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

In the Matter of:)

Implementation of the Satellite Home Viewer
Improvement Act of 1999:)

CS Docket No. 00-2

Application of Network Nonduplication,
Syndicated Exclusivity, and Sports Blackout
Rules To Satellite Retransmissions)

NOTICE OF PROPOSED RULEMAKING

Adopted: January 5, 2000

Released: January 7, 2000

Comment Date: February 7, 2000

Reply Comment Date: February 28, 2000

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking ("*Notice*"), we seek comment on our implementation of certain aspects of the Satellite Home Viewer Improvement Act of 1999 ("*SHVIA*"), which was enacted on November 29, 1999.¹ This act authorizes satellite carriers to add more local and national broadcast programming to their offerings, and to make that programming available to some subscribers who previously have been prohibited from receiving broadcast programming via satellite. The legislation generally seeks to place satellite carriers on an equal footing with cable operators with respect to the availability of broadcast programming. By this *Notice* we seek comment on the adoption of implementing regulations that apply network nonduplication, syndicated program exclusivity, and sports blackout requirements to satellite carriers.

2. Section 1008 of the SHVIA creates a new Section 339 of the Communications Act of 1934 ("*Communications Act*") entitled "*Carriage of Distant Television Stations by*

¹The SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("*IPACORA*") (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999). This is the second in a series of Notices and Orders that the Commission will issue to implement the SHVIA. The statutory provisions most relevant to this proceeding are attached hereto as Appendix A. The most relevant cable regulations discussed herein are attached as Appendix B.

Satellite Carriers.”² Section 339(b) directs the Commission to apply these three rules (*i.e.*, network nonduplication, syndicated exclusivity, and sports blackout), previously applicable only to cable television systems, to satellite carriers’ retransmission of nationally distributed superstations to subscribers.³ The Commission must also apply the cable sports blackout rule to satellite carriers’ retransmission of network stations to subscribers, but only “to the extent technically feasible and not economically prohibitive.”⁴ This proceeding will consider how best to apply these rules to satellite carriers consistent with the statutory requirements and the Commission’s goal of facilitating competition in the multichannel video programming distribution marketplace.

3. The complexity of both the statutory provisions and the existing cable rules that we are charged with applying in this new context requires that we include an explanation of the existing network nonduplication, syndicated exclusivity, and sports blackout rules as they apply to cable operators. We seek here to minimize the likelihood of confusion in the future by assuring that we begin with a common understanding of the rules and terminology. These rules have been in existence for 25 years, and the nuances attendant to enforcement and compliance require some explication to provide a solid foundation from which to build a new set of rules to apply to satellite carriers. This is particularly important given that Congress has asked us to implement these new rules so that they will be “as similar as possible” to the rules applicable to cable operators.⁵ Our goal throughout this proceeding is to develop regulations that will be as clear and easy to follow as possible. Our purpose in laying out the cable rules here is so that the newly covered satellite carriers and other parties will have an understanding of the existing rules for the preparation of their comments in this proceeding. Likewise, it is important to describe in some detail the interpretation of the statute upon which we will base our rulemaking. We seek comment on these explanations and interpretations.

II. STATUTORY PROVISIONS AND INTERPRETATIONS

4. The first statutory provision discussed below, Section 339(b)(1)(A), requires application of three cable rules, network nonduplication, syndicated exclusivity, and sports blackout, to satellite retransmission of nationally distributed superstations. The second statutory

²See 47 U.S.C. § 339 (*as enacted by* § 1008 of the SHVIA). Section 339(d)(4) defines “satellite carrier” by reference to the definition in the Copyright Act of 1947, *as amended*, 17 U.S.C. § 119(d): “The term ‘satellite carrier’ means an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission and operates in the Fixed-Satellite Service under part 25 of title 47 of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point- to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing.” 17 U.S.C. §119(d)(6).

³47 U.S.C. § 339(b)(1)(A).

⁴See § 1008 of the SHVIA and 47 U.S.C. § 339(b)(1)(B).

⁵*Joint Explanatory Statement of the Committee of Conference on H.R. 1554*, 106th Cong. (“*Joint Explanatory Statement*”), 145 Cong. Rec. H11793, H11796 (daily ed. Nov. 9, 1999).

provision, Section 339(b)(1)(B), applies one of these cable rules, sports blackout, to satellite retransmission of network stations.⁶ As discussed below, one important distinction between these provisions is that nationally distributed superstations may be retransmitted to both served and unserved households, but network stations may only be retransmitted to unserved households.

5. The Commission rules in question here, as applied in the cable context, generally protect exclusive contractual rights that have been negotiated between broadcasters and program providers or other rights holders. These exclusive contractual rights are potentially threatened by cable systems that are capable of retransmitting programming from distant sources beyond the control of the contracting parties. The Commission's network nonduplication, syndicated exclusivity and sports blackout rules provide that specific programs must be deleted from distant signals delivered to cable subscribers if the programs are subject to exclusive contracts to local stations or, in the context of sporting events, if carriage from distant stations would violate sports blackout arrangements to protect gate receipts in the local market. To determine how best to apply these cable rules in the satellite context, it is first necessary to understand the underlying statutory scheme. To that end, we first discuss the relevant provisions of the SHVIA statute and our interpretations of these provisions.

A. Section 339(b)(1)(A): Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout to Retransmission of Nationally Distributed Superstations

6. Section 339(b)(1)(A) of the Communications Act requires the Commission "to apply network nonduplication protection (47 CFR 76.92), syndicated exclusivity protection (47 CFR 76.151), and sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers."⁷ For these purposes, a "nationally distributed superstation" is a term that is defined as a television broadcast station, licensed by the Commission, that meets the following three criteria:

- (A) is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States;⁸
- (B) on May 1, 1991, was retransmitted by a satellite carrier and was not a network station⁹ at that time; and

⁶The network nonduplication and syndicated exclusivity rules are not applied to satellite retransmission of network stations that are not also nationally distributed superstations. As discussed, *infra*, at n. 11, five of the six nationally distributed superstations are also network stations.

⁷47 U.S.C. § 339(b)(1)(A).

⁸This criterion tracks the definition of "television network" contained in Section 339. See 47 U.S.C. § 339(d)(5) (Television network means "a television network in the United States which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more States.").

⁹A "network station" is "(A) a television broadcast station, including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States

- (C) was, as of July 1, 1998, retransmitted by a satellite carrier under the statutory license of section 119 of title 17, United States Code.¹⁰

It appears that the television broadcast stations that meet the foregoing criteria are limited to KTLA-TV (Los Angeles), WPIX-TV (New York), KWGN-TV (Denver), WSBK-TV (Boston), WWOR-TV (New York) and WGN-TV (Chicago).¹¹ We do not believe that any other station could meet these criteria in the future due to the date-specific conditions set forth in the definition. We believe this is, therefore, a finite list of the nationally distributed superstations covered by the statute, but we invite comment on this issue. We also note that the statutory definitions of network station, television network, and television broadcast station generally contemplate entities within the United States. We seek comment on the relevance of this issue in this proceeding. Are stations based in foreign countries affected by the SHVIA provisions requiring application of the cable exclusivity and sports blackout rules to satellite retransmissions?

7. A nationally distributed superstation is a type of "superstation," which is defined in the Copyright Act of 1947, *as amended* ("Copyright Act"), as "a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier."¹² By creating this special category known as nationally distributed superstations, Congress permits satellite carriers to retransmit these superstations to subscribers regardless of whether they are "served" or "unserved" pursuant to the Copyright Act. Congress achieved this result by amending the Section 119 compulsory copyright license in the Copyright Act.¹³ The amended copyright provision provides that the retransmission of nationally distributed superstations to subscribers who do not reside in "unserved households"¹⁴ shall not violate the compulsory copyright license.¹⁵ While Section 1005(b) of the

which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States" or "(B) a noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934)" except that the term does not include "the signal of the Alaska Rural Communications Service, or any successor entity to that service." 17 U.S.C. § 119(d)(2) (*as amended by* § 1008(b) of the SHVIA).

¹⁰ 47 U.S.C. § 339(d)(2).

¹¹ Memorandum of December 20, 1999 from William J. Roberts Jr., U.S. Copyright Office, listing superstations based upon the Library of Congress' Statement of Accounts. KTLA, WPIX and KWGN are all now affiliates of the Warner Brothers Network ("WB"). In addition, WSBK and WWOR currently are affiliated with the UPN Network. (WGN formerly was affiliated with WB but is no longer so affiliated.) We note that WB and UPN did not qualify as "television networks" as of January 1, 1995, the operative date referenced in Section 339(d)(2)(A) because they did not satisfy each of the statutory criteria.

¹² 17 U.S.C. § 119(d)(9)(A) (*as amended by* § 1006(c) of the SHVIA). The Public Broadcasting Service satellite feed also is included in this definition. *Id.* at § 119(d)(9)(B); *see also* 17 U.S.C. § 119(d)(12) (*as enacted by* § 1006(c)(2) of the SHVIA) (definition of "Public Broadcasting Service satellite feed").

¹³ *See* § 1005(b) of the SHVIA.

¹⁴ An unserved household is defined in part as one that cannot receive over-the-air a signal of Grade B intensity for a primary television network station. 17 U.S.C. § 119(d)(10) (*as amended by* § 1008(b) of the SHVIA).

SHVIA does not refer to nationally distributed superstations expressly, the criteria for its application are identical to those contained in the definition of a nationally distributed superstation. Thus, we believe that based on Section 1005(b), there is no geographic restriction on the retransmission of "nationally distributed superstations" pursuant to the compulsory copyright license.

