

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

In the Matter of
Carriage of Digital Television Broadcast
Signals: Amendment to Part 76 of the
Commission's Rules
CS Docket 98-120

FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 11, 2015

Released: March 12, 2015

Comment Date: [20 days after date of publication in the Federal Register]
Reply Comment Date: [30 days after date of publication in the Federal Register]

By the Commission:

I. INTRODUCTION

1. In this Fifth Further Notice of Proposed Rulemaking, we seek comment on a Petition for Rulemaking filed by the American Cable Association ("ACA") requesting, among other things, that the Commission extend for an additional three years the exemption from the requirement to carry high definition ("HD") broadcast signals under the "material degradation" provisions of the Communications Act of 1934, as amended ("the Act") that it granted to certain small cable systems in the Fifth Report and Order ("HD carriage exemption"). This exemption is slated to expire on June 12, 2015 absent further action by the Commission. As discussed below, we tentatively conclude that the public interest would be served by extending the HD carriage exemption for three years, or until June 12, 2018. We set forth below a brief history of the HD carriage exemption and a summary of ACA's arguments in support of its Petition, and seek comment on our tentative conclusion to grant ACA's proposal.

II. BACKGROUND

2. Sections 614(b)(4)(A) and 615(g)(2) of the Act require that cable operators carry signals of commercial and noncommercial broadcast television stations, respectively, "without material degradation." In the context of the carriage of digital signals, the Commission has interpreted this

1 See American Cable Association Petition for Rulemaking, CS Docket No. 98-120 (filed Jan. 27, 2015) ("Petition").

2 See 47 U.S.C. §§ 534(b)(4)(A), 535(g)(2) (material degradation requirements relating to signals of local commercial and noncommercial television stations, respectively).

3 See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120, Fifth Report and Order, 27 FCC Rcd 6529, 6546-49, ¶¶ 19-23 (2012) ("Fifth Report and Order").

4 In particular, Section 614(b)(4)(A) of the Act provides that:

[t]he signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable

(continued....)

requirement: (i) to prohibit cable operators from discriminating in their carriage between broadcast and non-broadcast signals; and (ii) to require cable operators to carry HD broadcast signals to their viewers in HD.⁵ In response to concerns from small cable operators about cost and technical capacity, the Commission, in the 2008 *Fourth Report and Order*, granted a three-year exemption from the HD carriage requirement to certain small cable systems.⁶ Specifically, the Commission exempted small cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers, and those with an activated channel capacity of 552 MHz or less.⁷

3. The exemption from this material degradation requirement permits such systems to carry broadcast signals in standard definition (“SD”) digital and/or analog format, even if the signals are broadcast in HD, so long as all subscribers can receive and view the signal.⁸ The Commission provided that the exemption would expire three years after the conclusion of the DTV transition, but stated that it would consider whether to extend the exemption in its final year.⁹ After conducting that review,¹⁰ the Commission, in the 2012 *Fifth Report and Order*, extended for an additional three years, or until June 12, 2015, the HD carriage exemption for certain small cable systems.¹¹ The Commission stated that the exemption was not intended to be permanent and that its purpose was “to provide small systems additional time to upgrade and, where necessary, expand their systems to come into full compliance with

(Continued from previous page) _____

system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

47 U.S.C. § 534(b)(4)(A). Section 615(g)(2) of the Act provides that:

[a] cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation.

See 47 U.S.C. § 535(g)(2). See also 47 C.F.R. § 76.62(b)-(d), (h).

⁵ See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21067, ¶ 7 (2007) (“*Viewability Order*”). See also *Fifth Report and Order*, 27 FCC Rcd at 6546, ¶ 19.

⁶ See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Fourth Report and Order, 23 FCC Rcd 13618 (2008) (“*Fourth Report and Order*”).

