

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

In the Matter of
Update to Publication for Television Broadcast
Station DMA Determinations for Cable and
Satellite Carriage
MB Docket No. 22-239

NOTICE OF PROPOSED RULEMAKING

Adopted: July 14, 2022

Released: July 14, 2022

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission: Chairwoman Rosenworcel and Commissioner Simington issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking, we seek comment on referencing a new publication for use in determining a television station’s designated market area (DMA) for satellite and cable carriage under the Commission’s regulations. The Nielsen Company has notified the Commission that its Nielsen Media Research division will no longer publish the annual Nielsen Station Index Directory (Annual Station Index).1 Consistent with the Communications Act of 1934, as amended (Act), and our rules, this publication has historically been used, in combination with the Nielsen Station Index and United States Television Household Estimates (Household Estimates), to determine a station’s DMA for local television stations seeking carriage.2 According to Nielsen, the Annual Station Index has been replaced with a monthly Local TV Station Information Report (Local TV Report), which is now the only

1 Letter from Michael Nilsson, Harris, Wiltshire & Grannis LLP, Counsel to the Nielsen Company, to Evan Baranoff, Attorney Advisor, Media Bureau, Policy Division, Federal Communications Commission (Dec. 15, 2021) (Nielsen Letter). The Nielsen Company submitted brief addenda to this letter on June 2, 2022 and June 6, 2022 (Nielsen Letter Addenda).

2 In the cable context, the term “local commercial television station” is defined as “any full power television broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market, as defined below in paragraph (e) of this section, as the cable system. . . .” 47 CFR § 76.55(c); 47 U.S.C. § 534(h)(1)(A). Paragraph (e) in the definitions, entitled “television market,” provides that “a commercial broadcast television station’s market . . . shall be defined as its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.” 47 CFR § 76.55(e).

With respect to satellite carriage, the Act specifically identifies these publications by cross-reference to certain provisions of the Copyright Act. 47 U.S.C. § 338(k)(4) (defining the term “local market” to have the “meaning given that term under section 122(j) of title 17, United States Code”); 17 U.S.C. § 122(j)(2) (defining the term “local market” as “the designated market area in which a station is located” and defining the term “designated market area” as “a designated market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication”). The Commission’s implementing rules define a “local market” as “the designated market area in which a station is located” and further define a “designated market area” as “the market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication.” 47 CFR § 76.66(e)(2).

publication necessary to determine a station's DMA, and the Household Estimates publication is no longer in use.³ In the discussion below, we tentatively conclude that we should revise our rules to identify the Local TV Report as the successor publication to be used to determine a station's DMA.

II. BACKGROUND

2. Pursuant to the Act, and the implementing rules adopted by the Commission, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within their market.⁴ Similarly, section 338 of the Act⁵ requires satellite carriers to carry on request all local television broadcast stations' signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁶ A station's market for cable and satellite carriage is its DMA, as defined by The Nielsen Company's Annual Station Index and Household Estimates "or any successor publications."⁷ The implementing regulations also specify which

³ Nielsen Letter at 2; Nielsen Letter Addenda.

⁴ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2975-77, paras. 41-46 (1993). The Commission subsequently extended mandatory carriage rights to digital television stations under section 614(a) of the Act and amended its rules accordingly. *Carriage of Digital Television Broadcast Signals*, First Report and Order, 16 FCC Rcd 2598, 2606, paras. 15-16, 2610, para. 28 (2001); 47 CFR § 76.64(f)(4).

⁵ 47 U.S.C. § 338, adopted as part of the Satellite Home Viewer Improvement Act of 1999. In November 2000, the Commission adopted rules to implement the provisions contained in section 338. *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, CS Docket No. 00-96, Report and Order, 16 FCC Rcd 1918, 1934, para. 15 (2000) (*SHVIA Order*).

⁶ 47 CFR § 76.66(a)(6). Pursuant to Section 338, satellite carriers are not required to carry local broadcast television stations; however, if a satellite carrier chooses to carry a local station in a particular DMA in reliance on the local statutory copyright license, it generally must carry any qualified local station in the same DMA that makes a timely election for retransmission consent or mandatory carriage. *See* 47 U.S.C. § 338(k)(4) (cross-referencing 17 U.S.C. § 122). Satellite carriers have a statutory copyright license under SHVIA for carriage of stations to any subscriber within a station's local market. Pub. L. No. 106-113, 113 Stat. 1501 (1999); *see also* 47 U.S.C. § 338(a)(1); 47 CFR § 76.66(b)(1). This is commonly referred to as the "carry one, carry all" requirement.

