

the language of Section 340(b)(3), as well as the amended language of the statute's subscriber eligibility limitations, and will serve the STELA's overarching goal of fostering SV carriage while protecting localism, we conclude that our new interpretation represents the best reading of Section 340(b)(3) in the context of the statute as a whole.

47. In this respect, we modify the Commission's 2005 interpretation of Section 340 and decline to adopt our tentative conclusion in the NPRM that the statutory exceptions should continue to apply as before. Section 340(b)(3) allows a satellite subscriber to receive an SV station notwithstanding the restrictions imposed by Sections 340(b)(1) and (b)(2) if there are no network stations affiliated with the same network as the SV station. Thus, even if the subscriber does not subscribe to local-into-local service, as would otherwise be required by Section 340(b)(1), the subscriber can receive an SV station if there is no local station affiliated with the same network as that SV station. We recognize that the compulsory copyright license, now in 17 U.S.C. § 122(a)(2), limits SV service to markets in which local-into-local service is offered. However, we disagree that this requires us to read a requirement into the Communications Act that is not there. The compulsory copyright license in 17 U.S.C. § 122(a)(2) permits waivers and automatically grants them if the in-market station affiliated with the same network as the out-of-market SV station does not respond to the satellite carrier's waiver request.¹⁷² As a practical matter, if there is no affiliate in the market, then there is no affiliate who can respond to a waiver request or grant a waiver under Section 122(a)(2). Thus, the satellite carrier could ultimately offer the SV station because the waiver request would, inevitably, go unanswered.¹⁷³ Accordingly, we interpret the Section 340(b)(3) in accordance with its express language. We find it unnecessary to change the text of the rule that corresponds to the Section 340(b)(3) exception because the rule uses the statutory language and is consistent with the interpretation adopted here.¹⁷⁴

E. Dish Petition for Further Rulemaking

48. We decline to consider here Dish's petition for further rulemaking (filed with its comments in this docket) as it is not within the scope of this proceeding.¹⁷⁵ The Dish petition seeks two changes to the Commission's rules.¹⁷⁶ First, Dish asks the Commission to adopt a rule "that tying retransmission consent to restrictions on SV station carriage" violates the requirement that parties negotiate retransmission consent in good faith.¹⁷⁷ Dish's first proposal to change the retransmission consent rules could have been filed in our open proceeding on retransmission consent issues in MB Docket No. 10-71.¹⁷⁸ Second, Dish seeks to amend the Commission's rules for determining when a station qualifies for "significantly viewed" status in order to address the "orphan county" problem, which

¹⁷² See 17 U.S.C. § 122(a)(2)(B).

¹⁷³ As a practical matter, we also agree with the Satellite Carriers that there would be no aggrieved party by this interpretation. DIRECTV Reply at 9 (noting that "if the same-network broadcaster grants a waiver, it has determined that it would benefit from the delivery of the neighboring station If there is no such broadcaster, there is nobody to be harmed even in theory."). Our interpretation, however, is limited to the provisions of the Communications Act. We do not intend to render any opinion with respect to a party's rights under the Copyright Act. See 17 U.S.C. § 122(a)(2)(B).

¹⁷⁴ See Appendix B final rule 47 C.F.R. § 76.54(g)(3) and (g)(4). We renumber Sections 76.54(g)(1) and (g)(2) as Sections 76.54(g)(3) and (g)(4), as well as make some other non-substantive changes to these rules.

¹⁷⁵ See Broadcaster Associations Reply at 17 and 23.

¹⁷⁶ See Dish Comments (Petition) at 9.

¹⁷⁷ *Id.* at 9. Section 76.65 of our rules requires TV stations and satellite carriers "to negotiate in good faith the terms and conditions of retransmission consent." 47 C.F.R. § 76.65(a). For example, Dish argues that it is not good faith if a local station conditions the grant of its retransmission consent in its local market on a concession from the satellite carrier that it will not carry an SV station affiliated with the same network in the local market. *Id.*

¹⁷⁸ See Broadcaster Associations Reply at 17.

refers to the situation in which a county in one state is assigned to a neighboring state's DMA and there are few, if any, stations assigned to that DMA which are licensed to communities located in the state in which the county is located.¹⁷⁹ This proposal is better addressed in our proceeding to implement Section 304 of the STELA.¹⁸⁰ We also note, as the Broadcaster Associations point out,¹⁸¹ that any changes to the Commission's existing rules for determining significantly viewed status would be inconsistent with the statute's requirement that we use the same rules for making significantly viewed determinations that were in effect for cable operators as of April 15, 1976.¹⁸²

F. Housecleaning Rule Changes

49. In this section, we make non-substantive changes to update our significantly viewed rules. In the NPRM, we sought comment on these rule changes. The Broadcaster Associations and Satellite Carriers support these changes. Accordingly, we adopt the NPRM's proposed housecleaning rule changes.

