



**6712-01**

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 76**

**[MB Docket Nos. 20-70, 17-105, 11-131; FCC 20-39; FRS 16644]**

**Modernization of Media Regulation Initiative; Program Carriage**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Commission seeks comment on whether to adopt changes to our rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs) to ensure an expeditious dispute resolution process. Specifically, we propose to modify one of the time limit requirements for filing program carriage complaints in order to make it consistent with the time limits for other types of complaints. For consistency, we also propose to revise the parallel time limit requirements for filing program access, open video system (OVS), and good-faith retransmission consent complaints. We also propose to revise the effective date and review procedures of initial decisions issued by an administrative law judge (ALJ) in program carriage proceedings so they comport with the Commission's generally applicable procedures for review of ALJ initial decisions. We propose to extend this change to program access and OVS proceedings as well.

**DATES:** Comments due on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**; reply comments due on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by MB Docket Nos. 20-70, 17-105, 11-131, by any of the following methods:

- Federal Communications Commission's Web Site: <http://apps.fcc.gov/ecfs/>. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the SUPPLEMENTARY INFORMATION section of this document.

**FOR FURTHER INFORMATION CONTACT:** For additional information on this proceeding, contact John Cobb, [John.Cobb@fcc.gov](mailto:John.Cobb@fcc.gov) of the Policy Division, Media Bureau, (202) 418-2120.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking (*FNPRM*), MB Docket Nos. 20-70, 17-105, 11-131; FCC 20-39, adopted on March 31, 2020 and released on April 1, 2020. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC, 20554. The full text of this document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12<sup>th</sup> Street, SW., Room CY-B402, Washington, DC 20554. To request these documents in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer

and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

## **Synopsis**

This Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking (FNPRM) proposes changes to the Commission's rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs). Specifically, we propose to modify one of the time limit requirements for filing program carriage complaints in order to make it consistent with the time limits for other types of complaints. For consistency, we also propose to revise the parallel time limit requirements for filing program access, open video system (OVS), and good-faith retransmission consent complaints. We also propose to revise the effective date and review procedures of initial decisions issued by an administrative law judge (ALJ) in program carriage proceedings so they comport with the Commission's generally applicable procedures for review of ALJ initial decisions. We propose to extend this change to program access and OVS proceedings as well. We believe that these changes will help ensure an expeditious program access, program carriage, retransmission consent, and OVS complaint process and provide additional clarity to both potential complainants and defendants, as well as adjudicators, consistent with the Communications Act of 1934, as amended (the Act). With this proceeding, we continue our efforts to modernize our media regulations.

*Background.* Congress passed the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) to, among other goals, "ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers." Congress was concerned that the local market power then held by cable operators along with increasing vertical integration in the industry would hinder diversity and competition in the video

programming market. To address these concerns, Congress instructed the Commission in section 616 of the Act to adopt regulations governing program carriage agreements between MVPDs and video programming vendors. Specifically, section 616 directed the Commission to prohibit several anti-competitive practices, and to adopt procedures for expedited review of program carriage complaints. In this *FNPRM*, we propose changes to two of these procedural provisions: first, the statute of limitations, and second, the rule governing the effective date of program carriage decisions.

For a program carriage complaint to be considered timely, a complainant must satisfy one of the three prongs of the statute of limitations set forth in § 76.1302(h) of the Commission's rules. The first prong provides that a complaint is timely if it is filed within one year of the date that the defendant MVPD enters into a program carriage contract that a party alleges to violate the program carriage rules. The second prong provides that a complaint is timely if it is filed within one year of the date that the defendant MVPD presents a carriage offer that a party alleges violates the program carriage rules. The third prong of the statute of limitations for program carriage complaints provides that a complaint "must be filed within one year of the date on which . . . [a] party has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section." As originally adopted in the *1993 Program Carriage Order*, this third prong included additional limiting language. In particular, it provided that a complaint would be timely if it was filed within one year of the date on which "the complainant has notified [an MVPD] that it intends to file a complaint with the Commission based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart." In the *1994*

*Program Carriage Order*, however, the Commission removed this limiting language without providing a rationale for this specific modification. Subsequently, in 1999, while discussing an amendment made to the second prong of the statutes of limitations for program access, program carriage, and OVS complaints, the Commission suggested that the third prong of these statutes of limitations is triggered when a “defendant unreasonably refuses to negotiate with [the] complainant.” We note that these three statutes of limitations were functionally identical when originally adopted by the Commission. But while the 1994 amendment to § 76.1302 removed any reference to a denial or non-acknowledgement of a request to negotiate from the text of the provision, the third prong of the other statutes of limitation was not similarly modified. And although the Commission suggested in 1999 that the third prong of the program carriage statute of limitations should be interpreted consistent with the statutes of limitation for program access and OVS complaints, in a series of decisions beginning in 2008, the Media Bureau and Commission applied the third prong in a manner consistent with the language of the rule.

