

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

In the Matter of)	
)	
Amendment of Commission Rule Requiring)	MB 20-35
Records of Cable Operator Interests in Video)	
Programming)	
)	
Modernization of Media Regulation Initiative)	MB 17-105

NOTICE OF PROPOSED RULEMAKING

Adopted: February 28, 2020

Released: March 2, 2020

Comment Date: (30 days after date of publication in the Federal Register)

Reply Comment Date: (45 days after date of publication in the Federal Register)

By the Commission: Chairman Pai and Commissioner O’Rielly issuing separate statements;
Commissioners Rosenworcel and Starks concurring and issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on whether to eliminate or modify section 76.1710 of the Commission’s rules, which requires that cable operators maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services.¹ The rule also requires that their online public inspection file contain information regarding cable operators’ carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest.² We also seek comment on whether to eliminate or modify section 76.1700(a)(7), which lists cable operator interests in video programming as one of the records to be maintained by cable system operators in their public inspection file.³ In conjunction with the Commission’s Modernization of Media Regulation Initiative (Media Modernization),⁴ parties have urged us to re-examine several categories of information in the online public inspection file that may be outdated, including records regarding cable operators’ interests in video programming.⁵ Our analysis of this rule indicates that its original purpose was to aid in the compliance of

¹ See 47 CFR § 76.1710 (“Cable operators are required to maintain records in their public file for a period of three years regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest. These records must be made available to local franchise authorities, the Commission, or members of the public on reasonable notice and during regular business hours.”).

² 47 CFR § 76.1710. We refer herein to both parts of this rule collectively as the “cable operator interests in video programming recordkeeping” requirement.

³ See 47 CFR § 76.1700(a)(7). In addition, we seek comment on whether to eliminate or modify Note 2 to section 76.504, which cross-references section 76.1710. See 47 CFR § 76.504.

⁴ *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (2017).

⁵ Verizon Comments, MB Docket No. 17-105, at 8 (rec. July 7, 2017) (Verizon Comments); Verizon Reply, MB Docket No. 17-105, at 4 (rec. Aug. 4, 2017); see also Frontier Communications Reply, MB Docket No 17-105, at 4-5 (rec. Aug. 4, 2017) (Frontier Reply); Independent Telephone and Telecommunications Alliance (ITTA) Reply, MB Docket No. 17-105, at 4-5 (rec. Aug. 4, 2017) (ITTA Reply) (agreeing with Verizon that the cable operator

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a Commission regulation that was reversed and remanded over eighteen years ago by the U.S. Court of Appeals for the District of Columbia Circuit. Accordingly, we seek comment on whether to eliminate or modify this rule. Through this NPRM, we advance our efforts to modernize our media regulations and eliminate outdated or unnecessary requirements.

II. BACKGROUND

2. The Commission originally adopted the cable operator interests in video programming recordkeeping requirement in 1993 as a method of monitoring compliance with the Commission's cable channel occupancy limits, which restricted the number of channels that could be occupied on a vertically integrated cable system by video programmers in which the cable operator had an attributable interest.⁶ Under this requirement, cable operators are required to maintain in their public inspection files, for a period of at least three years, records regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they also have an attributable interest.⁷ The Commission stated that such records would enable local franchise authorities to aid the Commission in monitoring compliance with the channel occupancy limits in their respective franchise areas.⁸ Specifically, the Commission asserted that a franchise authority could request to inspect a local cable operator's records should the franchise authority have questions as to whether the cable operator was in violation of the channel occupancy limits.⁹ After such inspection, if a franchise authority believed that a violation existed, it could file a complaint with the Commission.¹⁰ The Commission also stated that other parties seeking to report potential violations of the channel occupancy limits could also contact the local franchise authority or report the matter directly to the Commission.¹¹

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interests in video programming record is information that is of no use or interest to consumers and that the Commission should eliminate some categories in the cable public inspection file if it does not eliminate the filing obligation altogether); National Cable and Telecommunications Association (NCTA) Comments, MB Docket No. 17-105, at 22 (rec. July 5, 2017) (NCTA Comments) (arguing that the Commission should eliminate or modernize several parts of the public file, which are unnecessary, duplicative, or unduly burdensome).