⁷ See *id.*

⁸ *Id.* at 13620, ¶ 5. The Commission concluded that cable operators, regardless of system size, need not carry an SD digital version of a broadcast station’s signal, in addition to the analog version, to satisfy the material degradation requirement, because both an SD digital version and an analog version of the digital broadcast signal received at the headend should have the same 480i resolution; thus, there should be no perceivable difference between the two versions of the signal. *Id.*

⁹ See *id.* at 13622, ¶ 11. See also *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, 27 FCC Rcd 1713, 1724, ¶ 23 (2012) (“*Fourth Further Notice*”). The exemption would have expired on February 17, 2012, if Congress had not delayed the DTV transition date from February 17, 2009 until June 12, 2009. *Id.* In the 2012 Declaratory Order accompanying the *Fourth Further Notice*, the Commission clarified that the HD carriage exemption was effective until June 12, 2012 because the HD exemption was intended to remain in effect for three full years from the DTV transition date. *Id.*

¹⁰ See *id.* at 1714, ¶ 3. See also *Fifth Report and Order*, 27 FCC Rcd at 6546-49, ¶¶ 19-23.

¹¹ See *id.* The Commission extended the exemption based on its finding that the same financial and capacity constraints that confronted small cable operators when it initially granted the exemption in 2008 continued to exist. *Id.* at 6547-48, ¶ 21. In particular, the Commission found that the exemption “remains necessary to protect the viability of small systems and their service to rural and smaller market consumers.” *Id.*

the material degradation provisions . . . by carrying HD versions of all HD broadcast signals without having to make relatively large expenditures over a short period of time.”¹²

4. On January 28, 2015, ACA filed its Petition requesting that the Commission: (i) commence a rulemaking proceeding to extend for an additional three years the HD carriage exemption; and (ii) clarify that analog-only cable systems are not required, and have never been required, to transmit must-carry signals in HD.¹³ In general, ACA contends that the HD carriage exemption has worked as intended by providing eligible systems with additional time to provide must-carry signals in HD, but that the exemption is still needed to protect a small number of systems and their subscribers from the potential costs and service disruptions that would result from immediate compliance with an HD carriage requirement.¹⁴ In support of its request for an extension, ACA points to data from a recent survey¹⁵ that shows that roughly 6%, or 53 of its members, continue to rely on it.¹⁶

5. With respect to the category of small systems that have a capacity of 552 MHz or less, ACA reports that 42 respondents (that account for at least 117 systems serving a total of 35,758 subscribers, or an average of 306 subscribers per system) continue to rely on the HD carriage exemption.¹⁷ Similarly, with respect to the category of systems that serve 2,500 or fewer subscribers and that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers, ACA reports that 53 respondents (that account for 143 systems serving a total of 49,790 subscribers, or an average of 348 subscribers per system)¹⁸ still rely on the exemption.¹⁹ The survey reveals further that these systems offer an average of 2.5 must-carry stations in a “down-converted” format only.²⁰ Given this

¹² *Id.* at 6548, ¶ 22. The Commission declined to restrict the exemption further by eliminating its application to systems that carry any signal in HD, as suggested by the National Association of Broadcasters (“NAB”). In so doing, the Commission reasoned that the exemption had already been crafted narrowly to excuse only a limited number of systems with certain capacity constraints or low subscribership, and that a small system’s ability to offer some HD service did not necessarily render that system capable of offering additional HD service. *Id.* at 6548, ¶ 23. The Commission also expressed concern that restricting the exemption further would create a disincentive for systems to offer more HD programming incrementally. *Id.*

¹³ *See Petition* at 1-2, 18.

¹⁴ *Id.* at 2.

¹⁵ ACA conducted an online survey of its members from October 2 through October 22, 2014 to determine the number of systems still relying on the HD carriage exemption. *Id.* at 4, n.8. ACA represents approximately 840 independent MVPDs that serve about 7.4 million video subscribers primarily in smaller markets and rural areas. ACA’s members range from family-run operations that serve a single town to multiple system operators with small systems. The median number of video subscribers per ACA member is 1,060. *Id.* at 4, n.9.

¹⁶ *Id.* at 4-5.

¹⁷ *Id.* at 5. ACA asserts that the survey further indicates that: (i) those systems offer an average of 2.3 must-carry stations in a down-converted format only; (ii) only 20.5% of those systems offer some HD television services; and (iii) 38.5% of those systems offer broadband service. *Id.* and Table 1.

¹⁸ ACA reports that all 117 of the systems with a capacity of 552 MHz or less also have fewer than 2,500 subscribers, and that 81.8% of the systems with fewer than 2,500 subscribers also have a capacity of 552 MHz or less. *See Petition* at 5-6 and Tables 1, 2.

