

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

In the Matter of:
Amendment to the Commission’s Rules
Concerning Market Modification
Implementation of Section 102 of the STELA
Reauthorization Act of 2014
MB Docket No. 15-71

NOTICE OF PROPOSED RULE MAKING

Adopted: March 26, 2015

Released: March 26, 2015

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 Wheeler and Commissioners Clyburn, Rosenworcel, Pai and O’Rielly
issuing separate statements.

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION..... 1
II. BACKGROUND..... 2
III. DISCUSSION 7
A. Requesting Market Modification 8
B. Statutory Factors and Evidentiary Requirements..... 11
C. Market Determinations 16
D. Technical or Economic Infeasibility Exception for Satellite Carriers 19
E. No Effect on Eligibility to Receive Distant Signals via Satellite..... 22
F. Definition of Community..... 23
IV. PROCEDURAL MATTERS..... 26
V. ORDERING CLAUSES..... 33
APPENDIX A – Proposed Rules
APPENDIX B – Initial Regulatory Flexibility Act Analysis

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we propose satellite television “market modification” rules to implement Section 102 of the Satellite Television Extension and Localism Act (STELA) Reauthorization Act of 2014 (“STELA Reauthorization Act” or “STELAR”).¹ The STELAR

¹ The STELA Reauthorization Act of 2014 (STELAR), §§ 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)). The STELAR was enacted on December 4, 2014 (H. R. 5728, 113th Cong.). This proceeding implements STELAR § 102 (titled “Modification of television markets to further consumer access (continued....)”).

amended the Communications Act (“Communications Act” or “Act”) and the Copyright Act to give the Commission authority to modify a commercial television broadcast station’s local television market for purposes of satellite carriage rights.² The Commission previously had such authority to modify markets only in the cable carriage context.³ With Section 102 of the STELAR, Congress provides regulatory parity in this regard in order to promote consumer access to in-state and other relevant television programming.⁴ Congress’ intent through this provision of STELAR, and the Commission’s actions in this NPRM, seek to address satellite subscribers’ inability to receive in-state programming in certain areas, sometimes called “orphan counties.”⁵ In this NPRM, consistent with Congress’ intent that the Commission model the satellite market modification process on the current cable market modification process, we propose to implement Section 102 of the STELAR by revising the current cable market modification rule, Section 76.59, to apply also to satellite carriage, while adding provisions to the rules to

(Continued from previous page)

to relevant television programming”), 128 Stat. at 2060-62, and the related statutory copyright license provisions in STELAR § 204 (titled “Market determinations”), 128 Stat. at 2067 (codified at 17 U.S.C. § 122(j)(2)(E)).

² STELAR §§ 102, 204, 128 Stat. at 2060-62, 2067. STELAR § 102(a) amends Section 338 of the Act by adding a new paragraph (l). 47 U.S.C. § 338(l) (titled “Market Determinations”). STELAR § 102(b) also makes conforming amendments to the cable market modification provision at 47 U.S.C. 534(h)(1)(C). STELAR § 204 amends the statutory copyright license for satellite carriage of “local” stations in 17 U.S.C. § 122 to cover market modifications in accordance with 47 U.S.C. § 338(l). 17 U.S.C. § 122(j)(2)(E). We note that, like the cable provision, the STELAR provision pertains only to “commercial” stations, thus excluding noncommercial stations from seeking market modifications. *See* 47 U.S.C. § 338(l)(1).

³ *See* 47 U.S.C. § 534(h)(1)(C). This section was added to the Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), as part of the cable must-carry/retransmission consent regime for carriage of local television stations. *See also* 47 C.F.R. § 76.59.

⁴ *See* title of STELAR Section 102, “Modification of Television Markets to Further Consumer Access to Relevant Television Programming.” *See also* 47 U.S.C. § 534(h)(1)(C)(ii)(III) (directing the Commission to consider whether a market modification would “promote consumers’ access to television broadcast station signals that originate in their State of residence”). There was no final Report issued to accompany the final version of the STELAR bill (H. R. 5728, 113th Cong.) as it was enacted. Because Section 102 of the STELAR was added from the Senate predecessor bill (S. 2799, the Satellite Television Access and Viewer Rights Act (STAVRA)), we therefore look to the Senate Report No. 113-322 (dated December 12, 2014) accompanying this predecessor bill for the relevant legislative history for this provision. *See* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 (2014) (“*Senate Commerce Committee Report*”).

⁵ We note that the Commission has sometimes referred to the situation in which a county in one state is assigned to a neighboring state’s local television market (*see infra* ¶ 3 and note 18) and, therefore, satellite subscribers residing in such county cannot receive some or any broadcast stations that originate in-state as the “orphan county” problem. The inability of satellite subscribers located in “orphan counties” to access in-state programming has been the subject of some congressional interest. *See, e.g.*, Orphan County Telecommunications Rights Act, H.R. 4635, 113th Cong. (2014); Colorado News, Emergency, Weather, and Sports Act, S. 2375, 113th Cong. (2014); Four Corners Television Access Act, H.R. 4469, 112th Cong. (2012); Letting Our Communities Access Local Television Act, S. 3894, 111th Cong. (2010); Local Television Freedom Act, H.R. 3216, 111th Cong. (2009). *See also, e.g.*, Letter from Doug Collins, Rep. Ga., & Bob Goodlatte, Rep. Va., to Tom Wheeler, Chairman, FCC, in Docket No. 14-8 (dated Aug. 18, 2014) (available via ECFS); Letter from Rand Paul, Sen. Ky., to Julius Genachowski, Chairman FCC in Docket No. 12-2 (dated Nov. 3, 2011) (available via ECFS); Letter from Ben Cardin, Sen. Md., & Barbara Mikulski, Sen. Md., to Julius Genachowski, Chairman, FCC, in Docket No. 11-9 (dated Mar. 4, 2011) (available via ECFS); Letter from Mark Udall, Sen. Colo., *et al.*, to Julius Genachowski, Chairman, FCC, in Docket No. 11-9 (dated Feb. 16, 2011) (available via ECFS); Letter from Scott Tipton, Rep. Colo., to Julius Genachowski, Chairman, FCC, in Docket No. 10-238 (dated Feb. 16, 2011) (available via ECFS); Letter from Mike Ross, Rep. Ark., to Julius Genachowski, Chairman, FCC, in Docket No. 11-9 (dated Jan. 25, 2011) (available via ECFS); Letter from Michael B. Enzi, Sen. Wyo., *et al.*, to Julius Genachowski, Chairman, FCC, in Docket No. 11-9 (dated Dec. 1, 2010) (available via ECFS); Letter from Russell Feingold, Sen. Wis., to Julius Genachowski, Chairman, FCC, in Docket No. 10-20 (dated July 28, 2010) (available via ECFS).

address the unique nature of satellite television service.⁶ In addition to establishing rules for satellite market modifications, Section 102 of the STELAR directs us to consider whether we should make changes to the current cable market modification rules,⁷ and it also makes certain conforming amendments to the cable market modification statutory provision.⁸ Accordingly, as part of our implementation of the STELAR, we propose to make conforming changes to the cable market modification rules and consider whether we should make any other changes to the current cable market modification rules. The STELAR requires the Commission to issue final rules in this proceeding on or before September 4, 2015.⁹

II. BACKGROUND

2. The STELAR, enacted December 4, 2014, is the latest in a series of statutes that have amended the Communications Act and Copyright Act to set the parameters for the satellite carriage of television broadcast stations. The 1988 Satellite Home Viewer Act (SHVA) first established a “distant” statutory copyright license to enable satellite carriers to offer subscribers who could not receive the over-the-air signal of a broadcast station access to broadcast programming via satellite.¹⁰ The 1999 Satellite Home Viewer Improvement Act (SHVIA) established a “local” statutory copyright license and expanded satellite carriers’ ability to offer broadcast television signals directly to subscribers by permitting carriers to offer “local” broadcast signals.¹¹ The 2004 Satellite Home Viewer Extension and Reauthorization Act (SHVERA) reauthorized the distant signal statutory copyright license until December 31, 2009 and expanded that license to allow satellite carriers to carry “significantly viewed” stations.¹² The 2010

⁶ See 47 C.F.R. § 76.59. As discussed herein, we propose to revise Section 76.59 of our rules to apply to both cable systems and satellite carriers. See Appendix A – Proposed Rules. We note Congress’ intent that the process established by the Commission under the Section 102 of the STELAR be “modeled” on the current cable market modification process. See *Senate Commerce Committee Report* at 10. However, the STELAR recognizes the inherent difference between cable and satellite television service with provisions specific to satellite. See 47 U.S.C. § 338(l)(3)(A), (5).

⁷ STELAR § 102(d) directs the Commission to consider as part of this rulemaking whether the “procedures for the filing and consideration of a written request under sections 338(l) and 614(h)(1)(C) of the Communications Act of 1934 (47 U.S.C. 338(l); 534(h)(1)(C)) fully effectuate the purposes of the amendments made by this section, and update what it considers to be a community for purposes of a modification of a market under section 338(l) or 614(h)(1)(C) of the Communications Act of 1934.”

⁸ See STELAR § 102(b) (amending 47 U.S.C. § 534(h)(1)(C)(ii)).

⁹ STELAR § 102(d)(1).

¹⁰ The Satellite Home Viewer Act of 1988 (SHVA), Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988); 17 U.S.C. § 119 (distant statutory copyright license). In addition to allowing satellite carriers to retransmit television signals of distant network stations to “unserved” subscriber households, the SHVA also permitted satellite carriers to retransmit distant superstations (non-network stations) to any subscriber household. See 17 U.S.C. § 119(d)(2) (defining “network station”), (d)(9) (defining “non-network station,” previously “superstation”) and (d)(10) (defining “unserved household”). The 1994 Satellite Home Viewer Act reauthorized the distant statutory copyright license for five years and made other changes to the distant statutory copyright license, but did not amend the Communications Act or otherwise alter satellite carriage rights. Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477 (1994). Each successive statute in the SHVA progeny has reauthorized the distant statutory copyright license.

¹¹ The Satellite Home Viewer Improvement Act of 1999 (SHVIA), Pub. L. No. 106-113, 113 Stat. 1501 (1999); 17 U.S.C. § 122 (local statutory copyright license). The local statutory copyright license makes no distinction between network and non-network signals or served or unserved households. See *id.* Local stations may elect mandatory carriage or carriage pursuant to retransmission consent. 47 U.S.C. §§ 325, 338. See 47 C.F.R. § 76.66(c). Unlike the distant license, the local statutory copyright license does not expire.

¹² The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, 118 Stat 2809 (2004). Significantly viewed stations are television broadcast stations that the Commission has determined have sufficient over-the-air (*i.e.*, non-cable and non-satellite) viewing to be treated as local stations with

(continued....)

Satellite Television Extension and Localism Act (STELA) extended the distant signal statutory copyright license through December 31, 2014,¹³ moved the significantly viewed signal copyright provisions to the local statutory copyright license (which does not expire), and revised the “significantly viewed” provisions to facilitate satellite carrier use of that option.¹⁴ With the STELAR, Congress extends the distant signal statutory copyright license for another five years, through December 31, 2019 and, among other things, authorizes market modification in the satellite carriage context and revises the market modification provisions for cable to promote parity for satellite and cable subscribers and competition between satellite and cable operators.¹⁵

3. Section 338 of the Act authorizes satellite carriage of local broadcast stations into their local markets, which is called “local-into-local” service.¹⁶ Specifically, a satellite carrier provides “local-into-local” service when it retransmits a local television signal back into the local market of that television station for reception by subscribers.¹⁷ Generally, a television station’s “local market” is defined by the Designated Market Area (DMA) in which it is located, as determined by the Nielsen Company (Nielsen).¹⁸ DMAs describe each television market in terms of a unique geographic area (group of

(Continued from previous page) _____
respect to a particular satellite community in another market, thus, allowing them to be carried by the satellite carrier in that community in the other market. For copyright purposes, significantly viewed status means that satellite carriers may carry the out-of-market but significantly viewed station with the reduced copyright payment obligations applicable to local (in-market) stations. *See* 17 U.S.C. § 122(a)(2). Satellite carriers are not required to carry out-of-market significantly viewed stations. If they do carry such significantly viewed stations, retransmission consent is required. *See* 47 U.S.C. § 340(d).