50. Section 76.5(i). We amend Section 76.5(i) of the rules to replace its references to the term "non-cable" with the term "over-the-air."¹⁸³ In the 2005 *SHVERA Significantly Viewed Report and Order*, the Commission made this change to Section 76.54 to reflect the rule's true meaning, that being to indicate over-the-air viewing.¹⁸⁴ The Commission explained that, in the *1972 Order*, the concept of significant viewing was adopted to apply to over-the-air households, which at the time essentially meant households without cable (*i.e.*, non-cable households).¹⁸⁵ Thus, amending Section 76.5(i) to change "non-cable" to "over-the-air" reflects the true intent of the rule as it was in 1976, and is more consistent with the STELA's intent to establish parity between cable and satellite.

51. Section 76.54(c). We amend Section 76.54(c) of the rules to strike the outdated reference to the analog Grade B contour.¹⁸⁶ In the 2004 *SHVERA Significantly Viewed Report and Order*, the Commission revised this rule to add the appropriate service contour relevant for a station's digital signal – that being the noise limited service contour ("NLSC").¹⁸⁷ With the completion of the transition, we now can eliminate the reference to the Grade B contour.

¹⁷⁹ *Id.* at 11. Dish seeks changes to Sections 76.5(i) (definition of "significantly viewed") and 76.54 (rules for demonstrating a station qualifies for "significantly viewed" status). 47 C.F.R. §§ 76.5(i) and 76.54. Several government representatives and citizens from southwest Colorado filed comments in support of Dish's proposals and any other ways for viewers in the counties of La Plata and Montezuma, CO, to receive in-state programming (such as from the Denver, CO DMA). See Appendix A. The counties of La Plata and Montezuma, CO are assigned to the Albuquerque-Santa Fe, NM DMA.

¹⁸⁰ Section 304 of the STELA requires the Commission to produce a "Report on In-State Broadcast Programming," due to Congress in August 2011, to address the concerns, such as those voiced by the southwest Colorado group, that in some DMAs, some subscribers are not able to receive stations licensed to communities in their state via satellite. STELA § 304.

¹⁸¹ See Broadcaster Associations Reply at 24.

¹⁸² 17 U.S.C. § 122(a)(2), as amended by STELA (which retained the SHVERA's requirement in the statutory copyright license for SV stations (previously 17 U.S.C. § 119(a)(3)) that the Commission use the same rules established for cable operators that were in effect as of April 15, 1976.

¹⁸³ See Appendix B final rule change to 47 C.F.R. § 76.5(i).

¹⁸⁴ *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17292-3, ¶ 32.

¹⁸⁵ *Id.* (citing to *1972 Cable R&O*, 36 FCC 2d at 175-6, ¶¶ 83-6).

¹⁸⁶ See Appendix B final rule change to 47 C.F.R. § 76.54(c).

¹⁸⁷ *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17292, ¶ 31. (The digital NLSC is defined in 47 C.F.R. § 73.622(e).)

G. *Order on Reconsideration Dismisses Pending Petition as Moot*

52. In this *Order on Reconsideration*, we dismiss as moot the petition for reconsideration filed jointly by DIRECTV and Dish of the Commission's *SHVERA Significantly Viewed Report and Order*.¹⁸⁸ The petition seeks reconsideration of two decisions in the *SHVERA Significantly Viewed Report and Order*.

53. First, the petition challenges the Commission's interpretation that the analog "local service" requirement in former Section 340(b)(1) also contains the "same network affiliate" requirement.¹⁸⁹ The STELA eliminates former Sections 340(b)(1) and (b)(2)(A).¹⁹⁰ The *R&O* accompanying this *Order on Reconsideration* revises the satellite television significantly viewed rules to eliminate the analog local service requirement, as well as the digital "same network affiliate" requirement.¹⁹¹ Accordingly, this issue is moot.