¹⁹ *Id.* at 6. ACA asserts that the survey further indicates that: (i) those systems offer an average of 2.5 must-carry stations in a down-converted format only; (ii) only 25.9% of those systems offer some HD television services; and (iii) 54.4% of those systems offer broadband service. *Id.* and Table 2.

²⁰ *Id.* Although ACA does not define “down-converted format,” we assume this term refers to a cable system’s conversion of a high definition broadcast signal to standard definition when retransmitting the signal to subscribers.

data, ACA asserts, imposing an HD carriage requirement at this time would be as detrimental to small systems today as it was when the Commission initially granted the exemption.²¹

6. ACA argues that applying the HD carriage exemption to cable systems with 552 MHz or less of channel capacity is still justified because such systems continue to face significant bandwidth constraints that affect their ability to provide must-carry signals in both analog and HD format.²² To support its assertion, ACA points to survey data demonstrating that for 81% of respondents with a capacity of 552 MHz or less, the amount of unused channel capacity that is available for new channels or services either has decreased²³ or remained the same²⁴ in the past three years. ACA asserts further that a substantial majority of survey respondents in this category report that they cannot deliver HD signals without changing existing channels or services, and that it would be burdensome for them to make available channel capacity for HD signals.²⁵ ACA contends that imposing an HD carriage requirement at this time would harm subscribers of these systems by forcing such systems: (i) to drop channels; (ii) to continue providing signals only in a down-converted format, thereby risking Commission enforcement action; or (iii) to cease operations entirely.²⁶

7. ACA contends that extending the HD carriage exemption to cable systems with 2,500 or fewer subscribers (and that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers) also remains justified because such systems still lack the financial resources necessary to purchase equipment needed to provide HD signals.²⁷ To support its assertion, ACA points to survey data showing that an overwhelming number of systems in this category reported that their net income from video services has declined over the last three years.²⁸ ACA contends, based on its survey, that many such systems would need to purchase additional equipment to offer must-carry signals in HD, and that doing so would be financially burdensome for them.²⁹ ACA argues that requiring these systems to transmit HD signals would force them to absorb the equipment costs or pass such costs on to subscribers, and that these harms far outweigh any benefits derived from an HD carriage mandate.³⁰ ACA also

²¹ *Id.* at 3.

²² *Id.* at 7-8.

²³ *Id.* at 8 and Table 4. According to ACA, the decrease in unused channel capacity has resulted from the need of operators to accommodate non-broadcast programmers that demand carriage of additional channels in exchange for access to, or less drastic rate increases for, popular non-broadcast channels. *Id.* at 8-9. ACA also attributes this decrease in capacity to the need of operators to allocate capacity for broadband services. *Id.* at 9.

²⁴ ACA asserts that the most common reason reported for no change in channel capacity was that the system was channel locked three years ago and remains the same today due to a lack of financial resources for capacity expansion or the absence of a business case to support such expansion. *Id.*

²⁵ *Id.* and Table 5.

²⁶ *Id.* at 10. ACA reports that 45.2% of survey respondents in this category would shut down their systems; 14.3% would drop existing channels; and 19% would risk Commission enforcement action rather than comply with an HD carriage requirement. *Id.*

²⁷ *Id.* at 11-12.

²⁸ *Id.* at 12-13 and Table 6.

²⁹ *Id.* at 13-14.

³⁰ *Id.* at 14. ACA reports that 37.3% of cable systems in this category would shut down their systems rather than invest in the equipment needed to comply with an HD carriage requirement; 22% would risk Commission enforcement action; and 35.6% would absorb or pass along to their subscribers the cost of the requisite equipment. *Id.*

highlights concerns about cost and compliance that may result from the upcoming broadcast spectrum incentive auction because the auction could result in fewer stations and/or channel sharing.³¹