⁷ 47 CFR §§ 76.55(e)(2), 76.66(e)(2). Section 614(h)(1)(C) of the Act provides that a station's market "shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns." 47 U.S.C. § 534(h)(1)(C). Sections 76.55(e)(2) and 76.66(e)(2) of the Commission's rules specify that a commercial broadcast television station's market is its DMA as determined by The Nielsen Company. 47 CFR § 76.55(e)(2) ("Effective January 1, 2000, a commercial broadcast television station's market, unless amended pursuant to § 76.59, shall be defined as its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications."); 47 U.S.C. § 338(k)(4) (cross-referencing 17 U.S.C. § 122(j)(2)); 47 CFR § 76.66(e)(2) ("A designated market area is the market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication. In the case of areas outside of any designated market area, any census area, borough, or other area in the State of Alaska that is outside of a designated market area, as determined by Nielsen Media Research, shall be deemed to be part of one of the local markets in the State of Alaska.").

We note that on August 12, 2021 the Media Rating Council (MRC) announced that it had temporarily suspended Nielsen National Television Service's accreditation as a television ratings agency. Media Rating Council, Inc., *MRC Statement on Accreditation Status of Nielsen's National Television Service* (Aug. 12, 2021), <http://mediaratingcouncil.org/081221%20MRC%20Statement%20on%20Nielsen%20Nat%20TV%20Service.pdf>. In March of this year, MRC announced that it had reached agreement with Nielsen with regard to auditing as a step toward reaccreditation, and that it does not expect to review the results of those audits before the end of September. Media Rating Council, Inc., *MRC Update on the Statuses of Television Measurement Services Currently Engaged in the MRC Accreditation Process* (Mar. 24, 2022), <http://mediaratingcouncil.org/032422%20TV%20Services%20MRC%20Status%20update.pdf>.

(continued...)

edition of the Annual Station Index is to be used for each election cycle (specifically, the one published the year prior to the election).⁸

3. The Nielsen Letter indicates that the Local TV Report generally contains the same information as the Annual Station Index and is simply published monthly rather than annually.⁹ However, one noted difference between the Annual Station Index and the Local TV Report is that the latter includes low-power and Class A television stations only if they reach a de minimis average audience size threshold.¹⁰

III. DISCUSSION

4. We tentatively conclude that we should amend our rules to eliminate the references to the Annual Station Index and Household Estimates and instead specify the Local TV Report as the successor publication to be used to determine a station's DMA, and we seek comment on this tentative conclusion. Consistent with the Act, our rules require that for carriage purposes, the Annual Station Index and the Household Estimates reports "or any successor publication" are to be used for determining a television station's DMA.¹¹ Because the Annual Station Index will not be available for the next carriage election cycle and the Household Estimates publication is no longer used to determine a station's DMA, we must update the Commission's rules in order to identify a new publication for defining market areas for carriage purposes. As represented by Nielsen, the Local TV Report is an appropriate "successor publication" to both the Annual Station Index and the Household Estimates for this purpose, as it generally contains the same market assignment information as the Annual Station Index but is published monthly rather than annually. Because the Annual Station Index was published on an annual basis, we tentatively conclude that we should specify which monthly Local TV Report should be used to determine a station's market to ensure that all market participants are using the same data to reflect a specific point in time. Nielsen explains that the Annual Station Index relied upon in each triennial carriage election was based on information gathered in the October two years prior to that election.¹² It contends that the October Local TV Report published two years before each carriage election could therefore be used as an "apples-to-apples" replacement for the Annual Station Index.¹³ On the other hand, the greater publication frequency of the Local TV Report means that parties could rely on information from a different month or more up-to-date information when making their election.¹⁴ It is unclear whether parties will benefit more from knowing DMA assignments well in advance of an election, or from ensuring that assignments are

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There does not appear to be any service currently accredited by MRC that would allow market participants to determine the local market area of a broadcast television station. Media Rating Council, *Accredited Services and Services Under Review*, <http://www.mediaratingcouncil.org/Accredited%20Services.htm> (visited July 1, 2022). The only television service currently accredited by MRC is the "TV Spot Service" provided by Media Monitors, which tracks the airing of commercial spots on broadcast television stations. Media Monitors, *Television*, <https://www.mediamonitors.com/television/> (visited July 1, 2022).

⁸ 47 CFR §§ 76.55(e)(2)(i-ii), 76.66(e)(3) (e.g., for elections made in 2005, the 2003-2004 edition was used).

⁹ Nielsen Letter at 1.

¹⁰ *Id.* at 2; Nielsen Letter Addenda.

¹¹ 47 CFR § 76.55(e)(2); 47 U.S.C. § 338(k)(4) (cross-referencing 17 U.S.C. § 122(j)(2)(C)); 47 CFR § 76.66(e)(2).

¹² For example, when making elections in 2020 for the carriage cycle beginning in 2021, parties referenced the 2018-2019 Annual Station Index, which was based on information gathered in October 2018.

¹³ *Id.* Thus, for example, when making elections in 2023 for the carriage cycle beginning in 2024, parties would reference the October 2021 Local TV Report.