¹³ The Satellite Television Extension and Localism Act of 2010 (STELA), Pub. L. No. 111-175, 124 Stat. 1218, 1245 (2010). Congress passed four short-term extensions of the distant signal statutory copyright license (on December 19, 2009, March 2, March 26 and April 15, 2010) before passing the STELA to reauthorize the distant signal statutory copyright license for a full five years, until December 31, 2014. STELA § 107(a). *See* Department of Defense Appropriations Act, 2010, § 1003(b), Pub. L. No. 111-118, 123 Stat 3409, 3469 (2009) (extending distant license until February 28, 2010); Temporary Extension Act of 2010, § 10, Pub. L. No. 111-144, 124 Stat 42, 47 (2010) (extending license until March 28, 2010); Satellite Television Extension Act of 2010, Pub. L. No. 111-151, 124 Stat 1027 (2010) (extending license until April 30, 2010); Continuing Extension Act of 2010, § 9, Pub. L. No. 111-157, 124 Stat 1116 (2010) (extending license May 31, 2010).

¹⁴ The STELA reauthorized the statutory copyright license for satellite carriage of significantly viewed signals and moved that license from the distant signal statutory copyright license provisions in 17 U.S.C. § 119(a)(3) to the local signal statutory copyright license provisions in 17 U.S.C. § 122(a)(2). STELA § 103. By doing so, Congress defined significantly viewed signals as another type of local signal, rather than as an exception to distant signal status. The move to the local license also meant that the significantly viewed signal license would not expire. STELA § 107(a). In the *STELA Significantly Viewed Report and Order*, the Commission revised its satellite television significantly viewed rules to facilitate satellite carriage of significantly viewed stations and thereby provide satellite subscribers with greater choice of programming and to improve parity and competition between satellite and cable carriage of broadcast stations. *Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)*, MB Docket No. 10-148, Report and Order and Order on Reconsideration, 25 FCC Rcd 16383, 16411, ¶ 55 (2010) (*STELA Significantly Viewed Report and Order*).

¹⁵ In Section 102 of the STELAR, Congress intended to “create a television market modification process for satellite carriers similar to the one already used for cable operators.” *Senate Commerce Committee Report* at 6. The STELAR also makes a variety of reforms to the video programming distribution laws and regulations that are not relevant here to our implementation of this section.

¹⁶ *See* 47 U.S.C. § 338(a)(1).

¹⁷ 47 C.F.R. § 76.66(a)(6).

¹⁸ *See* 17 U.S.C. § 122(j)(2); 47 C.F.R. § 76.66(e) (defining a television broadcast station’s local market for purposes of satellite carriage as the DMA in which the station is located). We note that a commercial television broadcast station’s local market for purposes of cable carriage is also generally defined as the DMA in which the station is located. *See* 47 U.S.C. 534(h)(1)(C); 47 C.F.R. § 76.55(e)(2).

counties) and are defined by Nielsen based on measured viewing patterns.¹⁹ The United States is divided into 210 DMA markets.²⁰ Unlike cable operators, 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 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.²¹ This is commonly referred to as the “carry one, carry all” requirement. If a broadcaster elects retransmission consent, the satellite carrier and broadcaster negotiate the terms of a retransmission consent agreement. With respect to those stations electing mandatory carriage, satellite carriers are generally not required to carry a station if the station’s programming “substantially duplicates”²² that of another station carried by the satellite carrier in the DMA,²³ and satellite carriers are not required to carry more than one network affiliate station in a DMA (even if the affiliates do not substantially duplicate their programming), unless the stations are licensed to communities in different states.²⁴ Satellite carriers are also not required to carry an otherwise qualified station if the station fails to provide a good quality signal to the satellite carrier’s local receive facility.²⁵

¹⁹ The Nielsen Company delineates television markets by assigning each U.S. county (except for certain counties in Alaska) to one market based on measured viewing patterns both off-air and by MVPD distribution. Generally, each U.S. county is assigned to only one market based on the market whose stations receive the preponderance of the audience in that county. However, in a few cases where a county is large and viewing patterns differ significantly between parts of the county, a portion of the county is assigned to one television market and another portion of the county is assigned to another market. Several counties in Alaska are not assigned to any DMA. *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, at ¶ 53, n.177 (Sept. 8, 2005) (*SHVERA Report*); see also Nielsen Media Research, Glossary of Media Terms, at <http://www.nielsenmedia.com/glossary/>.

²⁰ DMAs frequently cross state lines and thus may include counties from multiple states.

²¹ See 17 U.S.C. § 122; 47 U.S.C. § 338(a)(1); 47 C.F.R. § 76.66(b)(1). DISH Network currently provides local service to all 210 DMAs and DIRECTV currently provides local service to 198 DMAs, according to the most recent Local Network Channel Broadcast Reports filed by these satellite carriers. 47 U.S.C.A. § 338 Note. These annual reports were initially required for five years by Section 305 of the STELA and were continued to be required for another five years by Section 108 of the STELAR.

²² “A commercial television station substantially duplicates the programming of another commercial television station if it simultaneously broadcasts the identical programming of another station for more than 50 percent of the broadcast week.” *Id.* § 76.66(h)(6). “A noncommercial television station substantially duplicates the programming of another noncommercial station if it simultaneously broadcasts the same programming as another noncommercial station for more than 50 percent of prime time, as defined by §76.5(n), and more than 50 percent outside of prime time over a three month period, Provided, however, that after three noncommercial television stations are carried, the test of duplication shall be whether more than 50 percent of prime time programming and more than 50 percent outside of prime time programming is duplicative on a non-simultaneous basis.” *Id.* § 76.66(h)(7).

²³ 47 U.S.C. § 338(c)(1); 47 C.F.R. § 76.66(h)(1). “A satellite carrier may select which duplicating signal in a market it shall carry.” 47 C.F.R. § 76.66(h)(2).

²⁴ 47 U.S.C. § 338(c)(1); 47 C.F.R. § 76.66(h)(1). “A satellite carrier may select which network affiliate in a market it shall carry.” 47 C.F.R. § 76.66(h)(3). However, a satellite carrier must carry network affiliated television stations licensed to different states, but located in the same market, even if the stations meet the definition of substantial duplication under the Commission’s rules. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, CS Docket Nos. 00-96 and 99-363, Report and Order, 16 FCC Rcd 1918, 1951, ¶ 80 (2000) (DBS Broadcast Carriage Report and Order). If two stations located in different states (but within the same local market) duplicate each other, but are not network affiliates, the satellite carrier only has to carry one. *Id.*

²⁵ 47 U.S.C. § 338(b)(1); 47 C.F.R. § 76.66(g)(1). A television station asserting its right to carriage is required to bear the costs associated with delivering a good quality signal to the designated local-receive-facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market. *Id.*

4. STELAR Section 102, which adds Section 338(l) of the Act, creates a satellite market modification regime very similar to that in place for cable, while adding provisions to address the unique nature of satellite television service.²⁶ Market modification, which has been available in the cable carriage context since 1992,²⁷ will allow the Commission to modify the local television market of a commercial television broadcast station to enable those broadcasters and satellite carriers to better serve the interests of local communities.²⁸ Market modification provides a means to avoid rigid adherence to DMA designations and to promote consumer access to in-state and other relevant television programming.²⁹ To better reflect market realities and effectuate the purposes of this provision, Section 338(l), like the corresponding cable provision in Section 614(h)(1)(C), permits the Commission to add communities to or delete communities from a station's local television market following a written request.³⁰ Furthermore, as in the cable carriage context, the Commission may determine that particular communities are part of more than one television market.³¹ Similar to the cable carriage context, when the Commission modifies a station's market to add a community for purposes of carriage rights, the station is considered local and is covered by the local statutory copyright license and may assert mandatory carriage (or retransmission consent) by the applicable satellite carrier in the local market.³² Likewise, if the Commission modifies a station's market to delete a community, the station is considered "distant" and loses its right to assert mandatory carriage (or retransmission consent) by the applicable satellite carrier in the local market.³³ We note that, in the cable carriage context, market modifications pertain to specific stations in specific cable communities and apply to the specific cable system named in the petition.³⁴

²⁶ See 47 U.S.C. §§ 338(l), 534(h)(1)(C).

²⁷ See *supra* note 3 (citing 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59).

²⁸ See *In-State Broadcast Programming: Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010*, MB Docket No. 10-238, Report, 26 FCC Rcd 11919, 11949-50, ¶ 55-59 (MB 2011) ("*In-State Programming Report*") (stating that "market modifications could potentially address special situations in underserved areas and facilitate greater access to local information"). See also *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1346, ¶ 49-50 (2008) ("*Broadcast Localism Report*").

²⁹ *Broadcast Localism Report*, 23 FCC Rcd at 1346, ¶ 50. The Commission has observed that, in some cases, general reliance on DMAs to define a station's market may not provide viewers with the most local programming. *Id.* at 1346, ¶ 49-50. Certain DMAs cross state borders and, in such cases, current Commission rules sometimes require carriage of the broadcast signal of an out-of-state station rather than that of an in-state station. *Id.* The Commission has observed that such cases may weaken localism, since viewers are often more likely to receive information of local interest and relevance – particularly local weather and other emergency information and local news and electoral and public affairs – from a station located in the state in which they live. *Id.*

³⁰ 47 U.S.C. §§ 338(l)(1), 534(h)(1)(C).

³¹ *Id.* § 338(l)(2)(A).

³² Section 204 of the STELAR amends the local statutory copyright license in 17 U.S.C. § 122 so that when the Commission modifies a station's market for purposes of satellite carriage rights, the station is considered local and is covered by the local statutory copyright license. See 17 U.S.C. § 122(j)(2)(E) (as amended by STELAR § 204); 47 U.S.C. § 338. See also 17 U.S.C. § 111(f)(4) (defining "local service area of a primary transmitter" for cable carriage copyright purposes); 47 U.S.C. § 534(h)(1)(C).

³³ See *id.*

³⁴ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2977, ¶ 47, n.139 (1993) (*Must Carry Order*) (stating that "the statute is intended to permit the modification of a station's market to reflect its individual situation"); 47 C.F.R. § 76.59. See also *infra* ¶ 16.

5. Section 338(l) states that, in deciding requests for market modifications, the Commission must afford particular attention to the value of localism by taking into account the following five factors:

- (1) whether the station, or other stations located in the same area—(a) have been historically carried on the cable system or systems within such community; and (b) have been historically carried on the satellite carrier or carriers serving such community;
- (2) whether the television station provides coverage or other local service to such community;
- (3) whether modifying the local market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence;
- (4) whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
- (5) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.³⁵

These statutory factors largely mirror those originally set forth for cable in Section 614(h)(1)(C)(ii) of the Act. To the extent the factors differ from the previous factors applicable to cable, the STELAR Section 102 makes conforming changes to the cable factors.³⁶ These include adding a fifth factor (inserted as factor number three) to Section 614(h)(1)(C)(ii) to “promote consumers’ access to television broadcast station signals that originate in their State of residence.”³⁷ Thus, STELAR creates parallel factors for satellite and cable.³⁸

6. The STELAR, however, provides a unique exception applicable only in the satellite context, providing that a market modification:

shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination.³⁹

Also unique to satellite, the STELAR provides that a market modification will not have “any effect on the eligibility of households in the community affected by such modification to receive distant signals pursuant to Section 339 [of the Act].”⁴⁰ Like the cable provision, Section 338(l) gives the Commission 120 days to act on a request for market modification and does not allow a carrier to delete from carriage

³⁵ 47 U.S.C. § 338(l)(2)(B)(i)-(v) (discussed in Section III.C. below).

³⁶ See 47 U.S.C. § 534(h)(1)(C)(ii), as amended by STELAR § 102(b).

³⁷ See *id.* § 534(h)(1)(C)(ii)(III) (“whether modifying the market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence”).

³⁸ Upon completion of this rulemaking proceeding, we will implement Section 102(c) of the STELAR by creating a consumer guide that will explain the market modification rules and procedures as revised and adopted in this proceeding, and by posting such guide on the Commission’s website. Section 102(c) requires the Commission to “make information available to consumers on its website that explains the market modification process.” STELAR 102(c); 47 U.S.C.A. § 338 Note. Such information must include: “(1) who may petition to include additional communities within, or exclude communities from, a—(A) local market (as defined in section 122(j) of title 17, United States Code); or (B) television market (as determined under section 614(h)(1)(C) of the Communications Act of 1934 (47 U.S.C. 534(h)(1)(C))); and (2) the factors that the Commission takes into account when responding to a petition described in paragraph (1).” See 47 U.S.C. §§ 338(l)(2)(B)(i)-(v); 47 U.S.C. § 534(h)(1)(C)(ii)(I)-(V).