8. Moreover, ACA asserts that the number of cable systems relying on the HD carriage exemption is declining and will continue to decline over the next three years.³² In particular, ACA claims that more than 200 fewer *systems* are using the HD exemption today than in 2012, and that by June 2018, only 73 of the 143 systems that are currently relying on the exemption are expected to still be in operation and meet the criteria for taking advantage of the exemption.³³ ACA anticipates that this decline in the number of systems will result from system shutdowns or system upgrades to increase channel capacity.³⁴ ACA argues that “[g]iven . . . the trend of decreasing reliance . . . , it is appropriate to extend the HD exemption for the relatively few remaining operators that continue to rely on the exemption.”³⁵

9. Finally, ACA seeks a clarification that cable systems that offer video programming only in analog are not required, and have never been required, to transmit must-carry signals in HD because such carriage is not “technically feasible” within the meaning of Section 614(b)(4)(A) of the Act and its implementing rules.³⁶ In particular, ACA contends that:

analog-only systems are unable to carry *any* HD signals. If an analog-only system had the capability of carrying an HD signal, which can only be done in digital format, the system would no longer be, by definition, an analog-only system. It would be a hybrid analog/digital system.³⁷

ACA claims that a small number of cable systems that rely on the HD carriage exemption would benefit from the requested clarification, and that this number is decreasing.³⁸ Even so, ACA asserts, some analog-only systems will remain in operation, and many of those systems provide the only available video service in rural areas where over-the-air reception of broadcast signals is infeasible.³⁹

III. DISCUSSION

10. We tentatively conclude that it would serve the public interest to extend the HD carriage exemption for an additional three years as requested by ACA. Based on the results of ACA’s survey, we tentatively conclude that the exemption is still necessary to protect the subscribers of small cable systems from the costs and service disruptions that may result from requiring those systems to deliver HD signals in HD beginning in June 2015. We seek comment on this tentative conclusion. We also seek comment on whether we should retain or revise the definition of the category of small cable systems eligible for the exemption. The fact that small operators that continue to rely on the exemption have, on average, only

³¹ *Id.* at 3, 15.

³² *Id.* at 15.

³³ *Id.* at 15-16. We note, however, that the number of ACA *members* reporting that they rely on the HD exemption has increased from 52 to 53. See *Fifth Report and Order*, 27 FCC Rcd at 6547, ¶ 20.

³⁴ *Petition* at 15-16.

³⁵ *Id.* at 16.

³⁶ As noted above, Section 614(b)(4)(A) of the Act requires that cable operators transmit local broadcast signals “without material degradation” and directs the Commission to “adopt carriage standards to ensure that, *to the extent technically feasible*, the quality of signal processing and carriage provided . . . will be no less than that provided . . . for the carriage of any other type of signal.” See 47 U.S.C. § 534(b)(4)(A) (emphasis added).

³⁷ See *Petition* at 17.

³⁸ *Id.*

³⁹ *Id.* ACA also asserts that in some cases, all-analog systems provide a locally operated, lower cost service that allows customers to receive basic cable programming without the need for set-top boxes. *Id.*

348 subscribers per system⁴⁰ suggests that our current definition of “small system” is overly broad. To the extent parties assert that we should restrict further the category of small systems eligible for the exemption, what is the appropriate small system standard? What, if any, harms would accrue to small systems if we were to narrow further the category of systems eligible for the exemption? What, if any, benefits would result from narrowing the exemption?

11. We seek comment on whether any circumstances have changed since release of the *Fifth Report and Order* that weigh in favor of revisiting our decision not to eliminate the HD carriage exemption for systems carrying any signal in HD.⁴¹ As noted, ACA’s data indicate that at least 20 percent of systems relying on the exemption are currently offering some HD digital television services.⁴² In particular, we request comment on whether there is any evidence that exempt systems that provide HD programming have discriminated unfairly against must-carry HD signals in favor of other HD signals. We also request comment on whether systems that carry a significant amount of HD programming, such as ten HD channels, should continue to be able to qualify for the exemption.

12. In addition, we seek comment on the costs and benefits of the exemption for broadcasters and cable subscribers. Commenters should quantify any asserted costs or benefits. We also request comment on whether any claimed benefits to small cable systems of extending the exemption for another three years would outweigh the costs to broadcasters and cable subscribers. How many, if any, small systems relying on the exemption have received complaints from subscribers about the absence or amount of HD programming available to them? ACA’s data also reveal that some systems relying on the exemption currently provide broadband service.⁴³ How many, if any, such systems would reduce or eliminate such service if required to carry HD signals in June 2015?