54. Second, the petition challenges the Commission's interpretation of the digital service "equivalent bandwidth" requirement in former Section 340(b)(2)(B).¹⁹² The STELA eliminates the "equivalent bandwidth" requirement in former Section 340(b)(2)(B)¹⁹³ and, in the *R&O* accompanying this *Order*, we revise the satellite television significantly viewed rules to eliminate this requirement.¹⁹⁴ Accordingly, this issue is also moot and we dismiss the petition.

IV. CONCLUSION

55. In this *R&O*, we implement the STELA amendments to the SV provisions that apply to satellite carriers. We have been mindful that Congress amended the SV provisions to create a more workable framework to facilitate satellite carriage of SV stations and thereby provide satellite subscribers with greater choice of programming and to improve parity and competition between satellite and cable carriage of broadcast stations. We have also considered the importance of localism and balanced access to SV stations with the benefits of continued carriage of local stations. The rules adopted by this *Order* will advance these goals for the benefit of consumers and the competitive market for video distribution.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

56. As required by the Regulatory Flexibility Act of 1980 ("RFA"),¹⁹⁵ the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this Report and Order. The FRFA is set forth in Appendix C.

¹⁸⁸ 2006 *DIRECTV-EchoStar Joint Petition*, at *supra* note 6.

¹⁸⁹ 2006 *DIRECTV-EchoStar Joint Petition* at 9. The petition does not challenge the Commission's interpretation that the digital requirement in former Section 340(b)(2)(A) contains the "same network affiliate" requirement, essentially conceding the meaning of that provision.

¹⁹⁰ See *supra* notes 66 and 68 (for former statutory text).

¹⁹¹ See *supra* Section III.B. (for discussion of new Section 340(b)(1)).

¹⁹² 2006 *DIRECTV-EchoStar Joint Petition* at 2.

¹⁹³ See *supra* notes 66 and 68 (for former statutory text).

¹⁹⁴ See *supra* Section III.C. (for discussion of new Section 340(b)(2)). See also *supra* note 40 (for former statutory text).

¹⁹⁵ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

B. Final Paperwork Reduction Act of 1995 Analysis

57. This Report and Order has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),¹⁹⁶ and does not contain any new or modified information collection requirements.¹⁹⁷ In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.¹⁹⁸

C. Congressional Review Act

58. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.¹⁹⁹

D. Additional Information

59. For more information on this Report and Order, please contact Evan Baranoff, Evan.Baranoff@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED that pursuant to Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA), and Sections 1, 4(i) and (j), and 340 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 340, this Report and Order IS ADOPTED, and the Commission's rules ARE HEREBY AMENDED as set forth in the final rule changes appendix (Appendix B) attached to this Report and Order.

61. IT IS ALSO ORDERED that, pursuant to the authority contained in Sections 203(b) and 307 of the STELA, STELA §§ 203(b) and 307, the rules adopted in this Report and Order ARE ADOPTED and WILL BE EFFECTIVE 30 days after date of publication in the Federal Register.

62. IT IS ALSO ORDERED that, pursuant to Sections 1, 4(i) and (j), and 340 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 340; and Section 1.429 of our rules, 47 C.F.R. § 1.429, the petition for reconsideration in MB Docket No. 05-49 which was filed jointly by DIRECTV and Dish (formerly Echostar) IS DISMISSED AS MOOT.

63. IT IS FURTHER ORDERED that, pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission WILL SEND a copy of this Report and Order in a report to Congress and the General Accounting Office.

¹⁹⁶ The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

¹⁹⁷ The Commission does not modify the existing information collections that relate to the Commission's significantly viewed rules and procedures. See OMB Control Nos. 3060-0311 (47 C.F.R. § 76.54), 3060-0960 (47 C.F.R. §§ 76.122, 76.123, 76.124, 76.127), and 3060-0888 (47 C.F.R. § 76.7). The Commission will maintain these collections.

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

¹⁹⁹ See 5 U.S.C. § 801(a)(1)(A).

64. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, WILL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script that reads "Marlene H. Dortch".

