

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

SIXTH REPORT AND ORDER

Adopted: June 10, 2015

Released: June 10, 2015

By the Commission:

I. INTRODUCTION

1. In this Sixth Report and Order, we adopt a proposal filed jointly by the American Cable Association ("ACA") and the National Association of Broadcasters ("NAB") that modifies and extends the exemption from the requirement to carry high definition ("HD") broadcast signals under "material degradation" provisions of the Communications Act of 1934, as amended ("the Act") that the Commission granted to certain small cable systems in 2012 ("HD carriage exemption"). As discussed below, we find that the joint proposal strikes a reasonable balance between the interests of broadcast stations in having their HD signals transmitted without material degradation and the technical and financial constraints that some small cable operators continue to experience. We set forth below a brief history of the HD carriage exemption and explain the basis for our decision.

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 Letter from Ross Lieberman, Senior Vice President of Government Affairs, American Cable Association and Erin L. Dozier, Senior Vice President and Deputy General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, in CS Docket No. 98-120 (filed May 14, 2015) ("Joint Proposal"); Letter from Ross Lieberman, Senior Vice President of Government Affairs, American Cable Association and Erin L. Dozier, Senior Vice President and Deputy General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, in CS Docket No. 98-120 (filed May 27, 2015) (clarifying two points in the joint proposal) ("Joint Clarification").

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 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.

(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 To address concerns expressed by small cable operators about cost and technical capacity, the Commission in 2008 granted a three-year exemption from the HD carriage requirement to certain small cable systems.⁶ In particular, the Commission applied the exemption to 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 In 2012, the Commission extended the HD carriage exemption for those cable systems until June 12, 2015.⁸

3. In January 2015, ACA filed a Petition for Rulemaking asking the Commission: (i) to commence a rulemaking proceeding to extend for an additional three years the HD carriage exemption; and (ii) to clarify that analog-only cable systems are not subject to the HD carriage requirement because carriage of HD signals by such systems is not “technically feasible” under Section 614(b)(4)(A) of the Act.⁹ On March 12, 2015, the Commission issued a *Fifth Further Notice of Proposed Rulemaking* in this proceeding that, among other things, proposed to extend the HD carriage exemption for three more years.¹⁰ In their initial pleadings responsive to the *Fifth Further Notice*, multichannel video programming distributors (“MVPDs”) supported the Commission’s proposal to extend the HD carriage exemption¹¹ and (Continued from previous page) _____
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 *Fourth Report and Order*, 23 FCC Rcd at 13620-21, ¶ 7. 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. *Id.* at 13620, ¶ 5.

⁸ See *Fifth Report and Order*, 27 FCC Rcd at 6546-49, ¶¶ 19-23.

⁹ See American Cable Association Petition for Rulemaking, CS Docket No. 98-120 (filed Jan. 27, 2015) (“*Petition*”). ACA asserts in its petition that the HD carriage exemption has been effective in providing small systems with additional time to provide must-carry signals in HD, but that the exemption remains vital to protect a limited number of systems and their subscribers from the costs and service disruptions that likely would result from requiring HD carriage beginning in June 2015. See *Petition* at 2. ACA asserts that a decision not to extend the exemption for another three years would impose significant burdens on a large majority of covered systems and force them to drop channels, increase cable rates, or exit the market, thereby harming consumers. *Id.* at 7-15.

¹⁰ See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Fifth Further Notice of Proposed Rulemaking, FCC 15-29 (rel. Mar. 12, 2015) (“*Fifth Further Notice*”). The *Fifth Further Notice* also sought comment on, among other things, whether to retain or revise the category of small cable systems eligible for the exemption; whether to revisit the Commission’s previous decision not to eliminate the HD carriage exemption for systems carrying any signal in HD; whether there are any other approaches to this issue that would appropriately balance the interests of broadcast stations and small cable operators; and whether to clarify that analog-only systems are not subject to the HD carriage requirement. See *Fifth Further Notice* at ¶¶ 10-11, 13-15. A list of commenters is set forth in Appendix A.