⁶ *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, MB Docket No. 92-264, Second Report and Order, 8 FCC Rcd 8565, 8606, para. 98 (1993) (*Channel Occupancy Order*). The Commission's channel occupancy limits placed a 40% cap on the number of channels that could be occupied on a vertically integrated cable system (with up to 75 channels) by video programmers in which the cable operator had an attributable interest. *Id.* at 8567, para. 4. For systems with more than 75 channels, the rule required that at least 45 channels be devoted to unaffiliated programming. *Id.* at para. 84 n.107. The Commission adopted channel occupancy limits consistent with Section 11 of the Cable Television Consumer Protection and Competition Act of 1992. *Id.* at 8583, para. 41; 47 U.S.C. § 533(f)(1)(B) (requiring the establishment of reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an attributable interest).

⁷ *Channel Occupancy Order*, 8 FCC Rcd at 8606, para. 98. The Commission initially proposed to enforce channel occupancy limits through a process of certification whereby cable operators would certify annually to the Commission that their cable systems are in compliance with the channel occupancy limits but, after receiving comments, the Commission determined that the recordkeeping requirement would be a preferable and less burdensome approach. *Id.* at 8605-06, paras. 95-98.

⁸ *Id.* at 8606, para. 99.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

3. The Commission reorganized its public file rules in 1999 to reduce the regulatory burden faced by cable operators with regard to the recordkeeping requirements.¹² At that time, the cable operator interests in video programming recordkeeping requirement was moved from the channel occupancy limits provision in Subpart J of Part 76 of the Commission's rules—where it was originally placed upon adoption—to its own section in Subpart U, which consolidated for ease of administration the documents to be maintained by multichannel video and cable television services for public inspection.¹³

4. In 2001, the channel occupancy limits were reversed and remanded to the Commission by the U.S. Court of Appeals for the D.C. Circuit.¹⁴ However, despite that decision, the cable operator interests in video programming recordkeeping requirement has remained part of the public file requirements for cable operators.¹⁵ The Commission transitioned the public file requirements for cable operators to an online format in 2016, when the Commission expanded the list of entities required to post public inspection files to the Commission's online database.¹⁶ Since then, the cable operator interests in video programming recordkeeping requirement has been part of the online public inspection file to be maintained by cable system operators.¹⁷

5. In its comments to the Commission's Media Modernization proceeding, Verizon listed cable operator interests in video programming as one of several categories of information that should be eliminated from the online public inspection file.¹⁸ Verizon stated that such information is of no use or interest to consumers and, further, that few people access the public inspection file, given that it does not

¹² *1998 Biennial Regulatory Review—Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, CS Docket No. 98-132, Report and Order, 14 FCC Rcd 4653, 4653, para. 1 (1999) (“*1999 Streamlining Order*”). As part of the reorganization proceeding, the Commission sought comment on whether to remove or consolidate any public file requirements. *1998 Biennial Regulatory Review—Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, CS Docket No. 98-132, Notice of Proposed Rulemaking, 13 FCC Rcd 15219, 15220, para. 4 (1998) (noting that certain information cable operators are required to maintain “may be difficult to collect and inefficient to maintain, especially when that information is infrequently used or readily available through another source”).

¹³ *1999 Streamlining Order*, 14 FCC Rcd 4653, Appx. D.

¹⁴ See *Time Warner*, 240 F.3d at 1139. The court found that the Commission failed to justify its channel occupancy limits as not burdening substantially more speech than necessary. *Id.*

¹⁵ The Commission has sought comment on reinstating the channel occupancy limits but, to date, has found the record inadequate to support adopting a specific vertical limit on the ownership of video programming sources by owners of cable systems. See generally *Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order and Further Notice of Proposed Rulemaking, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, CS Docket Nos. 98-82 and 96-85, 23 FCC Rcd 2134, 2192, para. 135 (2008) (noting that the record contained no proposals for a specific limit, no evidence to support a specific limit, no methodology to help determine a specific limit, and no demonstration of any link between the harms of vertical integration and a specific limit designed to prevent these harms); *Commission's Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, 9381-82, para. 9 (2005) (finding no sound evidentiary basis for setting vertical limits as required by the D.C. Circuit) (*Second Channel Occupancy FNPRM*); *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, CS Docket Nos. 98-82 and 96-85, 16 FCC Rcd 17312, 17350-52 paras. 81-84 (2001) (seeking comment on vertical limit proposals after reversal by the D.C. Circuit).

¹⁶ *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No., 14-127, Report and Order, 31 FCC Rcd 526, 528, para. 4, Appx. B (2016).

¹⁷ 47 CFR § 76.1700(a)(7).