¹⁴ For example, when making elections in 2023 for the carriage cycle beginning in 2024, parties could instead reference the October 2022 Local TV Report, or the June 2023 Local TV Report, as long as all parties were relying on the same report.

based on more timely information. We therefore seek comment on whether the rule should reference the October Local TV Report published two years prior to each triennial carriage election. Or, alternatively, should we consider a Local TV Report that is published closer in time to each triennial carriage election? If commenters suggest a time period closer in time to the election, they should identify the month and year that they believe would be most appropriate. Under either alternative, however, we tentatively conclude that we should remove the reference to any specific effective date in the rule and seek comment on this tentative conclusion.¹⁵

5. Another difference between the two reports, as noted above, is that Nielsen's Local TV Report includes low-power and Class A television stations only if they meet a certain de minimis average audience size threshold. As an initial matter, is there even a need, under our rules, to determine DMA assignments for low-power and Class A stations? We note that under section 338(a)(3) of the Act, low-power television stations, including Class A stations, are not entitled to mandatory satellite carriage rights.¹⁶ And for purposes of cable carriage, low-power television station carriage, including Class A stations, is based on distance from the cable headend and other factors, and not presence within a particular DMA.¹⁷ Thus, presumably it would not be necessary to know a low-power television station's DMA for purposes of satellite or cable carriage rules. If such information is necessary for stations other than those already identified in the Local TV Report, we note that Nielsen still gathers this information for all television stations and can generate a report upon request for subscribers that would include all low-power and Class A stations.¹⁸ If obtaining any necessary information from Nielsen in this manner is not sufficient, are there other publications that could publicly provide this information? Any commenter suggesting an additional or alternative "successor" publication should identify the publication as well as the data similarities and differences between the Nielsen Local TV Report and the suggested publication, and explain why the alternative publication is preferable. Are there any other differences between Nielsen's Station Index Directory and Local TV Report that we should take into account as we update these rules?

6. Are there any other rules that we should consider updating in light of Nielsen's publication changes? Although we note that the Commission's carriage election rules discussed herein appear to be the only Commission rules that expressly reference the Annual Station Index and Household Estimates, changing how we determine DMA in this context will impact other statutory and rule provisions relating to carriage.¹⁹ We tentatively conclude that the publication or publications ultimately selected in this proceeding will also be used to define "local market" as contemplated in these other statutory provisions and rules. We seek comment on this tentative conclusion.

7. *Digital Equity and Inclusion.* Finally, the Commission, as part of its continuing effort to advance digital equity for all,²⁰ including people of color, persons with disabilities, persons who live in

¹⁵ *Infra* Appendix A (proposing to eliminate the reference to the original January 1, 2000 effective date from section 76.55(e)(2) of the Commission's rules).

¹⁶ 47 U.S.C. § 338(a)(3).

¹⁷ 47 U.S.C. § 534(h)(2)(D); 47 CFR § 76.65(d)(4).

¹⁸ Nielsen Letter at 2 and Nielsen Letter Addenda.

¹⁹ *See, e.g.*, 47 USC § 325(b)(7)(E) (retransmission consent); 47 USC § 339(d)(1) (carriage of distant signals by satellite carriers); 47 USC § 340(i)(1) (significantly viewed); 47 CFR 76.54(e) (significantly viewed); 47 CFR § 76.65(b)(3)(i) (retransmission consent); 47 CFR 73.683(f) (field strength contours). These statutory and rule provisions incorporate or reference the definition of "local market" in either the carriage election rules (*see infra* Appendix A) or 17 U.S.C. § 122(j) (*see supra* note 2).

²⁰ Section 1 of the Communications Act of 1934 as amended provides that the FCC "regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex." 47 U.S.C. § 151.

rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations²¹ and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

IV. PROCEDURAL MATTERS

8. *Ex Parte Rules - Permit-But-Disclose.* The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.²² 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.

9. *Filing Requirements—Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- 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.
- Filings can be sent 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.

²¹ The term "equity" is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. See Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021).

²² 47 CFR §§ 1.1200 *et seq.*

- 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.
- Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.²³
- During the time the Commission’s building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

10. *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.”²⁴ 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.²⁵ 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).²⁶

11. With respect to this Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in Appendix B. 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.

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

13. *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.

14. *Additional Information.* For additional information on this proceeding, please contact the Media Bureau’s Policy Division staff: Kenneth Lewis, at (202) 418-2622 or Kenneth.lewis@fcc.gov.

²³ See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Red 2788 (2020).

²⁴ 5 U.S.C. § 603.

²⁵ *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).

²⁶ 15 U.S.C. § 632.

V. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 303, 325, 335, 338, 339, 340, 403, and 614 of the Communications Act, 47 U.S.C §§ 151, 152, 154(i), 154(j), 303, 325, 335, 338, 339, 340, 403, and 534 this Notice of Proposed Rulemaking **IS ADOPTED**.

16. **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 CHANGES

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, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.55 is amended by revising paragraph (e)(2) and replacing paragraph (e)(2)(i), as follows, and eliminating paragraph (e)(2)(ii):

§ 76.55 Definitions applicable to the must-carry rules.