Marlene H. Dortch
Secretary

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

1. Atkinson, Ronald; resident of Durango, Colorado
2. Brown, Marilyn T.; League of Women Voters of La Plata County
3. Bruen, Elizabeth; resident of Durango, Colorado
4. Calahan, Michael; Citizens For Colorado TV Access
5. City of Durango; City Manager
6. DIRECTV, Inc. ("DIRECTV")
7. DISH Network L.L.C. ("Dish")
8. Dulson, Laurie.; resident of southwest Colorado
9. Flatten, Ann; resident of La Plata County, Colorado
10. La Plata County, Colorado; Board of County Commissioners
11. National Association of Broadcasters ("NAB") and the ABC, CBS, FBC (Fox), and NBC Television Affiliates Associations (joint comments) (jointly, the "Broadcaster Associations")
12. Necchik, Elayne and John; residents of Durango, Colorado
13. Roberts, Ellen; Colorado State Representative, House District 59
14. Salazar, John T.; U.S. House Representative, 3rd District of Colorado
15. Schafer, Marie L.; resident of southwest Colorado
16. Staby, Paul and Carolyn; residents of Durango, Colorado
17. Whitehead, Bruce T.; Colorado State Senator, Senate District 6

REPLY COMMENTS

1. Broadcaster Associations
2. DIRECTV
3. Dish

APPENDIX B

Final Rule Changes

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

PART 76 – Multichannel Video and Cable Television Service.

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend §76.5(i) by removing the words “other than cable television” and adding in their place the words “over-the-air” and in the Note following paragraph (i) remove the word “noncable” each place it appears and add in its place the words “over-the-air”.

3. Amend §76.54 by revising the first sentence in paragraph (c), revising paragraph (g), removing and reserving paragraph (h), and revising paragraph (i), to read as follows:

§ 76.54 Significantly viewed signals; method to be followed for special showings.

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted noise limited service contour, as defined in §73.622(e) of this chapter, the cable or satellite community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. * * *

* * * * *

(g) Limitations on satellite subscriber eligibility. A satellite carrier may retransmit a significantly viewed network station to a subscriber, provided the conditions in paragraphs (g)(1) and (g)(2) of this section are satisfied or one of the two exceptions to these conditions provided in paragraphs (g)(3) and (g)(4) of this section apply.

(1) Local service requirement. A satellite carrier may retransmit to a subscriber the signal of a significantly viewed station if:

(i) Such subscriber receives local-into-local service pursuant to §76.66; and

(ii) Such satellite carrier is in compliance with §76.65 with respect to the stations located in the local market into which the significantly viewed station will be retransmitted.

(2) HD format requirement. Subject to the conditions in paragraphs (g)(2)(i) through (iv) of this section, a satellite carrier may retransmit to a subscriber in high definition (HD) format the signal of a significantly viewed station only if such carrier also retransmits in HD format the signal of a station located in the local market of such subscriber and affiliated with the same network whenever such format is available from such station, including when the HD signal is broadcast on a multicast stream.

(i) The requirement in paragraph (g)(2) of this section applies only where a satellite carrier retransmits to a subscriber the significantly viewed station in HD format, and does not restrict a

satellite carrier from retransmitting to a subscriber a significantly viewed station in standard definition (SD) format.

(ii) For purposes of paragraph (g)(2) of this section, the term “HD format” refers to a picture quality resolution of 720p, 1080i, or higher.

(iii) For purposes of paragraph (g)(2) of this section, the local station’s HD signal will be considered “available” to the satellite carrier when the station:

(A) Elects mandatory carriage or grants retransmission consent;

(B) Provides a good quality HD signal to the satellite carrier’s local receive facility (LRF); and

(C) Complies with the requirements of §§76.65 and 76.66.

(iv) Notwithstanding the provisions of paragraph (g)(2)(iii) of this section, if the local station is willing to grant retransmission consent and make its HD signal available to the satellite carrier, but the satellite carrier does not negotiate with the local station in good faith, as required by §76.65, then the local station’s HD signal will be deemed “available” for purposes of paragraph (g)(2) of this section.

(3) Exception if no network affiliate in local market. The limitations in paragraphs (g)(1) and (g)(2) of this section will not prohibit a satellite carrier from retransmitting a significantly viewed network station to a subscriber located in a local market in which there are no network stations affiliated with the same television network as the significantly viewed station.