¹⁸ Verizon Comments at 8.

provide the kind of information typically sought by consumers.¹⁹ Verizon instead contended that the Commission can request this information, if needed, upon reasonable notice and time for production.²⁰ No commenter in the Media Modernization proceeding argued in favor of retaining the cable operator interests in video programming recordkeeping requirement specifically or described the utility of such information in particular.²¹

III. DISCUSSION

6. We seek comment on whether to eliminate or modify the cable operator interests in video programming recordkeeping rule. Specifically, as discussed below, we seek comment on whether there is any remaining purpose for this rule, other potential sources for this information, the burdens this requirement places on cable operators, and possible modifications to the rule.

7. We note that the cable operator interests in video programming recordkeeping requirement was adopted in order to assist in the enforcement of the Commission's cable channel occupancy limits. Given that those limits were reversed and remanded by the D.C. Circuit over eighteen years ago, should this requirement be eliminated? If not, what purpose does this rule serve today that would justify its retention?

8. We seek comment on whether and how this information regarding cable operator interests in video programming is used today, if at all. Do local franchising authorities, consumers, or other parties currently inspect the cable operator interests in video programming records in the online public inspection file? Are these records being utilized by local franchising authorities, consumers, or other parties to keep track of vertical integration? If so, for what purpose? We note that, as the recordkeeping requirement does not apply to other video programming distributors, the information in these records would only be useful for monitoring vertical integration in cable operators. Given the many video programming options from which consumers can choose today, have marketplace changes rendered this requirement less useful or relevant?

9. UCC et al. assert generally that the online public inspection file database is used to research and analyze how the entities required to maintain such files are serving their communities and meeting their obligations under the Commission's rules.²² If evidence of a particular use exists, commenters are encouraged to cite specific examples of how the information is being used currently, or has been used recently, by any party for any related purpose. We note that, in the over 26 years since the requirement was adopted, we are aware of only one instance in which the rule has been invoked.²³ Commenters should inform us as to the utility of the rule in today's competitive media marketplace.

¹⁹ *Id.* See also Frontier Reply at 5; ITTA Reply at 5 (agreeing with Verizon's characterization of cable operator interests in video programming as a category of information that is of no use or interest to consumers).

²⁰ Verizon Comments at 8. See also NCTA Comments at 26 (stating that cable operators do not object to the need to provide certain information to the public but question the imposition of recordkeeping costs when much of the public information is already available on cable company websites).

²¹ UCC et al. argue for maintaining the online public inspection file as a whole but do not refer specifically to the cable operator interests in video programming recordkeeping requirement. UCC et al. Reply at 1.

²² UCC et al. Reply at 2.

²³ We are aware of only one complaint—which was subsequently withdrawn—alleging violation of the rule. See *Communications Workers of America v. AT&T Broadband LLC*, Order, 16 FCC Rcd 11012 (CSB 2001) (granting the parties' joint request for withdrawal of the complaint). In one other instance, the Commission discovered an apparent violation of the rule but only took action based on other public inspection file violations. See *Time Warner Entertainment - Advance/Newhouse Subsidiary, LLC d/b/a Time Warner Cable 3701 N. Sillect Avenue Bakersfield, California 93308*, Forfeiture Order, 19 FCC Rcd 10412, 10413, para. 5 & n.10 (EB 2004) (stating that the public inspection file did not contain a statement of the operator's interest in video programming, in violation of Section

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10. If the Commission were to eliminate the cable operator interest in video programming recordkeeping rule, we seek comment on whether the Commission or interested parties could access such information through other methods that would be more efficient or less burdensome for cable operators than compiling such information and placing it in a public inspection file.²⁴ Would it be more cost effective for the Commission to undertake targeted information collections to acquire such information, if needed, as it does in the merger context?²⁵ We also seek comment on whether and to what extent such information is redundant with or superfluous to information the Commission otherwise collects.²⁶ Can such information be found readily online? Is there a publicly available database for such information? If so, are such alternative sources accurate and current? Are there costs associated with accessing these alternative sources? And are these sources adequate substitutes for information provided directly by cable operators themselves?

11. We also seek comment on the regulatory burden for cable operators to file this information, including the amount of time and resources required to complete each filing. Notably, there is no standard form filed by cable operators pursuant to this rule, and the rule does not state how frequently cable operators should file or update their information, instead stating only that they must maintain records regarding the nature and extent of their interests in their file for a period of three years.²⁷ How frequently are cable operators filing such information today? Is the information being provided and the filing frequency being adhered to consistent among different cable operators? Do the burdens and costs on cable operators outweigh the utility of the information? Do any burdens associated with this requirement place cable operators at a disadvantage vis-à-vis their video programming competitors?