¹¹ See generally ACA Comments; NCTA Comments; WTA Comments; TDS Reply.

broadcasters opposed it.¹² After a series of discussions aimed at resolving their differences, ACA and NAB, on May 14, 2015, filed the joint proposal with the Commission.¹³

III. DISCUSSION

4. We conclude that it would serve the public interest to adopt the joint proposal put forth by ACA and NAB. Throughout the course of this proceeding, ACA and NAB have expressed differing views about the appropriate scope and duration of the HD carriage exemption, among other issues.¹⁴ We find that the compromise reached by ACA and NAB as reflected in the joint proposal reasonably balances the interest of broadcast stations in having their HD signals transmitted in HD and the interest of small cable operators in upgrading their systems to carry HD broadcast signals in a manner that is cost efficient.¹⁵ We note that no industry commenter has lodged any objection to the joint proposal.¹⁶ We, therefore, find that the public interest would be served by adopting ACA and NAB's joint proposal, as set forth below:¹⁷

- HD Carriage Exemption Eligibility after June 12, 2015: A small cable system not offering any programming in HD is exempt from the HD carriage requirement. Beginning December 12, 2016, a system utilizing the HD carriage exemption shall no longer be eligible to use it once the system offers any programming in HD.
- Notice: Beginning December 12, 2016, at the time a small cable system utilizing the HD carriage exemption offers any programming in HD, the system must give notice that it is offering HD programming to all broadcast stations in its market that are carried on its system.

¹² See NAB Comments; NAB Reply.

¹³ See *Joint Proposal*. See also *Joint Clarification*; Letter from Erin L. Dozier, Senior Vice President and Deputy General Counsel, National Association of Broadcasters, and Ross Lieberman, Senior Vice President of Government Affairs, American Cable Association, to Marlene H. Dortch, Secretary, FCC, in CS Docket No. 98-120 (filed May 13, 2015) (stating that “there may be circumstances under which [NAB and ACA] could settle on a joint set of principles despite those principles not being directly aligned with their respective sets of comments filed in response to the [Fifth Further Notice]”).

¹⁴ In its pleadings responsive to the *Fifth Further Notice*, for example, ACA had argued that we should continue to define small cable system as one that serves 2,500 or fewer subscribers and is unaffiliated with a cable operator serving more than 10 percent of all MVPD subscribers; NAB had urged us to circumscribe eligibility to systems serving 1,000 or fewer subscribers that are not affiliated with a cable operator serving more than one million subscribers (or approximately one percent of MVPD subscribers nationwide). See ACA Comments at 8-10; ACA Reply at 6-10; NAB Comments at 7-8; NAB Reply at 5-6. See also NCTA Comments at 2-4; WTA Comments at 8-10. In addition, ACA had advocated to continue applying the HD carriage exemption to systems that provide HD programming, see ACA Comments at 10-12; ACA Reply at 17-19, whereas NAB had favored eliminating the exemption for systems providing non-broadcast channels in HD. See NAB Comments at 5-7; NAB Reply at 3-5.

¹⁵ See *Joint Proposal* at 1 (stating that despite their respective positions on the record, “neither [ACA nor NAB] would object (through petitions for reconsideration or litigation) to a Commission order [that adopted the proposals set forth therein]”). See also Letter from Patricia Cave, Director, Government Affairs, WTA, to Marlene H. Dortch, Secretary, FCC, in CS Docket No. 98-120 (filed May 27, 2015) (generally supporting the joint proposal).

¹⁶ NAB is the only industry commenter in this proceeding to oppose the Commission's proposal to extend the HD carriage exemption. See NAB Comments; NAB Reply. Cf. Comments of Meg Sterchi, Student, University of Missouri School of Law (asserting, among other things, that it is not in the public interest to extend the HD carriage exemption for three more years). We note that Meg Sterchi was the only non-industry commenter in the proceeding.

¹⁷ See *Joint Proposal*; *Joint Clarification*. We need not resolve in this order the issue whether analog-only cable systems are subject to the HD carriage requirement under Section 614(b)(4)(A) of the Act because under the terms of the joint proposal, cable systems that do not offer any programming in HD, including analog-only systems, will be exempt from the HD carriage requirement. See *Joint Proposal* at 1. Thus, our adoption of the joint proposal renders this issue moot.

- Transition for Some Systems: A cable system utilizing the HD carriage exemption on June 12, 2015 that does not qualify for the HD carriage exemption on or after June 13, 2015 must come into compliance by December 12, 2016. A cable system that becomes ineligible for the HD carriage exemption after December 12, 2016 would be expected to come into compliance promptly.
- Revisions to Definition of “Small” Cable System: “Small” cable systems eligible for the HD carriage exemption would be redefined as those: (i) serving 1,500 (rather than 2,500) or fewer subscribers, and not affiliated with a cable operator serving more than 2 percent (rather than 10 percent) of all MVPD subscribers, or (ii) having an activated channel capacity of 552 MHz or less.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

5. As required by the Regulatory Flexibility Act of 1980 (“RFA”),¹⁸ the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Sixth Report and Order*. The FRFA is set forth in Appendix B.