Most recently, in the *2011 Program Carriage NPRM*, the Commission expressed concern that the third prong of the statute of limitations could be read to mean that a complaint is timely if filed within one year of when the complainant notified the defendant MVPD of its intention to file, regardless of when the actual act alleged to have violated the rules occurred. The Commission recognized that an interpretation of the program carriage statute of limitations that allows filing within one year of notice of intent to file, regardless of when the allegedly unlawful conduct occurred, “undermines the fundamental purpose of a statute of limitations.” Thus, the Commission proposed to revise the rule in the *2011 Program Carriage NPRM* by replacing the three-pronged statute of limitations with a single provision providing “that a complaint must be filed within one year of the act that allegedly violated the program carriage rules.”

The program carriage procedural rules also provide that the Chief of the Media Bureau may refer a carriage dispute case to an ALJ after determining that the complainant has established a prima facie violation of § 76.1301. Section 76.1302(j) then specifies that a decision issued by an ALJ on the merits shall become effective upon release, except in limited circumstances. If review of an ALJ decision is sought, the rules require that the decision remain in effect pending review, unlike the generally applicable procedures of § 1.276(d), that automatically stay an ALJ's initial decision pending review. We note that while Congress instructed the Commission to adopt procedures for expedited review of program carriage complaints, there is no specific statutory requirement mandating that ALJ initial decisions take immediate effect, nor that they remain in effect pending review. These rules governing when an ALJ's initial decision in a program carriage matter takes effect and whether it remains in effect pending review have caused confusion for both parties and adjudicators, and ultimately can create inconsistent outcomes pending appeal. In this *FNPRM*, we propose rule changes to eliminate this confusion.

The procedural rules for program access complaints and OVS complaints contain parallel provisions requiring that orders take immediate effect and remain in effect pending review. Section 628 of the 1992 Cable Act instructed the Commission to adopt procedures for the expedited review of program access complaints. Accordingly, in the *1993 Program Access Order*, the Commission adopted regulations providing for the expedited review of program access complaints, including a provision that ALJ initial decisions would take effect upon release. The Commission subsequently adopted nearly identical procedures for the filing of OVS complaints pursuant to section 653 of the Act, including the rule providing that ALJ initial decisions would take immediate effect. In 1999, the Commission consolidated review

procedures from the program carriage, program access, and OVS rules into a newly created section, which provides that review of an initial decision on the merits by an ALJ in any Part 76 proceeding will be handled in accordance with the Commission's general procedures, except that orders issued pursuant to the program carriage, program access, and OVS rules will remain in effect pending review.

In May 2017, the Commission launched a proceeding to review its media regulations to eliminate or modify regulations that are outdated, unnecessary, or unduly burdensome. Commenters in that proceeding suggested that the program carriage rules should be reviewed and updated as part of this initiative.

*Discussion.* This *FNPRM* seeks comment on two different proposals to amend the Part 76 procedural rules. First, we propose to revise the program carriage statute of limitations provision in § 76.1302(h) to modify subsection (3) of that provision. As explained below, this proposal differs from the proposal in the *2011 Program Carriage NPRM* to revise this same provision. Second, we propose to amend §§ 76.10(c)(2), 76.1003(h)(1), 76.1302(j)(1), and 76.1513(h)(1) to provide that review of all initial decisions issued by an ALJ pursuant to the program access, program carriage, and OVS complaint rules will be handled in accordance with the Commission's generally applicable procedures for review of ALJ initial decisions. We believe that amending these provisions as proposed will make the Commission's procedures more consistent and encourage the timely resolution of program carriage disputes.