12. If the Commission finds that the cable operator interests in video programming recordkeeping rule should be retained, we seek comment on whether modifications to the rule would be appropriate. If we were to modify the rule, what changes should we make to reduce the burden on cable operators? For instance, should the Commission clarify how often cable operators need to update their information? Should the Commission retain part of rule that requires reporting of attributable interests

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76.1710, but noting that the Notice of Apparent Liability for Forfeiture was based only on section 76.1700 violations).

²⁴ For example, in the past, the Commission has used information from various sources, such as cable company websites, published articles, and SNL Kagan, to identify affiliations between programming services and MVPDs for its Video Competition Reports. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 577-78, paras. 22-24, Appx. B, Tbl. B-1, Appx. C, Tbl. C-1, and Appx. D (MB 2017); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, 31 FCC Rcd 4472, 4480-81, paras. 21-22, Appx. B, Tbl. B-1, Appx. C, Tbl. C-1, and Appx. D (MB 2016).

²⁵ We note that the Commission has collected information on the percentage of video programming channels attributed to cable operator merger applicants via information requests in the past. See Letter from William T. Lake, Chief, Media Bureau, to Michael H. Hammer, James H. Casserly, Michael D. Hurwitz and Brien C. Bell, Willkie Farr & Gallagher LLP, Counsel for Comcast, Attach. at 5-6 (May 21, 2010) (on file in MB Docket No. 10-56); Letter from Donna C. Gregg, Chief, Media Bureau, FCC, to Brad Sonnenberg and James N. Zerefos, Adelphia Communications Corp., and Philip L. Verveer, Michael H. Hammer and Francis M. Buono, Willkie Farr & Gallagher LLP, Attach. at 3-6 (Dec. 5, 2005) (on file in MB Docket No. 05-192).

²⁶ For example, the Commission regularly seeks information regarding, and subsequently reports on, the state of vertical integration in the video programming marketplace as part of its report on competition, albeit at the MVPD industry level rather than focusing on individual cable operators. See *Communications Marketplace Report*, Report, 33 FCC Rcd 12558, 12603, para. 67 (2018); *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, 32 FCC Rcd 6654, 6662-63 (MB 2017).

²⁷ See 47 CFR § 76.1710(a).

but eliminate the part of the rule that requires reporting of carriage, given that channel lineup information is widely available elsewhere?²⁸

13. Finally, we seek information and data on the benefits and costs associated with possible elimination or modification of the cable operator interests in video programming recordkeeping rule. We ask commenters supporting retention, modification, or elimination of the rule to explain the anticipated economic impact of any proposed action, including the impact on small and independent entities, and, where possible, to quantify benefits and costs of proposed actions and alternatives.

IV. PROCEDURAL MATTERS

14. *Ex Parte Rules - Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁹ 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.

15. *Filing Requirements - Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules interested parties may file comments and reply comments on or before the dates indicated on the first page of this document.³⁰ Comments may be filed using ECFS.³¹

- Commenting parties may file comments in response to this Notice in MB Docket No. 18-349; interested parties are not required to file duplicate copies in the additional dockets listed in the caption of this notice.
- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- 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.

²⁸ See *Channel Lineup Requirements – Sections 76.1705 and 76.1700(a)(4)*, Report and Order, 34 FCC Red 2636 (2019) (eliminating rules requiring cable operators to maintain a channel lineup at their local office and make their channel lineups available via their online public inspection file when this information is publicly available elsewhere).

²⁹ 47 CFR §§ 1.1200 *et seq.*

³⁰ 47 CFR §§ 1.415, 1.419.

³¹ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
 - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, D.C. 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
 - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, D.C. 20554.

16. *Initial Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”³² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.³³ 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).³⁴

17. With respect to this Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in the Appendix. Written public comments are requested on the IRFA and must be filed in accordance with the same filing deadlines as comments on this Notice of Proposed Rulemaking, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this Notice of Proposed Rulemaking and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the Federal Register.

18. *Paperwork Reduction Act.* This document seeks comment on whether the Commission should adopt new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. 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 information collection burden for small business concerns with fewer than 25 employees.

19. *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 and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

³² 5 U.S.C. § 603.

³³ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, 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).

³⁴ 15 U.S.C. § 632.

20. *Additional Information.* For additional information on this proceeding, please contact Chad Guo of the Media Bureau, Industry Analysis Division, Chad.Guo@fcc.gov, (202) 418-0652.

V. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), 303(r), and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and 533, this Notice of Proposed Rulemaking **IS ADOPTED**.