³⁹ 47 U.S.C. § 338(l)(3)(A) (discussed in Section III. E. below).

⁴⁰ 47 U.S.C. § 338(l)(5) (discussed in Section III. F. below).

the signal of a commercial television station during the pendency of any market modification proceeding.⁴¹

III. DISCUSSION

7. Consistent with the STELAR's goal of regulatory parity, we propose to amend Section 76.59 of our rules – the current cable market modification rule – to apply to the satellite context.⁴² We also propose to amend Section 76.59 to reflect the STELAR provisions that uniquely apply to satellite carriers. The STELAR also directs us to update our definition of a “community” for purposes of market modification and, below, we seek comment in this regard. We seek comment on the specific rule proposals and tentative conclusions contained herein. We also seek comment on any alternative approaches.

A. Requesting Market Modification

8. Consistent with the current cable requirement in Section 76.59, we propose to allow either the affected commercial broadcast station or satellite carrier to file a satellite market modification request.⁴³ Section 338(l)(1) of the Act contains very similar language to the corresponding cable statutory provision in Section 614(h)(1)(C)(i) of the Act.⁴⁴ Like the cable provision, Section 338(l)(1) permits the Commission to modify a local television market “following a written request,” but does not specify the appropriate party to make such requests.⁴⁵ Section 102(d)(2) of the STELAR further directs the Commission to ensure in both the cable and satellite contexts that “procedures for the filing and consideration of a written request ... fully effectuate the purposes of the amendments made by this section.”⁴⁶ The Commission found in the cable context that the involved broadcaster and cable operator are the only appropriate parties to file market modification requests.⁴⁷ The Commission reasoned that “the fact that Congress made must carry an elective choice for broadcasters diminishes the argument that third parties have standing to demand carriage of a broadcast station on a cable system. A subscriber's ability to receive the benefits provided from must carry is predicated upon a station's election to exercise its rights under the statute. No statute or Commission rule requires a broadcaster to allow its signal to be carried on a local cable system because another party wishes to view it. Instead, broadcasters are given a choice whether to demand carriage under must carry, to negotiate carriage under the retransmission

⁴¹ 47 U.S.C. § 338(l)(3)(B), (4).

⁴² See Appendix A – Proposed Rules; 47 C.F.R. § 76.59. See also *supra* note 15.

⁴³ See Appendix A – Proposed Rules; 47 C.F.R. § 76.59(a) (allowing either a broadcast station or a cable system to file market modification requests).

⁴⁴ 47 U.S.C. § 338(l)(1) (“Following a written request, the Commission may, with respect to a particular commercial television broadcast station, include additional communities within its local market or exclude communities from such station's local market to better effectuate the purposes of this section.) See 47 U.S.C. § 534(h)(1)(C)(i) (“For purposes of this section, a broadcasting 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, except that, following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section....”).

⁴⁵ 47 U.S.C. § 338(l)(1).

⁴⁶ STELAR § 102(d)(2) directs the Commission to consider as part of this rulemaking whether the “procedures for the filing and consideration of a written request under sections 338(l) and 614(h)(1)(C) of the Communications Act of 1934 (47 U.S.C. 338(l); 534(h)(1)(C)) fully effectuate the purposes of the amendments made by this section.” See 47 U.S.C.A. § 338 Note.

⁴⁷ See *John Wiegand v. Post Newsweek Pacifica Cable, Inc.*, CSR 4179-M, Memorandum Opinion and Order, 16 FCC Rcd 16099 (2001) (“*Wiegand v. Post Newsweek*”) (limiting standing in the must carry and market modification contexts to the affected broadcaster or cable operator); *Must Carry Order*, 8 FCC Rcd at 2977, ¶ 46.

consent provisions, or not to be carried on a particular cable system at all.”⁴⁸ Thus, only these entities have carriage rights or obligations at stake, giving them a legitimate basis for filing such requests.

9. Without the active participation of the affected broadcaster, modifying the market of a particular television station, in itself, would not result in consumer access to that station.⁴⁹ This reasoning appears to apply to the satellite context as well. Thus, a market modification would serve little purpose without the cooperation of the involved broadcaster or MVPD having carriage rights or obligations. We seek comment on our proposal and these tentative conclusions. We also seek comment on any alternative approaches. We note, for example, that some local governments have previously sought the ability to petition for market modifications on behalf of their citizens.⁵⁰ We recognize that seeking and providing carriage is a business decision by the involved broadcaster and satellite carrier and, therefore, we tentatively conclude to limit the participation of local governments and individuals to filing comments in support of, or in opposition to, particular market modification requests, for the reasons discussed in this and the preceding paragraph. We, nevertheless, seek comment on this tentative conclusion and how else satellite subscribers or their representatives can meaningfully advocate for the receipt of in-state programming via satellite.

10. Consistent with the current cable requirement in Section 76.59, we propose to require broadcasters and satellite carriers to file market modification requests for satellite carriage purposes in accordance with the procedures for filing Special Relief petitions in Section 76.7 of the rules.⁵¹ Consistent with Section 76.7, we propose that a petitioner must serve a copy of its market modification request on any MVPD operator, station licensee, permittee, or applicant, or other interested party who is likely to be directly affected if the relief requested is granted, and we propose to amend Section 76.7(a)(3), accordingly, to reference “any MVPD operator.”⁵² We seek comment on our proposal. Because, as noted above, some local governments have expressed interest in orphan county issues, we also seek comment on whether franchising authorities⁵³ or certain local government entities (such as cities, counties or towns) that may represent subscribers and local viewers in affected communities should

⁴⁸ See *Must Carry Order*, 8 FCC Rcd at 2977, ¶ 46.

⁴⁹ See *Wiegand v. Post Newsweek*, 16 FCC Rcd at 16103, ¶ 11 (“[t]he granting of a request to expand the market of a television station merely allows a broadcaster the option to seek must carry status on cable systems added to its market. A broadcaster is not required to seek carriage of its signal on all of the cable systems in its market.”).

⁵⁰ See *In-State Programming Report*, 26 FCC Rcd 11950, ¶ 58.

⁵¹ 47 C.F.R. § 76.59(b). See Appendix A – Proposed Rules. A fee is generally required for the filing of Special Relief petitions; 47 C.F.R. §§ 1.1104, 1.1117, 76.7. We remind filers that Special Relief petitions must be submitted electronically using the Commission’s Electronic Comment Filing System (ECFS). See *Media Bureau Announces Commencement of Mandatory Electronic Filing for Cable Special Relief Petitions and Cable Show Cause Petitions Via the Electronic Comment Filing System*, Public Notice, 26 FCC Rcd 17150 (MB 2011). Petitions must be initially filed in MB Docket No. 12-1. *Id.*

⁵² See Appendix A – Proposed Rules; 47 C.F.R. § 76.7(a)(3). While our rules currently state that documents that are required to be served must be served in paper form unless the parties agree to another method of service, 47 C.F.R. § 1.47(d), we take notice of the Commission’s broader efforts to modernize our procedures where possible. See, e.g., *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44, Order, 29 FCC Rcd 14955, 14962, ¶ 26 (2014) (authorizing Commission staff to accept §§ 214 and 215 filings in electronic form); *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure Relating to the Filing of Formal Complaints Under Section 208 of the Communications Act and Pole Attachment Complaints Under Section 224 of the Communications Act*, GC Docket No. 10-44, Order, 29 FCC Rcd 14078, ¶ 2 (2014) (mandating electronic filing of §§ 208 and 224 complaints). Service of market modification requests seems ripe for modernization as well. In the near term, the Commission will explore whether and how this and other types of required filings might transition to electronic form.

⁵³ We recognize, for example, that in several states, the state acts as the franchising authority instead of a local government.

be considered “interested parties” and served with market modification requests. We seek specific comment on whether to require petitioners seeking only a satellite carriage market modification to serve the relevant franchising authority. We note that while the Commission has found that a franchising authority represents the interests of subscribers and other local viewers in the cable context,⁵⁴ franchising authorities currently have no role in satellite regulation.

B. Statutory Factors and Evidentiary Requirements

11. As discussed above, the purpose of market modifications is to permit adjustments to a particular station’s local television market (which is initially defined by the DMA in which it is located) to better reflect localism and ensure that satellite subscribers receive the broadcast stations most relevant to them.⁵⁵ To this end, the STELAR requires the Commission to consider five statutory factors when evaluating market modification requests.⁵⁶ As noted, the STELAR added a fifth factor (inserted as the new third statutory factor) for both cable and satellite to “promote consumers’ access to television broadcast station signals that originate in their State of residence.”⁵⁷ The legislative history indicates Congress’ concern that “many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances,” may “lack access to local television programming that is relevant to their everyday lives.”⁵⁸ The legislative history further indicates Congress’ intent that the Commission “consider the plight of these consumers when judging the merits of a [market modification] petition . . . , even if granting such modification would pose an economic challenge to various local television broadcast stations.”⁵⁹ We tentatively conclude that this new third statutory factor is intended to favor a market modification to add a community if doing so would increase consumer access to in-state programming. We also tentatively conclude, however, that this new third statutory factor is not intended to bar a market modification simply because it would not result in increased consumer access to in-state programming. In such cases, we believe this new third statutory factor would be inapplicable.⁶⁰ We seek comment on these tentative conclusions and any alternative interpretations.

12. We tentatively conclude that the evidentiary requirements currently required in Section 76.59 continue to be appropriate to support and evaluate market modification petitions. Specifically, we propose that market modification requests for both satellite carriers and cable system operators must include the following evidence:

⁵⁴ See *KMSO-TV, Inc.*, CSR-883, Memorandum Opinion and Order, 58 FCC2d 414, 415, ¶ 3 (1976).

⁵⁵ See 47 U.S.C. §§ 338(l)(2)(B), 534(h)(1)(C)(ii) (requiring the Commission to “afford particular attention to the value of localism” by taking into account the five statutory factors).

⁵⁶ See *supra* at ¶ 5.

⁵⁷ 47 U.S.C. §§ 338(l)(2)(B)(iii), 534(h)(1)(C)(ii)(III). We will refer to this new factor as the “third statutory factor.”

⁵⁸ *Senate Commerce Committee Report* at 11.

⁵⁹ *Id.*

⁶⁰ We note that this is similar to how we apply the fourth statutory factor (“whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community”). 47 U.S.C. §534(h)(1)(C)(ii)(III). The Commission has found that this fourth factor (previously the third factor) is not intended to operate as a bar to a station’s market modification request whenever other stations could also be shown to serve the communities at issue. See *e.g.*, *Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629, 8633, ¶ 23 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, ¶ 13 (1997). Rather, the fourth factor is intended to enhance a station’s market modification request where it could be shown that other stations do not provide news coverage of issues of concern to the communities at issue. See *id.* Likewise, we believe the new third statutory factor is intended to enhance a station’s market modification request where it could be shown that such modification would promote consumer access to in-state programming.

- (1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend or satellite carrier local receive facility locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market;
- (2) Noise-limited service contour maps (for digital stations) or Grade B contour maps (for analog stations) delineating the station's technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas.
- (3) Available data on shopping and labor patterns in the local market.
- (4) Television station programming information derived from station logs or the local edition of the television guide.
- (5) Cable system or satellite carrier channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.
- (6) Published audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both multichannel video programming distributor (MVPD) and non-MVPD households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.⁶¹

In 1999, the Commission adopted this standardized evidence approach for market modifications in the cable context in an effort to promote administrative efficiency, given the 120-day time period for Commission action on such petitions.⁶² We seek comment on whether to do the same for satellite and on whether any of these evidentiary requirements are not relevant in the satellite context. We further seek comment on whether any other evidence should be required to evaluate the statutory factors.