*Program Carriage Statute of Limitations.* The third prong of the program carriage statute of limitations provides that a complaint is timely as long as it is filed within one year of the complainant notifying the defendant of its intent to file a complaint with the Commission, regardless of when the actual act alleged to have violated the rules occurred. As discussed

above, the Commission has previously expressed concern that this undermines “the fundamental purpose of a statute of limitations ‘to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.’” We propose to revise the third prong of the program carriage statute of limitations to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer and a defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage. The revised rule will provide that, “in instances where there is no existing contract or an offer for carriage,” program carriage complaints relying on the third triggering event must be filed within one year of the date on which “[an MVPD] has denied or failed to acknowledge a request by a video programming vendor for carriage or to negotiate for carriage of that video programming vendor’s programming on defendant’s distribution system, allegedly in violation of one or more of the [program carriage rules].” With this proposed revision, we intend to ensure that parties file program carriage complaints on a timely basis and provide certainty to both MVPDs and prospective complainants. We seek comment on the potential effects of this proposal on the program carriage complaint process and the parties involved.

We tentatively find persuasive comments responding to the *2011 Program Carriage NPRM* suggesting that the Commission should reincorporate limiting language that would make clear that the third prong applies only in instances where an MVPD denies or fails to acknowledge either a request for carriage or a request to negotiate for carriage, similar to the language of the rule as originally adopted in 1993, rather than adopt the single statute of limitations provision proposed in that item. We tentatively agree with commenters that this revision would provide clarity as to when an MVPD’s alleged violation occurred and eliminate

the possibility of an open-ended interpretation of the program carriage statute of limitations, a concern raised by the Commission itself and by multiple commenters in the 2011 proceeding. Commenters in the 2011 proceeding argued that the proposal to replace the three-pronged statute of limitations with a single provision would not alleviate the problems caused by the current statute of limitations, as it would “effectively eliminate any time limitation by allowing complaints to be filed within one year of any ‘alleged violation’ of the rules without any limitation on what ‘alleged violations’ program carriage claims may be based on.” We seek comment on this analysis. Would the revision proposed herein better fulfill the general aim of a statute of limitations by protecting potential MVPD defendants against “stale and vexatious” claims? Relatedly, would it provide greater certainty for potential complainants regarding when their claims expire? How should we determine when a potential defendant has failed to acknowledge a request? Should we specify a set number of days (e.g., 30 or 60) after the initial request for program carriage is made by which the MVPD must acknowledge the request or else the statute of limitations begins to run? If we specify a time period, should that time period instead run from the date that the initial request is received by the MVPD? What evidence should the Commission rely on in determining when that request is made or received? What are other ways that we could determine whether an MVPD has failed to acknowledge a request? Are there other objective means by which we can make this determination or is it inherently fact specific and thus better determined on a case-by-case basis? How, if at all, would making the changes discussed above affect the ability of MVPDs to file program carriage complaints? What would the effect of this revision be on the expeditious resolution of program carriage complaints by Commission staff or an ALJ, an explicit goal of section 616? We encourage commenters to provide specific examples where possible of how this proposed revision, if adopted, would affect

the resolution of program carriage complaints.

We note that the statutes of limitations for program access, OVS, and good-faith retransmission consent complaints contain a similar triggering event that runs from the moment that a potential complainant notifies a defendant that it intends to file a complaint based on a denial or failure to acknowledge a request. For consistency, we propose to revise those provisions so that the triggering event for each would be the denial or failure to acknowledge a request, rather than notice of intent to file a complaint on that basis. We seek comment on this proposal. We propose to determine when a potential defendant has failed to acknowledge a request with regard to program access, OVS, and good-faith retransmission consent complaints in the same way we would make this determination in the context of program carriage complaints. Or are there reasons why these determinations should differ in the context of these different types of substantive disputes?

We note that the Commission or Bureau has previously entertained several program carriage complaints which involved a contract that provided a defendant MVPD with the discretion to re-tier a complainant programmer or to carry the complainant programmer on additional systems. In those proceedings, the complainant programmer had alleged that the defendant MVPD exercised its discretion in a way that violated the program carriage statute and rules. The Commission or Bureau found that such complaints were timely filed under the third prong of the program carriage statute of limitations. Would similar complaints be timely filed under any of the three prongs of the program carriage statute of limitations if we were to adopt the rule revisions proposed herein? If not, how would complainant programmers be impacted? We propose to add language to the third prong to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer. Having agreed to a

contractual provision that provides an MVPD with the discretion to take future carriage actions unilaterally, what basis, if any, would there be for allowing such programmer to file a program carriage complaint when an MVPD exercises that discretion?