22. **IT IS FURTHER ORDERED** that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking in MB Docket Nos. 20-35 and 17-105 on or before thirty (30) days after publication in the *Federal Register* and reply comments on or before forty five (45) days after publication in the *Federal Register*.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rule

Part 76 of Title 47 of the U.S. 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 continues to read as follows: AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 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 Section 76.504 by removing Note 2.

3. Amend Section 76.1700 by removing and reserving paragraph (a)(7).

Section 76.1710 is removed and reserved.

APPENDIX B

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 significant economic impact on small entities of the policies and rules proposed in this *Notice of Proposed Rulemaking* (NPRM). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. This NPRM seeks comment on whether to eliminate or modify the requirement that cable operators maintain records in their online public inspection file regarding the nature and extent of their attributable interests⁴ in all video programming services as well as information regarding their carriage of such vertically integrated video programming⁵ services on cable systems in which they have an attributable interest for a period of at least three years. The rule's original purpose was to aid in the enforcement of the Commission's channel occupancy limits, which have been reversed and remanded by the U.S. Court of Appeals for the D.C. Circuit. Eliminating or modifying this rule would reduce the burden of maintaining the public inspection file on cable operators.

B. Legal Basis

3. The proposed action is authorized under sections 1, 4(i), 4(j), 303(r), and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and 533.

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

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted.⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁷ In addition, the term "small business" has

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

² 5 U.S.C. § 603(a).

³ *Id.*

⁴ An attributable interest is an ownership interest in, or relationship to, an entity that gives the interest holder a certain degree of influence or control over the entity as defined in the Commission's rules. *See* 47 CFR § 76.501, Note 2.

⁵ Vertically integrated video programming is video programming carried by a cable system and produced by an entity in which the cable system's operator has an attributable interest.

⁶ 5 U.S.C. § 603(b)(3).

⁷ 5 U.S.C. § 601(6); *see infra* note 8 (explaining the definition of "small business" under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, 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(5) (defining "small governmental jurisdiction" as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty

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the same meaning as the term “small business concern” under the Small Business Act (SBA).⁸ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁹ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Cable Companies and Systems (Rate Regulation Standard)*. The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.¹⁰ Industry data indicate that, of 4,200 cable operators nationwide, all but 9 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 Industry data indicate that, of 4,200 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records.¹³ 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 one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”¹⁴ As of 2018, there were approximately 50,504,624 cable video subscribers in the United States.¹⁵ Accordingly, an operator serving fewer than 505,046 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.¹⁶ Based on available data, we find that all but six incumbent cable

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thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register”).

⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632(a)(1)). 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.” *Id.*

⁹ 15 U.S.C. § 632(a)(1)-(2)(A).

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

¹¹ The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on January 2, 2020. See FCC, Cable Operations and Licensing Systems (COALS), www.fcc.gov/coals (last visited Jan. 2, 2020).

¹² 47 CFR § 76.901(c).

¹³ See *infra* note 17.

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

¹⁵ S&P Global Market Intelligence, *U.S. Cable Subscriber Highlights, Basic Subscribers(actual) 2018, U.S. Cable MSO Industry Total*, <https://platform.marketintelligence.spglobal.com/>.

¹⁶ 47 CFR § 76.901(f) and notes ff. 1, 2, and 3.

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 Therefore we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

7. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis.... These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”¹⁹ The SBA size standard for this industry establishes as small, any company in this category which has annual receipts of \$38.5 million or less.²⁰ Census data for 2012 show that there were 367 firms that operated for that entire year. Of that number, 319 operated with annual receipts of less than \$25 million a year.²¹ Thus, under this size standard, the majority of such businesses can be considered small entities.

8. *Motion Picture and Video Production.* These entities may be indirectly affected by our action. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”²² We note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: those having \$32.5 million or less in annual receipts.²³ Census data for 2012 show that there were 8,203 firms that that operated that year.²⁴ Of that number, 8,075 had annual receipts of \$24,999,999 or less.²⁵ Thus, under this size standard, the majority of such businesses can be considered small entities.

9. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and

¹⁷ S&P Global Market Intelligence, *Top Cable MSOs as of 12/2018*, <https://platform.marketintelligence.spglobal.com/>. The six cable operators all had more than 505,046 basic cable subscribers.

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 CFR § 76.909(b).

¹⁹ U.S. Census Bureau, 2012 NAICS Definitions, “515210 Cable and Other Subscription Programming,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²⁰ 13 CFR § 121.201; 2012 NAICS code 515210.

²¹ See U.S. Census Bureau, *2012 Economic Census of the United States*, Tbl. EC1251SSSZ4, Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 515210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515210. Available census data does not provide a more precise estimate of the number of firms that have receipts of \$38.5 million or less.

