. of the *R&O*.

[51] 17 U.S.C. § 119(a)(3).

[52] *See id*.

as amended, the SHVERA provisions, and Commission rules on competition in the MVPD market.[53] Accordingly, the Commission has issued a Public Notice to initiate this inquiry.[54]

F. Report to Congress

27. The Commission will send a copy of the *R&O*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[55] In addition, the Commission will send a copy of the *R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *R&O* and FRFA (or summaries thereof) will also be published in the Federal Register.[56]

[53] *See* Section 208 of SHVERA. The Commission is required to submit a report to Congress on the results of its inquiry no later than nine months after SHVERA's enactment date (*i.e.*, September 8, 2005).

[54] *Public Notice*, "Media Bureau Seeks Comment For Inquiry Required By the on Rules Affecting Competition In the Television Marketplace," MB Docket No. 05-28, 20 FCC Rcd 1572 (2005) (opening inquiry required by Section 208 of the SHVERA concerning the impact of certain rules and statutory provisions on competition in the television marketplace).

[55] *See* 5 U.S.C. § 801(a)(1)(A).

[56] *See id*. § 604(b).