We recognize that determining when an MVPD has denied or failed to acknowledge a request for carriage or a request to negotiate for carriage may require a fact-specific analysis and that parties may view circumstances giving rise to the dispute differently. To the extent necessary, we expect that the adjudicator will be able to resolve such issues on a case-by-case basis. Relatedly, we tentatively disagree with suggestions from comments to the *2011 Program Carriage NPRM* that complainants would manufacture triggering events, resulting in a statute of limitations that lacks any clarity for defendant MVPDs. We tentatively conclude that Part 76's general pleading requirements, which prohibit the filing of false or frivolous claims and provide for sanctions against parties doing so, would sufficiently dissuade parties from filing vexatious claims in the program carriage context. We seek comment on this tentative conclusion.

Some commenters responding to the *2011 Program Carriage NPRM* argued that the statute of limitations should not begin to run until discriminatory conduct that is alleged to violate the program carriage rules has become apparent to video programming vendors. Video programming vendors suggested that they are at an information disadvantage because they do not have access to all of the terms offered by MVPDs to comparably situated vendors making it difficult to determine whether they have a meritorious claim of discrimination. We seek additional comment on this argument. For discriminatory conduct to violate the program carriage rules, it must be "on the basis of affiliation or non-affiliation of" programmers and it must "unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly." If an MVPD makes an offer or the parties enter into a contract that discriminates "on the

basis of affiliation or non-affiliation of” programmers and to an extent that it unreasonably restrains the ability of an unaffiliated video programming vendor to compete fairly, then the video programming vendor has one year from the date on which that offer was made or that contract was executed to file a complaint with the Commission. Does this preclude video programming vendors from being eligible to file meritorious program carriage complaints because of their alleged information disadvantage? Other commenters alleged that MVPDs “have historically strung out negotiations with unaffiliated programmers, permitting them to discriminate against unaffiliated vendors without ever having to issue a formal denial.” We seek comment on this argument. Are there alternative proposals that would address these issues, while still foreclosing stale and vexatious claims?

*Review of Initial ALJ Decisions.* The differences between the Part 1 and Part 76 review procedures for ALJ initial decisions have caused confusion for both adjudicators and parties in program carriage proceedings. The Part 76 review procedures for ALJ initial decisions contain two major differences from the Part 1 procedures. First, ALJ decisions following the Part 1 procedures do not take effect for at least 50 days following release, while Part 76 provides that they take immediate effect. Second, Part 1 provides that ALJ decisions are stayed automatically upon the filing of exceptions, while Part 76 provides that ALJ decisions will remain in effect pending review. To address this confusion, we propose to amend the program access, program carriage, and OVS procedural rules so that review of initial decisions issued by an ALJ is handled in accordance with the Commission’s generally applicable procedures in Part 1 of our rules for review of ALJ initial decisions. In practice, this will mean that decisions on the merits issued by an ALJ in program access, program carriage, and OVS proceedings will not take effect before 50 days after issuance and decisions will be automatically stayed upon the filing of

exceptions by an aggrieved party.

We tentatively conclude that this revision would reduce the potential for confusion by making the Part 76 procedures consistent with the Commission's generally applicable procedures in Part 1 of our rules for review of ALJ initial decisions. We seek comment on this proposal. Are there valid reasons for requiring that ALJ initial decisions in program access, program carriage, and OVS proceedings take effect upon release, but delaying the effectiveness of ALJ initial decisions in other contexts? Further, what are the reasons, if any, for allowing ALJ initial decisions in program access, program carriage, and OVS proceedings to remain in effect while the parties seek review? Would there be any potential negative effects for consumers from making this change? Are there any potential negative effects for complainants? Would there be any harms to complainants from staying the effect of ALJ initial decisions during review that could not be alleviated by extending the effect of the remedial order commensurate with the length of the stay? Would any potential costs to complainants resulting from our proposed rule revisions outweigh the benefits? Commenters are encouraged to provide specific examples where possible. What, if any, other technical rule revisions would reduce confusion in the application of these ALJ review procedures and aid in the efficient resolution of program access, program carriage, and OVS complaints by ALJs?