8. In addition to amending the Copyright Act, Section 1009 of the SHVIA amends the retransmission consent section of the Communications Act, which generally prohibits multichannel video programming distributors from retransmitting the signals of a broadcaster absent the broadcaster's written authorization.¹⁶ The SHVIA exemption allows a satellite carrier to retransmit the signal of a superstation in the absence of written consent from the superstation if: (i) the station was a superstation on May 1, 1991, and (ii) the station was retransmitted by the satellite carrier as of July 1, 1998, provided the satellite carrier complies with the Commission's nonduplication, syndicated exclusivity, and sports black out rules.¹⁷ This provision differs slightly from the definition of a nationally distributed superstation in that it does not specify that the superstation must not be affiliated with a network that existed as such as of January 1, 1995. At this time, this distinction is without practical significance because the six television stations cited above meet the relevant criteria of either definition,¹⁸ and there are no additional stations that are included or excluded by operation of this third criterion. Taking all these provisions together, we believe that, pursuant to these new statutory provisions in the Copyright Act and the Communications Act, satellite carriers are permitted to retransmit the signals of the nationally distributed superstations covered by Section 339(b)(1)(A) to both served and unserved households without the station's consent and without geographic restriction.¹⁹

9. We believe that Congress' purpose in applying the network nonduplication, syndicated exclusivity, and sports blackout rules to these satellite retransmissions reflects a balance between providing access to national programming carried by the superstation and a recognition that, in the absence of retransmission consent requirements, broadcasters and rights

¹⁵See 17 U.S.C. § 119(a)(5)(E) (as amended by Section 1005(b) of the SHVIA).

¹⁶See 47 U.S.C. § 325(b).

¹⁷Section 1009 of the SHVIA amends Section 325(b) of the Communications Act to insert a new paragraph (b)(2)(B) which provides that the retransmission consent requirements shall not apply "to retransmission of the signal of a television broadcast station outside the station's local market by a satellite carrier directly to its subscribers, if (i) such station was a superstation on May 1, 1991; (ii) as of July 1, 1998, such station was retransmitted by a satellite carrier under the statutory license of section 119 of title 17, United States Code; and (iii) the satellite carrier complies with any network nonduplication, syndicated exclusivity, and sports blackout rules adopted by the Commission under section 339(b) of this Act." 47 U.S.C. § 325(b)(2)(B) (as enacted by Section 1005(b) of the SHVIA).

¹⁸Compare 47 U.S.C. § 325(b)(2)(B) with 47 U.S.C. § 339(d)(2).

¹⁹The *Joint Explanatory Statement* clarifies that the purpose of this provision is "to allow certain longstanding superstations to continue to be delivered to satellite customers without regard to the 'unserved household' limitation, even if the station now technically qualifies as a 'network station' under the 15-hour-per-week definition in the Act." The conferees note further that "this exception will cease to apply if such a station in the future becomes affiliated with one of the four networks (ABC, CBS, Fox, and NBC) that qualified as networks as of January 1, 1995." *Joint Explanatory Statement* at H11794.

holders will have no opportunity to protect their contractual rights. We also believe Congress is seeking to create parity between the regulations covering satellite carriers and cable operators. We seek comment on this interpretation of the operation and underlying intent of the statutory requirements.

B. Section 339(b)(1)(B): Application of the Sports Blackout Rule to Retransmission of Network Stations

10. In addition to applying the existing cable rules to nationally distributed superstations, Section 339(b)(1)(B) requires the Commission to “apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers to subscribers” “to the extent technically feasible and not economically prohibitive.”²⁰ By its terms, Section 339(b)(1)(B) applies only to “network stations,” which are, generally, television broadcast stations owned or operated by, or affiliated with, one or more of the television networks.²¹ Affiliates of these networks are the only entities that meet the definition of a television network station contained in the Copyright Act²² and are the only stations covered by Section 339(b)(1)(B). We note that in the cable context, the Commission’s sports blackout rule applies to any television broadcast station and is not limited to network stations. We seek comment on whether the cable rules are indeed broader in scope than Section 339(b)(1)(B).²³

11. We also observe that the title of new Section 339, “Carriage of Distant Television Stations by Satellite Carriers,” suggests that this section is intended to apply to satellite retransmission of *distant* network stations, notwithstanding that the text of Section 339(b)(1) does not specifically so state.²⁴ We seek comment on this interpretation, which is relevant to determining which satellite retransmissions are covered by this section of the statute.

III. IMPLEMENTATION OF THE STATUTORY REQUIREMENT

12. In general, under the new statutory provisions, the network nonduplication, syndicated exclusivity, and sports blackout rules will apply when a satellite carrier retransmits a nationally distributed superstation to a household within a local broadcaster’s zone of protection,²⁵ and the nationally distributed superstation carries a program to which the local

²⁰47 U.S.C. § 339(b)(1)(B).

²¹See complete definition of “network station,” *supra*, at n. 9.

²²See 17 U.S.C. § 119(d)(2).

²³The Commission’s cable rules define a television broadcast station in relevant part as “any television broadcast station operating on a channel regularly assigned to its community.” 47 C.F.R. § 76.5(b).

²⁴*But see* discussion, *infra*, at ¶ 29, of circumstances in which there are two affiliates of the same network in the same market and a served household could receive both affiliates, thus potentially triggering the sports blackout rule notwithstanding that no distant or out of market station is involved.

²⁵The Commission’s rules describe geographic areas that are protected by commercial contracts and through operation of the rules. See discussion *infra*, at n. 33, 34.

station has exclusive rights.²⁶ In these cases, the television broadcast station holding exclusive rights may require the satellite carrier to blackout these particular programs for the satellite subscriber households within the protected zone. We seek comment generally on the appropriate manner in which to implement the provisions of Section 339(b)(1) of the Communications Act. In particular, we seek comment on whether the amended provisions should be incorporated into existing Sections 76.67, 76.92, and 76.151 of the Commission's rules, or whether we should adopt new separate rules for satellite carriers.

A. Network Nonduplication Rule

13. The Commission's cable television network nonduplication rule²⁷ allows a television broadcast station that has purchased exclusive rights to network programming within a specified area to protect its exclusivity on local cable systems.²⁸ The rules allow a local television broadcast station to demand that a local cable system's duplicate carriage of the same program from an otherwise distant station be blacked out.²⁹ A station may assert its exclusivity rights regardless of whether its signal is carried by the cable system in question. These rules are not statutorily mandated. They arose from the Commission's recognition in the 1970s and 1980s that protection of exclusive contractual rights is necessary both to protect local broadcasters from the importation of non-local stations by cable systems and to provide appropriate protections and incentives to program producers and distributors to provide the programming desired by viewers.³⁰

14. Under the network nonduplication rule, a television station is entitled to assert its exclusivity rights against a cable system serving any "cable community unit" within its "specified zone" that is carrying duplicative programming for which the local station has obtained exclusive distribution rights.³¹ The rule applies on a community unit basis by requiring the cable system for

²⁶The program may fall under either the definition of network program (delivered simultaneously to more than one broadcast station, see 47 C.F.R. § 76.5(m)) or the definition of syndicated program (sold, licensed, distributed or sold to licensees in more than one market, see 47 C.F.R. § 76.5(ii)).

²⁷47 C.F.R. § 76.92.

²⁸"Network program" is something of a misnomer in terms of common usage as it appears to suggest a program provided by a recognized network. In fact, it is defined as "any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial." 47 C.F.R. § 76.5(m). It is not necessary that the program be delivered by a "television network."

²⁹In addition to full power television stations, 100 watt translator stations are allowed to demand network nonduplication protection under certain circumstances. Translator stations are not entitled to syndicated exclusivity protection. See 47 C.F.R. § 76.92(d).

³⁰*In re Amendment of Parts 73 and 76 of the Commission's Rules Related to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd. 5299, 5308 (1988) ("Program Exclusivity Order"), recon. denied in pertinent part, 4 FCC Rcd. 2711 (1989). For a complete history of the Commission's network nonduplication and syndicated program exclusivity rules see 4 FCC Rcd. at 2712-2715.

³¹Cable systems are comprised of one or more "community units" that correspond to separate and discrete communities or municipal entities. 47 C.F.R. § 76.5(dd).

a particular community unit to black out a specific program based on the priorities established in the rule.³² The "specified zone" of a television broadcast station is the 35 mile area surrounding its community of license.³³ The zone of exclusivity protection for television stations licensed to smaller television markets extends an additional 20 miles, for a total 55 miles surrounding a smaller television station's community of license.³⁴ We seek comment on whether Congress intended to retain the same geographic zones for satellite carriers as those used in the cable context.

15. While the Commission's rules allow television stations to assert their nonduplication rights within the above territorial limits, a television station's rights within these areas are limited by the terms of the contractual agreement between the station and the holder of the rights to the program ("rights holder").³⁵ Thus, if the rights holder grants the television station a zone of protection³⁶ of ten miles, then that station would be precluded from exercising its nonduplication rights against any cable system located more than ten miles from that station's city of license.³⁷ In addition, for local programming to be protected, the local programming must be the same as the distant programming that is being imported into a local station's market.³⁸

³²See 47 C.F.R. § 76.92(a).

³³See 47 C.F.R. § 76.5(e). The 35 mile specified zone, as well as all other mileage zones used in applying the exclusivity rules, is measured from the relevant station's "reference point" in its community of license. The rules provide a list of the reference points to identify television market boundaries used for this purpose. See 47 C.F.R. § 76.53.

³⁴In addition, television stations licensed to hyphenated markets are entitled to assert their exclusivity rights throughout a subject hyphenated market. In larger hyphenated television markets, stations are entitled to request protection against distant programming within 35 miles around each named community in the relevant larger hyphenated market. For example, a station licensed to Oakland, California, which is in the San Francisco-Oakland-San Jose, California larger television market, would be entitled to assert its network nonduplication rights against all cable systems located within 35 miles of each of the three named cities in this market. With respect to network nonduplication, a television station licensed to a smaller hyphenated television market would be entitled to a 55 mile zone of network nonduplication protection around each named city in that smaller television market. See the note to 47 C.F.R. § 76.92, which refers to 47 C.F.R. § 73.658(m), to determine the extent of exclusivity protection television stations licensed to hyphenated television markets may assert. Section 73.658(m) sets out the extent of exclusivity protection a station may demand in a hyphenated market. For a list of the top 100 television markets in the United States and the hyphenated markets contained therein, see 47 C.F.R. § 76.51.