13. In particular, we seek comment on what evidence could be used to demonstrate the new “third statutory factor,” which seeks to promote consumer access to in-state programming.⁶³ For example, in situations in which this third statutory factor would apply, should we require the petitioner to show that the station at issue is licensed to a community within the state in which the modification is requested and that the DMA at issue lacks any (or an adequate number of) in-state stations? We note that the current rule already requires a petitioner to provide television station programming information. Would this information provide sufficient evidence of whether the station at issue offers programming (*e.g.*, news, sports, weather, political, talk shows, etc.) specifically covering in-state issues? Should we require a petitioner to provide a list of advertisers, which would show that the station is used to attract viewers to local businesses? In addition, are there any satellite-specific evidentiary showings that we should require separate and apart from the six evidentiary showings described above?

14. In addition, we tentatively conclude to revise Section 76.59(b)(2) of the rules to add a reference to the digital noise-limited service contour (NLSC), which is the relevant service contour for a station's digital signal.⁶⁴ Section 76.59(b)(2) requires petitioners seeking a market modification to

⁶¹ See Appendix A – Proposed Rules; 47 C.F.R. § 76.59(b)(1)-(6). We are also updating Section 76.59(b)(6) of the rules to reflect the change from “evidence of viewing patterns in *cable and noncable households* ...” to “evidence of viewing patterns in *households that subscribe and do not subscribe to the services offered by multichannel video programming distributors*” in the fifth statutory factor (*emphasis added*). See 47 U.S.C. §§ 338(l)(2)(B)(v), 534(h)(1)(C)(ii)(V).

⁶² *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, CS Docket No. 95-178, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366, 8385-86, ¶ 44 (1999).

⁶³ 47 U.S.C. §§ 338(l)(2)(B)(iii), 534(h)(1)(C)(ii)(III).

⁶⁴ See *supra* ¶ 13; Appendix A – Proposed Rules; 47 C.F.R. § 76.59(b)(2).

provide Grade B contour maps delineating the station's technical service area,⁶⁵ however the Grade B contour defines an analog television station's service area.⁶⁶ Since the completion of the full power digital television transition on June 12, 2009, there are no longer any full power analog stations and, therefore, the Commission uses the NLSC set forth in 47 C.F.R. § 73.622(e),⁶⁷ in place of the analog Grade B contour set forth in 47 C.F.R. § 73.683(a), to describe a full power station's technical service area.⁶⁸ Since the DTV transition, the Media Bureau has required full power stations to provide NLSC maps, in place of Grade B contour maps, for purposes of cable market modifications.⁶⁹ Therefore, we tentatively conclude that Section 76.59(b)(2) should be updated for purposes of market modifications in both the cable and satellite contexts. However, we propose to retain the reference in the rule to the Grade B contour because that reference may still have relevance with respect to low power television (LPTV) stations.⁷⁰ We seek comment on these tentative conclusions.

15. Consistent with the cable carriage rule, we propose that satellite market modification requests that do not include the required evidence also be dismissed without prejudice and may be supplemented and re-filed at a later date with the appropriate filing fee.⁷¹ In addition, consistent with the cable carriage rule, we propose that, during the pendency of a market modification petition before the

⁶⁵ 47 C.F.R. § 76.59(b)(2).

⁶⁶ See 47 C.F.R. § 73.683(a).

⁶⁷ As set forth in Section 73.622(e), a full-power station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level. See 47 C.F.R. § 73.622(e).

⁶⁸ See *Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)*, MB Docket No. 10-148, Report and Order and Order on Reconsideration, 25 FCC Rcd 16383, 16410, ¶ 51 (2010) (*STELA Significantly Viewed Report and Order*) (stating that the digital NLSC is "the appropriate service contour relevant for a station's digital signal"); *2010 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, Notice of Inquiry, 25 FCC Rcd 6086, 6117, ¶ 103 (2010) (stating that the Commission developed the digital NLSC to approximate the same probability of service as the Grade B contour and has stated that the two are roughly equivalent); Report To Congress: The Satellite Home Viewer Extension And Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures; ET Docket No. 05-182, 20 FCC Rcd 19504, 19554, ¶ 111 (2005). Since the DTV transition, the Media Bureau has used the digital NLSC in place of the analog Grade B contour in cable contexts in addition to market modifications (noted *infra* at note 69). See, e.g., *KXAN, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 3307, 3312, ¶ 8 n.32 (MB 2010) (using the NLSC in place of the Grade B contour for purposes of the cable network non-duplication and syndicated program exclusivity rules). Congress has also acted on the presumption that the two standards are roughly equivalent, by adopting parallel definitions for households that are "unserved" by analog (measured by Grade B) or digital (measured by NLSC) broadcasters in the STELA legislation enacted after the DTV transition. See 17 U.S.C. § 119(d)(10)(A)(i).

⁶⁹ See, e.g., *Tennessee Broadcasting Partners*, Memorandum Opinion and Order, 25 FCC Rcd 4857, 4859 at ¶ 6, n.14 (MB 2010) (stating, in a market modification order, that the Commission has treated a digital station's NLSC as the functional equivalent of an analog station's Grade B contour); *Lenfest Broadcasting, LLC*, Memorandum Opinion and Order, 19 FCC Rcd 8970, 8974, ¶ 7, n.27 (MB 2004).

⁷⁰ We note that the Commission has tentatively concluded that it should extend the September 1, 2015 digital transition deadline for LPTV stations. See *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations*, MB Docket No. 03-185, Third Notice of Proposed Rulemaking, 29 FCC Rcd 12536, 12538-39, ¶ 4 (2014). Although LPTV stations are not entitled to mandatory satellite carriage, see 47 U.S.C. § 338(a)(3), LPTV stations may be entitled to mandatory cable carriage, but only in limited circumstances. Both the Communications Act and the Commission's rules mandate that only a minimum number of qualified low power stations must be carried by cable systems, see 47 U.S.C. § 534(c)(1); 47 C.F.R. § 76.56(b)(3), and, in order to qualify, such stations must meet several criteria. See 47 U.S.C. § 534(h)(2)(A)—(F); 47 C.F.R. § 76.55(d)(1)—(6).

⁷¹ See Appendix A – Proposed Rules; 47 C.F.R. § 76.59(c).

Commission, satellite carriers will also be required to maintain the status quo with regard to signal carriage and must not delete from carriage the signal of an affected commercial television station.⁷²

C. Market Determinations

16. Consistent with the cable carriage context, we interpret the statute to require that market modifications in the satellite carriage context must be limited to the specific station or stations identified in the market modification request and to the specific satellite community or communities referenced in the request.⁷³ This reading is based on the statute's language granting authority to modify markets "with respect to a particular commercial television broadcast station."⁷⁴ This also makes sense because market modification determinations are highly fact-specific and turn on whether a particular commercial television broadcast station serves the needs of a specific community. We also propose to consider market modification requests separately in the cable and satellite contexts. We believe this proposal makes sense given the service area differences between satellite carriers and cable systems and the potential difference between a cable and satellite community, given that the former is defined as "a separate and distinct community or municipal entity" and we consider defining the latter using one or more five-digit zip codes.⁷⁵ We also propose that market modification requests will only apply to the satellite carrier or carriers named in the request.⁷⁶ For example, a modification may not always appropriately apply to both carriers because their spot beams may be different, even though they are serving the same market and thus one may have an infeasibility defense while the other may not. We seek comment on these proposals. We also seek comment on any alternative approaches. For example, should market determinations apply for purposes of both cable and satellite carriage and what procedures or definitional changes would be needed to implement such an approach? How would such an alternative approach account for the STELAR's exception for satellite carriage that would not be "technically and economically feasible" (discussed below)?⁷⁷

17. *Prior Determinations.* Because market modification determinations are so highly fact-specific, we tentatively conclude that prior market determinations made with respect to cable carriage will not automatically apply to the satellite context. It appears that the inherent differences between cable and satellite service would make such automatic application inadvisable. We note, however, that historic carriage is one of the five factors the Commission would consider in evaluating market modification

⁷² See Appendix A – Proposed Rules; 47 C.F.R. § 76.59(d). See also 47 U.S.C. §§ 338(l)(3)(B), 534(h)(1)(C)(iii); *Must Carry Order*, 8 FCC Rcd at 2977, ¶ 46.

⁷³ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2977, ¶ 47, n.139 (1993) (*Must Carry Order*) (stating that "the statute is intended to permit the modification of a station's market to reflect its individual situation"); 47 C.F.R. § 76.59. We note that this is also consistent with the Commission's previous determination that stations may make a different retransmission consent/mandatory carriage election in the satellite context than that made in the cable context. See *DBS Broadcast Carriage Report and Order*, 16 FCC Rcd at 1929-30, ¶ 23.

⁷⁴ 47 U.S.C. § 338(l)(1).

⁷⁵ See *id.* at 1930, ¶ 24. See also *infra* at ¶¶ 23-25 (Section F) (discussing the appropriate definition of the term "community").

⁷⁶ This is also consistent with the satellite carriage election process. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, CS Docket No. 00-96, Order on Reconsideration, 16 FCC Rcd 16544, 16575, ¶ 62 (2001) ("*DBS Must Carry Reconsideration Order*") ("where there is more than one satellite carrier in a local market area, a television station can elect retransmission consent for one satellite carrier and elect must carry for another satellite carrier").

⁷⁷ See *infra* ¶ 19 (Section D).

requests and could carry weight in determining a market modification in the satellite context.⁷⁸ We seek comment on these tentative conclusions. We also seek comment on any alternative approaches. For example, should prior market determinations in the cable context carry a presumption of approval in the satellite context or automatically apply to the satellite context? We note, however, that any presumption or automatic application would have to be subject to the STELAR's exception for satellite carriers if the resulting carriage would not be "technically and economically feasible." Would such alternative approaches impose a significant burden on satellite carriers who would have to evaluate the feasibility of carriage resulting from all prior determinations?

18. *Carriage after a market modification.* We tentatively conclude that television broadcast stations that become eligible for mandatory carriage with respect to a satellite carrier (pursuant to Section 76.66 of the rules) by virtue of a change in the market definition (by operation of a market modification pursuant to Section 76.59 of the rules) may, within 30 days of the effective date of the new definition, elect retransmission consent or mandatory carriage with respect to such carrier.⁷⁹ We further tentatively conclude that a satellite carrier must commence carriage within 90 days of receiving the request for carriage from the television broadcast station.⁸⁰ These proposals are consistent with our cable rules, as well as with existing satellite carriage procedures, including those involving new television stations.⁸¹ In addition, we tentatively conclude that the carriage election must be made in accordance with Section 76.66(d)(1).⁸² We seek comment on these tentative conclusions and on any other procedural requirements we should consider.

D. Technical or Economic Infeasibility Exception for Satellite Carriers

19. We propose to include the statutory language of Section 338(l)(3) within Section 76.59 to implement this provision, and we seek comment on this implementation.⁸³ Section 338(l)(3) provides that "[a] market determination . . . shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination."⁸⁴ The legislative history indicates that Congress recognized "that there are technical and operational differences that may make a particular television market modification difficult for a satellite carrier to effectuate."⁸⁵ The legislative history also indicates "that claims of the existence of such difficulties should be well substantiated and carefully examined by the [Commission] as part of the petition consideration process."⁸⁶ Based on the language of the provision

⁷⁸ See 47 U.S.C. §§ 338(l)(2)(B)(i)(I) (whether the station, or other stations located in the same area— "have been historically carried on the cable system or systems within such community").

⁷⁹ See Appendix A – Proposed Rules; proposed rule 47 C.F.R. § 76.66(d)(6).

⁸⁰ *Id.*

⁸¹ See 47 C.F.R. §§ 76.64(f)(5), 76.66(d)(1) and (d)(3).

⁸² See 47 C.F.R. § 76.66(d)(1). Section 76.66(d)(1) requires that an election request made by a television station must be in writing and sent to the satellite carrier's principal place of business, by certified mail, return receipt requested. 47 C.F.R. § 76.66(d)(1)(ii). The rule requires that a television station's written notification shall include the following information: (1) Station's call sign; (2) Name of the appropriate station contact person; (3) Station's address for purposes of receiving official correspondence; (4) Station's community of license; (5) Station's DMA assignment; and (6) Station's election of mandatory carriage or retransmission consent. 47 C.F.R. § 76.66(d)(1)(iii). The rule also requires that, within 30 days of receiving the request for carriage from the television broadcast station, a satellite carrier must notify the station in writing that it will not carry the station, along with the reasons for such decision, or that it intends to carry the station. 47 C.F.R. § 76.66(d)(1)(iv).