(e) ***

~~(2) Effective January 1, 2000, a~~ A commercial broadcast station's market, unless amended pursuant to § 76.59, shall be defined as its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen **Local TV Station Information Report Station Index Directory** and Nielsen ~~Station Index US Television Household Estimates~~ or any successor publications.

(i) The applicable DMA list for the 2023 election pursuant to § 76.64(f) will be the DMA assignments specified in the Nielsen October 2021 Local TV Station Information Report, and so forth using the publications for the October two years prior to each triennial election pursuant to § 76.64(f). For the 1999 election pursuant to § 76.64(f), which becomes effective on January 1, 2000, DMA assignments specified in the 1997-98 Nielsen Station Index Directory and September 1997 Nielsen Station Index US Television Household Estimates, available from Nielsen Media Research, 770 Broadway, New York, NY, shall be used.

~~(ii) The applicable DMA list for the 2002 election pursuant to § 76.64(f) will be the DMA assignments specified in the 2000-2001 list, and so forth for each triennial election pursuant to § 76.64(f).~~

3. Section 76.66 is amended by revising paragraph (e)(2) as follows:

§ 76.66 Satellite broadcast signal carriage.

(e) ***

(2) A designated market area is the market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates, **the October 2021 Nielsen Local TV Station Information Report**, or any successor publication. In the case of areas outside of any designated market area, any census area,

borough, or other area in the State of Alaska that is outside of a designated market area, as determined by Nielsen Media Research, shall be deemed to be part of one of the local markets in the State of Alaska.

(3) A satellite carrier shall use the **October 2021 Nielsen Local TV Station Information Report** ~~1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates to define television markets for the first retransmission consent-mandatory carriage election cycle commencing on January 1, 2024~~⁰² and ending on December 31, 2027⁰⁵. The **October 2024 Nielsen Local TV Station Information Report** ~~2003-2004 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates~~ shall be used for the ~~second~~ retransmission consent-mandatory carriage election cycle commencing January 1, 2028⁰⁶ and ending December 31, 2030⁰⁸, and so forth **using the publications for the October two years prior to** each triennial election pursuant to this section. Provided, however, that a county deleted from a market by Nielsen need not be subtracted from a market in which a satellite carrier provides local-into-local service, if that county is assigned to that market in the 1999-2000 Nielsen Station Index Directory or any subsequent issue of that publication, **or the Local TV Station Information Report commencing with October 2021, and every three years thereafter (i.e., October 2024, October 2027, etc.)**. A satellite carrier may determine which local market in the State of Alaska will be deemed to be the relevant local market in connection with each subscriber in an area in the State of Alaska that is outside of a designated market, as described in paragraph (e)(2) of this section.

APPENDIX B

Initial Regulatory Flexibility Analysis

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

A. Need for, and Objectives of, the Proposed Rule Changes.

2. In this *Notice of Proposed Rulemaking (NPRM)*, we seek comment on adoption of a new publication for use in determining a television station's designated market area (DMA) for satellite and cable carriage under the Commission's regulations. The Nielsen Company has notified the Commission that its Nielsen Media Research division will no longer publish an annual Station Index Directory (Annual Station Index). Under our rules, this publication has been used, along with the Nielsen Station Index United States Television Household Estimates (Household Estimates), to determine a station's DMA for local television stations seeking carriage on satellite and cable systems.⁴ The Annual Station Index has been replaced with a monthly Local TV Station Information Report (Local TV Report), which contains all the information necessary to determine a television station's DMA.⁵ We tentatively conclude that we should amend our rules to eliminate reference to the Annual Station Index and the Household Estimates and instead determine DMA assignments for carriage purposes by reference to the Local TV Report, and seek comment on this tentative conclusion. We also seek comment on whether we should direct parties to refer to the Local TV Report published in the October two years prior to each triennial carriage election, or one published in a different month or year or closer to the time period of the election. We seek to amend our rules to replace the Annual Station Index and the Household Estimates with a "successor publication" that is consistent with the Act and our rules and that provides similarly useful information for parties engaged in the retransmission consent-mandatory carriage election cycle.

B. Legal Basis.

3. The proposed action is authorized pursuant to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 303, 325, 335, 338, 339, 340, 403, 534, .

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 rules, if adopted.⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small

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

² 5 U.S.C. § 603(a).

³ *Id.*

⁴ Letter from Michael Nilsson, Harris, Wiltshire & Grannis LLP, Counsel to the Nielsen Company, to Evan Baranoff, Attorney Advisor, Media Bureau, Policy Division, Federal Communications Commission (Dec. 15, 2021) (Nielsen Letter).

⁵ *Id.*

⁶ 5 U.S.C. § 603(b)(3).

organization,” and “small governmental jurisdiction.”⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.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 The rules proposed herein will directly affect small television and radio broadcast stations. Below, we provide a description of these small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as 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 communications networks.¹⁰ 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.¹¹ By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.¹² Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.¹³

6. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.¹⁴ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.¹⁵ Of this number, 2,964 firms operated with fewer than 250 employees.¹⁶ Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 5,183 providers that reported they were engaged

⁷ *Id.* § 601(6).