We also propose a simple technical edit in the respective program access, program carriage, and OVS provisions to make clear that decisions under those rules may be issued by the Commission, Commission staff, or an ALJ. This revision does not reflect a substantive change to the rules and would merely increase the clarity of the program access, program carriage and OVS rules. Are there any additional proposals related to the effective date of program access, program carriage, and OVS complaint decisions issued by ALJs that we should consider as a part

of this proceeding?

*Other Program Carriage Proposals.* The *2011 Program Carriage NPRM* sought comment on a number of additional issues related to the Commission's program carriage rules, including: revising the discovery procedures; permitting the award of damages; adopting a best "final offer" dispute resolution model; heightening the evidentiary showing to obtain a mandatory carriage remedy; explicitly prohibiting retaliation for filing a complaint; adopting a good-faith negotiation rule; clarifying what constitutes discrimination; and codifying the burden of proof requirements for discrimination cases. Given the significant amount of time that has passed since the *2011 Program Carriage NPRM* and the vast changes in the media marketplace in the intervening years, we seek comment on whether those proposals are necessary to ensure an efficient program carriage marketplace.

*Initial Regulatory Flexibility Act Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to this *NPRM*. The IRFA is set forth below.

*Paperwork Reduction Act.* This *NPRM* may result in new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501 through 3520). If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the Federal Register inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

*Ex Parte Rules—Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s ex parte rules. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. Memoranda must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with § 1.1206(b) of the rules. In proceedings governed by § 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in

their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

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

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing.

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

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public

Notice, DA 20-304 (Mar. 19, 2020) available <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

*People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

*Availability of Documents.* Comments and reply comments will be publicly available online via ECFS. These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC Headquarters, 445 12th Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

*Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the Further Notice of Proposed Rulemaking and Notice of Proposed Rulemaking (*FNPRM*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *FNPRM*. The Commission will send a copy of the

FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.

*Need for, and Objectives of, the Proposed Rules.* Congress passed the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) to, among other goals, “ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers.” Congress was concerned that the local market power held by cable operators along with increased vertical integration in the industry would hinder diversity and competition in the video programming market. To address these concerns, Congress instructed the Commission in section 616 of the 1992 Cable Act to adopt regulations governing program carriage agreements between MVPDs and video programming vendors. Section 616 directed the Commission to adopt procedures for expedited review for complaints filed pursuant to section 616 and provide for penalties and remedies for violations of the same.

This *FNPRM* seeks comment on two different proposals to amend the Part 76 procedural rules. First, we propose to revise the program carriage statute of limitations provision in § 76.1302(h) to revise subsection (3) to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer and a defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage. For consistency, we propose to revise the parallel program access, OVS, and good-faith retransmission consent rules, so that the triggering event for each would be the denial or failure to acknowledge a request, rather than notice of intent to file a complaint on that basis, as we propose to do with the program carriage rules here. Second, we propose to amend §§ 76.10(c)(2), 76.1003(h)(1), 76.1302(j)(1), and 76.1513(h)(1) to provide that all initial decisions

issued by an administrative law judge (ALJ) pursuant to the program access, program carriage, and OVS rules will not take effect before 50 days after issuance and decisions will be automatically stayed upon the filing of exceptions by an aggrieved party in accordance with the Commission's generally applicable procedures for review of ALJ decisions. We believe that amending these provisions as proposed will better ensure that program access, program carriage, OVS, and good-faith retransmission consent complaints are addressed expeditiously by providing additional clarity to both potential complainants and defendants, consistent with Congress's intent in the Act, and will apply existing Commission procedures uniformly.

*Legal Basis.* The proposed action is authorized pursuant to 1, 4(i), 4(j), 616, 628, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 536, 548, and 573.

*Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* 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. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

*Cable Companies and Systems (Rate Regulation Standard).* The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under

the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 4,200 cable operators nationwide, all but 9 are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 4,200 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records. Thus, under this second size standard, the Commission believes that most cable systems are small.

*Cable System Operators (Telecommunications Act Standard).* The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." There are approximately 49,011,210 cable subscribers in the United States today. Accordingly, an operator serving fewer than 490,112 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total revenues of all its affiliates, do not exceed \$250 million in the aggregate. Based on the available data, we find that all but five independent cable operators are affiliated with entities whose gross annual revenues exceed \$250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under the definition in the Communications Act.

*Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic

dish antenna at the subscriber's location. DBS is now included in SBA's economic census category "Wired Telecommunications Carriers." The Wired Telecommunications Carriers 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 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. The SBA determines that a wireline business is small if it has fewer than 1,500 employees. Economic census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. Currently, however, only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Accordingly, we conclude that, in general, DBS service is provided only by large firms.

*Motion Picture and Video Production.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials." We notes that firms in this category may be engaged in various industries, including cable

programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$35,000,000 or less in annual revenue. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census Bureau for the year 2012. Census Bureau data for 2012 show that there were 8,203 firms in this category that operated for the entire year. Of these, 8075 firms had annual receipts of \$24,999,999 or less, and 61 firms had annual receipts exceeding \$50,000,000. 67 firms had annual receipts between \$25,000,000 and \$49,000,000. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

*Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.” We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category which is: all such firms having \$34,500,000 million or less in annual revenue. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census Bureau for the year 2012. Census Bureau data for 2012 show that there were 307 firms in this category that operated for the entire year. Of these, 294 firms had annual receipts of \$24,999,999 or less, and 8 firms had annual receipts exceeding \$50,000,000. 5 firms had annual receipts between \$25,000,000 and \$49,000,000. Thus, under

this category and associated small business size standard, the majority of firms can be considered small.

*Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.” These establishments operate television broadcast 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 studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts. The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of less than \$25 million, 25 had annual receipts ranging from \$25 million to \$49,999,999, and 70 had annual receipts of \$50 million or more. Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,374. Of this total, 1,282 stations (or 94.2%) had revenues of \$41.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 15, 2019, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates the number of licensed noncommercial educational (NCE) television stations to be 388. The Commission does not compile and 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.

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

There are also 387 Class A stations. Given the nature of these services, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard. In addition, there are 1,892 LPTV stations and 3,621 TV translator stations. Given the nature of these services as secondary and in some cases purely a “fill-in” service, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

*Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* As discussed above, this *FNPRM* proposes two revisions to the Part 76 procedural rules. The first revision concerns the statute of limitations provision contained in § 76.1302(h) and would insert limiting language to clarify that it applies only in circumstances where there is not an existing program carriage contract or contract offer and a defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage. For consistency, we propose to revise the parallel program

access, OVS, and good-faith retransmission consent rules, so that the triggering event for each would be the denial or failure to acknowledge a request, rather than notice of intent to file a complaint on that basis, as we propose to do with the program carriage rules here. The second would amend § 76.1302(j)(1) to provide that initial decisions by an administrative law judge are automatically stayed upon the filing of exceptions by an aggrieved party, rather than only in the event of an order mandating carriage of a video programming vendor's content that requires a defendant MVPD to delete existing programming from its system to accommodate carriage. For consistency, we propose to extend this change to parallel provisions in program access, § 76.1003(h)(1), and OVS, § 76.1513(h)(1), proceedings as well. These revisions should result in a more streamlined and clear Part 76 complaint process, which would ultimately reduce the burden on entities potentially involved in Part 76 complaints.

*Steps Taken to Minimize Significant Economic 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 (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, standard; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

Through this *FNPRM*, the Commission seeks to minimize the burdens associated with the resolution of program carriage, program access, OVS, and good-faith retransmission consent complaints, by clarifying that the third triggering for all four types of complaints is the denial or failure to acknowledge a request and providing for automatic stays of initial decisions by an

ALJ pending review for program carriage, program access, and OVS complaints. It is our hope that these revisions will aid in the expeditious resolution of program access, program carriage, OVS, good-faith retransmission consent complaints consistent with the Act. These changes would reduce the costs associated with litigating program access, program carriage, OVS, good-faith retransmission consent complaints before the Commission by eliminating any confusion surrounding the statute of limitations in all four contexts and eliminating the need to seek a stay of an initial decision issued by an ALJ pending review for program carriage, program access, and OVS complaints. The Commission invites comment on alternative proposals that we should consider that would better minimize any adverse impact on small businesses, while still furthering the goal of reducing the costs associated with the efficient resolution of Part 76 complaints.

*Federal Rules that May Duplicate, Overlap or Conflict With the Proposed Rule.* None.