13. We also invite comment on whether an additional three years will provide adequate time for eligible systems to upgrade their facilities to provide HD signals. Although ACA’s data indicate that at least 200 fewer cable systems are relying on the HD exemption today than did in 2012,⁴⁴ the data also indicate that the number of ACA cable operator members relying on the HD exemption has not changed significantly.⁴⁵ Therefore, do these data points reflect actual progress of ACA members coming into compliance with the HD carriage requirement? For example, to what extent is the decrease in the number of systems relying on the exemption attributable to the fact that some operators have expanded system capacity to provide signals in HD (thus rendering them ineligible for the exemption), or the fact that systems have ceased operations?⁴⁶ In addition, ACA estimates that more than 70 of the 143 systems that

⁴⁰ *Id.* at 4-5.

⁴¹ As noted above, the Commission, in the *Fifth Report and Order*, declined to eliminate application of the HD carriage exemption to systems that carry any signal in HD on the grounds that a system’s ability to offer some HD service did not refute an argument that offering additional HD service was burdensome, and that not allowing such systems to invoke the exemption would discourage them from taking incremental steps to offer more HD programming to subscribers. *See supra* note 12.

⁴² *Petition* at 5-6.

⁴³ *Id.* at 5-7 and Tables 2, 3.

⁴⁴ *See supra* ¶ 8.

⁴⁵ *Compare Fifth Report and Order*, 27 FCC Rcd at 6547, ¶ 20 (citing ACA’s report that “at least 52 of its members” rely on the exemption) *with Petition* at 4-5 (reporting that “at a minimum, 53 ACA members . . . continue to rely on the HD carriage exemption”).

⁴⁶ Although ACA states that “some systems that relied on the HD exemption in the past no longer rely upon it because a business case materialized for an upgrade to occur,” ACA also asserts that “system shutdowns [will be] the primary reason that there will be fewer systems relying on the HD exemption” in the next three years. *Petition* at 16 and n.33. ACA thus contends that “the benefit of the HD exemption is not only in avoiding the hastening of system closings, but in giving systems time to make upgrades possible.” *Id.*

currently invoke the exemption are expected to be eligible for the exemption in June 2018.⁴⁷ To the extent some systems expect that they still will be unable to provide HD signals in three years, when would such systems likely be able to comply with an HD carriage requirement? That is, we invite comment on the plans of these small systems to upgrade to HD. We seek comment on whether there are any systems for which the costs of providing HD signals likely will outweigh the benefits for the indefinite future, and, if so, the projected number of such systems. We invite comment on any other issues that are relevant to our determination whether to extend the HD carriage exemption for small cable systems. We also seek comment on any other approach to this issue that would appropriately balance the interest of broadcast stations in being carried in HD and the technical and financial limitations some small cable operators face. In addition, we request comment on whether there is any merit to ACA's argument that requiring small systems to provide HD signals at this time would be inequitable given the uncertainty surrounding the broadcast spectrum incentive auction.

14. We note that the HD exemption was not intended to be permanent and that, based on ACA's survey, a number of systems must make greater progress in complying with the HD carriage requirement. Assuming we were to adopt our tentative conclusion to extend the exemption for three more years, we seek comment on what steps we can take to facilitate such compliance within that time period. For example, should we require individual cable systems that rely on the exemption to file information with the Commission indicating such, so that we can better understand the particular technical and financial challenges faced by these systems and track each system's progress for coming into compliance with the HD carriage requirement?

15. Finally, we seek comment on ACA's request for clarification that all-analog systems are not subject to the HD carriage requirement because such carriage is technically infeasible under Section 614(b)(4)(A) of the Act and its implementing rules. How many cable systems that currently rely on the exemption are all-analog systems? To what extent are all-analog systems capable of passing the ATSC⁴⁸ digital broadcast signal through to their customers for reception on digital televisions? What upgrades, if any, to an all-analog system's cable amplifiers and other equipment outside the headend would be required to support passing through the ATSC signal on a cable channel? What upgrades would be required in the headend?