³⁵See 47 C.F.R. §§ 76.92, 76.151 (notes to both sections refer to "broadcast territorial exclusivity rights" as defined in 47 C.F.R. § 73.658(m)). We note that in a pending proceeding the Commission has proposed the deletion of Section 73.658(m). *In re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Further Notice of Proposed Rule Making*, 3 FCC Rcd. 617 (1988). We believe the rules in question could continue to function even if the Commission ultimately deletes Section 73.658(m).

³⁶A "zone of protection" is the zone granted by the rights holder, whereas the "specified zone" is the area covered by the Commission's rules.

³⁷This distinction between the area protected by the rule and the area protected by contract arises more frequently in the context of hyphenated markets in which the local station's exclusivity contract applies to only one of the hyphenated cities in the market. Thus, notwithstanding that the Commission's rule would

16. In order to exercise nonduplication protection, a television broadcast station must notify cable operators of the rights they have obtained within 60 days of the signing of a contract affording exclusive rights.³⁹ In adopting these rules, the Commission recognized that affected cable operators would need sufficient time to negotiate for the lifting of the requested protection or to arrange for alternative sources of programming to fill the void left when a station exercised its rights. In this regard, television stations have been required to disclose the exact contractual terms under which they have been granted exclusivity protection.⁴⁰ We seek comment on how the notification process described in the network nonduplication rule can be applied to satellite carriers and on whether the 60 day period and the other notification periods used in the cable context are appropriate for satellite carriers.

17. There are several exceptions to application of the network nonduplication rule. First, the network nonduplication rule is inapplicable to any non-commercial educational ("NCE") station programming carried in fulfillment of a cable system's mandatory carriage rules.⁴¹ Second, because of the cost of the equipment necessary to carry out deletions, the Commission exempted cable systems having fewer than 1,000 subscribers.⁴²

18. The rule also does not apply if the distant station's signal is "significantly viewed" in a relevant cable system community.⁴³ The concept of significant viewing is directly related to whether an otherwise distant station's broadcast signal is viewable over-the-air in a cable community unit. The significantly viewed exception to the exclusivity rules is meant to insure that any programming that is available terrestrially in a community from an over-the-air station will not be blacked out on a community's cable system.⁴⁴ We seek comment on the

provide exclusivity protection for 35 miles around each of the hyphenated cities, the station in this example receives protection for no more than 35 miles around one city.

³⁸The use of different camera crews and announcers during the production of an imported program may result in the distant program not being considered the same. *See In re Major League Baseball*, 6 FCC Rcd. 5573 (1991).

³⁹*See* 47 C.F.R. § 76.94 (generally 60 calendar days for network non-duplication) and § 76.155 (syndicated exclusivity procedures vary with specific circumstances).

⁴⁰Only television broadcast stations are permitted to assert protection in accordance with their contractual rights. *See* 47 C.F.R. § 76.93. For a full explanation of the notification rules see *In re Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries*, Report and Order, 3 FCC Rcd 5299, 5315 (1988).

⁴¹47 C.F.R. §§ 76.92(g), 76.56; *see also* 47 C.F.R. § 73.621 (general description of noncommercial educational stations).

⁴²*See* 47 C.F.R. §§ 76.95(a), 76.156(b); *see also Program Exclusivity Order*, 3 FCC Rcd. at 5314 (1988).

⁴³In addition, a cable operator need not black out the syndicated programming of an otherwise distant station if that station's grade B signal encompasses the relevant cable community. *See* 47 C.F.R. § 76.156(a).

⁴⁴*In re Network Program Exclusivity Nonduplication Rules for Cable Television*, First Report and Order, 52 FCC 2d 519, 535 (1975). To establish over-the-air viewership, the Commission's rules provide for an empirical study to be conducted to determine whether a subject station's signal is available to viewers over-

relevance in the satellite context of the exception for significantly viewed stations. Are there situations in which a nationally distributed superstation from an adjacent market could be significantly viewed within the relevant specified zone based on terrestrial transmission? We believe a nationally distributed superstation could only qualify as significantly viewed based on terrestrial broadcast reception over-the-air in the areas surrounding its city of license,⁴⁵ thus limiting the relevance of this exception to those circumstances in which the superstation is actually functioning as a local station, and therefore, arguably, not covered by the terms of Section 339(b)(1)(A).

19. Under the cable network nonduplication rules, if the cable community unit is located in one or more overlapping specified zones, neither station can blackout the other station's duplicating programming because both stations have equal priorities.⁴⁶ We do not believe a similar situation could occur in the satellite carrier context because superstations, as such, do not have specified zones outside of the markets from which they originate,⁴⁷ and, under the new statutory requirement, network nonduplication applies only to the retransmission of nationally distributed superstations and not to retransmission of network stations. We seek comment on this issue.

B. Syndicated Program Exclusivity Rule

20. The Commission's syndicated program exclusivity rule allows local stations to protect their exclusive distribution rights for syndicated programming on local cable systems in a local market.⁴⁸ This rule is similar in operation to the network nonduplication rule, but it applies to exclusive contracts for syndicated programming, rather than for network programming. In this rule, too, a local television station is entitled to assert its exclusivity rights within a specified zone of 35 miles surrounding a television station's city of license. Unlike the network nonduplication rule, however, the maximum zone of protection allowed under the rules is 35 miles surrounding a television station's city of license in a non-hyphenated television market and 35 miles surrounding each named city in any size hyphenated market; the zone of protection is not greater in smaller markets.

the-air in the relevant cable system's community unit. See 47 C.F.R. § 76.54. Such studies are conducted by parties seeking to be declared significantly viewed through a Commission declaratory ruling and consist of an audience survey of over-the-air viewership. If a subject station's signal meets certain statistically relevant viewership levels in this population, that signal is afforded significantly viewed status. See 47 C.F.R. § 76.5(i); see also *1999 Cable and TV Station Coverage Atlas*, Warren Publishing Inc., at 87-155 ("Significantly Viewed Television Stations, County-by-County Listing Derived from Study by American Research Bureau Originally Revised May 1972;" includes stations granted significantly viewed status by the Commission through March 1999).

⁴⁵That is, a superstation might be significantly viewed in areas surrounding its city of license based upon its over-the-air broadcast signal from the station transmitter rather than by satellite.

⁴⁶See 47 C.F.R. §§ 76.92(b), (e). The syndicated program exclusivity rules do not contain priorities.

⁴⁷But see discussion, *infra* ¶ 34, considering superstations in their capacity as local stations.

⁴⁸47 C.F.R. § 76.151. A syndicated program is defined as "any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming . . ." 47 C.F.R. § 76.5(ii).

21. As with network nonduplication, the syndicated exclusivity rule applies on a community unit basis by requiring the cable system for a particular community unit to black out a specific program based on the priorities established in the rule.⁴⁹ In addition, the geographic limits for exclusivity under the Commission's rules are limited by the terms of the contractual agreement between the station and the holder of the rights to the program.⁵⁰ Thus, if the rights holder grants the television station a zone of protection of ten miles, then that station would be precluded from exercising its exclusivity rights against any cable system located more than ten miles from that station's city of license. In addition, as with the network nonduplication rules, for syndicated programming to be protected, the programming covered by the contract must be the same as the distant programming.

22. To exercise syndicated exclusivity protection under the cable rule, a television broadcast station must notify cable operators of the rights they have obtained within 60 days of the signing of a contract affording exclusivity rights,⁵¹ and must disclose the exact contractual terms under which they have been granted exclusivity protection.⁵² In addition to the television broadcast station, distributors of syndicated programming are also allowed to seek protection for a period of one year from the initial licensing of such programming anywhere in the United States, except where the relevant programming has already been licensed.⁵³ We seek comment on whether the rights holder should, in the satellite context, notify the satellite carrier directly.⁵⁴ We also seek comment on whether the 60 day period and the other notification periods used in the cable context for both network nonduplication and syndicated exclusivity are appropriate for satellite carriers.

23. The exceptions to application of the syndicated program exclusivity rule are similar to those that apply to the network nonduplication rule. Cable systems with fewer than 1,000 subscribers are exempted, again because of the cost of the equipment necessary to carry out deletions.⁵⁵ This rule also does not apply if the distant station's signal is "significantly viewed" in a relevant cable system community. In addition, the syndicated programming of an otherwise distant station need not be blacked out if that station's grade B signal encompasses the relevant cable

⁴⁹See 47 C.F.R. § 76.151.

⁵⁰ See 47 C.F.R. § 76.151, note (note refers to "broadcast territorial exclusivity rights" as defined in 47 C.F.R. § 73.658(m)).

⁵¹See 47 C.F.R. § 76.94 (generally 60 calendar days for network non-duplication) and § 76.155 (syndicated exclusivity procedures vary with specific circumstances).

⁵²For a full explanation of the notification rules see *In re Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries*, Report and Order, 3 FCC Rcd. 5299, 5315 (1988).

⁵³See 47 CFR §§ 76.93, 76.153.

⁵⁴See 47 C.F.R. §§ 76.153, 76.155 (either television broadcast licensee or syndicated program distributor may exercise syndicated exclusivity rights under certain circumstances and notify cable system accordingly).