(4) Exception if waiver granted by local station. The limitations in paragraphs (g)(1) and (g)(2) of this section will not apply if, and to the extent that, the local network station affiliated with the same television network as the significantly viewed station has granted a waiver in accordance with 47 U.S.C. 340(b)(4).

(h) [Reserved.]

(i) For purposes of paragraph (g) of this section, * * *

* * * * *

Final Rule Changes (Showing Changes)

Note: For ease of review, the proposed rule changes are repeated here showing changes in bold/underline (for additions) or strikethrough/underline (for deletions) text.

1. Section 76.5 is amended by revising paragraph (i) and the Note to paragraph (i) to read as follows:

§ 76.5 Definitions.

* * * * *

(i) Significantly viewed. Viewed in ~~other than cable television~~ **over-the-air** households as follows: (1) For a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See §76.54.

Note: As used in this paragraph, “share of viewing hours” means the total hours that ~~noncable~~ **over-the-air** television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and “net weekly circulation” means the number of ~~noncable~~ **over-the-air** television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total ~~noncable~~ **over-the-air** television households in the survey area.

* * * * *

2. Section 76.54 is amended by revising paragraphs (c), (g), (h) and (i) as set forth below:

§ 76.54 Significantly viewed signals; method to be followed for special showings.

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted ~~Grade B contour (and, with respect to a survey pertaining to a station broadcasting only a digital signal,~~ the noise limited service contour, as defined in §73.622(e)) of this chapter, the cable or satellite community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. * * *

* * * * *

(g) Limitations on satellite subscriber eligibility. A satellite carrier may retransmit a significantly viewed network station to a subscriber, provided the conditions in paragraphs (g)(1) and (g)(2) of this section are satisfied or one of the two exceptions to these conditions provided in paragraphs (g)(3) and (g)(4) of this section apply.

(1) Local service requirement. A satellite carrier may retransmit to a subscriber the signal of a significantly viewed station if:

(i) Such subscriber receives local-into-local service pursuant to §76.66; and

(ii) Such satellite carrier is in compliance with §76.65 with respect to the stations located in the local market into which the significantly viewed station will be retransmitted. ~~(g) Signals of analog or digital significantly viewed television broadcast stations may not be retransmitted by satellite carriers to subscribers who do not receive local into local service, including a station affiliated with the same network as the significantly viewed station, pursuant to section 76.66;~~

except that a satellite carrier may retransmit a significantly viewed signal of a television broadcast station to a subscriber who receives local into-local service but does not receive a local station affiliated with the same network as the significantly viewed station, if

(2) HD format requirement. Subject to the conditions in paragraphs (g)(2)(i) through (iv) of this section, a satellite carrier may retransmit to a subscriber in high definition (HD) format the signal of a significantly viewed station only if such carrier also retransmits in HD format the signal of a station located in the local market of such subscriber and affiliated with the same network whenever such format is available from such station, including when the HD signal is broadcast on a multicast stream. (h) Signals of significantly viewed network stations that originate as digital signals may not be retransmitted to subscribers unless the satellite carrier retransmits the digital signal of the local network station, which is affiliated with the same television network as the network station whose signal is significantly viewed, in either (1) at least the equivalent bandwidth of the significantly viewed station or (2) the entire bandwidth of the digital signal broadcast by such local station.

(i) The requirement in paragraph (g)(2) of this section applies only where a satellite carrier retransmits to a subscriber the significantly viewed station in HD format, and does not restrict a satellite carrier from retransmitting to a subscriber a significantly viewed station in standard definition (SD) format.

(ii) For purposes of paragraph (g)(2) of this section, the term “HD format” refers to a picture quality resolution of 720p, 1080i, or higher.

(iii) For purposes of paragraph (g)(2) of this section, the local station’s HD signal will be considered “available” to the satellite carrier when the station:

(A) Elects mandatory carriage or grants retransmission consent;

(B) Provides a good quality HD signal to the satellite carrier’s local receive facility (LRF); and

(C) Complies with the requirements of §§76.65 and 76.66.

(iv) Notwithstanding the provisions of paragraph (g)(2)(iii) of this section, if the local station is willing to grant retransmission consent and make its HD signal available to the satellite carrier, but the satellite carrier does not negotiate with the local station in good faith, as required by §76.65, then the local station’s HD signal will be deemed “available” for purposes of paragraph (g)(2) of this section.

