



FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket Nos. 20-35, 17-105; FCC 20-139; FRS 17157]

Requiring Records of Cable Operator Interests in Video Programming; Modernization of Media Regulation Initiative

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission eliminates the rules requiring that cable operators maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services, as well as information regarding cable operators' carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Chad Guo, Chad.Guo@fcc.gov, or 202-418-0652.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (*Order*), FCC 20-139, in MB Docket Nos. 20-35, 17-105, adopted on September 29, 2020, and released on September 30, 2020. The complete text of this document is available electronically via the search function on the FCC's Electronic Document Management System (EDOCS) web page at https://apps.fcc.gov/edocs_public/ (https://apps.fcc.gov/edocs_public/).

The complete document is also available for public inspection at

<https://docs.fcc.gov/public/attachments/FCC-20-134A1.pdf>. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov (mail to: fcc504@fcc.gov) or call the FCC's Consumer and

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

Synopsis

In this Report and Order (*Order*), we eliminate § 76.1710 of our rules, which requires cable operators to maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services. The current rule also requires that the online public inspection files maintained by cable operators contain information regarding the operators' carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest. We refer herein to both parts of this rule collectively as the "cable operator interests in video programming recordkeeping" requirement. Based upon comments received in response to the *Notice of Proposed Rulemaking (NPRM)* (85 FR 18527, April 2, 2020), we find that the recordkeeping obligations set forth in § 76.1710 are outdated and unnecessary. Therefore, we eliminate this regulation and revise our rules to omit existing cross-references. By adopting our proposal to repeal this rule, we remove a regulatory burden on cable operators that no longer serves the public interest. Additionally, through this *Order*, we continue our efforts to modernize the Commission's media regulations.

Background. Section 76.1710 contains recordkeeping obligations with respect to two categories of information. It requires cable operators to maintain in their public inspection files, for a period of three years, records regarding the nature and extent of their attributable interests in all video programming services (the attributable interests requirement) as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they also have an attributable interest (the carriage requirement). As described in the NPRM, these recordkeeping requirements were adopted in 1993 to aid in the enforcement of the Commission's channel occupancy limits, which were reversed and remanded to the Commission by the U.S. Court of Appeals for the D.C. Circuit in 2001. The

Commission adopted the channel occupancy limits consistent with section 11 of the Cable Television Consumer Protection and Competition Act of 1992, which required the Commission to establish reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an attributable interest. The court found that the Commission failed to justify its channel occupancy limits as not burdening substantially more speech than necessary. While the Commission did seek comment on reinstating the channel occupancy limits, it found the record inadequate to support adopting a specific vertical limit on the ownership of video programming sources by owners of cable systems. However, despite that court decision, the cable operator interests in video programming recordkeeping requirement has remained part of the public file requirements for cable operators. The Commission reorganized its public file rules in 1999 to reduce the regulatory burden faced by cable operators with regard to recordkeeping requirements. As part of the reorganization proceeding, the Commission sought comment on whether to remove or consolidate any public file requirements.

The Commission transitioned the public file requirements for cable operators to an online format in 2016, when the Commission expanded the list of entities required to post public inspection files to the Commission's online database. Since then, the cable operator interests in video programming recordkeeping requirement has been part of the online public inspection file to be maintained by cable system operators.

Comments in the Commission's Media Modernization proceeding identified cable operator interests in video programming as one of several categories of information that parties felt were superfluous and could be eliminated from the online public inspection file. In February 2020, the Commission adopted the *NPRM* to seek comment on whether to modify or eliminate § 76.1710 and references to the rule in other associated rule provisions. As the channel occupancy limits were reversed and remanded by the D.C. Circuit over 18 years ago,

the *NPRM* sought comment on what purpose, if any, the rule serves today that would justify its retention. The *NPRM* noted that, in the over 26 years since the requirement was adopted, the Commission was aware of only a single instance in which the rule has been invoked.

As discussed below, all but one commenter to the *NPRM* agree that § 76.1710 should be eliminated in its entirety. Three parties filed comments in this proceeding in response to the *NPRM*. Verizon and the National Cable Telecommunications Association (NCTA) support eliminating § 76.1710 in its entirety. ACA Connects—America’s Communications Association (ACA) advocates for retaining a portion of § 76.1710. The only point of contention in the record is whether the attributable interests requirement (i.e., the requirement to disclose attributable interests in video programming) should be retained due to the potential usefulness of the information in the context of program access complaints. Notably, no commenter asserts that § 76.1710 remains useful for its original purpose, which was to aid in the enforcement of the channel occupancy limits.