⁵⁵See 47 C.F.R. § 76.156(b); see also *Program Exclusivity Order*, 3 FCC Rcd. at 5314 (1988).

community.⁵⁶ There is no exception to the syndicated exclusivity rules for NCE station programming carried pursuant to mandatory carriage because the syndicated exclusivity rule applies only to commercial stations.⁵⁷

C. Sports Blackout Rule

24. The Commission's sports broadcasts rule ("sports blackout rule") is designed to allow the holder of the exclusive distribution rights to local programming, in this case sporting events, to control, through contractual agreements, the display of that event on local cable systems.⁵⁸ Unlike the other cable rules we are required to apply to satellite carriers, only the sports blackout rule applies to retransmission of both nationally distributed superstations and network stations. The purpose of the sports blackout rule is to insure the continued general availability of sports programming to the public. The Commission adopted this rule based on a concern that sports teams would refuse to sell the rights to their local games to television stations serving distant markets due to their fear of losing gate receipts if the local cable system imported the local sporting event carried on the distant station. The Commission stated this would have the ultimate undesirable effect of making sporting events available to fewer viewers.⁵⁹ When a subject sporting event will not be aired live by any local television station carried on a community unit cable system,⁶⁰ the sports blackout rule allows the rights holder to the event to demand that the local cable system blackout the distant importation of the subject sporting event. The zone of protection afforded by the sports blackout rule is generally 35 miles surrounding the reference point of the broadcast station's community of license in which the live sporting event is taking

⁵⁶47 C.F.R. § 76.156(a).

⁵⁷See 47 C.F.R. § 76.92(c) (applying network nonduplication to noncommercial stations and note no comparable provision in Section 76.151 for the syndicated exclusivity rules).

⁵⁸47 C.F.R. § 76.67.

⁵⁹See *In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs*, Report and Order, 54 FCC 2d 265, 281 (1975).

⁶⁰Section 76.67(a) applies "if the event is not available live on a television broadcast signal carried by the community unit meeting the criteria specified in §§76.5(gg)(1) through 76.5(gg)(3) of this part." 47 C.F.R. §76.5(a). The former Section 76.5(gg) defined "basic cable service" for purposes of basic cable service rate regulation and incorporated the standard for mandatory carriage under the Commission's original 1972 must-carry rules. In summary, for purposes of rate regulation of the basic tier at that time, Section 76.5(gg) provided that the basic tier for cable systems serving communities located outside all major and smaller television markets included television broadcast stations within whose Grade B contours the community of the community unit was located; for communities in smaller television markets, the basic tier included television broadcast stations within whose specified zone the community of the community unit is located, commercial television broadcast stations licensed to communities in other smaller television markets within whose Grade B contours the community of the community unit is located, and television broadcast stations licensed to communities that are generally considered to be part of the same smaller television market; and for communities in major television markets, the basic tier included television broadcast stations within whose specified zone the community of the community unit is located and television broadcast stations licensed to other designated communities of the same major television market; as well as, in all size markets, commercial television broadcast stations that were significantly viewed in the community of the community unit.

place.⁶¹ As with the Commission's exclusivity rules, the sports blackout rule specifies notification procedures regarding the sports programming to be deleted.⁶² However, the time frame allowed for notification is significantly shorter in the case of the sports blackout rule, and can be as little as 24 hours in contrast to 60 days for the other rules.⁶³ We seek comment on whether the same timing should apply for both cable operators and satellite carriers.

25. As with the network nonduplication and syndicated exclusivity rules, the sports blackout rule does not apply to cable systems with fewer than 1,000 subscribers.⁶⁴ This exemption is based on the cost of the equipment needed to delete programming. We seek comment on whether there is an analogous situation for satellite carriers. Will there be situations in which there may be no more than 1,000 subscribers in an area subject to program blackout, and, if so, is there a significant cost to blacking out this limited number of subscribers? We seek specific information from satellite carriers on the likelihood of the occurrence of this situation. We seek comment on these questions with respect to the network nonduplication and syndicated exclusivity rules, as well as the sports blackout rule. We particularly seek specific information from satellite carriers on the comparative costs per subscriber of deleting programming where more than or less than 1,000 subscriber households are affected.

26. As noted, the sports blackout rule for cable systems applies only in a limited 35 mile geographic area surrounding the relevant broadcast station's community reference point and only when no local television station is carrying the event. Typically this area contains households that can receive a signal of Grade B intensity or better. Because the Section 119 compulsory copyright license only allows the retransmission of distant network stations to unserved households, *i.e.* those that cannot receive a signal of Grade B intensity, and because the existing sports blackout zone is typically limited to an area containing only served households, we expect that there would be few occasions where a subscriber residing within a sports blackout zone would be eligible to receive protected programming *via* distant network retransmissions made pursuant to the Section 119 compulsory copyright license.⁶⁵ Thus, there may be very few occasions where, as a practical matter, the sports blackout rule could be invoked for a satellite

⁶¹For a full explanation of the relevant zone of protection for the application of the sports blackout rule see 47 C.F.R. § 76.5(e). The 35 mile zone of protection is measured from a television station's reference point based upon the list of reference points in 47 C.F.R. § 76.53. The same reference point applies to all stations licensed to the same community regardless of where their transmitter or studios are located.

⁶²See 47 C.F.R. §§ 76.67(b), (c).

⁶³Notifications for regularly scheduled events subject to the sports blackout rule must be received no later than the Monday preceding the calendar week during which the deletion is to be made. Notifications for events not regularly scheduled must be received within 24 hours of the time the telecast to be deleted is known, but in no event less than 24 hours from the time the event will take place. 47 C.F.R. § 76.67(c).

⁶⁴See 47 C.F.R. §§ 76.67(f), 76.95(a), 76.156(b).

⁶⁵We acknowledge that some "served" households that can receive a signal of Grade B intensity will be eligible for retransmission of distant network signals until December 31, 2004 pursuant to the Moratorium on Copyright Liability provisions of the Satellite Home Viewer Improvement Act, 17 U.S.C. § 119(e) (*as amended by* § 1005 of the SHVIA).

retransmission of network stations.⁶⁶ It may, however, present technical and economic challenges to the satellite carrier to take the actions necessary to blackout out the sports broadcast in these comparatively few situations. We seek comment on this issue.

27. The SHVIA's directive to apply the network nonduplication, syndicated exclusivity, and sports blackout rules to satellite retransmission of nationally distributed superstations appears to apply without any limitation based upon a satellite carrier's technical ability to comply. The SHVIA, however, limits application of the sports blackout rule to retransmission of network stations "to the extent technically feasible and not economically prohibitive."⁶⁷ The legislative history suggests that a "very serious economic threat to the health of the carrier" is necessary to justify deviating from the cable rules.⁶⁸ We seek comment concerning the circumstances in which the sports blackout rule should apply in the satellite context, on whether the 35 mile zone is appropriate in the satellite context, and, particularly, on the technical and economic consequences related to satellite carriers' compliance with the rule.

28. We note that satellite carriers routinely provide pay-per-view events and descramble programming by use of "conditional access" mechanisms. With regard to the question of technical and economic effects on the satellite carrier, we ask whether conditional access mechanisms can be used to blackout sports programming on network stations. If the satellite provider can identify the households required to be blacked out for a specific sporting event, would conditional access provide the means to initiate the blackout? How much lead time would a satellite carrier need if conditional access can meet this requirement? What would the cost be per subscriber to implement sports blackout, as compared to the other exclusivity rules discussed above, using conditional access? Commenters are asked to address consideration of both the economic and technical considerations facing satellite carriers.

29. Under the new Section 122 of the Copyright Act, a satellite carrier may retransmit the signal of a network station to all subscribers within that station's local market, which is defined as its Designated Market Area ("DMA").⁶⁹ It is possible that in areas in which there are two affiliates of the same network within the same DMA, a "served" subscriber would be eligible to receive both network stations based on the satellite carrier's "local-into-local" license because the subscriber resides in the DMA of the second station. The geographic area for purposes of the sports blackout zone surrounding one of the affiliates is most often smaller than

⁶⁶Note that this argument focuses on the sports blackout rule as it applies to network stations and not to retransmission of nationally distributed superstations. Because satellite carriers may retransmit nationally distributed superstations to both served and unserved households, we believe there will be more households affected by sports blackout of nationally distributed superstations than by sports blackout of network stations.

⁶⁷47 U.S.C. § 339(b)(1)(B) (*as amended by* § 1008 of the SHVIA).

⁶⁸*Joint Explanatory Statement* at H11796. Specifically, the conferees wrote: "These regulations under subparagraph (B) are to be imposed 'to the extent technically feasible and not economically prohibitive' with respect to the affected parties. The burden of showing that conforming to rules similar to cable would be 'economically prohibitive' is a heavy one. It would entail a very serious economic threat to the health of the carrier. Without that showing, the rules should be as similar as possible to that applicable to cable services." *Id.*

⁶⁹*See* 17 U.S.C. §§ 122(a), (j)(2).

the DMA. If one of the affiliates is not carrying the event, the sports blackout rule can be triggered. If the second affiliate is carrying the event, then the satellite carrier might be required to blackout the event being transmitted by the second affiliate to subscribers within the 35 mile zone. Alternatively, this situation may never occur if, as a practical matter, the contractual arrangements allow the rights holder to prohibit both affiliates from broadcasting the event in question. We seek comment on whether the two-affiliates-in-one market scenario is likely to occur, and whether the rules should treat this situation differently from the retransmission of a distant network station.

IV. ADDITIONAL DISCUSSION AND REQUEST FOR COMMENT

30. We also seek comment, generally, on how to apply the terms of the three existing cable rules to satellite carriers. As discussed above, the cable rules refer to “community units,” which correspond to separate and discrete communities or municipal entities that comprise cable systems.⁷⁰ In the cable context, all cable subscribers who are in a community unit that lies in whole or in part within the specified zone experience program deletions if the program is covered by one of these rules. There are, however, no boundaries for satellite service that readily and necessarily correspond to the cable community unit. Is it necessary to administer these rules in the satellite context using the same community unit concept that applies in the cable context?⁷¹ Or, is it more appropriate to consider each household served by the satellite carrier and determine if it is within a broadcaster’s specified zone for protection under the rules? In either case, the satellite carrier must be able to determine the location of each subscriber in relation to the relevant zone of protection for each local broadcast television station. How can a satellite carrier accurately locate a subscriber whose address is a post office box or rural route number? Is it appropriate to use the subscriber’s zip code for this purpose? We seek comment on which approach best serves the purposes of the statute while not unnecessarily depriving satellite subscribers who are beyond the specified zone – but within a community unit that lies partially within the specified zone – of programming. We also seek comment on how the use of DMA in the SHVIA to define the local market⁷² applies to determination of the specified zone for purposes of the nonduplication, syndicated exclusivity and sports blackout rules in the satellite context.