²² U.S. Census Bureau, 2012 NAICS Definitions, “512110 Motion Picture and Video Production,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²³ 13 CFR § 121.201; 2012 NAICS code 512110.

²⁴ See U.S. Census Bureau, *2012 Economic Census of the United States*, Tbl. EC1251SSSZ4, Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 512110, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~512110.

²⁵ See *id.*

exhibitors.”²⁶ We note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: those having \$32.0 million or less in annual receipts.²⁷ Census data for 2012 show that there were 307 firms that operated for that entire year.²⁸ Of that number, 294 had annual receipts of \$24,999,999 or less.²⁹ Thus, under this size standard, the majority of such businesses can be considered small entities.

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

10. The NPRM seeks comment on whether to eliminate or revise the recordkeeping requirement, in section 76.1710 of the Commission’s rules, regarding cable operator interests in video programming. This rule requires cable operators maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services, as well as information regarding cable operators’ carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest. Elimination of these rules would reduce compliance requirements for cable operators. The NPRM also seeks comment on whether, if the rule is retained, it should be revised and, if so, how.

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

11. 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.³⁰

12. The NPRM seeks comment on whether to eliminate or modify a current requirement that cable operators maintain records in their online public inspection file, specifically the cable operator interests in video programming recordkeeping requirement. Eliminating or modifying this obligation would reduce the overall public inspection file burden on cable operators. There could also be an impact on small independent video programmers to the extent any programmers relied on the public file in question for information that is not easily available elsewhere. The NPRM seeks comment on eliminating or modifying this public file requirement, including any comments that might oppose eliminating or modifying this requirement.

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

13. None.

²⁶ U.S. Census Bureau, 2012 NAICS Definitions, “512120 Motion Picture and Video Distribution,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²⁷ 13 CFR § 121.201; 2012 NAICS code 512120.

²⁸ See U.S. Census Bureau, *2012 Economic Census of the United States*, Tbl. EC1251SSSZ4, Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 512120, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~512120.

²⁹ See *id.*

³⁰ See 5 U.S.C. § 603(c).

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Amendment of Commission Rule Requiring Records of Cable Operator Interests in Video Programming, Modernization of Media Regulation Initiative*, MB Docket Nos. 20-35 and 17-105, Notice of Proposed Rulemaking.

Today, we launch our twentieth proceeding in the Commission's *Modernization of Media Regulation Initiative*. That's a lot. Indeed, it's larger than the number of Harry Potter (8), Fast and Furious (8), and Lord of the Rings (3) movies *combined* (19).

Now, each of those movie series launched in 2001, the same year that the D.C. Circuit reversed and remanded the Commission's cable channel occupancy limits, which restricted the number of channels that could be occupied on cable systems by video programmers in which the cable operator had an attributable interest. In order to help enforce those limits, the Commission established a recordkeeping rule requiring cable operators to maintain in their public inspection files records regarding their carriage of any vertically-integrated video programming.

Over the last nineteen years, the FCC under seven different Chairs—four Democrats and three Republicans—has declined to revisit the issue of channel occupancy limits. Yet our recordkeeping requirement has remained on the books. So, at Commissioner O'Rielly's suggestion, this Notice of Proposed Rulemaking principally tees up a very simple question: Does this rule continue to serve any useful purpose? We seek comment on whether this reporting requirement is still necessary and ask about the usefulness of the information collected versus the costs associated with compiling it.

I'd like to thank the Commission staff who prepared this item. From the Media Bureau, Ty Bream, Michelle Carey, Chad Guo, Brendan Holland, and from the Office of General Counsel, David Konzcal. While another Fast and Furious movie is scheduled to be released this spring, bringing the combined number of Fast and Furious, Harry Potter, and Lord of the Rings films to twenty, with your help, we'll have already launched at least the twenty-first media modernization proceeding by the time Vin Diesel returns to the silver screen.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Amendment of Commission Rule Requiring Records of Cable Operator Interests in Video Programming, Modernization of Media Regulation Initiative*, MB Docket Nos. 20-35 and 17-105, Notice of Proposed Rulemaking.

Fans of HGTV are familiar with the likely fate of ugly wallpaper, left behind when the original owners vacate an outdated home. Similarly, today we take the first step of ripping out a reporting requirement that has faded from relevance in the two decades since the Commission's cable occupancy limits were reversed and remanded by the D.C. Circuit. As noted in the item, this reporting requirement was moved to a different subsection within our Part 76 rules for administrative efficiency before the turn of the century. While generally overlooked during subsequent regulatory cleanup efforts as a result, it has remained an unsightly fixture for cable operators ever since.