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

16. As required by the Regulatory Flexibility Act of 1980 ("RFA"),⁴⁹ the Commission has prepared an Initial Regulatory Flexibility Act Analysis ("IRFA") relating to this *Fifth Further Notice*. The IRFA is attached to this *Fifth Further Notice* as an Appendix.

B. Paperwork Reduction Act

17. This document seeks comment on potential information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the potential information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public

⁴⁷ *Id.* at 15-16.

⁴⁸ Section 73.682(d) of the Commission's rules prescribes that digital broadcast television signals must comply with certain privately developed engineering protocols that the rule incorporates by reference. *See* 47 C.F.R. § 73.682(d). The channel identification data that a station transmits, for example, must comply with "ATSC A/65C: 'ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006,' (January 2, 2006)." *Id.*

⁴⁹ *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").

Law 104-13.⁵⁰ In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the potential information collection burden for small business concerns with fewer than 25 employees.⁵¹

C. *Ex Parte* Rules

18. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁵² Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

D. Filing Requirements

19. Pursuant to sections 1.415 and 1.419 of the Commission’s rules,⁵³ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS).⁵⁴

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

⁵⁰ 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.).

⁵¹ 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).

⁵² 47 C.F.R. §§ 1.1200 *et seq.*

⁵³ *See* 47 C.F.R. §§ 1.415, 1419.

⁵⁴ *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

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

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

22. *Additional Information.* For additional information on this proceeding, contact Raelynn Remy of the Policy Division, Media Bureau, at raelynn.remy@fcc.gov or (202) 418-2936.

V. ORDERING CLAUSES

23. **IT IS ORDERED** that, pursuant to the authority found in Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 534, and 535, this *Fifth Further Notice of Proposed Rulemaking* is **ADOPTED**.

24. **IT IS FURTHER ORDERED** that the Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Fifth Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ the Commission has prepared this Initial Regulatory Flexibility Act Analysis (“IRFA”) of the possible economic impact on a substantial number of small entities by the actions proposed in this *Fifth Further Notice of Proposed Rulemaking* (“*Fifth Further Notice*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Fifth Further Notice* as indicated on its first page. The Commission will send a copy of the *Fifth Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).² In addition, the *Fifth Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposals

2. In the accompanying *Fifth Further Notice*, the Commission seeks comment on, among other things, whether to extend for an additional three years the exemption from the requirement to carry high definition (“HD”) broadcast signals under the “material degradation” provisions of the Communications Act of 1934, as amended, that it granted to certain small cable systems in the 2012 *Fifth Report and Order* (“HD carriage exemption”).⁴ The *Fifth Further Notice* stems from a Petition for Rulemaking filed by the American Cable Association principally requesting that the Commission extend this exemption, which will expire on June 12, 2015 without action by the Commission. In the *Fifth Further Notice*, the Commission tentatively concludes that the public interest would be served by extending the HD carriage exemption for three years, or until June 12, 2018. In particular, the Commission tentatively concludes that the HD carriage exemption is still necessary to protect the subscribers of small cable systems from the costs and service disruptions that may result from requiring those systems to deliver HD signals in HD beginning in June 2015. The exemption applies to operators of cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all MVPD subscribers, and to those with an activated channel capacity of 552 MHz or less.

B. Legal Basis

3. The authority for the action proposed in this rulemaking is contained in Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 534, and 535.

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

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 proposed actions if adopted.⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁶ In addition, the term “small business” has

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ See *Fifth Further Notice* at ¶¶ 10-15.

⁵ 5 U.S.C. § 603(b)(3).

⁶ 5 U.S.C. § 601(b).

the same meaning as the term “small business concern” under the Small Business Act.⁷ 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).⁸ The action proposed herein will affect small cable system operators and small television broadcast stations. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

5. *Cable Companies and Systems.* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.⁹ Industry data indicate that there are currently 660 cable operators.¹⁰ Of this total, all but ten cable operators nationwide are small under this size standard.¹¹ In addition, under the Commission’s rate regulation rules, a “small system” is a cable system serving 15,000 or fewer subscribers.¹² Current Commission records show 4,629 cable systems nationwide.¹³ Of this total, 4,057 cable systems have less than 20,000 subscribers, and 572 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

6. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”¹⁴ There are approximately 54 million cable video subscribers in the United States today.¹⁵ Accordingly, an operator serving fewer than 540,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not

⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 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.”