31. The syndicated exclusivity and sports blackout rules make specific provision for what type of programming a cable system may substitute for programming deleted pursuant to these rules. For example, when a program is blacked out based on syndicated rights, a cable operator may substitute a program from any other television broadcast station and carry that program.⁷³ We seek comment on what types of programming and methods of substitution are appropriate for satellite

⁷⁰See 47 C.F.R. § 76.5(dd).

⁷¹“Community unit” refers to “a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single discrete unincorporated areas).” 47 C.F.R. § 76.5(dd).

⁷² See 17 U.S.C. § 122(j)(2) (as amended by § 1002 of the SHVIA).

⁷³47 C.F.R. §§ 76.161, 76.67(d). The sports blackout rule also allows cable operators to substitute programming when a sporting event is being deleted.

carriers. What role do retransmission consent requirements, as well as copyright licensing requirements, play in determination of substitute programming?

32. Congress apparently chose not to extend application of the network nonduplication and syndicated exclusivity rules to retransmission of television broadcast stations other than nationally distributed superstations. We believe that the statutory requirements, nevertheless, will protect all contractual arrangements because the satellite carrier either needs the retransmission consent of the independent station or voluntarily complies with the exclusivity and sports blackout rules.⁷⁴ We believe, therefore, that the interests of rights holders and local broadcasters are protected, but we seek comment on this issue.

33. It has been suggested that the Commission consider certain additional issues concerning the distribution of sports programming that are related to, but not directly covered by, the SHVIA. The National Football League sells packages of programming to networks on a national basis, but different games are broadcast locally on a regional basis, often in two-game packages. To the extent that broadcasts of games are carried into local markets on distant broadcast signals via satellite, the network nonduplication and other rules involved in this proceeding appear to offer neither the stations nor the leagues involved any protection beyond the rights to the particular games that local stations are authorized to broadcast.⁷⁵ In light of the SHVIA's restrictions on households that are eligible to receive distant network signals,⁷⁶ it is not clear to what extent carriage of distant signals providing different games merits remedial action. We seek comment on the question of how the patterns of sports carriage involved are addressed by the new law, and whether they can and should be addressed in the regulations the Commission is required to adopt pursuant to it.

34. We note, too, that WPIX, KTLA, and KWGN are WB affiliates and WSBK and WWOR are UPN affiliates; thus all are both "network stations" as well as "nationally distributed superstations," pursuant to the definitions in the SHVIA.⁷⁷ Should the exclusivity rules apply to blackout programming on a local station if that station is also a nationally distributed superstation or should the station be treated only as a local station within its local market, notwithstanding that it is a nationally distributed superstation outside its market? We note by way of analogy that, in the context of mandatory cable carriage, we have concluded that local commercial stations do not become superstations until such time as they are retransmitted via satellite outside their market,

⁷⁴See 47 U.S.C. § 325(b)(2)(B)(iii) and discussion, *supra*, at ¶ 8.

⁷⁵As noted in the discussion of the network nonduplication rules, *supra*, the Commission has determined in the cable context that the use of different camera crews and announcers for a sporting event results in the distant program not being considered the same as the local program. See *Major League Baseball*, 6 FCC Rcd 5573 (1991).

⁷⁶Retransmission of distant network stations is generally restricted to households that cannot receive local stations over-the-air. See discussion *infra* at ¶¶ 7 and 26.

⁷⁷See 47 U.S.C. § 339(d)(2) (as amended by § 1008(a) of the SHVIA) and 17 U.S.C. § 119(d)(2) (as amended by § 1008(b) of the SHVIA) and discussion of definitions of "nationally distributed superstation" and "network station," *supra*, at ¶ 6 and n. 9 respectively.

an activity unrelated to their status as local commercial broadcast stations within their market.⁷⁸ We seek comment on the applicability of that conclusion in the satellite context.

35. In addition, if we decide that it is necessary for the satellite carrier rules for sports blackout protection for network stations to differ from sports blackout protection for nationally distributed superstations due to technical feasibility and economic prohibitions, we seek comment on whether the sports blackout protection for these stations should apply to them as superstations, rather than as network stations.

36. Section 339(b)(1) and the relevant part of the *Joint Explanatory Statement* are silent regarding application of the exclusivity and sports blackout rules to the retransmission of digital broadcast signals. In the pending proceeding considering cable mandatory carriage of digital signals, we requested comment on how these cable rules would function for cable carriage of digital signals.⁷⁹ Similarly here, we question whether Congress intended to apply these rules to satellite retransmission of digital broadcast signals. We note that the SHVIA can be read as applying to both analog and digital broadcast signals. An alternative interpretation is that Congress was only concerned about the carriage of analog signals given that elsewhere in the statute Congress expressly mentioned digital signals and, presumably, could have done so in this context as well.⁸⁰ We seek comment on whether and how the exclusivity rules could apply to satellite carriage of digital broadcast signals, and whether there is a meaningful distinction between analog and digital carriage issues for satellite carriers in this context.

37. As a final matter, we note that several sections of the existing cable rules contain outdated cross-references to other sections of the rules. We will take this opportunity to correct these references. These proposed revisions are listed in Appendix C. We welcome comment on these and any other such corrections that are needed. For example, Section 76.67 contains a reference to Section 76.5(gg) for purposes of identifying the broadcast television stations that trigger the rule's application. Section 76.5(gg) has been eliminated. We seek comment on whether we should reinstate a standard based upon the original criteria incorporated into Section 76.5(gg) or adopt a new standard. In addition, we welcome comment on changes to the

⁷⁸See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, ("Must Carry Reconsideration Order"), 9 FCC Rcd. 6723, 6742 (1994) ("Congress intended for all local commercial broadcast stations to have the option to assert either must-carry or retransmission consent within their individual market. These local commercial stations do not become superstations until such time as they are retransmitted via satellite outside their market, an activity unrelated to their status as local commercial broadcast stations within their market. Therefore, such local commercial stations retain the right to elect between must-carry and retransmission consent within their market.").

⁷⁹See *In re Carriage of the Transmission of Digital Television Broadcast Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd. 15092 (1988).

⁸⁰Section 339(c) requires the Commission to conduct an inquiry into alternative standards for determining subscriber eligibility to receive distant signals and specifies that the Commission should recommend standards for analog and, separately, for digital signals. In addition, in the *Joint Explanatory Statement*, the conferees state, with reference to must carry requirements for satellite carriers, that they take no position regarding the application of must-carry rules to carriage of digital television signals by either cable or satellite systems. *Joint Explanatory Statement* at H11795.

application of the rules in the cable context to the extent necessary or desirable for harmonizing the regulatory requirements among the affected parties.

V. ADMINISTRATIVE MATTERS

A. Initial Regulatory Flexibility Act Statement and Paperwork Reduction Act Statement

38. The initial regulatory flexibility analysis is attached to this order as Appendix D. This *Notice* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days from date of publication of this *Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

B. Ex Parte Rules

39. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules. 47 C.F.R. 1.1206(b), as revised. *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 oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the 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. See 47 C.F.R. 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

C. Filing of Comments and Reply Comments

40. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments in response to this *Notice* on or before February 7, 2000 and reply comments on or before February 28, 2000. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.⁸¹ Comments filed through the ECFS can be sent as an

⁸¹See *In re Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd. 11322 (1998) (amending Parts 0 and 1 of the Commission's rules to allow electronic filing of comments and other pleadings).

electronic file via the Internet to <<http://www.fcc/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form<your e-mail address." A sample form and directions will be sent in reply.

41. Parties who choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. If more than one docket or rulemaking number appears in the caption of this proceeding commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. The Cable Services Bureau contact for this proceeding is Eloise Gore at (202) 418-7200, TTY (202) 418-7172, or at egore@fcc.gov.

42. Parties who choose to file by paper should also submit their comments on diskette. Parties should submit diskettes to Eloise Gore, Cable Services Bureau, 445 12th Street N.W., Room 4-A802, Washington, D.C. 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible form using MS DOS 5.0 and Microsoft Word, or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the party's name, proceeding (including the lead docket number in this case [CS Docket No. 00-2]), type of pleading (comments or reply comments), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, referable in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, 1231 20th Street, N.W., Washington, D.C. 20036.

43. Written comments by the public on the proposed and/or modified information collections are due **[February 7, 2000]**. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before **[60 days after date of publication in the Federal Register.]** In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Virginia Huth, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to vhuth@omb.eop.gov.

VI. ORDERING CLAUSES

44. Accordingly, **IT IS ORDERED** that pursuant to Section 1008 of the Satellite Home Viewer Act of 1999, Section 339(b)(1) of the Communications Act of 1934, as amended, **NOTICE IS HEREBY GIVEN** of the proposals described in this Notice of Proposed Rulemaking.

45. **IT IS FURTHER ORDERED** that the Commission's Consumer Information 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.⁸²

Federal Communications Commission

Magalle Roman Salas
Secretary

⁸²See 5 U.S.C. § 603(2).

APPENDIX A**SELECTED PROVISIONS OF THE SATELLITE HOME VIEWER
IMPROVEMENT ACT OF 1999 AND TITLE 17 OF THE U.S. CODE –
COPYRIGHTS****SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999¹****SEC. 1008. RULES FOR SATELLITE CARRIERS RETRANSMITTING TELEVISION
BROADCAST SIGNALS.**

(a) AMENDMENTS TO COMMUNICATIONS ACT OF 1934- Title III of the Communications Act of 1934 is amended by inserting after section 337 (47 U.S.C. 337) the following new sections:

* * *

'SEC. 339. CARRIAGE OF DISTANT TELEVISION STATIONS BY SATELLITE
CARRIERS.