B. Final Paperwork Reduction Act Analysis

6. This *Sixth Report and Order* contains new information collection requirements subject to the Paperwork Reduction Act of 1995.¹⁹ It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), 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.

C. Congressional Review Act

7. The Commission will send a copy of this *Sixth Report and Order* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.²⁰

D. Additional Information

8. 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

9. Accordingly, **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 *Sixth Report and Order* **IS ADOPTED** and will become effective thirty (30) days after the date of publication in the *Federal Register*, except that the “Notice” rule, which contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13, will not become effective until the Federal Communications Commission publishes a notice in the Federal Register announcing OMB approval and the effective date of that rule.

¹⁸ *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”).

¹⁹ 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.).

²⁰ *See* 5 U.S.C. § 801(a)(1)(A).

10. **IT IS FURTHER ORDERED** that, pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission **WILL SEND** a copy of this *Sixth Report and Order* in CS Docket No. 98-120 in a report to Congress and the Government Accountability Office.

11. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **WILL SEND** a copy of this *Sixth Report and Order* in CS Docket No. 98-120, including the Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**List of Commenters****COMMENTS**

American Cable Association (ACA)
National Association of Broadcasters (NAB)
National Cable and Telecommunications Association (NCTA)
WTA – Advocates for Rural Broadband (WTA)
Meg Sterchi

REPLY COMMENTS

American Cable Association
National Association of Broadcasters
National Cable and Telecommunications Association
TDS Telecommunications Corporation (TDS)
WTA – Advocates for Rural Broadband

APPENDIX B

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)¹ an Initial Regulatory Flexibility Act Analysis (“IRFA”) was incorporated in the *Fifth Further Notice* in this proceeding.² The Commission sought written public comment on the proposals in the *Fifth Further Notice*, including comment on the IRFA. The Commission received no comments on the IRFA. This Final Regulatory Flexibility Act Analysis (“FRFA”) conforms to the RFA.³

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

2. This proceeding stems from a Petition for Rulemaking filed by the American Cable Association in January 2015 principally requesting that the Commission extend 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”). The HD carriage exemption will expire on June 12, 2015 without action by the Commission.

3. In the accompanying *Sixth Report and Order*, the Commission adopts a proposal filed jointly by the American Cable Association (“ACA”) and the National Association of Broadcasters (“NAB”) that modifies and extends the HD carriage exemption. The joint proposal reflects a compromise between ACA and NAB on issues concerning, among other things, the appropriate scope and duration of the HD carriage exemption. The *Sixth Report and Order* concludes that the joint proposal strikes a reasonable balance between the interests of broadcast stations in having their HD signals transmitted without material degradation and the interests of small cable operators in upgrading their systems to provide HD broadcast signals in a manner that is cost efficient.

4. In particular, the *Sixth Report and Order* adopts the following provisions that are set forth in the joint proposal:

- **HD Carriage Exemption Eligibility after June 12, 2015:** A small cable system not offering any programming in HD is exempt from the HD carriage requirement. Beginning December 12, 2016, a system utilizing the HD carriage exemption shall no longer be eligible to use it once the system offers any programming in HD.
- **Notice:** Beginning December 12, 2016, at the time a small cable system utilizing the HD carriage exemption offers any programming in HD, the system must give notice that it is offering HD programming to all broadcast stations in its market that are carried on its system.
- **Transition for Some Systems:** A cable system utilizing the HD carriage exemption on June 12, 2015 that does not qualify for the HD carriage exemption on or after June 13, 2015 must come into compliance by December 12, 2016. A cable system that becomes ineligible for the HD carriage exemption after December 12, 2016 would be expected to come into compliance promptly.
- **Revisions to Definition of “Small” Cable System:** “Small” cable systems eligible for the HD carriage exemption would be redefined as those: (i) serving 1,500 (rather than 2,500)

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. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

² See *Fifth Further Notice*, Appendix.

³ See 5 U.S.C. § 604.

or fewer subscribers, and not affiliated with a cable operator serving more than 2 percent (rather than 10 percent) of all MVPD subscribers, or (ii) having an activated channel capacity of 552 MHz or less.

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

5. The Commission did not receive any comments in response to the IRFA.

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

6. 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.⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁶ 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).⁷ The action taken in the accompanying *Sixth Report and Order* 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.

7. *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.⁸ Industry data indicate that there are currently 660 cable operators.⁹ Of this total, all but ten cable operators nationwide are small under this size standard.¹⁰ In addition, under the Commission’s rate regulation rules, a “small system” is a cable system serving 15,000 or fewer subscribers.¹¹ Current Commission records show 4,629 cable systems

⁴ 5 U.S.C. § 603(b)(3).