(3) Exception if no network affiliate in local market. The limitations in paragraphs (g)(1) and (g)(2) of this section will not prohibit a satellite carrier from retransmitting a significantly viewed network station to a subscriber located in a local market in which there are no network stations affiliated with the same television network as the significantly viewed station.(1) there is no station affiliated with the same television network as the station whose signal is significantly viewed; or

(4) Exception if waiver granted by local station. The limitations in paragraphs (g)(1) and (g)(2) of this section will not apply if, and to the extent that, the local network station affiliated with the same television network as the significantly viewed station has granted a waiver in accordance with 47 U.S.C. 340(b)(4).(2) the station affiliated with the same television network as the station whose signal is significantly viewed has granted a waiver in accordance with 47 U.S.C. § 340(b)(4).

(h) [Reserved.]

(i) For purposes of paragraph's (g) and (h) of this section, television network and network station are as defined in 47 U.S.C. 339(d).

APPENDIX C

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)¹ the Commission has prepared this present Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Report and Order (R&O)*. As required by the RFA, an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rulemaking (“NPRM”)* to this proceeding.² The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA.³ The Commission received no comments on the IRFA. This present FRFA conforms to the RFA.⁴

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

2. This document adopts changes to the Commission’s satellite television “significantly viewed” rules to implement Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA).⁵ We initiated this proceeding on July 23, 2010 by issuing a Notice of Proposed Rulemaking (NPRM). With this *R&O*, we satisfy the STELA’s mandate that the Commission adopt final rules in this proceeding on or before November 24, 2010.

3. Section 203 of the STELA amends Section 340 of the Communications Act, which gives satellite carriers the authority to offer out-of-market but “significantly viewed” broadcast television stations as part of their local service to subscribers.⁶ The designation of “significantly viewed” status allows a station assigned to one DMA to be treated as a “local” station with respect to a particular cable or satellite community in another DMA, and, thus, enables cable or satellite carriage into said community in that other DMA. Whereas cable operators have had carriage rights for “significantly viewed” (“SV”) stations since 1972, satellite carriers have had such authority only since the 2004 Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) and may only retransmit SV network stations to “eligible” satellite subscribers. The satellite subscriber eligibility rules impose conditions on when satellite carriers may retransmit SV stations to subscribers. These conditions are intended to prevent satellite carriers from favoring an SV network station over the in-market (local) station affiliated with the same network. We note that the nature of SV carriage under Section 340 is permissive (and not mandatory), meaning the statute applies when a satellite carrier chooses to carry an SV station and has obtained retransmission consent from such SV station.⁷

4. Section 203 of the STELA changes the restrictions on subscriber eligibility to receive SV network stations from satellite carriers. To implement the STELA, we revise our satellite subscriber eligibility rules as follows:

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

² *STELA-Significantly Viewed NPRM, supra R&O* note 3, at app. B.

³ *Id.*

⁴ See 5 U.S.C. § 604.

⁵ The Satellite Television Extension and Localism Act of 2010 (STELA) § 203, Pub. L. No. 111-175, 124 Stat. 1218, 1245 (2010) (§ 203 codified as amended at 47 U.S.C. § 340, other STELA amendments codified in scattered sections of 17 and 47 U.S.C.).

⁶ 47 U.S.C. § 340.

⁷ *Id.* § 340(d).