* * *

'(b) **EXTENSION OF NETWORK NONDUPLICATION, SYNDICATED
EXCLUSIVITY, AND SPORTS BLACKOUT TO SATELLITE RETRANSMISSION-**

'(1) **EXTENSION OF PROTECTIONS-** Within 45 days after the date of the enactment of the Satellite Home Viewer Improvement Act of 1999, the Commission shall commence a single rulemaking proceeding to establish regulations that--

'(A) apply network nonduplication protection (47 CFR 76.92) syndicated exclusivity protection (47 CFR 76.151), and sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers; and

'(B) to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers to subscribers.

'(2) **DEADLINE FOR ACTION-** The Commission shall complete all actions necessary to prescribe regulations required by this section so that the regulations shall become effective within 1 year after such date of enactment.

* * *

'(d) **DEFINITIONS-** For the purposes of this section:

¹Act of Nov. 29, 1999, Pub. L. No. 106-113, §1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.).

'(1) LOCAL MARKET- The term 'local market' has the meaning given that term under section 122(j) of title 17, United States Code.²

'(2) **NATIONALLY DISTRIBUTED SUPERSTATION**- The term 'nationally distributed superstation' means a television broadcast station, licensed by the Commission, that--

'(A) is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States;

'(B) on May 1, 1991, was retransmitted by a satellite carrier and was not a network station at that time; and

'(C) was, as of July 1, 1998, retransmitted by a satellite carrier under the statutory license of section 119 of title 17, United States Code.

'(3) NETWORK STATION- The term 'network station' has the meaning given such term under section 119(d) of title 17, United States Code.³

'(4) SATELLITE CARRIER- The term 'satellite carrier' has the meaning given such term under section 119(d) of title 17, United States Code.⁴

'(5) TELEVISION NETWORK- The term 'television network' means a television network in the United States which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more States.'

² See 17 U.S.C. § 122(j) (as amended by Section 1002 of the SHVIA), quoted *infra*.

³ See 17 U.S.C. § 119(d) (as amended by Section 1008 of the SHVIA), quoted *infra*.

⁴ See 17 U.S.C. § 119(d), quoted *infra*.

SEC. 1002. LIMITATIONS ON EXCLUSIVE RIGHTS; SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS WITHIN LOCAL MARKETS.

(a) IN GENERAL- Chapter 1 of title 17, United States Code is amended by adding after section 121 ((17 USCA 121)) the following new section:

'Sec. 122. Limitations on exclusive rights; secondary transmissions by satellite carriers within local markets

* * *

'(j) DEFINITIONS- In this section—

* * *

'(2) LOCAL MARKET-

'(A) IN GENERAL- The term 'local market', in the case of both commercial and noncommercial television broadcast stations, means the designated market area in which a station is located, and--

'(i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area are within the same local market; and

'(ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.

'(B) COUNTY OF LICENSE- In addition to the area described in subparagraph (A), a station's local market includes the county in which the station's community of license is located.

'(C) DESIGNATED MARKET AREA- For purposes of subparagraph (A), the term 'designated market area' means a designated market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication.

Title 17 U.S. Code – Copyrights

17 U.S.C. § 119. Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing.

* * *

(d) Definitions.-- As used in this section:

* * *

(2) Network station.--The term "network station" means --

(A) a television broadcast station, including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or

(B) a noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934); except that the term does not include the signal of the Alaska Rural Communications Service, or any successor entity to that service.

* * *

(6) Satellite carrier.-- The term "satellite carrier" means an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission and operates in the Fixed-Satellite Service under part 25 of title 47 of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point- to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing.

APPENDIX B

NETWORK NONDUPLICATION, SYNDICATED PROGRAM EXCLUSIVITY AND SPORTS BLACKOUT RULES AND RELATED REGULATIONS

Network Nonduplication Rules

§ 76.92 Network non-duplication; extent of protection.

(a) Upon receiving notification pursuant to § 76.94, a cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal, except as otherwise provided below.

(b) For purposes of this section, the order of nonduplication priority of television signals carried by a community unit is as follows:

(1) First, all television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(2) Second, all smaller market television broadcast stations within whose secondary zone the community of the community unit is located, in whole or in part.

(c) For purposes of this section, all noncommercial educational television broadcast stations licensed to a community located in whole or in part within a major television market as specified in § 76.51 shall be treated in the same manner as a major market commercial television broadcast station, and all noncommercial educational television broadcast stations not licensed to a community located in whole or in part within a major television market shall be treated in the same manner as a smaller market television broadcast station.

(d) Any community unit operating in a community to which a 100-watt or higher power translator is located within the predicted Grade B signal contour of the television broadcast station that the translator station retransmits, and which translator is carried by the community unit shall, upon request of such translator station licensee or permittee, delete the duplicating network programming of any television broadcast station whose reference point (See § 76.53) is more than 88.5 km (55 miles) from the community of the community unit.

(e) Any community unit which operates in a community located in whole or in part within the secondary zone of a smaller market television broadcast station is not required to delete the duplicating network programming of any major market television broadcast station whose reference point (See Section 76.53) is also within 88.5 km (55 miles) of the community of the community unit.

(f) A community unit is not required to delete the duplicating network programming of any television broadcast station which is significantly viewed in the cable television community pursuant to § 76.54.

(g) A community unit is not required to delete the duplicating network programming of any qualified NCE television broadcast station that is carried in fulfillment of the cable television system's mandatory signal carriage obligations, pursuant to § 76.56.

Note: With respect to network programming, the geographic zone within which the television station is entitled to enforce network non-duplication protection and priority of shall be that geographic area agreed upon between the network and the television station. In no event shall such rights exceed the area within which the television station may acquire broadcast territorial exclusivity rights as defined in § 73.658(m), except that small market television stations shall be entitled to a secondary protection zone of 32.2 additional kilometers (20 additional miles). To the extent rights are obtained for any hyphenated market named in § 76.51, such rights shall not exceed those permitted under § 76.658(m) for each named community in that market.

§ 76.93 Parties entitled to network non-duplication protection.

Television broadcast station licensees shall be entitled to exercise non-duplication rights pursuant to § 76.92 in accordance with the contractual provisions of the network-affiliate agreement.

§ 76.94 Notification.

(a) In order to exercise non-duplication rights pursuant to § 76.92, television stations shall notify each cable television system operator of the non-duplication sought in accordance with the requirements of this Section. Except as otherwise provided in paragraph (b) of this section, non-duplication protection notices shall include the following information:

(1) The name and address of the party requesting non-duplication protection and the television broadcast station holding the non-duplication right;

(2) The name of the program or series (including specific episodes where necessary) for which protection is sought; and

(3) The dates on which protection is to begin and end.

(b) Broadcasters entering into contracts providing for network non-duplication protection shall notify affected cable systems within 60 calendar days of the signing of such a contract; provided, however, that for such contracts signed before May 5, 1989, a broadcaster may provide notice on or before June 19, 1989. In the event the broadcaster is unable based on the information contained in the contract, to furnish all the information required by paragraph (a) of this section at that time, the broadcaster must provide modified notices that contain the following information:

(1) The name of the network (or networks) which has (or have) extended non-duplication protection to the broadcaster;

(2) The time periods by time of day (local time) and by network (if more than one) for each day of the week that the broadcaster will be broadcasting programs from that network (or networks) and for which non-duplication protection is requested; and

(3) The duration and extent (e.g., simultaneous, same-day, seven-day, etc.) of the non-duplication protection which has been agreed upon by the network (or networks) and the broadcaster.

(c) Except as otherwise provided in paragraph (d) of this section, a broadcaster shall be entitled to non-duplication protection beginning on the later of:

(1) The date specified in its notice (as described in paragraphs (a) or (b) of this section, whichever is applicable) to the cable television system; or

(2) The first day of the calendar week (Sunday-Saturday) that begins 60 days after the cable television system receives notice from the broadcaster.

(d) A broadcaster shall provide the following information to the cable television system under the following circumstances:

(1) In the event the protection specified in the notices described in paragraphs (a) or (b) of this section has been limited or ended prior to the time specified in the notice, or in the event a time period, as identified to the cable system in a notice pursuant to paragraph (b) of this section, for which a broadcaster has obtained protection is shifted to another time of day or another day (but not expanded), the broadcaster shall, as soon as possible, inform each cable television system operator that has previously received the notice of all changes from the original notice. Notice to be furnished "as soon as possible" under this subsection shall be furnished by telephone, telegraph, facsimile, overnight mail or other similar expedient means.

(2) In the event the protection specified in the modified notices described in paragraph (b) of this section has been expanded, the broadcaster shall, at least 60 calendar days prior to broadcast of a protected program entitled to such expanded protection, notify each cable system operator that has previously received notice of all changes from the original notice.

(e) In determining which programs must be deleted from a television signal, a cable television system operator may rely on information from any of the following sources published or otherwise made available:

(1) Newspapers or magazines of general circulation.

(2) A television station whose programs may be subject to deletion. If a cable television system asks a television station for information about its program schedule, the television station shall answer the request:

(i) Within ten business days following the television station's receipt of the request; or

(ii) Sixty days before the program or programs mentioned in the request for information will be broadcast; whichever comes later.

(3) The broadcaster requesting exclusivity.

(f) A broadcaster exercising exclusivity pursuant to § 76.92 shall provide to the cable system, upon request, an exact copy of those portions of the contracts, such portions to be signed by both the network and the broadcaster, setting forth in full the provisions pertinent to the duration, nature, and extent of the non-duplication terms concerning broadcast signal exhibition to which the parties have agreed.

§ 76.95 Exceptions.