⁸ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.* § 601(3).

⁹ 15 U.S.C. § 632(a)(1). Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

¹⁰ See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

¹¹ *Id.*

¹² *Id.*

¹³ Fixed Local Service Providers include the following types of providers: Incumbent Local Exchange Carriers (ILECs), Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, and Other Local Service Providers. Local Resellers fall into another U.S. Census Bureau industry group and therefore data for these providers is not included in this industry.

¹⁴ See 13 CFR § 121.201, NAICS Code 517311.

¹⁵ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

¹⁶ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

in the provision of fixed local services.¹⁷ Of these providers, the Commission estimates that 4,737 providers have 1,500 or fewer employees.¹⁸ Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

7. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standard 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.¹⁹ Based on industry data, there are about 420 cable companies in the U.S.²⁰ Of these, only five have more than 400,000 subscribers.²¹ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²² Based on industry data, there are about 4,139 cable systems (headends) in the U.S.²³ Of these, about 639 have more than 15,000 subscribers.²⁴ Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

8. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²⁵ For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 677,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator based on the cable subscriber count established in a 2001 Public Notice.²⁶ Based on industry data, only four cable system operators have more than 677,000 subscribers.²⁷ Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250

¹⁷ Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/pub/d.lic/attachments/DOC-379181A1.pdf>.

¹⁸ *Id.*

¹⁹ 47 CFR § 76.901(d).

²⁰ S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

²¹ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

²² 47 C.F.R. § 76.901(c).

²³ S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

²⁴ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

²⁵ 47 U.S.C. § 543(m)(2).

²⁶ *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (CSB 2001) (*2001 Subscriber Count PN*). In this Public Notice, the Commission determined that there were approximately 67.7 million cable subscribers in the United States at that time using the most reliable source publicly available. *Id.* We recognize that the number of cable subscribers changed since then and that the Commission has recently estimated the number of cable subscribers to be approximately 48.6 million. See *Communications Marketplace Report*, GN Docket No. 20-60, 2020 Communications Marketplace Report, 36 FCC Rcd 2945, 3049, para. 156 (2020) (*2020 Communications Marketplace Report*). However, because the Commission has not issued a public notice subsequent to the *2001 Subscriber Count PN*, the Commission still relies on the subscriber count threshold established by the *2001 Subscriber Count PN* for purposes of this rule. See 47 CFR § 76.901(e)(1).

²⁷ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

million.²⁸ 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.

9. *Direct Broadcast Satellite (“DBS”) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS is included in the Wired Telecommunications Carriers industry which 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.²⁹ Transmission facilities may be based on a single technology or combination of technologies.³⁰ 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.³¹ By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.³²

10. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.³³ U.S. Census Bureau data for 2017 show that 3,054 firms operated in this industry for the entire year.³⁴ Of this number, 2,964 firms operated with fewer than 250 employees.³⁵ Based on this data, the majority of firms in this industry can be considered small under the SBA small business size standard. According to Commission data however, only two entities provide DBS service - DIRECTV (owned by AT&T) and DISH Network, which require a great deal of capital for operation.³⁶ DIRECTV and DISH Network both exceed the SBA size standard for classification as a small business. Therefore, we must conclude based on internally developed Commission data, in general DBS service is provided only by large firms.

11. *Open Video Services.* 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. The OVS framework provides opportunities for the distribution of video programming

²⁸ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(e) of the Commission’s rules. See 47 CFR § 76.910(b).

²⁹ See U.S. Census Bureau, *2017 NAICS Definition*, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

³⁰ *Id.*

³¹ See *id.* Included in this industry are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed-circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

³² *Id.*

³³ See 13 CFR § 121.201, NAICS Code 517311.

³⁴ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPfirm, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&t=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

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

³⁶ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report*, Table III.A.5, 32 FCC Rcd 568, 595 (Jan. 17, 2017).

other than through cable systems. OVS operators provide subscription services and therefore fall within the SBA small business size standard for the cable services industry, which is “Wired Telecommunications Carriers.”³⁷ The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small.³⁸ U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.³⁹ Of this total, 2,964 firms operated with fewer than 250 employees.⁴⁰ Thus, under the SBA size standard the majority of firms in this industry can be considered small. Additionally, we note that the Commission has certified some OVS operators who are now providing service and broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information for the entities authorized to provide OVS however, the Commission believes some of the OVS operators may qualify as small entities.

12. *Wireless Cable Systems – Broadband Radio Service and Educational Broadband Service.* Wireless cable systems use the Broadband Radio Service (BRS)⁴¹ and Educational Broadband Service (EBS)⁴² to transmit video programming to subscribers. In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.⁴³ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.⁴⁴ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.⁴⁵ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not

³⁷ See U.S. Census Bureau, *2017 NAICS Definition*, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

³⁸ See 13 CFR § 121.201, NAICS Code 517311.

³⁹ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFFIRM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFFIRM&hidePreview=false>.