It is telling that no one thus far has argued in favor of keeping this reporting requirement, nor justified any apparent use for the collected information. Let that sink in for any critics: not a single soul has advocated so far that we maintain this rule. Nonetheless, the item explores potential reasonable arguments to be made in its favor should the information still have utility in a different context. At the same time, we make clear that even if the information is determined to be useful, we must consider more efficient ways to obtain it, rather than simply requiring cable operators to stockpile it by default. Personally, I seriously doubt the information is useful or that it could not be more easily obtained another way. As I have noted in the past, continuing to collect this information when the original purpose for doing so has been struck down by the courts is a serious waste of time and resources for everyone. It is time to move on.

I thank the Chairman and staff for carrying out my idea to jettison the rule, considering my input when crafting the proposal, and bringing this item to a vote. I look forward to a speedy resolution culminating in a final Order. While plenty of work remains on the media modernization DIY project, we're making progress each month and need to keep up the momentum.

I approve.

**CONCURRING STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Amendment of Commission Rule Requiring Records of Cable Operator Interests in Video Programming, Modernization of Media Regulation Initiative*, MB Docket Nos. 20-35 and 17-105, Notice of Proposed Rulemaking.

Today we kick off another rulemaking to modernize our media policies. We ask about changing our rules requiring cable operators to maintain records in their public files about their interests in video programming services. This seems simple. But there is a procedural quirk here that makes this more complicated than it first seems.

Let me explain. For decades, the Federal Communications Commission has required that broadcasters, cable operators, and direct broadcast satellite providers keep public inspection files that include a range of information about their operations. The specific records cable operators are required to keep that are at issue here are a byproduct of the Cable Television Consumer Protection and Competition Act of 1992.

In that law Congress directed this agency to establish limits on the number of channels a cable operator may devote to video programming from affiliated channels. Our first such rules were put in place in 1993. They were revised in 1999. But in 2001 a court remanded those limits back to the agency. A series of rulemakings followed, including one in 2008, when this agency last asked how it should refashion these rules.

And then . . . nothing. Until today, when we ask for comment on getting rid of the filings required pursuant to the very rule for which a rulemaking is still outstanding.

You might think something here is missing. You would be right. We need to address the underlying remand and we should be doing it before we seek comment on removing the records associated with this rule regarding video programming services. Because this puts the cart before the horse. We have time to fix the underlying issues here before we proceed—and we should. For this reason, I choose to concur.

This latest installment in our media modernization initiative suggests we are looking high and low for rules to rescind. But the truth is we are avoiding the obvious places. Among the most obvious? Well, it's an election year. Those online public files kept by broadcasters, cable operators, and direct broadcast satellite providers include what is known as the political file. It features a treasure trove of information about who paid for political advertisements, when they ran, and what issues of national importance they discuss.

This is an essential tool for transparency in our elections. An estimated \$4.55 billion is expected to be spent on television advertising during this political cycle. So you might want to see where it's going and who is funding candidates. But good luck. Because this agency, dedicated to the digital age, has chosen to leave these files locked away in analog formats. That means it is impossible for the public file to serve as a useful tool for researchers, journalist, advocates, and the public. It's time to fix this mess and modernize these files by making them machine readable.

Today's rulemaking, however, does nothing to address this problem and that's unfortunate, because this is the kind of media modernization our democracy needs.

**CONCURRING STATEMENT OF
COMMISSIONER GEOFFREY STARKS**

Re: *Amendment of Commission Rule Requiring Records of Cable Operator Interests in Video Programming, Modernization of Media Regulation Initiative*, MB Docket Nos. 20-35 and 17-105, Notice of Proposed Rulemaking.

I agree that, as a matter of good stewardship, the Commission should update and eliminate rules found to be clearly obsolete or unnecessary. Here, the Commission seeks comment on whether to eliminate or modify section 76.1710 of our rules, which requires cable providers to maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services, and the extent to which they carry such services on cable systems in which they have an attributable interest. At first blush, this seems to be a narrow inquiry about a reporting requirement that may be inconsequential, but a closer examination reveals that more is at stake here.

Let me begin by repeating the standard I have set for approaching these “Modernization of Media Regulation” items with a consistent framework. I have stated that no matter how narrow the proceeding or how minor the form or rule being eliminated, I will look into each item to make sure that the Commission is meeting its broader statutory obligations and key mission. This is to ensure that when we propose to eliminate a rule or regulation, the Commission’s underlying statutory obligations are otherwise addressed, or we make a commitment to address any unmet requirements under the law. In the instance of an unmet statutory obligation, we should always seek concrete steps to make progress towards compliance with the law, or make a firm plan to engage, in short order, to demonstrate our commitment to addressing our obligations.