(a) The provisions of §§ 76.92-76.94 shall not apply to a cable system serving fewer than 1,000 subscribers. Within 60 days following the provision of service to 1,000 subscribers, the operator of each such system shall file a notice to that effect with the Commission, and serve a copy of that notice on every television station that would be entitled to exercise network non-duplication protection against it.

(b) Network non-duplication protection need not be extended to a higher priority station for one hour following the scheduled time of completion of the broadcast of a live sports event by that station or by a lower priority station against which a cable community unit would otherwise be required to provide non-duplication protection following the scheduled time of completion.

§ 76.97 Effective dates.

The network non-duplication protection and exceptions thereto outlined in §§ 76.92 through 76.95 shall become enforceable on January 1, 1990. The rules in effect on May 18, 1988, will remain operative until January 1, 1990.

Syndicated Program Exclusivity Rules

§ 76.151 Syndicated program exclusivity: extent of protection.

Upon receiving notification pursuant to § 76.155, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal, except as otherwise provided below.

Note: With respect to each syndicated program, the geographic zone within which the television station is entitled to enforce syndicated exclusivity rights shall be that geographic area agreed upon

between the non-network program supplier, producer or distributor and the television station. In no event shall such zone exceed the area within which the television station has acquired broadcast territorial exclusivity rights as defined in § 73.658(m). To the extent rights are obtained for any hyphenated market named in § 76.51, such rights shall not exceed those permitted under § 73.658(m) for each named community in that market.

§ 76.153 Parties entitled to syndicated exclusivity.

(a) Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to § 76.151 in accordance with the contractual provisions of their syndicated program license agreements, consistent with § 76.159.

(b) Distributors of syndicated programming shall be entitled to exercise exclusive rights pursuant to § 76.151 for a period of one year from the initial broadcast syndication licensing of such programming anywhere in the United States; provided, however, that distributors shall not be entitled to exercise such rights in areas in which the programming has already been licensed.

§ 76.155 Notification.

(a) In order to exercise exclusivity rights pursuant to § 76.151, distributors or television stations shall notify each cable television system operator of the exclusivity sought in accordance with the requirements of this section. Syndicated program exclusivity notices shall include the following information:

(1) The name and address of the party requesting exclusivity and the television broadcast station or other party holding the exclusive right;

(2) The name of the program or series (including specific episodes where necessary) for which exclusivity is sought;

(3) The dates on which exclusivity is to begin and end.

(b) Broadcasters entering into contracts on or after August 18, 1988, which contain syndicated exclusivity protection shall notify affected cable systems within sixty calendar days of the signing of such a contract. Broadcasters who have entered into contracts prior to August 18, 1988, and who comply with the requirements specified in § 76.159 shall notify affected cable systems on or before June 19, 1989; provided, however, that with respect to such pre-August 18, 1988, contracts that require amendment in order to invoke the provisions of these rules, notification may be given within sixty calendar days of the signing of such amendment. A broadcaster shall be entitled to exclusivity protection beginning on the later of:

(1) The date specified in its notice to the cable television system; or

(2) The first day of the calendar week (Sunday-Saturday) that begins 60 days after the cable television system receives notice from the broadcaster;

(c) In determining which programs must be deleted from a television broadcast signal, a cable television system operator may rely on information from any of the following sources published or otherwise made available.

(1) Newspapers or magazines of general circulation;

(2) A television station whose programs may be subject to deletion. If a cable television system asks a television station for information about its program schedule, the television station shall answer the request:

(i) Within ten business days following the television station's receipt of the request; or

(ii) Sixty days before the program or programs mentioned in the request for information will be broadcast; whichever comes later.

(3) The distributor or television station requesting exclusivity.

(d) In the event the exclusivity specified in paragraph (a) of this section has been limited or has ended prior to the time specified in the notice, the distributor or broadcaster who has supplied the original notice shall, as soon as possible, inform each cable television system operator that has previously received the notice of all changes from the original notice. In the event the original notice specified contingent dates on which exclusivity is to begin and/or end, the distributor or broadcaster shall, as soon as possible, notify the cable television system operator of the occurrence of the relevant contingency. Notice to be furnished "as soon as possible" under this subsection shall be furnished by telephone, telegraph, facsimile, overnight mail or other similar expedient means.

§ 76.156 Exceptions.

(a) Notwithstanding the requirements of §§ 76.151-76.155, a broadcast signal is not required to be deleted from a cable community unit when that cable community unit falls, in whole or in part, within that signal's grade B contour, or when the signal is significantly viewed pursuant to § 76.54 in the cable community.

(b) The provisions of §§ 76.151-76.155 shall not apply to a cable system serving fewer than 1,000 subscribers. Within 60 days following the provision of service to 1,000 subscribers, the operator of each such system shall file a notice to that effect with the Commission, and serve a copy of that notice on every television station that would be entitled to exercise syndicated exclusivity protection against it.

§ 76.157 Exclusivity contracts.

A distributor or television station exercising exclusivity pursuant to § 76.151 shall provide to the cable system, upon request, an exact copy of those portions of the exclusivity contracts, such portions to

be signed by both the distributor and the television station, setting forth in full the provisions pertinent to the duration, nature, and extent of the exclusivity terms concerning broadcast signal exhibition to which the parties have agreed.

§ 76.158 Indemnification contracts.

No licensee shall enter into any contract to indemnify a cable system for liability resulting from failure to delete programming in accordance with the provisions of this subpart unless the licensee has a reasonable basis for concluding that such program deletion is not required by this subpart.

§ 76.159 Requirements for invocation of protection.

For a station licensee to be eligible to invoke the provisions of this subpart, it must have a contract or other written indicia that it holds syndicated exclusivity rights for the exhibition of the program in question. Contracts entered on or after August 18, 1988, must contain the following words: "the licensee [or substitute name] shall, by the terms of this contract, be entitled to invoke the protection against duplication of programming imported under the Compulsory Copyright License, as provided in § 76.151 of the FCC rules [or 'as provided in the FCC's syndicated exclusivity rules']." Contracts entered into prior to August 18, 1988, must contain either the foregoing language or a clear and specific reference to the licensee's authority to exercise exclusivity rights as to the specific programming against cable television broadcast signal carriage by the cable system in question upon the contingency that the government reimposed syndicated exclusivity protection. In the absence of such a specific reference in contracts entered into prior to August 18, 1988, the provisions of these rules may be invoked only if (a) the contract is amended to include the specific language referenced above or (b) a specific written acknowledgment is obtained from the party from whom the broadcast exhibition rights were obtained that the existing contract was intended, or should now be construed by agreement of the parties, to include such rights. A general acknowledgment by a supplier of exhibition rights that specific contract language was intended to convey rights under these rules will be accepted with respect to all contracts containing that specific language. Nothing in this Section shall be construed as a grant of exclusive rights to a broadcaster where such rights are not agreed to by the parties.

§ 76.161 Substitutions.

Whenever, pursuant to the requirements of the syndicated exclusivity rules, a community unit is required to delete a television program on a broadcast signal that is permitted to be carried under the Commission's rules, such community unit may, consistent with these rules and the sports blackout rules at 47 CFR 76.67, substitute a program from any other television broadcast station. Programs substituted pursuant to this section may be carried to their completion.

§ 76.163 Effective dates.

No cable system shall be required to delete programming pursuant to the provisions of §§ 76.151 through 76.159 prior to January 1, 1990.

Sports Broadcasts Rule.¹**§ 76.67 Sports broadcasts.**

(a) No community unit located in whole or in part within the specified zone of a television broadcast station licensed to a community in which a sports event is taking place, shall, on request of the holder of the broadcast rights to that event, or its agent, carry the live television broadcast of that event if the event is not available live on a television broadcast signal carried by the community unit meeting the criteria specified in §§ 76.5(gg)(1) through 76.5(gg)(3) of this part. For purposes of this section, if there is no television station licensed to the community in which the sports event is taking place, the applicable specified zone shall be that of the television station licensed to the community with which the sports event or team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed.

(b) Notification of the programming to be deleted pursuant to this section shall include the following information:

(1) As to programming to be deleted from television broadcast signals regularly carried by the community unit:

(i) The name and address of the party requesting the program deletion;

(ii) The date, time and expected duration of the sports event the television broadcast of which is to be deleted;

(iii) The call letters of the television broadcast station(s) from which the deletion is to be made.

(2) As to programming to be deleted from television broadcast signals not regularly carried by the community unit:

(i) The name and address of the party requesting the program deletion;

(ii) The date, time and expected duration of the sports event the television broadcast of which is to be deleted.

(c) Notifications given pursuant to this section must be received, as to regularly scheduled events, no later than the Monday preceding the calendar week (Sunday-Saturday) during which the program deletion is to be made. Notifications as to events not regularly scheduled and revisions of notices previously submitted, must be received within twenty-four (24) hours after the time of the telecast to be deleted is known, but in any event no later than twenty-four (24) hours from the time the subject telecast is to take place.

¹ This rule is commonly referred to as the Sports Blackout Rule, and is so called in the SHVIA.

(d) Whenever, pursuant to this section, a community unit is required to delete a television program on a signal regularly carried by the community unit, such community unit may, consistent with the rules contained in Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the community unit need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

(e) The provisions of this section shall not be deemed to require the deletion of any portion of a television signal which a community unit was lawfully carrying prior to March 31, 1972.

(f) The provisions of this section shall not apply to any community unit having fewer than 1,000 subscribers.

Other Relevant Regulations**73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.**

* * *

(m) Territorial exclusivity in non-network arrangements.

(1) No television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non-network program producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away, as determined by the reference points contained in § 76.53 of this chapter, (if reference points for a community are not listed in § 76.53, the location of the main post office will be used) from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person, except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in § 76.51 of this chapter for those 100 markets listed, and for markets not listed in § 76.51 of this chapter, the listing as contained in the ARB Television Market Analysis for the most recent year at the time that the exclusivity contract, arrangement or understanding is complete under practices of the industry. As used in this paragraph, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

APPENDIX C

TECHNICAL CORRECTIONS TO COMMISSION RULES

§ 76.5(ii) Definitions.