Discussion. For the reasons discussed below, we repeal § 76.1710 and all cross-references to it. Consistent with our observations in the *NPRM*, the record indicates that the rule is of very limited utility and there is little justification for its retention after the D.C. Circuit reversed and remanded the channel occupancy limits. Accordingly, we eliminate both the portion of the rule requiring cable operators to maintain in their public inspection files, for a period of three years, records regarding the nature and extent of their attributable interests in all video programming services (the attributable interests requirement) as well as the portion of the rule requiring maintenance of records regarding their carriage of such vertically integrated video programming services on cable systems in which they also have an attributable interest (the carriage requirement). No commenter supports retention of the latter, i.e., the carriage requirement; indeed, even the lone commenter that put forth an argument to retain the attributable interests requirement agrees that the carriage requirement portion of the rule should

be eliminated because such information is widely available elsewhere. ACA cites to the Commission's findings in an earlier Media Modernization proceeding that found consumers were more likely to seek and access channel lineup information from cable company websites, on-screen electronic program guides, and paper guides. Therefore, we find that there is no dispute as to whether cable operators should be required to disclose the carriage information for vertically integrated programming in their online public inspection files. We agree with commenters that this requirement has become outdated and no longer serves the public interest, and accordingly, we hereby eliminate it.

The only contested issue in the record involves § 76.1710's attributable interests requirement, i.e., the requirement that cable operators maintain records regarding the nature and extent of their attributable interests in all video programming services. While Verizon and NCTA support eliminating this attributable interest recordkeeping requirement completely, ACA advocates for retaining the attributable interest record in a less burdensome way. ACA asserts that the information is potentially useful in program access complaint proceedings. As the Commission's program access rules prohibit unfair practices by satellite cable programming vendors in which a cable operator has an attributable interest, a prospective complainant against a satellite cable programming vendor must demonstrate that a cable operator has an attributable interest in such a vendor. Thus, ACA contends that the attributable interests requirement in § 76.1710 assists prospective program access complainants by providing ready access to information regarding cable operators' attributable interests, information that complainants would otherwise have to obtain on their own. ACA claims that requiring cable operators to continue disclosing this information in the public inspection file would be preferable to forcing program access complainants to obtain this information from other, potentially less reliable sources. NCTA disagrees, stating that "entities seeking attributable interest information can retrieve it from a variety of readily available sources." NCTA also argues that it is unreasonable

to require all cable operators to keep compiling this information and uploading it to the public file just because of “the possibility that at some future point it may spare a potential program access complainant the burden of compiling ownership information on its own.”

We find that the public interest will be best served by eliminating § 76.1710 in its entirety, including the attributable interests portion of the recordkeeping requirement. We note that no party maintains that the information is useful or of interest to the general public. The record indicates that it is only potential program access complainants that might find such information useful. Furthermore, the usefulness of such information in the program access context appears to be theoretical at best, as there is no evidence in the record that this information has ever actually been relied upon in a program access complaint. Ultimately, we find that the narrow and specific circumstances under which the attributable interests information could benefit a small subset of industry, together with the availability of other sources for ascertaining such information, weighs against retaining the requirement that this information be included in the public inspection file.

We agree with NCTA that there are other publicly available sources from which information for program access issues could be obtained, including Securities and Exchange Commission (SEC) filings and industry-specific resources such as SNL Kagan. Although ACA may be correct that, in general, this information is only available for publicly held cable operators, and may not always be accurate if available for smaller or privately held cable operators, we disagree that this very narrow utility of the rule justifies its retention. This is particularly true as smaller cable operators are less likely to be subject to a program access complaint given that they are less likely to have attributable interests in programming in general or, more specifically, in the sort of programming that is highly rated and/or considered “must-have” and thus more likely to be the basis for a complaint. Commission reports also indicate that the most notable networks affiliated with cable operators tend to be affiliated with larger

operators, which own several times more cable networks than smaller operators. We also agree with NCTA that this information is readily discoverable in the complaint context. Based on publicly available sources, potential program access complainants could plead that the programming at issue is vertically integrated with a cable operator, and the cable operator in its answer would have to concede that the assertion is true or provide evidence that it is untrue. Finally, as the Commission's program access rules and procedures were not adopted to work in conjunction with the attributable interests recordkeeping requirements, we find that the program access rules would still function as intended in the absence of attributable interests information being available in cable operators' online public inspection files.

We also agree with NCTA that the public interest would not be served by requiring *all* cable operators to keep such information in their public inspection files solely on the chance that *a* cable operator becomes the subject of a program access complaint. We note that in the past five years, the Commission has received only one program access complaint. Therefore, we believe that requiring a cable operator to keep these records on file even though the records are likely never to be used by a program access complainant (or anyone else), runs counter to our goal of eliminating unnecessary regulatory burdens. As noted above, the Commission has received just one program access complaint in the past five years. Although ACA questions whether the recordkeeping requirement imposes any meaningful burden on large cable system operators, it offers no evidence that undermines NCTA's position.

Lastly, we disagree with ACA's proposal to modify the rule. ACA proposes that the rule be modified to allow cable operators to post their attributable interests once and then only post updates if the interests change. ACA further suggests cable operators could post "classes" of ownership percentages so that they would not have to update their filings based on minor ownership changes. No other commenter supports this or any other modification of the rule. Indeed, we find that the proposed modification is arguably more burdensome than the current

rule, as it would still require cable operators to determine, prepare, and post some amount of attributable interest information and would require updates that in some cases would go above and beyond what is required by the current regulation. For example, under ACA's proposal, a cable operator would have to file an update when its ownership in a programmer increased from 70% to 80% even though no such update is required under our current rules. Furthermore, given the very limited utility, if any, of keeping attributable interests information on file, we cannot find a justification in the record for retaining any part of the rule, even in a modified or reduced form.