⁵ 5 U.S.C. § 601(b).

⁶ 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.”

⁷ 15 U.S.C. § 632.

⁸ 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).

⁹ 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”).

¹⁰ See SNL Kagan, “Top Cable MSOs – 12/12 Q”; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>.

¹¹ 47 C.F.R. § 76.901(c).

nationwide.¹² 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.

8. *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.”¹³ There are approximately 54 million cable video subscribers in the United States today.¹⁴ 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 exceed \$250 million in the aggregate.¹⁵ Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard.¹⁶ 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.¹⁷ 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.

9. *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.¹⁸ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,¹⁹ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”²⁰ The SBA has developed a small business size standard for this

¹² 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.

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

¹⁴ See NCTA, Industry Data, Cable’s Customer Base, <http://www.ncta.com/industry-data> (visited October 13, 2014).

¹⁵ 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).

¹⁶ See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

¹⁷ 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).

¹⁸ 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”).

¹⁹ See 47 U.S.C. § 573.

²⁰ 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>.

category, which is: all such businesses having 1,500 or fewer employees.²¹ Census data for 2007 shows that there were 3,188 firms that operated for that entire year.²² Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.²³ Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities.

10. *Television Broadcasting.* This economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”²⁴ The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.²⁵ 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 \$25,000,000.²⁶ 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.

11. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,387 stations.²⁷ 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 395.²⁸ NCE stations are non-profit, and therefore considered to be small entities.²⁹ Based on these data, we estimate that the majority of television broadcast stations are small entities.

12. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations³⁰ 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

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

²² 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.

²³ *Id.*

²⁴ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

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

²⁶ 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.

²⁷ 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.

²⁸ See *Broadcast Station Totals*, *supra*.

²⁹ See generally 5 U.S.C. §§ 601(4), (6).

³⁰ “[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).

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

13. In this section, we describe the reporting, recordkeeping, and other compliance requirements that the Commission adopts in the *Sixth Report and Order*.

14. *Reporting Requirements.* The *Sixth Report and Order* does not adopt reporting requirements.

15. *Recordkeeping Requirements.* The joint proposal adopted in the *Sixth Report and Order* requires that, “[b]eginning December 12, 2016, at the time a small cable system utilizing the HD carriage exemption offers any programming in HD, the system must give notice that it is offering HD programming to all broadcast stations in its market that are carried on its system.” This requirement obligates certain small cable operators to notify broadcast stations, and thus, to make and keep records of such notification.

16. *Other Compliance Requirements.* The joint proposal adopted in the *Sixth Report and Order*:

- Requires “[a] cable system utilizing the HD carriage exemption on June 12, 2015 that does not qualify for the HD carriage exemption on or after June 13, 2015 [to] come into compliance [with the HD carriage requirement] by December 12, 2016. A cable system that becomes ineligible for the HD carriage exemption after December 12, 2016 would be expected to come into compliance promptly.”
- Requires that “[b]eginning December 12, 2016, a system utilizing the HD carriage exemption shall no longer be eligible to use it once the system offers any programming in HD.”

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

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.³¹ We seek comment on the applicability of any of these alternatives to affected small entities.

18. The HD carriage exemption, as modified in the *Sixth Report and Order*, provides continued regulatory relief to operators of certain small cable systems, *i.e.*, those that (i) serve 1,500 or fewer subscribers and are not affiliated with a cable operator serving more than two percent of all MVPD subscribers; or (ii) have an activated channel capacity of 552 MHz or less. Although some eligible cable systems will no longer qualify for the exemption as a result of the *Sixth Report and Order*, the joint proposal adopted in the order gives such systems until December 12, 2016 to come into compliance with the HD carriage requirement. We note that the modifications made to the exemption in the *Sixth Report and Order* were an outgrowth of discussions between ACA and NAB and thus reflect the interests of both small cable operators and broadcasters (including small broadcasters), respectively. The HD carriage exemption has a positive economic impact on any cable system operator that takes advantage of the exemption, and imposes no significant burdens on small television stations.

³¹ 5 U.S.C. § 603(c)(1) – (c)(4).

F. Report to Congress

19. The Commission will send a copy of this *Sixth Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA.³² In addition, the Commission will send a copy of this *Sixth Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this *Sixth Report and Order* and the FRFA (or summaries thereof) also will be published in the Federal Register.³³

³² See *id.* § 801(a)(1)(A).

³³ See *id.* § 604(b).