⁸³ See Appendix A – Proposed Rules.

⁸⁴ 47 U.S.C. § 338(l)(3).

⁸⁵ *Senate Commerce Committee Report* at 11.

⁸⁶ See *Senate Commerce Committee Report* at 11.

and the legislative history, we tentatively conclude that the satellite carrier has the burden to demonstrate technical or economic infeasibility. We further interpret the statutory text as requiring a satellite carrier to raise any technical or economic impediments in the market modification proceeding and we propose to address this issue in the market modification proceeding.⁸⁷ This reading is consistent with the language of the statute (that we consider whether the carrier can accomplish carriage “at the time of the determination”). Moreover, this will be most efficient for all parties. We seek comment on this proposal and whether the satellite carrier should be deemed to have waived technical or economic infeasibility arguments if not raised in response to the market modification request (and, thus, be prohibited from raising such a claim after a market determination, such as in response to a station’s request for carriage). We also seek comment on any alternative approaches. In addition, we propose to grant a meritorious market modification request, even if such grant would not create a new carriage obligation at that time, for example, due to a finding of technical or economic infeasibility.⁸⁸ This would ensure that, if there is a change in circumstances such that it later becomes technically and economically feasible for the satellite carrier to carry the station, then the station could assert its carriage rights pursuant to the earlier market modification.⁸⁹ We seek comment on this proposal or if, alternatively, we should deny a market modification request that would not create a new carriage obligation at the time of the determination.

20. We also invite comment on the types of technical or economic impediments contemplated by this provision and the type of evidence needed to prove such infeasibility claims. Are there any objective criteria by which the Commission could determine technical or economic infeasibility? For example, the Commission has recognized that spot beam coverage limitations, in the provision of local-into-local service context, may be a legitimate technical impediment.⁹⁰ Under what circumstances would the limitations or coverage of a spot beam be a sufficient basis for a satellite carrier to prove that carriage of a station in the community at issue is not technically and economically feasible? Should we require satellite carriers claiming infeasibility due to insufficient spot beam coverage to provide spot beam contour diagrams to show whether a particular spot beam can be used to cover a particular community? We also seek specific comment from satellite carriers on the complexities and expense that may be associated with reconfiguring a spot beam to cover additional communities added to the market served by the spot beam by operation of the market modification process. In addition, in the event of a Commission finding of technical or economic infeasibility, we seek comment on whether we should impose a reporting requirement on satellite carriers to notify the affected broadcaster if circumstances change at a later time making it technically and economically feasible for the carrier to carry the station. Would such changes in circumstances be sufficiently public so as to not necessitate the burden of such a reporting requirement? If not notified by the carrier, how else could a broadcaster find out about such a change in the feasibility of carriage? To the extent that a satellite carrier can provide the station at issue to some, but not all, subscribers in the community, should we allow or require the carrier to deliver the station to subscribers in the community who are capable of receiving the signal?

21. We note that compiling the standardized evidence necessary to demonstrate that a market modification should be granted may not be, in some instances, a simple or inexpensive process. In this regard, should the Commission, in the case of satellite market modifications, require or encourage stations seeking market modifications to contact a satellite carrier before filing a market modification request in

⁸⁷ *Id.*

⁸⁸ We note that this is consistent with the cable carriage context, in which the Commission might grant a market modification, even if such grant would not result in a new carriage obligation at that time, for example, due to the station being a duplicating signal. *See* 47 C.F.R. § 76.56(b)(5).

⁸⁹ This concept is similar to the duplicating signals situation, in which a satellite carrier must add a television station to its channel line-up if such station no longer duplicates the programming of another local television station. *See* 47 C.F.R. § 76.66(h)(4).

⁹⁰ *See DBS Broadcast Carriage Report and Order*, 16 FCC Rcd at 1937-38, ¶ 42 (allowing satellite carriers to use spot beam technology to provide local-into-local service, even if the spot beam did not cover the entire market).

order to get an initial determination on whether the carrier considers the request technically and economically feasible? Such an initial inquiry might save some broadcasters the time and expense of compiling the standardized evidence for a modification that is not technically and economically feasible by alerting them to the technical or economic issue, which they could then take into account in deciding whether to file the request. We seek comment on this issue.

E. No Effect on Eligibility to Receive Distant Signals via Satellite

22. We propose to include the statutory language of Section 338(l)(5) within Section 76.59 to implement this provision, and we seek comment on any further guidance we can give for its implementation.⁹¹ Section 338(l)(5) provides that “[n]o modification of a commercial television broadcast station’s local market pursuant to this subsection shall have any effect on the eligibility of households in the community affected by such modification to receive distant signals pursuant to section 339, notwithstanding subsection (h)(1) of this section.”⁹² There are two key restrictions on a satellite subscriber’s eligibility to receive “distant” (out-of-market) signals.⁹³ First, subscribers are generally eligible to receive a distant station from a satellite carrier only if the subscriber is “unserved” over the air by a local station of the same network.⁹⁴ Second, even if “unserved,” a subscriber is not eligible to receive a distant station from a satellite carrier if the carrier is making “available” to such subscriber a local station of the same network.⁹⁵ We believe Section 338(l)(5) is largely intended as an exception to these two subscriber eligibility requirements. In other words, under this reading, the addition of a new local station to a local television market by operation of a market modification (which might otherwise restrict a subscriber’s eligibility to receive a distant station) would not disqualify an otherwise eligible satellite subscriber from receiving a distant station of the same network. For example, a subscriber may be receiving a distant station because the subscriber resides in a “short market,”⁹⁶ has obtained a waiver from the relevant network station,⁹⁷ or is otherwise eligible to receive distant signals pursuant to Section 339. That subscriber will continue to be eligible to receive the distant station after a market modification that adds a new local station of the same network. We seek comment on our proposed reading of this provision. We also seek comment on any alternative interpretations. We invite comment on the specific

⁹¹ See Appendix A – Proposed Rules.

⁹² 47 U.S.C. § 338(l)(5).

⁹³ See 17 U.S.C. § 119; 47 U.S.C. § 339. Generally, a station is considered “distant” with respect to a subscriber if such station originates from outside of the subscriber’s local television market (or DMA). See *id.*

⁹⁴ The Copyright Act defines an “unserved household,” with respect to a particular television network, as “a household that cannot receive, through the use of an antenna, an over-the-air signal containing the primary stream, or, on or after the qualifying date, the multicast stream, originating in that household’s local market and affiliated with that network— (i) if the signal originates as an analog signal, Grade B intensity as defined by the Federal Communications Commission in section 73.683(a) of title 47, Code of Federal Regulations, as in effect on January 1, 1999; or (ii) if the signal originates as a digital signal, intensity defined in the values for the digital television noise-limited service contour, as defined in regulations issued by the Federal Communications Commission (section 73.622(e) of title 47, Code of Federal Regulations), as such regulations may be amended from time to time. 17 U.S.C. § 119(d)(10)(A). An unserved household can also be one that is subject to one of four statutory waivers or exemptions. See *id.* § 119(d)(10)(B)-(E).

⁹⁵ See 47 U.S.C. § 339(a)(2); 17 U.S.C. § 119(a)(3). This second restriction on eligibility is commonly referred to as the “no distant where local” rule. A satellite carrier makes “available” a local signal to a subscriber or person if the satellite carrier offers that local signal to other subscribers who reside in the same zip code as that subscriber or person. 47 U.S.C. § 339(a)(2)(H). See also 17 U.S.C. § 119(a)(3)(F).

⁹⁶ See 47 U.S.C. § 339(a)(2)(C); 17 U.S.C. § 119(d)(10). By a “short market,” we refer to a market in which one of the four major television networks is not offered on the primary stream of a local broadcast station, thus permitting satellite carriers to deliver a distant station affiliated with that missing network to subscribers in that market.

⁹⁷ See 47 U.S.C. § 339(a)(2)(E).

situations intended to be covered by Section 338(l)(5). We seek comment on whether Section 338(l)(5) also means that the deletion of a local station from a local television market by operation of a market modification would not make otherwise ineligible subscribers now eligible to receive a distant station of the same network. We also seek comment on any other rule changes necessary to implement this statutory provision.

F. Definition of Community

23. As directed by the STELAR, we consider how to define a “community” for purposes of market modification in both the cable and satellite contexts.⁹⁸ With respect to a “satellite community,” we generally invite comment on how to define a “satellite community,” and seek specific comment on two alternate proposals for this definition below. With respect to a “cable community,” we tentatively conclude that our existing definition of a “cable community” (in Section 76.5(dd) of the rules) has worked well in cable market modifications for more than 20 years and should not be changed. While we continue to believe the cable definition best effectuates the cable market modification provision, we nevertheless invite comment on whether we need to update this definition, such as whether to allow cable modifications on a county basis. Section 102(d)(2) of the STELAR requires the Commission to “update what it considers to be a community for purposes of a modification of a market” in both the satellite and cable contexts.⁹⁹ The legislative history indicates Congress’ intent for the Commission “to consider alternative definitions for community that could make the market modification process more effective and useful.”¹⁰⁰

24. The concept of a “community” is important in the market modification context, because the term describes the geographic area that will be added to or deleted from a station’s local television market, which in turn determines the stations that must be carried by a cable operator (or, in the future, a satellite carrier) to subscribers in that community.¹⁰¹ Because of the localized nature of cable systems, cable communities are easily defined by the geographic boundaries of a given cable system, which are often, but not always, coincident with a municipal boundary and may vary as determined on a case-by-case basis.¹⁰² In the cable carriage context, the Commission considers market modification requests on a community-by-community basis¹⁰³ and defines a community unit in terms of a “distinct community or municipal entity” where a cable system operates or will operate.¹⁰⁴ A “satellite community,” however, is

⁹⁸ STELAR § 102(d)(2); 47 U.S.C.A. § 338 Note.

⁹⁹ STELAR § 102(d)(2) (“MATTERS FOR CONSIDERATION.—As part of the rulemaking required by paragraph (1), the Commission shall . . . update what it considers to be a community for purposes of a modification of a market under section 338(l) or 614(h)(1)(C) of the Communications Act of 1934”); 47 U.S.C.A. § 338 Note.

¹⁰⁰ *Senate Commerce Committee Report* at 12.

¹⁰¹ *See* 47 U.S.C. § 338(a)(1); 47 C.F.R. § 76.66(b)(1).

¹⁰² *See 1977 Cable Order*, 63 FCC 2d at 966, ¶ 20, n. 5 (citing *Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals By Community Antenna Television Systems, and Related Matters*, Docket 15971, 2 FCC 2d 725, 785-6, ¶ 149 (1966) (“community” as used in the rules must be determined case-by-case depending on the circumstances involved); *Telerama, Inc.*, 3 FCC 2d 585 (1966), *Mission Cable TV Inc.*, 4 FCC 2d 236 (1966), *Calvert Telecommunications Corp.*, 49 FCC 2d 200 (1974), and *St. Louis Telecast, Inc.*, 12 RR 1289, 1369 (1957)).

¹⁰³ *See Amendment of Part 76 of the Commission’s Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, Docket No. 20561, First Report and Order, 63 FCC 2d 956, 964, ¶ 22 (1977) (“1977 Cable Order”) (explaining that the cable carriage rules apply “on a community-by-community basis”). *See also* 47 C.F.R. §§ 76.5(dd), 76.59.

¹⁰⁴ 47 C.F.R. § 76.5(dd) defines “community unit” as: “A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).” A

(continued....)

not as easily defined as a cable community. Unlike cable service, which reaches subscribers in a defined local area via local franchises, satellite carriers offer service on a national basis, with no connection to a particular local community or municipality. Moreover, satellite service is sometimes offered in areas of the country that do not have cable service, and thus cannot be defined by cable communities. The Commission previously faced the question of how to define a satellite community in 2005, after the SHVERA added significantly viewed provisions for the satellite carriage context.¹⁰⁵ In the significantly viewed context, the Commission, seeking regulatory parity, defined a satellite community in the same way as a cable community in most situations.¹⁰⁶ However, the Commission allowed a satellite carrier to define a satellite community “by one or more adjacent five-digit zip code areas” in the limited situation in which there was no previously defined cable community and the area was unincorporated.¹⁰⁷

25. We seek comment on whether we should use the definition of “satellite community” in Section 76.5(gg) for satellite market modifications.¹⁰⁸ Alternatively, we seek comment on whether we should use one or more adjacent five-digit zip codes to form the basis of a “satellite community” for satellite market modifications.¹⁰⁹ Would allowing satellite carriers to use one or more adjacent five-digit zip code areas (notwithstanding the presence of a cable community) in the market modification context better effectuate the STELAR’s goal to promote consumer access to relevant television programming?