⁴⁰ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁴¹ BRS was previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS). See *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

⁴² EBS was previously referred to as the Instructional Television Fixed Service (ITFS). See *id.*

⁴³ 47 CFR § 27.1213(a).

⁴⁴ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1,500 or fewer employees.

⁴⁵ *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.⁴⁶ Auction 86 concluded in 2009 with the sale of 61 licenses.⁴⁷ Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

13. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined in paragraph 6, *supra*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.⁴⁸ Census data for 2017 shows that there were 3,054 firms that operated that year. Of this total, 2,964 operated with fewer than 250 employees.⁴⁹ Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to Census data, the Commission's internal records indicate that as of August 2021, there are 2,451 active EBS licenses.⁵⁰ The Commission estimates that of these 2,451 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.⁵¹

14. *Incumbent Local Exchange Carriers (ILECs) and Small Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers⁵² is the closest industry with a SBA small business size standard.⁵³ The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁵⁴ U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.⁵⁵

⁴⁶ *Id.* at 8296.

⁴⁷ *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

⁴⁸ 13 CFR § 121.201, NAICS Code 517311.

⁴⁹ United States Census Bureau, *Selected Sectors: Employment Size of Firms for the U.S. 2017*, TableID EC1700SIZEEMPFIEM (2017), <https://data.census.gov/cedsci/table?q=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM> (last visited Aug. 9, 2021)..

⁵⁰ FCC, *Universal Licensing System*, <https://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp> (under "Advanced License Search" option, select "ED - Educational Broadband Service," "Active" and "Regular" License, and "Exclude Leases" to see search results).

⁵¹ The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

⁵² See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁵³ See 13 CFR § 121.201, NAICS Code 517311.

⁵⁴ *Id.*

⁵⁵ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311,

(continued....)

Of this number, 2,964 firms operated with fewer than 250 employees.⁵⁶ Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 1,227 providers that reported they were incumbent local exchange service providers.⁵⁷ Of these providers, the Commission estimates that 929 providers have 1,500 or fewer employees.⁵⁸ Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

15. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers.⁵⁹ Wired Telecommunications Carriers⁶⁰ is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁶¹ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.⁶² Of this number, 2,964 firms operated with fewer than 250 employees.⁶³ Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 3,956 providers that reported they were competitive local exchange service providers.⁶⁴ Of these providers, the Commission estimates that 3,808 providers have 1,500 or fewer employees.⁶⁵ Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

16. *Television Broadcasting.* This industry is comprised of “establishments primarily engaged in broadcasting images together with sound.”⁶⁶ These establishments operate television

(Continued from previous page)

<https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

⁵⁶ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁵⁷ Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/public/attachments/DOC-379181A1.pdf>.

⁵⁸ *Id.*

⁵⁹ Competitive Local Exchange Service Providers include the following types of providers: Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers.

⁶⁰ See U.S. Census Bureau, 2017 NAICS Definition, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁶¹ See 13 CFR § 121.201, NAICS Code 517311.

⁶² See U.S. Census Bureau, 2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017, Table ID: EC1700SIZEEMPfirm, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

⁶³ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁶⁴ Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/public/attachments/DOC-379181A1.pdf>.

⁶⁵ *Id.*

⁶⁶ See U.S. Census Bureau, 2017 NAICS Definition, “515120 Television Broadcasting,” <https://www.census.gov/naics/?input=515120&year=2017&details=515120>.

broadcast studios and facilities for the programming and transmission of programs to the public.⁶⁷ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies businesses having \$41.5 million or less in annual receipts as small.⁶⁸ 2017 U.S. Census Bureau data indicate that 744 firms in this industry operated for the entire year.⁶⁹ Of that number, 657 firms had revenue of less than \$25,000,000.⁷⁰ Based on this data we estimate that the majority of television broadcasters are small entities under the SBA small business size standard.

17. The Commission estimates that as of March 2022, there were 1,373 licensed commercial television stations.⁷¹ Of this total, 1,280 stations (or 93.2%) had revenues of \$41.5 million or less in 2021, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on June 1, 2022, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates as of March 2022, there were 384 licensed noncommercial educational (NCE) television stations, 383 Class A TV stations, 1,840 LPTV stations and 3,231 TV translator stations.⁷² The Commission however does not compile, and otherwise does not have access to financial information for these television broadcast stations that would permit it to determine how many of these stations qualify as small entities under the SBA small business size standard. Nevertheless, given the SBA's large annual receipts threshold for this industry and the nature of these television station licensees, we presume that all of these entities qualify as small entities under the above SBA small business size standard.

18. We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations⁷³ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of "small business" requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive.

19. There are also 386 Class A stations.⁷⁴ Given the nature of these services, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size

⁶⁷ *Id.*

⁶⁸ See 13 CFR § 121.201, NAICS Code 515120.

⁶⁹ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 515120, <https://data.census.gov/cedsci/table?y=2017&n=515120&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>.

⁷⁰ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see https://www.census.gov/glossary/#term_ReceiptsRevenueServices.