For these reasons, we eliminate § 76.1710 in its entirety. We also eliminate from §§ 76.504 and 76.1700 of the Commission's rules the references to the recordkeeping requirement contained in § 76.1710. Note 2 to § 76.504 contains a cross reference to § 76.1710. Section 76.1700 lists operator interests in video programming as a component of the public inspection file and also cross-references § 76.1710.

Regulatory Flexibility Act. As required by the Regulatory Flexibility Act of 1980 (RFA), as amended, an Initial Regulatory Flexibility Certification was incorporated into the *NPRM*. Pursuant to the RFA, the Commission's Final Regulatory Flexibility Certification relating to this Report and Order is attached as Appendix B.

Paperwork Reduction Act. This Order does not contain proposed new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501- 3520). In addition, this Order therefore does not contain any new or modified "information burden for small business concerns with fewer than 25 employees" pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. 3506(c)(4).

Congressional Review Act. The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs,

that this rule is “non-major” under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

Final Regulatory Flexibility Act Analysis. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in MB Docket 20-35. The Commission sought public comments on proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Proposed Rules. This *Order* stems from an *NPRM* released by the Commission in March 2020, seeking comment on whether to eliminate or modify § 76.1710 of the Commission’s rules. The parties that filed comments in the proceeding agree that the recordkeeping requirement at issue is no longer necessary for its original purpose. One party commented that the attributable interest regulations should be retained due to the potential usefulness of that information in the context of program access complaints. The *Order* finds that the information on which program access complaints are based can be obtained from sources other than the public inspection files maintained by cable operators. The *Order* also finds that the usefulness of such information in program access contexts is largely theoretical because cable operators would have to maintain such information in their public inspection files simply on the chance that the operator might someday become the subject of a program access complaint. Therefore, the *Order* does not find any compelling reason to retain the rule.

By eliminating this rule, the *Order* reduces the burden of maintaining the public inspection file on cable operators. Specifically, the *Order* eliminates the requirement that cable operators maintain records in their online public inspection file regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in

which they have an attributable interest for a period of at least three years. An attributable interest is an ownership interest in, or relationship to, an entity that gives the interest holder a certain degree of influence or control over the entity as defined in the Commission's rules. Vertically integrated video programming is video programming carried by a cable system and produced by an entity in which the cable system's operator has an attributable interest. The *Order* finds that eliminating this recordkeeping requirement will remove an outdated and unnecessary regulatory burden on cable operators.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA. No comments were filed in response to the IRFA.

Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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 rule revisions, 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 (SBA). 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 rate regulation 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 standard, we estimate that most cable systems are small entities.

Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." As of 2019, there were approximately 48,646,056 basic cable video subscribers in the United States. Accordingly, an operator serving fewer than 486,460 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Based on available data, we find that all but five cable operators are small entities under this size standard. 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. Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements. The *Order* eliminates a rule that requires cable operators to maintain records of their attributable interests in video programming in their online public inspection files.

Accordingly, the *Order* does not impose any new reporting, recordkeeping, or other compliance requirements.

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, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

The *Order* eliminates the obligation, imposed on cable operators, to maintain records of their attributable interests in video programming in their online public inspection files. Eliminating this requirement is intended to modernize the Commission's regulations and reduce costs and recordkeeping burdens for affected entities, include small entities. Under the revised rules, affected entities no longer will need to expend time and resources maintaining and updating this portion of their online public inspection files.

Because no commenter provided information specifically quantifying the costs and administrative burdens of complying with the existing recordkeeping requirements, we cannot precisely estimate the impact on small entities of eliminating them. By eliminating the rule, the *Order* reduces the costs and burdens of compliance on all cable operators, including small entities.

Report to Congress. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.

Accordingly, *it is ordered* that, pursuant to the authority found in sections 1, 4(i), 4(j),

303(r), and 613 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), and 533, this Report and Order *is adopted*. *It is further ordered* that Part 76 of the Commission's rules *is amended* as set forth in Appendix A, and the rule changes to §§ 76.504, 76.1700, and 76.1710 adopted herein will become effective as of the date of publication of a summary in the Federal Register. *It is further ordered* that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 20-35 *shall be terminated* and its docket *closed*. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall 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. *It is further ordered* that the Commission *shall 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, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Cable television, Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene Dortch,
Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 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, 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.

§ 76.504 [Amended]

2. Amend § 76.504 by removing Note 2.

§ 76.1700 [Amended]

3. Amend § 76.1700 by removing and reserving paragraph (a)(7).

§ 76.1710 [Removed]

4. Remove § 76.1710.

[FR Doc. 2020-25007 Filed: 11/17/2020 8:45 am; Publication Date: 11/18/2020]