(Continued from previous page) _____

cable system community is assigned a community unit identifier number (“CUID”) when registered with the Commission, pursuant to Section 76.1801 of the rules. 47 C.F.R. § 76.1801.

¹⁰⁵ See *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278, 17300, ¶ 51 (2005) (“*SHVERA Significantly Viewed Report and Order*”). The SHVERA defined the term “community” for purposes of the significantly viewed rules, as either “(A) a county or a cable community, as determined under the rules, regulations, and authorizations of the Commission applicable to determining with respect to a cable system whether signals are significantly viewed; or (B) a satellite community, as determined under such rules, regulations, and authorizations (or revisions thereof) as the Commission may prescribe in implementing the requirements of this section.” 47 U.S.C. § 340(i)(3).

¹⁰⁶ See 47 C.F.R. § 76.5(gg) (defining a “satellite community” as “[a] separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). The boundaries of any such unincorporated community may be defined by one or more adjacent five-digit zip code areas. Satellite communities apply only in areas in which there is no pre-existing cable community, as defined in 76.5(dd).”). See also *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 17299, ¶ 50. We note, however, that the SHVERA required satellite carriers to use the existing defined cable communities on the significantly viewed list. See 47 U.S.C. §§ 340(a)(1); 340(i)(3)(A). This provision, in part, caused the Commission to favor the use of cable communities to define future communities, except for unincorporated areas, to promote consistent rules and significantly viewed listings for both satellite and cable. See *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 17300, ¶ 51 (stating that the “definition will also make it more likely that a cable system subsequently built in such an area would serve a ‘community’ similar to the satellite community, thus making the [Significantly Viewed] List more easily used by both cable and satellite providers”). This reasoning does not necessarily apply to the market modification context if we adopt our proposal to separately consider and apply market modifications in the cable and satellite contexts.

¹⁰⁷ 47 C.F.R. § 76.5(gg). The Commission required satellite carriers to use zip codes that were adjacent to each other “to prevent carriers from cherry-picking their service to these areas.” *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 17300, ¶ 52.

¹⁰⁸ See 47 C.F.R. § 76.5(gg).

¹⁰⁹ We note that the Commission used zip codes in lieu of community units to define the various zones of protection afforded under the satellite exclusivity rules applicable to nationally distributed superstations. See 47 C.F.R. §§ 76.122, 76.123; *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, CS Docket No. 00-2, Report and Order, 15 FCC Rcd 21688, 21703, ¶ 28 (2000), recon. granted in part, denied in part, Order on Reconsideration, 17 FCC Rcd 27875 (2002).

What other possible definitions of satellite community should we consider? Would another definition be more technically and economically feasible for satellite carriers to apply and, thus, facilitate successful market modifications?¹¹⁰ For example, it might not be technically and economically feasible for a satellite carrier to retransmit a station to an entire cable community (as defined in 76.5(dd)), but it might be feasible for the carrier to retransmit the station to particular portions of that community, such as to certain zip codes within such community. What definition of community will most effectively promote consumer access to in-state programming?¹¹¹ For example, is it appropriate to consider county-based modifications in the satellite context, particularly in situations in which the county is assigned to an out-of-state DMA?¹¹² If we allow modifications on a county basis in the satellite context, should we also allow such modifications in the cable context?

IV. PROCEDURAL MATTERS

26. Initial Regulatory Flexibility Act Analysis. As required by the Regulatory Flexibility Act of 1980 (RFA),¹¹³ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA). The IRFA is attached as Appendix B. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the first page of this document. The Commission will send a copy of this document, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

27. Initial Paperwork Reduction Act of 1995 Analysis. This document contains proposed modified information collection requirements.¹¹⁴ The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995 (PRA).¹¹⁵ In addition, pursuant to the Small Business Paperwork Relief Act of 2002,¹¹⁶ we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

28. Ex Parte Rules. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹¹⁷ *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. 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

¹¹⁰ We note that the two satellite carriers previously favored the use of zip codes in the significantly viewed context to offer “greater certainty to consumers.” See *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 17300, ¶ 52.

¹¹¹ We take particular note here of Congress’ concern that consumers in an out-of-state DMA may “lack access to local television programming that is relevant to their everyday lives.” *Senate Commerce Committee Report* at 11.

¹¹² See *In-State Programming Report*, 26 FCC Rcd at 11950, ¶ 58.

¹¹³ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601, *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

¹¹⁴ See OMB Control Number 3060-0546.

¹¹⁵ The Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

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

¹¹⁷ See 47 C.F.R. § 1.1206 (Permit-but-disclose proceedings); see also *id.* §§ 1.1200 *et seq.*

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. Memoranda must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. 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 Section 1.1206(b) of the rules. In proceedings governed by Section 1.49(f) of the rules 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.

29. Filing Requirements. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,¹¹⁸ 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).¹¹⁹

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

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

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

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

31. Availability of Documents. Comments and reply comments will be publically available online via ECFS.¹²⁰ These documents will also be available for public inspection during regular business

¹¹⁸ See 47 C.F.R. §§ 1.415, 1419.

¹¹⁹ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

¹²⁰ Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC Headquarters, 445 12th Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

32. For additional information, contact Evan Baranoff, Evan.Baranoff@fcc.gov, of the Media Bureau, Policy Division, (202) 418-7142. Direct press inquiries to Janice Wise at (202) 418-8165.

V. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that, pursuant to Section 102 of the STELA Reauthorization Act of 2014 (STELAR), Pub. L. No. 113-200, 128 Stat. 2059 (2014), and Sections 1, 4(i), 303(r), 338 and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 338 and 534, this Notice of Proposed Rulemaking IS ADOPTED and NOTICE IS HEREBY GIVEN of the proposals and tentative conclusions described in this Notice of Proposed Rulemaking.

34. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, 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 Rules

The Federal Communications Commission proposes to amend Part 76 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

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 76.7 is amended by revising paragraph (a)(3) to read as follows:

§76.7 General special relief, waiver, enforcement, complaint, show cause, forfeiture, and declaratory ruling procedures.

(a) * * *

* * * * *

(3) *Certificate of service.* Petitions and Complaints shall be accompanied by a certificate of service on any cable television system operator, **multichannel video programming distributor**, franchising authority, station licensee, permittee, or applicant, or other interested person who is likely to be directly affected if the relief requested is granted.

* * * * *

3. Section 76.59 is amended to read as follows:

§76.59 Modification of television markets.

(a) The Commission, following a written request from a broadcast station, ~~or a cable system~~ **or satellite carrier**, may deem that the television market, **as defined either by §76.55(e) or §76.66(e)**, of a particular commercial television broadcast station should include additional communities within its television market or exclude communities from such station's television market. In this respect, communities may be considered part of more than one television market.

(b) Such requests for modification of a television market shall be submitted in accordance with §76.7, petitions for special relief, and shall include the following evidence:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend **or satellite carrier local receive facility** locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) **Noise-limited service contour maps (for digital stations) or** Grade B contour maps **(for analog stations)** delineating the station's technical service area and showing the location of the cable system headends **or satellite carrier local receive facilities** and communities in relation to the service areas.

Note to paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guide.

(5) Cable system **or satellite carrier** channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(6) Published audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both **multichannel video programming distributor (MVPD) and non-MVPD cable and noncable** households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.

(c) Petitions for Special Relief to modify television markets that do not include such evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee.

(d) A cable operator **or satellite carrier** shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this section.

(e) A market determination under this section shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination.

(f) No modification of a commercial television broadcast station's local market pursuant to this section shall have any effect on the eligibility of households in the community affected by such modification to receive distant signals from a satellite carrier pursuant to 47 U.S.C. 339.

4. Section 76.66 is amended by adding a new paragraph (d)(6) and revising paragraph (e) to read as follows:

§76.66 Satellite broadcast signal carriage.

* * * * *

(d) Carriage procedures—

* * * * *

(6) *Carriage after a market modification.* Television broadcast stations that become eligible for mandatory carriage with respect to a satellite carrier (pursuant to § 76.66) due to a change in the market definition (by operation of a market modification pursuant to §76.59) may, within 30 days of the effective date of the new definition, elect retransmission consent or mandatory carriage with respect to such carrier. A satellite carrier shall commence carriage within 90 days of receiving the carriage election from the television broadcast station. The election must be made in accordance with the requirements in paragraph (d)(1) of this section.

* * * * *

(e) *Market definitions.* (1) A local market, in the case of both commercial and noncommercial television broadcast stations, is the designated market area in which a station is located, **unless such market is amended pursuant to §76.59**, and

* * * * *

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 Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rule Making (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 provided on the first page of the item. 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 Rule Changes

2. In this Notice of Proposed Rulemaking (NPRM), the Commission proposes satellite television “market modification” rules to implement Section 102 of the Satellite Television Extension and Localism Act (STELA) Reauthorization Act of 2014 (“STELA Reauthorization Act” or “STELAR”).⁴ The STELAR amended the Communications Act (“Communications Act” or “Act”) and the Copyright Act to give the Commission authority to modify a commercial television broadcast station’s local television market for purposes of satellite carriage rights.⁵ The Commission currently has the authority to modify markets only in the cable carriage context.⁶ With Section 102 of the STELAR, Congress provides regulatory parity in this regard in order “to further consumer access to relevant television programming.”⁷ In this NPRM, consistent with Congress’ intent that the Commission model the satellite market modification process on the current cable market modification process, the Commission proposes to implement Section 102 of the STELAR by revising the current cable market modification rule, Section 76.59, to apply also to satellite carriage, while adding provisions to the rules to address the unique nature of satellite television service.⁸ In addition to establishing rules for satellite market modifications, Section 102 of the STELAR directs the Commission to consider whether it should make changes to the current cable market modification rules,⁹ and it also makes certain conforming amendments to the cable market modification statutory provision.¹⁰ Accordingly, as part of the implementation of the STELAR, the Commission proposes to make conforming changes to the cable market modification rules and considers

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ The STELAR Reauthorization Act of 2014 (STELAR), §§ 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)). The STELAR was enacted on December 4, 2014 (H. R. 5728, 113th Cong.). See NPRM ¶ 1.

⁵ STELAR §§ 102, 204, 128 Stat. at 2060-62, 2067.

⁶ See 47 U.S.C. § 534(h)(1)(C). See also 47 C.F.R. § 76.59.

⁷ See title of STELAR Section 102, “Modification of Television Markets to Further Consumer Access to Relevant Television Programming.” See also Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 (2014) (“*Senate Commerce Committee Report*”).

⁸ See 47 C.F.R. § 76.59. The Commission proposes to revise Section 76.59 of the rules to apply to both cable systems and satellite carriers. See NPRM at Appendix A – Proposed Rules.

⁹ STELAR § 102(d).

¹⁰ See STELAR § 102(b) (amending 47 U.S.C. § 534(h)(1)(C)(ii)).

whether it should make any other changes to the current cable market modification rules. The STELAR requires the Commission to issue final rules in this proceeding on or before September 4, 2015.¹¹

B. Legal Basis

3. The proposed action is authorized pursuant to Section 102 of the STELA Reauthorization Act of 2014 (STELAR), Pub. L. No. 113-200, 128 Stat. 2059 (2014), and Sections 1, 4(i), 303(r), 338 and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 338 and 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.¹² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁴ 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.¹⁵ The rule changes proposed herein will directly affect small television broadcast stations and small MVPD systems, which include cable system operators and satellite carriers. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Wired Telecommunications Carriers.* The North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”¹⁶ The SBA has developed a small business size standard for wireline firms for the broad economic census category of “Wired

¹¹ STELAR § 102(d)(1).

¹² 5 U.S.C. § 603(b)(3).

¹³ 5 U.S.C. § 601(6).

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

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

¹⁶ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category 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”).