Existing Section 76.5(ii) references Section 76.5(o). The correct reference is to Section 76.5(m).

§ 76.51(a)(2), (a)(28) Major Television Markets.

Section 76.51 lists the top 100 television markets in the United States. The “Los Angeles-San Bernardino-Corona-Fontana-Riverside, Calif.” market is listed at Section 76.51(a)(2). In 1995, the Commission redesignated the “Los Angeles-San Bernardino-Corona-Fontana-Riverside, Calif.,” market as the “Los Angeles-San Bernardino-Corona-Riverside-Anaheim, Calif.” market.¹ However, the published amendment to Section 76.51(a) intended to effectuate the foregoing change inadvertently amended Section 76.51(a)(28), rather than Section 76.51(a)(2). As a result, the redesignated “Los Angeles-San Bernardino-Corona-Riverside-Anaheim, Calif.” market is listed as Section 76.51(a)(28) and the “Los Angeles-San Bernardino-Corona-Fontana-Riverside, Calif.” market still is listed as Section 76.51(a)(2). The “Tampa-St. Petersburg-Clearwater, Florida” market, which was listed at Section 76.51(28) at the time the Commission adopted the *Los Angeles Redesignation Order*, was deleted inadvertently from Section 76.51(a)(28) and currently is not listed elsewhere in Section 76.51.

The correct reference in Section 76.51(a)(2) is to the “Los Angeles-San Bernardino-Corona-Riverside-Anaheim, Calif.” market. The correct reference in Section 76.51(a)(28) is to the “Tampa-St. Petersburg-Clearwater, Florida” market.

§ 76.67(a) Sports Broadcasts.

The existing rule references criteria set forth in Section 76.5(gg) in identifying the broadcast television stations triggering the rule’s application. The Commission deleted Section 76.5(gg) in its 1993 Order rescinding cable service rate regulation.² Thus, Section 76.67 now references a non-existent rule. In paragraph 37 of the *Notice*, we seek comment on whether we should reinstate a standard based upon the original criteria incorporated into Section 76.5(gg) or adopt a new standard.

§ 76.92 Network non-duplication; extent of protection.

¹ *Cable Television Service; List of Major Television Markets*, Final Rule, MM Dkt. No. 93-304 (released August 31, 1995) (the “*Los Angeles Redesignation Order*”).

² *Implementation of Sections of the Cable Television Consumer Protection Act of 1992*, MM Dkt. No. 92-266, 8 FCC Rcd. 5631, 6030 (1993).

The existing Note to Section 76.92 references Section 76.658(m) in the last sentence. The correct reference is to Section 73.658(m), as correctly stated in the second sentence of the Note.

Appendix D

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act ("RFA"),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the possible policies and rules that would result from this Notice of Proposed Rulemaking ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above in paragraph 40. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.² In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

2. *Need for, and Objectives of, the Proposed Rule Changes.* On November 29, 1999, the Satellite Home Viewer Improvement Act of 1999 was enacted ("SHVIA").⁴ Section 1008 of the SHVIA creates a new Section 339 of the Communications Act entitled "Carriage of Distant Television Stations by Satellite Carriers."⁵ The *Notice* discusses adoption of implementing regulations relating to the cable rules concerning network nonduplication, syndicated program exclusivity, and sports broadcasts to satellite carriers. Section 339(b) directs the Commission to apply these three cable rules to satellite carriers' retransmission of nationally distributed superstations to subscribers.⁶ The Commission is also to apply the sports broadcasts rule to satellite carrier's retransmission of network stations to subscribers, but only to the extent technically feasible and not economically prohibitive.

3. *Legal Basis.* The authority for the action proposed in this rulemaking is contained in Sections 1, 4(i) and (j), 339 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 339.

4. *Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply.* The IRFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.⁷ The IRFA defines

¹See 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).

²See 5 U.S.C. §603(a).

³See *id.*

⁴S. 1948, the Satellite Home Viewer Improvement Act of 1999. Enacted November 29, 1999.

⁵See 47 U.S.C. § 339.

⁶47 U.S.C. § 339(b)(1)(A).

⁷5 U.S.C. §604(b)(3).

the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.⁸ Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").⁹ The rules we may adopt as a result of the Notice will affect television station licensees, satellite carriers and video program distributors and delivery services.

5. *Television Stations.* The proposed rules and policies will apply to television broadcasting licensees. The Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.¹⁰ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.¹¹ Included in this industry are commercial, religious, educational, and other television stations.¹² Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.¹³ Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.¹⁴ There were 1,509 television stations operating in the nation in 1992.¹⁵ That number has remained fairly

⁸5 U.S.C. §601(3)(incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632.) Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such the 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).

⁹15 U.S.C. §632.

¹⁰13 C.F.R. §121.201, Standard Industrial Code (SIC) 4833 (1996).

¹¹Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

¹²*Id.* See also OMB SIC Manual at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as:

Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

¹³Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

¹⁴*Id.* SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

¹⁵FCC News Release No. 31327, Jan. 13, 1993.

constant as indicated by the approximately 1,579 operating full power television broadcasting stations in the nation as of May 31, 1998.¹⁶

6. Thus, the proposed rules will affect many of the approximately 1,579 television stations; approximately 1,200 of those stations are considered small businesses.¹⁷ These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

7. In addition to owners of operating television stations, any entity that seeks or desires to obtain a television broadcast license may be affected by the proposals contained in this item. The number of entities that may seek to obtain a television broadcast license is unknown. We invite comment as to such number.

8. *Small Multiple Video Program Distributors ("MVPDs")*: SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.¹⁸ This definition includes cable system operators, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,758 total cable and other pay television services and 1,423 had less than \$11 million in revenues.¹⁹ We address below services individually to provide a more precise estimate of small entities.

9. *Direct Broadcast Satellite ("DBS")*: There are four licenses of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees which are operational have annual revenues which may be in excess of the threshold for a small business. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge that there are entrants in this field that may not yet have generated \$11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

10. *Home Satellite Delivery ("HSD")*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled.²⁰ HSD owners

¹⁶See *Broadcast Station Totals As Of May 31, 1998*, FCC News Release, June 19, 1998.

¹⁷We use the 77 percent figure of TV stations operating at less than \$10 million for 1992 and apply it to the 1998 total of 1579 TV stations to arrive at 1,200 stations categorized as small businesses.

¹⁸ 13 C.F.R. §121.201 (SIC 4841).

¹⁹ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC Code 4841 (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

²⁰ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Third

can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.²¹

11. According to the most recently available information, there are approximately 30 program packages nationwide offering packages of scrambled programming to retail consumers.²² These program packages provide subscriptions to approximately 2,314,900 subscribers nationwide.²³ This is an average of about 77,163 subscribers per program package. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small MSO. Furthermore, because this is an average, it is likely that some program packages may be substantially smaller.

12. Entities which may be indirectly affected by the rules we may adopt as a result of the Notice are cable television systems.

13. *Cable Systems*: The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.²⁴ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.²⁵ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable systems operators that may be affected by the decisions and rules emanating out of the Notice.

14. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliate with any entity or entities whose gross annual

Annual Report, CS Docket No. 96-133, 12 FCC Rcd 4358, 4385 (1996)(*Third Annual Report*)..

²¹ *Third Annual Report*, 12 FCC Rcd at 4385, ¶ 49..

²² *Id.*

²³ *Id.*

²⁴ 47 C.F.R. §76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 7393 (1995).

²⁵ Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

revenues in the aggregate exceed \$250,000,000.²⁶ The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.²⁷ Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals approximately 1,450.²⁸ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act. It should be further noted that recent industry estimates project that there will be a total of 64,000,000 subscribers and we have based our fee revenue estimates on that figure.

14. *Description of Projected Reporting, Recordkeeping and other Compliance Requirements.* In order to implement Section 1008 of the Satellite Home Viewer Improvement Act of 1999, which creates a new Section 339 of the Communications Act, the Commission has proposed to add new rules and modify others, as the provisions at issue previously were applicable only to cable. We have yet to determine whether to amend existing provisions of the Commission's rules, or to adopt some other regulatory framework or procedures. There are compliance requirements involving the nonduplication protection, syndicated exclusivity, and sports blackout rules. To exercise nonduplication protection and syndicated exclusivity protection, the rights holder to specific network or syndicated programming will have to notify and report to the satellite carrier, and do so within 60 days of the signing of a contract affording exclusivity rights. Such notification and reporting is required to take place within a shorter time period in the sports blackout context. In certain instances, staff may have to dedicate time and effort to monitoring and ensuring that notifications are properly given in a timely manner to satellite carriers.

15. There may be costs associated with hiring accounting or engineering personnel, as there may be instances where entities may have to provide detailed information relating to such aspects of their particular operations. Specifically, costs here may relate possibly to conducting engineering studies to accurately determine zones of protection. Further, there will likely be costs in equipment necessary to carry out deletions. The Commission recognized the significant costs involved in implementing deletions and exempted systems having 1,000 or fewer subscribers.²⁹

16. In terms of record keeping, entities may have to keep a record of the contractual terms and agreements and may be required to maintain such information within their business environment. At this time, small businesses might not be impacted differently in any of the above, but we seek comment on these matters.

²⁶ 47 U.S.C. §543(m)(2).

²⁷ 47 C.F.R. §76.1403(b).

²⁸ Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

²⁹ *Supra* at ¶ 15 and ¶ 21.

17. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* 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: (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.

18. As indicated, the provisions of Section 339 refer to superstations and network stations, in terms of television broadcast stations. This legislation, however, applies to small entities and large entities equally. The Commission acknowledges that consideration should be given to possible differences in size of entities, as evidenced by the fact that there are certain exemptions in the application of these rules. Overall, at this time, small entities are not treated differently and might not be impacted differently, but we seek comment.

19. *Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals.*
None.