I first articulated this approach one year ago when we considered elimination of the requirement that certain broadcasters file mid-term Equal Employment Opportunity (EEO) data on Form 397. I only concurred with that action because I believed we did not adequately face our statutory obligation to ensure that broadcasters are seeking and attracting diverse employees.¹ I had engaged in good faith with the Chairman’s office and with the Media Bureau, proposing a clear path forward to resolve the underlying rulemaking that had been pending for 15 years. And although Commissioner Rosenworcel and I were able to get a commitment to issue a further notice on our EEO rules more generally, the resulting notice of proposed rulemaking released in July of 2019² was disappointing, and inadequate to fully address the Commission’s failure to comply with its statutory duty to collect EEO data. I remain hopeful that the record from that proceeding will produce enough of a groundswell to compel us to finally, and comprehensively, fix the EEO data collection regime, as Congress and the courts have directed us to do.

Today’s item feels like déjà vu all over again, because we are considering the elimination of another reporting rule. In seeking to eliminate this rule, we are leaving unaddressed statutory obligations that require the Commission to prescribe a reasonable limit on the number of video programming channels on a cable system that can be occupied by the cable operator’s own channels. Congress, apparently concerned that cable operators might favor their own affiliate video programmers over others

¹ *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2), Modernization of Media Regulation Initiative*, MB Docket Nos. 18-23 and 17-105, Report and Order, 34 FCC Rcd 668 (2019).

² *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, MB Docket No. 19-177, Notice of Proposed Rulemaking, 34 FCC Rcd 5358 (2019).

or otherwise impede consumer access to video programming, adopted this requirement “to enhance effective competition.”³

The Commission did set a channel occupancy limit in 1992. Section 76.504 of the Commission’s rules limits cable channel carriage of affiliated video programming to 40% of activated channels, applicable to channel capacity up to 75 channels. But that decision was reversed and remanded to the Commission in 2001, in part because the court found that the Commission “failed to justify its vertical limit as not burdening substantially more speech than necessary.”⁴ The Commission then sought comment on setting a new vertical limit three times: in 2001,⁵ in 2005,⁶ and in 2008.⁷

The reporting rule at issue today was at one time deemed necessary for the Commission and others to monitor compliance with the underlying channel occupancy limit rule. It is now targeted for elimination as outdated, in part because the underlying rule was reversed and remanded over eighteen years ago.

Clearly this reporting requirement does not stand alone—it is bound to the underlying statutory requirement, which has its roots in Congress’s desire to enhance competition among video service providers. Perhaps one could argue that with so much video content competition available today from DBS and other MVPD providers, online video distributors, and streaming apps, video programming competition is well-enough established to no longer need reporting on this metric. But without revisiting the channel occupancy limit itself, how can we reasonably reach that conclusion?

As I’ve said before, true regulatory “modernization” means more than just getting rid of rules. If we make these decisions while leaving basic and foundational statutory obligations unmet, the rules and policies that are truly in need of “modernization” will remain unchanged or forgotten. This is particularly true in the case of the channel occupancy limit rule, which has languished in a state of repeal without replacement for more than 18 years. In this instance, “modernization” seems more like sweeping under the rug. The item doesn’t even attempt to explain what, if anything, the Commission will do about the underlying rule.

³ 47 U.S.C. § 533(f).

⁴ *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1139 (DC Cir. 2001) (also stating that the Commission “seems to have plucked the 40% limit out of thin air.” *Id.* at 1137).

⁵ *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; The Commission’s Cable Horizontal and Vertical Ownership Limits and Attribution Rules; Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission’s Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission’s Cross-Interest Policy*, CS Docket Nos. 98-82 and 96-85, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312 (2001).

⁶ *The Commission’s Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374 (2005).

⁷ *The Commission’s Cable Horizontal and Vertical Ownership Limits; Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission’s Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission’s Cross-Interest Policy*, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, CS Docket Nos. 98-82 and 96-85, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134 (2008) (noting that the Commission had previously rejected commenters’ proposal not to set a new vertical limit because the statute expressly requires it. *Id.* at 2190).

It sends the wrong signal to move forward on eliminating the reporting requirement without addressing the statutory requirement that made the reporting rule necessary. For that reason, I concur.

Thank you to the Media Bureau staff who prepared this item for our consideration.