IT IS ORDERED that, pursuant to the authority found in sections 1, 4(i), 4(j), 303(r), 616, 628, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 536, 548, and 573, this Further Notice of Proposed Rulemaking in MB Docket No. 11-131 and Notice of Proposed Rulemaking in MB Docket No. 20-70 IS ADOPTED. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Further Notice of Proposed Rulemaking in MB Docket No. 11-131 and Notice of

Proposed Rulemaking in MB Docket No. 20-70, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 76**

Administrative practice and procedure, Cable Television.

Federal Communications Commission.

**Cecilia Sigmund,**  
*Federal Register Liaison Officer*  
*Office of the Secretary.*

## Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 76 as follows:

### **PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

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

**Authority:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.10 by revising paragraph (c)(2) to read as follows:

#### **§ 76.10 Review.**

\* \* \* \* \*

(c) \* \* \*

(2) Any party to a part 76 proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with §§ 1.276(a) and 1.277(a) through (c) of this chapter.

3. Amend § 76.65 by revising paragraph (e)(3) to read as follows:

#### **§ 76.65 Good faith and exclusive retransmission consent complaints.**

\* \* \* \* \*

(e) \* \* \*

(3) The television broadcast station or multichannel video programming distributor has denied, unreasonably delayed, or failed to acknowledge a request to negotiate retransmission consent in violation of one or more of the rules contained in this subpart.

\* \* \* \* \*

4. Amend § 76.1003 by revising paragraphs (g)(3) and (h)(1) to read as follows:

**§ 76.1003 Program access proceedings.**

\* \* \* \* \*

(g) \* \* \*

(3) A cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor has denied or failed to acknowledge a request to purchase or negotiate to purchase satellite cable programming, satellite broadcast programming, or terrestrial cable programming, or has made a request to amend an existing contract pertaining to such programming pursuant to § 76.1002(f), allegedly in violation of one or more of the rules contained in this subpart.

(h) *Remedies for violations— (1) Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission, Commission staff, or Administrative Law Judge shall order appropriate remedies, including, if necessary, the imposition of damages, and/or the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance. Such order issued by the Commission or Commission staff shall be effective upon release. See 47 CFR 1.102(b); 1.103. The effective date of such order issued by the Administrative Law Judge is set forth in 47 CFR 1.276(d).

\* \* \* \* \*

5. Amend § 76.1302 by revising paragraphs (h)(1) and (3) and (j)(1) to read as follows:

**§ 76. 1302 Carriage agreement proceedings.**

\* \* \* \* \*

(h) \* \* \*

(1) The multichannel video programming distributor enters into a contract with a video programming vendor that a party alleges to violate one or more of the rules contained in this section; or

\* \* \* \* \*

(3) In instances where there is no existing contract or an offer for carriage, the multichannel video programming distributor has denied or failed to acknowledge a request by a video programming vendor for carriage or to negotiate for carriage of that video programming vendor's programming on defendant's distribution system, allegedly in violation of one or more of the rules contained in this section.

\* \* \* \* \*

(j) *Remedies for violations—(1) Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission, Commission staff, or Administrative Law Judge shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance. The effective date of such order issued by the Administrative Law Judge is set forth in 47 CFR 1.276(d). Such order issued by the Commission or Commission staff shall become effective upon release, see 47 CFR 1.102(b), 1.103, unless any order of mandatory carriage issued by the staff would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff decision, the order for carriage of a video programming

vendor's programming will not become effective unless and until the decision of the staff is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant MVPD will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

\* \* \* \* \*

6. Amend § 76.1513 by revising paragraphs (g)(3) and (h)(1) to read as follows:

**§ 76.1513 Open video dispute resolution.**

\* \* \* \* \*

(g) \* \* \*

(3) An open video system operator has denied or failed to acknowledge a request for such operator to carry the complainant's programming on its open video system, allegedly in violation of one or more of the rules contained in this part.

(h) *Remedies for violations— (1) Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission, Commission staff, or Administrative Law Judge shall order appropriate remedies, including, if necessary, the requiring carriage, awarding damages to any person denied carriage, or any combination of such sanctions. Such order shall set forth a timetable for compliance. Such order issued by the Commission or Commission staff shall be effective upon release. See 47 CFR 1.102(b); 1.103. The effective date of such order issued by the Administrative Law Judge is set forth in 47 CFR 1.276(d).

\* \* \* \* \*

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