Telecommunications Carriers.” Under this category, a wireline business is small if it has 1,500 or fewer employees.¹⁷ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.¹⁸ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.¹⁹ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

6. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which category is defined above.²⁰ The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer employees.²¹ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.²² Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.²³ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

7. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rate regulation rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.²⁴ According to SNL Kagan, there are 1,258 cable operators.²⁵ Of this total, all but 10 incumbent cable companies are small under this size standard.²⁶ In addition, under the Commission’s rules, a “small system” is a cable

¹⁷ 13 C.F.R. § 121.201; NAICS code 517110.

¹⁸ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

¹⁹ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

²⁰ See also U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

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

²² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

²³ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

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

²⁵ Data provided by SNL Kagan to Commission Staff upon request on March 25, 2014. Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, ¶ 24 (2013) (“15th Annual Competition Report”).

²⁶ SNL Kagan, U.S. Multichannel Top Cable MSOs, <http://www.snl.com/interactivex/TopCableMSOs.aspx> (visited June 26, 2014). We note that when this size standard (*i.e.*, 400,000 or fewer subscribers) is applied to all MVPD operators, all but 14 MVPD operators would be considered small. *15th Annual Competition Report*, 28 FCC Rcd at 10507-08, ¶¶ 27-28 (subscriber data for DBS and Telephone MVPDs). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37

(continued....)

system serving 15,000 or fewer subscribers.²⁷ Current Commission records show 4,584 cable systems nationwide.²⁸ Of this total, 4,012 cable systems have fewer than 20,000 subscribers, and 572 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

8. *Cable System Operators* (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁹ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.³⁰ Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.³¹ 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.³² Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable to estimate with greater precision the number of cable system operators that would qualify as small cable operators under this definition.

9. *Satellite Carriers*. The term “satellite carrier” means an entity that uses the facilities of a satellite or satellite service licensed under Part 25 of the Commission’s rules to operate in the Direct Broadcast Satellite (DBS) service or Fixed-Satellite Service (FSS) frequencies.³³ As a general practice (not mandated by any regulation), DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be

(Continued from previous page) _____

(2011) (“*CALM Act Report and Order*”) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

²⁷ 47 C.F.R. § 76.901(c).

²⁸ The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on July 1, 2014. A cable system is a physical system integrated to a principal headend.

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

³⁰ 47 C.F.R. § 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, 16 FCC Rcd 2225 (Cable Services Bureau, 2001) (establishing the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers and stating that this threshold will remain in effect for purposes of Section 76.901(f) until the Commission issues a superseding public notice). We note that current industry data indicates that there are approximately 54 million incumbent cable video subscribers in the United States today and that this updated number may be considered in developing size standards in a context different than Section 76.901(f). NCTA, Industry Data, Cable’s Customer Base (June 2014), <https://www.ncta.com/industry-data> (visited June 25, 2014).

³¹ *See* SNL Kagan, U.S. Multichannel Top Cable MSOs, <http://www.snl.com/interactivex/TopCableMSOs.aspx> (visited June 26, 2014).

³² The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. *See* 47 C.F.R. § 76.901(f).

³³ The Communications Act defines the term “satellite carrier” by reference to the definition in the copyright laws in title 17. *See* 47 U.S.C. §§ 340(i)(1) and 338(k)(3); 17 U.S.C. §119(d)(6). Part 100 of the Commission’s rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed under Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.³⁴ The Commission has concluded that the definition of “satellite carrier” includes all three of these types of entities.³⁵

10. *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, by exception, is now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,³⁶ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³⁷ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.³⁸ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.³⁹ Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.⁴⁰ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.⁴¹ Each currently offers subscription services. DIRECTV and DISH Network each reports annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and

³⁴ See, e.g., *Application Of DIRECTV Enterprises, LLC, Request For Special Temporary Authority for the DIRECTV 5 Satellite; Application Of DIRECTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DIRECTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location*, 19 FCC Rcd. 15529 (Sat. Div. 2004).

³⁵ *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278, 17302-3, ¶¶ 59-60 (2005) (“*SHVERA Significantly Viewed Report and Order*”).

³⁶ This category of Wired Telecommunications Carriers is defined above (“By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”). U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³⁷ 13 C.F.R. § 121.201; NAICS code 517110.

³⁸ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

³⁹ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

⁴⁰ 13 C.F.R. § 121.201; NAICS code 517510 (2002).

⁴¹ See *15th Annual Competition Report*, at ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at ¶¶ 27, 110-11.

condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, Wired Telecommunications Carriers,⁴² which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁴³ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁴⁴ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.⁴⁵ Therefore, under this size standard, the majority of such businesses can be considered small.

12. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.⁴⁶ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁴⁷ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁴⁸ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.⁴⁹ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

13. *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.⁵⁰ The OVS framework provides opportunities for the distribution of video

⁴² This category of Wired Telecommunications Carriers is defined above ("By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."). U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴³ 13 C.F.R. § 121.201; NAICS code 517110.

⁴⁴ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴⁵ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

⁴⁶ This category of Wired Telecommunications Carriers is defined above ("By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."). U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁷ 13 C.F.R. § 121.201; NAICS code 517110.

⁴⁸ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴⁹ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

⁵⁰ 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("Thirteenth Annual Cable Competition Report").

programming other than through cable systems. Because OVS operators provide subscription services,⁵¹ OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.⁵² The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁵³ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁵⁴ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.⁵⁵ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁵⁶ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.⁵⁷ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

14. *Wireless cable systems – Broadband Radio Service and Educational Broadband Service.* Wireless cable systems use the Broadband Radio Service (BRS)⁵⁸ and Educational Broadband Service (EBS)⁵⁹ 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.⁶⁰ 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.⁶¹

⁵¹ See 47 U.S.C. § 573.

⁵² This category of Wired Telecommunications Carriers is defined above. See also U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁵³ 13 C.F.R. § 121.201; NAICS code 517110.

⁵⁴ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁵⁵ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

⁵⁶ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

⁵⁷ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁵⁸ 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*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

⁵⁹ EBS was previously referred to as the Instructional Television Fixed Service (ITFS). See *id.*

⁶⁰ 47 C.F.R. § 21.961(b)(1).

⁶¹ 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.

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.⁶² The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not 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.⁶³ Auction 86 concluded in 2009 with the sale of 61 licenses.⁶⁴ 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.

15. 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,⁶⁵ which was developed for small wireline businesses. The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁶⁶ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁶⁷ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.⁶⁸ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses.⁶⁹ The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.⁷⁰

⁶² *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).

⁶³ *Id.* at 8296.

⁶⁴ *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).

⁶⁵ This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁶⁶ 13 C.F.R. § 121.201; NAICS code 517110.

⁶⁷ U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁶⁸ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

⁶⁹ <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp>.

⁷⁰ 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 fewer than 50,000). 5 U.S.C. §§ 601(4)-(6).

16. *Incumbent Local Exchange Carriers (ILECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. ILECs are included in the SBA's economic census category, Wired Telecommunications Carriers.⁷¹ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁷² Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁷³ Of this total, 3,144 firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.⁷⁴ Therefore, under this size standard, the majority of such businesses can be considered small.

17. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."⁷⁵ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.⁷⁶ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

18. *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 small business size standard specifically for these service providers. These entities are included in the SBA's economic census category, Wired Telecommunications Carriers.⁷⁷ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁷⁸ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁷⁹ Of this total, 3,144

⁷¹ This category of Wired Telecommunications Carriers is defined above. See also U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷² 13 C.F.R. § 121.201; NAICS code 517110.

⁷³ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁷⁴ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

⁷⁵ 15 U.S.C. § 632.

⁷⁶ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

⁷⁷ This category of Wired Telecommunications Carriers is defined above. See also U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷⁸ 13 C.F.R. § 121.201; NAICS code 517110.

⁷⁹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

firms had fewer than 1,000 employees, and 44 firms had 1,000 or more employees.⁸⁰ Therefore, under this size standard, the majority of such businesses can be considered small.

19. *Television Broadcasting.* This economic census category “comprises establishments primarily engaged in broadcasting images together with sound.”⁸¹ The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.⁸² The 2007 U.S. Census indicates that 808 firms in this category operated in that year. Of that number, 709 had annual receipts of \$25,000,000 or less, and 99 had annual receipts of more than \$25,000,000.⁸³ Because the Census has no additional classifications that could serve as a basis for determining the number of stations whose receipts exceeded \$38.5 million in that year, we conclude that the majority of television broadcast stations were small under the applicable SBA size standard.

20. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,390 stations.⁸⁴ Of this total, 1,221 stations (or about 88 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 2, 2014. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395.⁸⁵ NCE stations are non-profit, and therefore considered to be small entities.⁸⁶ Therefore, we estimate that the majority of television broadcast stations are small entities.

21. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁸⁷ 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, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

22. *Class A TV and LPTV Stations.* The same SBA definition that applies to television broadcast stations would apply to licensees of Class A television stations and low power television

⁸⁰ *Id.* With respect to the latter 44 firms, there is no data available that shows how many operated with more than 1,500 employees.

⁸¹ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.”

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

⁸³ U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2007* (515120), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

⁸⁴ *See Broadcast Station Totals as of December 31, 2014*, Press Release (MB rel. Jan. 7, 2015) (*Broadcast Station Totals*) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-331381A1.pdf.

⁸⁵ *See Broadcast Station Totals, supra.*

⁸⁶ *See generally* 5 U.S.C. §§ 601(4), (6).

⁸⁷ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 21.103(a)(1).

(LPTV) stations, as well as to potential licensees in these television services. As noted above, the SBA has created the following small business size standard for this category: those having \$38.5 million or less in annual receipts.⁸⁸ The Commission has estimated the number of licensed Class A television stations to be 431.⁸⁹ The Commission has also estimated the number of licensed LPTV stations to be 2,003.⁹⁰ Given the nature of these services, we will presume that these licensees qualify as small entities under the SBA definition.

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

23. The NPRM proposes to revise Section 76.59 of the rules to apply it to the satellite television context, thus permitting commercial TV broadcast stations and satellite carriers to file petitions seeking to modify a commercial TV broadcast station's local television market for purposes of satellite carriage rights.⁹¹ Under Section 76.59 of the rules, commercial TV broadcast stations and cable system operators may already file such requests for market modification for purposes of cable carriage rights. Consistent with the current cable requirement in Section 76.59, the proposed rules would require commercial TV broadcast stations and satellite carriers to file market modification requests and/or responsive pleadings in accordance with the procedures for filing Special Relief petitions in Section 76.7 of the rules.⁹² Consistent with the current cable requirement in Section 76.59, the proposed rules would require commercial TV broadcast stations and satellite carriers to provide specific forms of evidence to support market modification petitions, should they chose to file such petitions.⁹³ The proposed rules would also require a satellite carrier to provide specific evidence to demonstrate its claim that satellite carriage resulting from a market modification would be technically or economically infeasible.⁹⁴ The NPRM does not otherwise propose any new reporting, recordkeeping or other compliance requirements.

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

24. 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.⁹⁵

25. Consistent with the statute's goal of promoting regulatory parity between cable and satellite service, the NPRM proposes to apply the existing cable market modification rule to the satellite context. The proposed rules would not change the market modification process currently applicable to small television stations and small cable systems, although the proposed rules would for the first time allow stations to request market modifications for purposes of satellite carriage. Small TV stations that

⁸⁸ 13 C.F.R. § 121.201; NAICS code 515120.

⁸⁹ See *Broadcast Station Totals*, *supra*.

⁹⁰ See *Broadcast Station Totals*, *supra*.

⁹¹ See NPRM ¶ 8.

⁹² See NPRM ¶ 10. Broadcasters and satellite carriers that want to oppose market modification requests would need to file responsive pleadings in accordance with 47 C.F.R. § 76.7.

⁹³ See NPRM ¶¶ 12-13.

⁹⁴ See NPRM ¶ 19-20.

⁹⁵ 5 U.S.C. § 603(c)(1)-(c)(4)

choose to file satellite market modification petitions must comply with the associated filing and evidentiary requirements; however, the filing of such petitions is voluntary. In addition, small TV stations may want to respond to a petition to modify its market (or the market of a competitor station) filed by a satellite carrier or a competitor station; however, there are no standardized evidentiary requirements associated with such responsive pleadings. Through a market modification process, a small TV station may gain or lose carriage rights with respect to a particular community, based on the five statutory factors, to better reflect localism.⁹⁶ We do not have data to measure whether small TV stations on the whole are more or less likely to benefit from market modifications, so we invite small TV stations to comment on this issue. In addition, we invite comment on whether there are any alternatives we should consider to the Commission's proposed implementation of Section 102 of the STELAR that would minimize any adverse impact on small TV stations, but which are consistent with the statute and its goals, such as promoting localism and regulatory parity.