⁷¹ Broadcast Station Totals as of March 31, 2022, Public Notice, DA 22-365 (rel. April 5, 2022) (*March 2022 Broadcast Station Totals PN*), <https://www.fcc.gov/document/broadcast-station-totals-march-31-2022>.

⁷² *Id.*

⁷³ "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 CFR § 121.103(a)(1).

⁷⁴ *Supra* note 60 (discussing broadcast station totals as of March 31, 2021).

standard. In addition, there are 1,985 LPTV stations and 3,306 TV translator stations.⁷⁵ Given the nature of these services as secondary and in some cases purely a “fill-in” service, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

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

20. The *NPRM* proposes adoption of an amendment to our rules that codifies the fact that Nielsen Media Research no longer publishes the Annual Station Index and has replaced it with the Local TV Report. Parties will be required to reference this commercial publication to determine DMA assignments for stations involved in the carriage election process.

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

21. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) 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.⁷⁶

22. These proposals would not impose a negative economic impact on any small entities because they impose no additional obligations on any entities. Commission regulations currently require that the Annual Station Index and Household Estimates “or its successor publication” be used for the purpose of determining a local broadcast station’s DMA. Given that the Annual Station Index will no longer be published by Nielsen, this proceeding will simply identify the “successor publication” parties are already required to consult. Nielsen has stated that the relevant information in the Local TV Report is the same as that previously contained in the Annual Station Index, so the process of accessing the information should not be any more burdensome. The proposed rules therefore will not result in any substantive change in the existing requirements for small entities.

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

23. None.

⁷⁵ *Id.*

⁷⁶ 5 U.S.C. § 603(c).

**STATEMENT OF
CHAIRWOMAN JESSICA ROSENWORCEL**

Re: *Update to Publication for Television Broadcast Station DMA Determinations for Cable and Satellite Carriage*, MB Docket No. 22-239, Notice of Proposed Rulemaking (July 14, 2022).

The ways we watch are changing. It used to be that households gathered at night to bask in the glow of a single television screen and watch what was on, when it was on. But the screens in our lives have multiplied and the ways to measure what we view and consume have changed. That's the case in my house and millions and millions of others around the country.

Still, some things stay the same. Broadcast television stations that seek to make it on the channel line-up of traditional cable and satellite systems and want to negotiate for carriage need to do so through the retransmission consent system. This system is set in the law. For more than two decades, television stations, cable operators, and satellite providers have all used the same publication, released annually by Nielsen, to determine each station's local market. It's a reference point in this system that helps ensure consumers get local programming. In fact, the Telecommunications Act of 1996 actually directed the Federal Communications Commission to rely on commercial publications to establish local market viewing patterns. Then, three years later in the Satellite Home Viewer Act, Congress amended copyright law to specifically define local market as determined by a Nielsen publication.

But back to things changing. That's because Nielsen recently chose to discontinue its commercial publication that historically has been used in this process. So onward. We are taking note of the fact that the law provides us with the opportunity to consider a "successor publication" in the event the original Nielsen publication is no longer available. This rulemaking kicks off that effort.

This is complicated. Yet the reality is simple. We are watching more content over more screens than ever before and in a world where viewing opportunities can feel infinite, we want to make sure every household has the opportunity to receive local television stations with news and programming from where they live. This is about updating the data report behind our policies to make sure they do so.

Thank you to the staff working to on this rulemaking, including Kenneth Lewis, Evan Baranoff, Lyle Elder, Maria Mullarkey, and Michelle Carey of the Media Bureau; Susan Aaron, David Konczal, and William Richardson of the Office of General Counsel; Mark Montano, Kim Makuch, and Andrew Wise of the Office of Economics and Analytics; and Belford Lawson of the Office of Communications Business Opportunities.

**STATEMENT OF
COMMISSIONER NATHAN SIMINGTON**

Re: *Update to Publication for Television Broadcast Station DMA Determinations for Cable and Satellite Carriage*, MB Docket No. 22-239, Notice of Proposed Rulemaking (July 14, 2022).

Today, we tentatively conclude to adopt Nielsen's Local TV Report as the successor publication to Nielsen's Station Index. Both the Station Index, and the Local TV Report, contain definitions for designated market areas, which the Commission critically relies on for many of the rights and obligations it creates within its rules.

This is far from the only Nielsen data on which the Commission relies. The Commission looks to Nielsen to determine whether a broadcast station is 'significantly viewed' outside of its market. Nielsen's market-level TV household estimates determine whether a station is within the "Top 4" in the market, impacting ownership possibilities for broadcasters. And whether a station is failing for the purposes of ownership rules—again, Nielsen.

Indeed, something like 23 Commission rules reference Nielsen in some way. The Commission relies heavily on Nielsen, and has for decades. And, in the ordinary course, following uncontroversial principles of good governance, the public might well expect the Commission to routinely canvas the industry for alternative data providers, comparing products across the sector, ensuring that our reliance on Nielsen is well-founded, so that the Commission can say with confidence that our regulatees, and above all the American people, are well served by the data sources on which we at the Commission rely.