⁸ 15 U.S.C. § 632.

⁹ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, ¶ 28 (1995).

¹⁰ NCTA, Industry Data, Number of Cable Operators and Systems, <http://www.ncta.com/Statistics.aspx> (visited October 13, 2014). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-6, ¶ 24 (2013) (“15th Annual Competition Report”).

¹¹ See SNL Kagan, “Top Cable MSOs – 12/12 Q”; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>.

¹² 47 C.F.R. § 76.901(c).

¹³ The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on October 10, 2014. A cable system is a physical system integrated to a principal headend.

¹⁴ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

¹⁵ See NCTA, Industry Data, Cable’s Customer Base, <http://www.ncta.com/industry-data> (visited October 13, 2014).

exceed \$250 million in the aggregate.¹⁶ Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard.¹⁷ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.¹⁸ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

7. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.¹⁹ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁰ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”²¹ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.²² Census data for 2007 shows that there were 3,188 firms that operated for that entire year.²³ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.²⁴ Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities.

8. *Television Broadcasting.* This economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”²⁵ The SBA has created the following

¹⁶ 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

¹⁷ *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

¹⁸ 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 C.F.R. § 76.901(f).

¹⁹ 47 U.S.C. § 571(a)(3)-(4); *see Implementation of Section 19 of the 1992 Cable Act and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) (“13th Annual Competition Report”).

²⁰ *See* 47 U.S.C. § 573.

²¹ *See* 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.” U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²² 13 C.F.R. § 121.201; 2012 NAICS code 517110.

²³ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

²⁴ *Id.*

²⁵ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

small business size standard for such businesses: those having \$38.5 million or less in annual receipts.²⁶ The 2007 U.S. Census indicates that 808 firms in this category operated in that year. Of that number, 709 had annual receipts of \$25,000,000 or less, and 99 had annual receipts of more than \$25,000,000.²⁷ Because the Census has no additional classifications that could serve as a basis for determining the number of stations whose receipts exceeded \$38.5 million in that year, we conclude that the majority of television broadcast stations were small under the applicable SBA size standard.

9. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,387 stations.²⁸ Of this total, 1,221 stations (or about 88 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 2, 2014. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395.²⁹ NCE stations are non-profit, and therefore considered to be small entities.³⁰ Based on these data, we estimate that the majority of television broadcast stations are small entities.

10. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations³¹ must be included. Because we do not include or aggregate revenues from affiliated companies in determining whether an entity meets the revenue threshold noted above, our estimate of the number of small entities affected is likely overstated. In addition, we note that one element of the definition of “small business” is that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, our estimate of small television stations potentially affected by the proposed rules includes those that could be dominant in their field of operation. For this reason, such estimate likely is over-inclusive.

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

11. The accompanying *Fifth Further Notice* seeks comment on, among other things, whether to extend for an additional three years the HD carriage exemption, which would affect small cable system operators and television broadcast stations. The exemption benefits small cable system operators by providing them with continued flexibility, and imposes no new regulatory compliance burdens on small television broadcast stations who need take no action as a result of the proposed extension.

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

12. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of

²⁶ 13 C.F.R. § 121.201; 2012 NAICS code 515120.

²⁷ U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2007* (515120), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

²⁸ See *Broadcast Station Totals as of June 30, 2014*, Press Release (MB rel. July 9, 2014) (*Broadcast Station Totals*) at https://apps.fcc.gov/edocs_public/attachmatch/DOC-328096A1.pdf.

²⁹ See *Broadcast Station Totals*, *supra*.

³⁰ See generally 5 U.S.C. §§ 601(4), (6).

³¹ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 C.F.R. § 21.103(a)(1).

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.³² We seek comment on the applicability of any of these alternatives to affected small entities.

13. Extending the HD carriage exemption likely would not have an adverse economic impact on any small entities, and would have a positive economic impact on small cable system operators that choose to take advantage of the exemption. In addition, extending the exemption would not impose any significant burdens on small television stations. We invite small entities to submit comment on the impact of extending the HD carriage exemption, and on how the Commission could minimize any potential burdens on small entities.

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

14. None.

³² 5 U.S.C. § 603(c)(1) – (c)(4).