26. The proposed rules, for the first time, would allow satellite carriers to request market modifications. As previously discussed, only two entities – DIRECTV and DISH Network – provide direct broadcast satellite (DBS) service, which requires a great investment of capital for operation. As noted in Section C of this IRFA, neither one of these two entities qualify as a small entity and small businesses do not generally have the financial ability to become DBS licensees because of the high implementation costs associated with satellite services.⁹⁷

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

27. None.

⁹⁶ See NPRM ¶ 5. Section 338(l) of the Act provides that, in deciding requests for market modifications, the Commission must afford particular attention to the value of localism by taking into account the following five factors: (1) whether the station, or other stations located in the same area—(a) have been historically carried on the cable system or systems within such community; and (b) have been historically carried on the satellite carrier or carriers serving such community; (2) whether the television station provides coverage or other local service to such community; (3) whether modifying the local market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence; (4) whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and (5) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community. 47 U.S.C. § 338(l)(2)(B)(i)-(v). See also discussion at NPRM ¶ 11.

⁹⁷ See IRFA ¶ 10.

**STATEMENT OF
CHAIRMAN TOM WHEELER**

Re: *Amendment of the Commission's Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-71.

Market modification rules for satellite TV hardly sounds like a kitchen-table issue, but to understand why today's item is important to consumers across America, you need only read a letter to the Commission from former Arkansas Congressman Mike Ross. He writes, "For reasons I have never fully understood, seven counties in my district are located in the Shreveport, Louisiana [market] and two counties are located in the Monroe, Louisiana [market] ... This means that thousands of my constituents receive Louisiana news, weather, and sports. It means that, on Fall Saturdays, they have to watch LSU Tigers football rather than Arkansas Razorbacks football." The college football fans in the room appreciate that this is no joking matter for these constituents. With today's action, the Commission moves to make sure that arcane regulations don't preclude satellite TV customers from accessing in-state coverage of news, emergency information, or their local sports teams.

The Communications Act and Copyright Act require satellite carriers to use the Nielsen Company's Designated Market Area (DMA) assignments to determine which TV broadcast stations to carry and include in their local programming packages to subscribers. DMAs frequently cross state lines and thus may include counties from multiple states.

As a result of DMA designations, some satellite subscribers, like the ones I mentioned in Southern Arkansas, are unable to receive in-state broadcast television stations. These areas are known as "orphan counties."

Satellite subscribers in "orphan counties" often lack access to in-state news, sports, public affairs, political information, and emergency information, such as severe weather alerts, school closings, road closures, and other breaking news. In addition, some of these subscribers may be located in rural areas that are unable to receive in-state stations over the air and that may have limited, if any, broadband service.

The STELA Reauthorization Act of 2014 (STELAR) gave the Commission authority to modify a commercial TV broadcast station's local television market for purposes of satellite carriage rights. Market modification through STELAR allows the Commission, at the request of a broadcaster or cable operator, to add or delete communities from a station's local television market to better reflect market realities. The Commission previously had such authority to modify a station's local television market only in the cable carriage context.

The Commission proposes to apply the existing cable rule to the satellite carriage context, while adding rules to address the unique nature of satellite television service, such as giving carriers an exception if the resulting carriage is "not technically and economically feasible."

The Commission is initiating this proceeding to enable satellite subscribers in certain communities to gain access to in-state and other programming that better serves the interests of those communities. The proposal would, as Congress directed, create regulatory parity between satellite and cable television providers.

Note, however, that the ability of the market modification provision to successfully address orphan county problems will depend in large part on broadcasters' willingness to grant retransmission consent and satellite carriers' technical and financial ability to provide the in-state stations.

STELAR requires the Commission to issue final rules in this proceeding on or before September 4, 2015. Today's action puts us on track to meet our obligations.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Amendment of the Commission's Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-71.

With this *Notice of Proposed Rulemaking*, we are taking the first step toward ensuring that customers of satellite television operators are able to watch the local programming that matters to them the most. Through the STELA Reauthorization Act of 2014, Congress gave the FCC tools to tackle the problem of so-called "Orphan Counties," or situations in which satellite customers are unable to view television stations in their home State because of the boundaries set by Nielsen Designated Market Areas.

The STELAR gives us the flexibility to adjust these boundaries, where warranted, through "market modifications." And once we adopt rules in this proceeding, we will be able to eliminate "Orphan Counties" in response to petitions filed by broadcasters or satellite operators. In addition, we will be able to address other situations in which satellite customers are unable to receive local news, public affairs, emergency weather coverage, hometown sports or other local broadcast programming most relevant to them. I am pleased that we are implementing this statutory provision in a conscientious and thorough manner.

This proceeding will promote regulatory parity between cable and satellite operators, while allowing us to account for the unique technical and economic aspects of satellite television service. In the current media landscape, there is no logical reason why we can modify the local market of a cable operator, but not that of a satellite operator. This *NPRM* begins the process of eliminating this outdated disparity, and it has my support.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Amendment of the Commission's Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-71.

Big changes are coming to television. If you want to see it on a small scale, you can come to my house. There was a time when my family sat together, basking in the glow of a single large screen. Today we still sit together. But that single large screen has given way to gatherings with many screens and multiple programs.

Still, with all this change, old problems with can linger. Today we address one of those problems for viewers of satellite television. It is frustrating for viewers when their satellite provider offers them local programming that just does not feel local. Sometimes broadcast stations are beamed in from other states and far-off places that do not reflect the communities where viewers live, or the news, weather, and emergency information that they need. This happens as a result of an old quirk in our satellite television laws which use Designated Market Areas to delineate carriage rights.

Last year, however, Congress decided it was time to address this long-standing problem. As a result, the Satellite Television Extension and Localism Act Reauthorization Act directs the Commission to extend our market modification policies to satellite television. This could create new opportunities for satellite television viewers to see the programming they want and the broadcast stations that truly cover their communities. So while there is a lot to look forward to as television evolves, in the near term I hope we can also look forward to more satellite viewers receiving more local stations as a result of our efforts here today.

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Amendment of the Commission's Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-71.

For residents of La Plata County, Colorado, who subscribe to satellite television, “local” news focuses on the weather in cities hundreds of miles away. Political coverage is devoted to elections in New Mexico. This is because La Plata County, and its neighbor, Montezuma County, are “orphan counties” in the Albuquerque-Santa Fe Designated Market Area, or DMA.¹ An orphan county is one that can’t receive some or even any broadcast signals that originate in-state.² As a result, residents in an orphan county must rely on out-of-state broadcasters to provide in-state news about issues of local interest.

Sometimes, out-of-state broadcasters don’t meet those needs. And that lack of local information can have a serious impact—beyond school closures, weather emergencies and the like. For example, there are tens of thousands of residents in Ashley County and Union County, Arkansas, who are a part of the Monroe, Louisiana, DMA. On Saturdays in the fall, they can only watch the LSU Tigers, instead of their beloved Razorbacks.³ I’m sure that’s enough for many of them to want to give a kick to their Cajun brethren—and I don’t mean the Golden Boot.⁴

But more seriously, orphan counties are a national concern. When the FCC last investigated the issue in 2010, there were 1.87 million households that were unable to receive *any* in-state stations via satellite service.⁵

To be clear, many broadcast stations do an excellent job of covering out-of-state news. For instance, people who live in Arlington, Virginia, benefit from receiving broadcast stations located in Washington, DC, instead of Richmond, Virginia, because the weather in Arlington is certainly more similar to the weather in Washington than in Richmond. And Washington stations know how many of their viewers are affected by the Virginia governor’s race.

That calculus changes, however, with geographically distant and sparsely populated orphan counties. For example, the Albuquerque DMA contains 679,380 households, but only about 27,000 of those—less than 4%—are in Colorado. It might not make economic or practical sense for an Albuquerque station to send reporters hundreds of miles to Colorado to cover stories that the vast majority of its viewers ordinarily would not care about. As a result, thousands of Coloradans, and other residents of geographically distant orphan counties, have been left without an option for truly local news.

Fortunately, Congress has stepped in to fix the problem. In the Satellite Television Extension and Localism Act Reauthorization Act of 2014, Congress directed the Commission to establish a process for modifying television markets for satellite providers and to favor cable and satellite market modification

¹ *In-State Broadcast Programming: Report to Congress Pursuant to Section 304 of the Satellite Television Extension & Localism Act of 2010*, MB Docket No. 10-238, Report, 26 FCC Rcd 11919, 12480–81 (Media Bur. 2011) (App’x F) (*In-State Broadcast Programming Report*).

² *Id.* at 11922, para. 5.

³ Letter from Congressman Mike Ross to Julius Genachowski, Chairman, FCC, MB Docket No. 10-238 (Jan. 25, 2011), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021028155>.

⁴ *See* http://en.wikipedia.org/wiki/Arkansas%E2%80%93LSU_football_rivalry#Golden_Boot_era.

⁵ *In-State Broadcast Programming Report*, 26 FCC Rcd at 11934, para. 28.

requests that “would promote consumers’ access to television broadcast station signals that originate in their State of residence.”⁶ In other words, they could get news that matters more to them.

Today’s Notice of Proposed Rulemaking begins the process of implementing this important statutory provision and does so consistent with Congressional intent. I am pleased to support it. I look forward to hearing what the public has to say and am hopeful that we ultimately make it easier for satellite and cable subscribers to watch the news they care about.

Finally, I would like to thank my colleagues for incorporating my suggestions and those in the Bureau—Evan Baranoff, Steve Broeckaert, Mary Beth Murphy and Kalpak Gude—for their hard work. I look forward to working with all of them in the months ahead to meet the September 4, 2015 deadline set by Congress for issuing final rules in this proceeding.

⁶ 47 U.S.C. §§ 338(l)(2)(B)(iii), 534(h)(1)(C)(ii)(III).

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Amendment of the Commission's Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-71.

I am pleased to support the Commission's latest step to implement the STELA Reauthorization Act of 2014, this time by proposing rules to address the challenge of "orphan counties" where satellite television subscribers do not receive in-state programming. I am very familiar with this issue, having worked to amend the law to directly allow New Hampshire's only full-power, in-state broadcaster to be made available statewide via satellite.¹

In this case, Congress gave the Commission authority to modify a commercial television broadcast station's local television market for the purposes of satellite carriage, as we currently have in the cable carriage context. With this new authority, we will have the flexibility to adjust boundaries, within the limits of providers' abilities, to connect consumers with their preferred broadcasters.

While according to our 2011 report to Congress, about 99.98% of American households have access to in-state TV programming,² those that do not face a real uphill climb just to access vital information many of us take for granted, including state political and election coverage, public affairs programming, and weather and emergency alerts. Today the Commission makes a move toward finally getting a solution in place for more of these consumers. With a new process mainly following our established cable market modification procedure, we should be well-equipped to address the concerns of "orphaned" satellite viewers sooner rather than later.

While I recognize the streamlining value to be gained by incorporating satellite into a tried-and-true process, there are important differences between satellite and cable systems, and the Commission would do well to keep the distinctions in mind as it further considers these proposed rules. Parity is a valued principle, but it shouldn't sidestep logic. This item takes the differences into account, for example, in the proposed strong technical and economic feasibility requirement, which should ensure that satellite carriers will never be asked to accomplish impossible or cost-prohibitive modifications. However, the lines between cable and satellite are uncomfortably blurred at other points in the item. While noting that local franchising authorities "currently have no role in satellite regulation," we nonetheless seek comment on whether they should still be considered "interested parties" and required to be served with copies of satellite market modification petitions. I see no reason for the Commission to involve franchising authorities in satellite carriage decisions at any stage of the process, and would be highly unlikely to support such a requirement in any final rules.

On a separate note, I feel the Commission should transition required document service, in this and other contexts, to electronic means. This is not the first time I have suggested expanding the use of electronic communications to promote efficiency around FCC communications and filing requirements, and I appreciate the Chairman's commitment in this item to explore such modernization in the near term. I look forward to seeing progress on that front soon.

¹ See The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat 2809, Division J, Title IX, Title I, Sec. 102(2)(C)(i) (2004).

² See *In-State Broadcast Programming: Report to Congress Pursuant To Section 304 of the Satellite Television Extension and Localism Act of 2010*, Report, MB Docket No. 10-238, 26 FCC Rcd.11919, 11929 ¶ 17 (MB 2011).