It's a big deal to have your company formally blessed by being specified by name as the basis of regulatory determinations, and it's not the case everywhere. For example, in the financial sector, the Securities and Exchange Commission establishes criteria for designating companies as "Nationally Recognized Statistical Ratings Organizations" (or NRSROs) for purposes of investment ratings. Companies can apply for and lose NRSRO status, and NRSROs, not specific firms, are mentioned and required in applicable laws and rules.

There's an obvious reason why we don't do this at the FCC, though. For most Commission purposes, there is no one else in the industry. Nielsen is the only game in town. There may be a little hemming and hawing here or there about that assertion—but those who know, know. Nielsen has ruled the media ratings world for decades.

That's not necessarily a bad thing, but as we've all learned from the supply chain crises during the pandemic, it's worth looking at bottlenecks, choke points, and single points of failure.

Does it work here? Well, let's see. The Media Ratings Council (or MRC), which is the accrediting body for media ratings agencies, de-accredited Nielsen last year for "deep-rooted, ongoing performance issues" that pre-dated the issues Nielsen encountered empaneling viewers and listeners during COVID. Nielsen has yet to regain its accreditation.

I am confident that Nielsen will work diligently to correct the defects in its methodology identified by the MRC, and that it will regain its accreditation. But I think it give us pause that the Commission is functionally obligated to adopt presently unaccredited Nielsen data and definitions because, as Nielsen has little competition, the Commission is left with no other choice. Might our obligation to act in the public interest even require us to, where possible, encourage innovation, or even just an alternative, in broadcast viewership and listenership analytics, so we avoid subjecting American media to this single point of failure in our broadcast regulatory scheme?

A lot is at stake here. If broadcasters are effectively obligated to purchase and rely on data that may be inaccurate, are they being given the tools to compete and grow? If a data provider exercises its dominant market position to extract higher prices for data, that are functionally compulsory for broadcasters in small markets to compete, are we discouraging localism? If advertisers believe that the main source of viewership and listenership data that they use to make buys on broadcast stations is unreliable, might that push them away from broadcast and toward online advertising platforms where data are considered more reliable?

That third question may have been appropriate to ask a decade ago, but I think we can consider it, by now, answered with advertisers' wallets. The broadcast industry has been losing to online platforms in the advertising competition. Of course, there are reasons for this outside of the accuracy and completeness of audience analytics—the secular trend of media consumption is toward online platforms, which drives the advertising dollar. Okay, sure. But is it not at least worth taking into account that among the considerations that advertisers—especially small businesses—cite for doing online advertising is the high trust they place in granular audience analytics?

Because, let's be clear, big tech platforms do pretty well—they have to. Their product offerings rely on their analytical performance. Facebook consumer data breadth and quality has been a key value proposition since before its IPO. Apple stitches together an impression of you from millions of data signals gathered from your usage, and provides that data—in anonymized but granular fashion—to its partners. The pitch for Google is that they know what you want when you search, and serve you up the right ad at the right time. The pitch for Amazon is that they know what you buy and when, and recommend you the right product at the right time. And, doubtless, the accuracy and completeness of the data each of these services provide drive, at least in part, the commercial value of these companies and firm decisions to partner with them as an advertising or sales platform. (We can leave CPM online vs. offline out of the equation for now—except to note that for online companies it is intrinsically low, so offline companies have even more reason to try to compete on data quality.)

There's no reason to think that only online companies can do good analytics. The big credit bureaus have decades of your financial history and provide simple tools and scores to help creditors evaluate that information. Credit card processors can generate excellent insight based on purchase patterns. Heck, even direct mail analytics are pretty good.

But there are reasons that it's hard to generate broadcast analytics. Over the air broadcast, by design, does not have an intrinsic data return path—even ATSC 3.0's return path will be delivered over the internet, not over the air (unless you're using a fixed wireless ISP.) So anyone doing broadcast analytics must overcome limitations not experienced by digital analytics. But is enough care being given to overcome those limitations? Both broadcasters and advertisers have long asked these questions, and I am not yet satisfied, considering the present unaccredited status of Nielsen, that the answer is an obvious yes.

Today's item makes a ministerial change in our rules, and I am happy to support it because so much of what we do relies on Nielsen data. Perhaps that reliance is ultimately warranted. But I don't believe that I could confidently tell the American public that we have proven that it is, and I think we owe it to the public to know for sure that we are justified in relying on a source that is quite literally written into our rules. I therefore believe the Commission should open a notice of inquiry related to Nielsen's inclusion in nearly two dozen Commission rules and the Commission's reliance on Nielsen data.

If there are opportunities to identify or generate new sources of broadcast data, we should take them. If there are improvements to be made in our usage of broadcast data, we should make them. And if our ties to Nielsen ultimately represent a structural impediment to the public interest, necessity, and convenience—we should break them.

My thanks to the Media Bureau and Chairwoman Rosenworcel and her staff for their diligent work in not just drafting this item, but in working with my office on edits. I support this item.