- We find that the local service requirement in amended Section 340(b)(1) requires only that a satellite subscriber receive local-into-local satellite service as a precondition for that subscriber to receive SV stations. We find that the statute no longer requires a satellite subscriber to receive the specific local network station as a precondition for that subscriber to receive an SV station affiliated with the same network.
- We find that amended Section 340(b)(2) no longer requires that a satellite carrier offer “equivalent bandwidth” to the local and SV network station pair and instead imposes an “HD format” requirement. We find that the HD format requirement in amended Section 340(b)(2) requires that, in order to carry an SV station in high definition (HD) format, a satellite carrier must carry the local station affiliated with the same network in HD whenever such format is available from the local station.
 - The HD format requirement applies only where a satellite carrier retransmits to a subscriber the SV station in HD format. This requirement does not restrict a satellite carrier from retransmitting to a subscriber the SV station in standard definition (SD) format.
 - For purposes of the HD format requirement, the corresponding local (in-market) station will be considered “available” to the satellite carrier when the station: (1) elects mandatory carriage or grants retransmission consent; (2) provides a good quality signal to the satellite carrier as required by Section 76.66(g) of the rules; and (3) is otherwise in compliance with the “good faith negotiation” and carriage provisions set forth in Sections 76.65 and 76.66 of the rules. However, the HD signal of the corresponding local station will be deemed “available” despite failure to reach agreement on the terms of retransmission if the satellite carrier is not in compliance with Section 76.65.
 - The HD format requirement requires satellite carriage of a secondary HD stream of a local station’s multicast signal if that stream is affiliated with the same network as an SV station retransmitted in HD to satellite subscribers in the local market.
- We modify the Commission’s 2005 interpretation of the Section 340(b)(3) exception, which is unchanged by the STELA, and find that, in the context of the newly revised statute, this exception permits a satellite carrier to offer an SV network station to a subscriber when there is no local affiliate of the same network present in the local market, even if the subscriber does not receive local-into-local service.

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

5. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

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

6. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁰ A small business

⁸ 5 U.S.C. § 603(b)(3).

⁹ *Id.* § 601(6).

¹⁰ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with (continued....)”

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”).¹¹ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

7. Satellite Carriers. The term “satellite carrier” means an entity that uses the facilities of a satellite or satellite service licensed under Part 25 of the Commission’s rules to operate in the Direct Broadcast Satellite (DBS) service or Fixed-Satellite Service (FSS) frequencies.¹² As a general practice (not mandated by any regulation), DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.¹³ In the *SHVERA Significantly Viewed Report and Order*, the Commission concluded that the definition of “satellite carrier” includes all three of these types of entities.¹⁴

8. Direct Broadcast Satellite (“DBS”) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”¹⁵ which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.¹⁶ However, the data we have available as a basis for estimating the number of such small entities were

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the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

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

¹² The Communications Act defines the term “satellite carrier” by reference to the definition in the copyright laws in title 17. See 47 U.S.C. §§ 340(i)(1) and 338(k)(3); 17 U.S.C. § 119(d)(6). Part 100 of the Commission’s rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed under Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

¹³ See, e.g., *Application Of DIRECTV Enterprises, LLC, Request For Special Temporary Authority for the DIRECTV 5 Satellite*; *Application Of DIRECTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DIRECTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location*, 19 FCC Rcd. 15529 (Sat. Div. 2004).

¹⁴ *SHVERA Significantly Viewed Report and Order*, supra R&O note 6, 20 FCC Rcd at 17302-3, ¶¶ 59-60.

¹⁵ See 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 North American Industry Classification System (“NAICS”) defines the category of “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” (*Emphasis added to text relevant to satellite services.*) U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM>.

¹⁶ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity was one with \$12.5 million or less in annual receipts.¹⁷ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (“EchoStar”) (marketed as the DISH Network).¹⁸ Each currently offer subscription services. DIRECTV¹⁹ and EchoStar²⁰ each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider. We seek comments that have data on the annual revenues and number of employees of DBS service providers.

9. Fixed-Satellite Service (“FSS”). The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.²¹ The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. FSS, by exception, is now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”²² which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.²³ However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity was one with \$12.5 million or less in annual receipts.²⁴ Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. The two DBS licensees (EchoStar and DIRECTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

10. Television Broadcasting. The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts.²⁵ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”²⁶ The

¹⁷ 13 C.F.R. § 121.201, NAICS code 517510 (2002).

¹⁸ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) (“13th Annual Report”). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. (“Dominion”) (marketed as Sky Angel). See Public Notice, “Policy Branch Information; Actions Taken,” Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

¹⁹ As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. See *id.* at 687, Table B-3.

²⁰ As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving “Sky Angel” service from DISH Network. See *id.* at 581, ¶ 76.

²¹ See 47 C.F.R. § 2.1(c).

²² See 13 C.F.R. § 121.201, NAICS code 517110 (2007).

²³ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

²⁴ 13 C.F.R. § 121.201, NAICS code 517510 (2002).

²⁵ See 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

²⁶ *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video (continued....)

Commission has estimated the number of licensed commercial television stations to be 1,392.²⁷ According to Commission staff review of the BIA/Kelsey, MAPro Television Database (“BIA”) as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations²⁸ (or about 74 percent) have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390.²⁹ We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations³⁰ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

11. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

12. Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”³¹ which was developed for small wireline firms.³² Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³³ However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity was one with \$12.5 million or less in annual receipts.³⁴

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Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

²⁷ See News Release, “Broadcast Station Totals as of December 31, 2009,” 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) (“*Broadcast Station Totals*”); also available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf.

²⁸ We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra* note 29; however, we are using BIA’s estimate for purposes of this revenue comparison.

²⁹ See *Broadcast Station Totals*, *supra* note 29.

³⁰ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

³¹ See *id.* § 121.201, NAICS code 517110 (2007).

³² Although SMATV systems often use DBS video programming as part of their service package to subscribers, they are not included in Section 340’s definition of “satellite carrier.” See 47 U.S.C. §§ 340(i)(1) and 338(k)(3); 17 U.S.C. § 119(d)(6).

³³ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

³⁴ 13 C.F.R. § 121.201, NAICS code 517510 (2002).

As of June 2004, there were approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.³⁵ The IMCC indicates that, as of June 2006, PCOs serve about 1 to 2 percent of the multichannel video programming distributors (MVPD) marketplace.³⁶ Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, as of June 2006, PCOs serve approximately 900,000 subscribers.³⁷ Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest 10 PCOs, we believe that a substantial number of PCOs may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution.³⁸

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

13. The final rules do not impose any new reporting, recordkeeping or other compliance requirements.

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

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.³⁹

15. In the NPRM, we invited comment on whether there were any alternatives we should consider to our proposed implementation of the statutory amendments to Section 340(b) that would minimize any adverse impact on small businesses, but which are consistent with the statute and its goals and also maintain the benefits of our proposals. We explained that STELA's amendments to Section 340(b) intend to facilitate satellite carriage of SV stations, with the expectation that this will increase satellite TV service to consumers and promote regulatory parity between cable and satellite service.⁴⁰ We tentatively concluded that our proposed rule changes implement the statute in the way that is most consistent with the express language of the statute. We also noted that the express language of the statute did not appear to give us discretion to treat small entities differently from larger ones, but sought comment on this question. We received no comments to the IRFA in the NPRM. We, therefore, affirm our conclusions in the NPRM's IRFA.

16. We find in the *R&O* that Congress amended the SV provisions to create a more workable framework to facilitate satellite carriage of SV stations and, thus, improve parity and competition between

³⁵ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, FCC 05-13, ¶ 110 (rel. Feb. 4, 2005) ("*11th Annual Report*").

³⁶ See *13th Annual Report*, 24 FCC Rcd at 684, Table B-1.

³⁷ *Id.*

³⁸ 13 C.F.R. § 121.201, NAICS code 517510 (2002).

³⁹ 5 U.S.C. § 603(c)(1)-(c)(4)

⁴⁰ See *H.R. 3570 Report* at 4-5; *H.R. 2994 Report* at 16.

satellite and cable. Satellite carriers, and the SV stations which they would carry,⁴¹ will certainly benefit from the opportunity for increased TV service afforded by the STELA's changes to the SV program. Furthermore, consumers of satellite TV service will benefit from greater choice of programming. We find that any adverse impact to these entities is unlikely because SV carriage under Section 340 is permissive (and not mandatory); that is, the satellite carrier chooses to carry an SV station and the SV station must grant its consent to be carried.⁴²

17. While we have included this complete FRFA, we note that we could have certified that this rulemaking will not have a "significant economic impact on a substantial number of small entities."⁴³ The rules impose compliance requirements only on the two DBS service providers, neither of which qualify as a small entity.⁴⁴

Report to Congress: The Commission will send a copy of this *R&O*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁴⁵ In addition, the Commission will send a copy of the *R&O*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *R&O* and FRFA (or summaries thereof) will also be published in the Federal Register.⁴⁶

⁴¹ For example, small broadcast stations will benefit from the opportunity to be delivered as an SV station to more viewers.

⁴² See 47 U.S.C. § 340(d).

⁴³ See 5 U.S.C. § 605(b).

⁴⁴ See *supra* FRFA ¶ 8.

⁴⁵ See 5 U.S.C. § 801(a)(1)(A).

⁴⁶ See *id.* § 604(b).