January 16, 2014, is withdrawn, effective immediately.

**FOR FURTHER INFORMATION CONTACT:** Teresa Schnorr Ph.D., Director NIOSH Division of Surveillance, Hazard Evaluations and Field Studies (DSHEFS); 4676 Columbia Parkway, Cincinnati, OH 45226; 513–841–4428 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** On January 16, 2014, HHS published a notice of proposed rulemaking (NPRM) to make minor technical amendments to the regulatory text in 42 CFR Part 85a (79 FR 2809). On the same date, HHS simultaneously published a companion direct final rule (DFR) that offered identical updates because the agency believed that the revisions were non-controversial and unlikely to generate significant adverse comment (79 FR 2789). In the NPRM preamble, HHS stated that if no significant adverse comments were received by March 17, 2014, the NPRM would be withdrawn and the effective date of the final rule would be confirmed within 30 days of the conclusion of the comment period. HHS received one public comment that was not a significant adverse comment, but rather was in support of the companion NPRM. Because HHS did not receive any significant adverse comments to the NPRM within the specified comment period, we hereby withdraw this NPRM from rulemaking.

Dated: April 3, 2014.

**Kathleen Sebelius,**

*Secretary.*

[FR Doc. 2014–07987 Filed 4–9–14; 8:45 am]

**BILLING CODE 4163–18–P**

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

**[MB Docket No. 10–71; FCC 14–29]**

### Network Non-Duplication and Syndicated Exclusivity Rules

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Commission seeks comment on whether to eliminate or modify the network non-duplication and syndicated exclusivity rules in light of changes in the video marketplace in the more than 40 years since these rules were adopted. The Commission seeks comment on whether the exclusivity rules are still needed to protect broadcasters' ability to compete in the video marketplace and to ensure that program suppliers have sufficient incentives to develop new and diverse programming and on the impact of eliminating of the exclusivity rules.

**DATES:** Comments for this proceeding are due on or before May 12, 2014; reply comments are due on or before June 9, 2014.

**ADDRESSES:** You may submit comments, identified by MB Docket No. 10–71, by any of the following methods:

- *Federal Communications Commission's Web site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *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, contact Kathy Berthot, *Kathy.Berthot@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–7454.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Further Notice of Proposed Rulemaking,* FCC 14–29, adopted on March 31, 2014 and released on March 31, 2014. The full text 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. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

This document contains no proposed information collection requirements.

**SUMMARY:**

## I. Introduction

1. We are issuing this *FNPRM* to solicit additional comment on whether we should eliminate or modify our network non-duplication and syndicated exclusivity rules. We received numerous comments on this issue in response to the *NPRM.* However, the record developed in this proceeding to date is not sufficient for us to yet make a determination whether the exclusivity rules are still needed in today's competitive video marketplace or to assess the potential impact on affected parties of eliminating these rules. Given the complex issues involved, we believe it is necessary and appropriate to undertake a more comprehensive review of the exclusivity rules and to compile a more complete record.

## II. Background

2. A broadcaster may carry network and syndicated programming on its local television station(s) only with the permission of the networks or syndicators that own or hold the rights to that programming, as reflected in network/affiliate agreements or syndication agreements. In addition, the ability of broadcasters to grant retransmission consent for MVPD carriage may be constrained by the network/affiliate agreement or by the syndication agreement because such agreements generally limit the geographical area in which the station holds exclusive rights to network or syndicated programming. The Commission's network non-duplication and syndicated exclusivity rules are designed to serve as a means of enforcing contractual exclusivity agreements entered into between broadcasters, which purchase the distribution rights to programming, and networks and syndicators, which supply the programming. Thus, the network non-duplication and syndicated exclusivity rules require that the broadcaster have contractual exclusivity rights and provide proper notice to the relevant MVPD, requesting that an MVPD delete duplicative network or syndicated programming. The rules may be invoked by stations that elect retransmission consent in their local markets, even if they are not actually carried by the MVPD, to prevent an MVPD from carrying programming of a distant station that duplicates local broadcast station programming. By requiring MVPDs to delete duplicative network or syndicated programming

carried on any distant signals they import into a local market, the Commission's network non-duplication and syndicated exclusivity rules provide an extra-contractual mechanism for broadcasters to enforce their contractual exclusivity rights against MVPDs, which are not parties to those exclusivity agreements.

*A. Network Non-Duplication*

3. The network non-duplication rules protect a local commercial or non-commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require programming subject to the rules to be blacked out on request when carried on another station's signal imported by an MVPD into the local station's zone of protection. A television station's rights under the network non-duplication rules are governed by the terms of the contractual agreement between the station and the holder of the rights to the program. The Commission's rules allow commercial and non-commercial television stations to protect the exclusive distribution rights they have negotiated with broadcast networks, not to exceed a specified geographic zone of 35 miles (55 miles for network programming in smaller markets). For purposes of these rules, it is these specified zones that distinguish between ''local'' and ''distant.''

4. *Cable.* Network non-duplication rules for cable were first promulgated by the Commission in 1965. Throughout the 1960s and 1970s the Commission continually refined the rules, but the policy behind them remained the same. The purpose of the rules was to protect the exclusive contractual rights of local broadcasters in network programming from the importation of non-local network stations by cable systems, thereby protecting local stations from what was perceived as the potential harm from the growth of cable systems. In this regard, the Commission was concerned that because broadcasters and cable systems were on an unequal footing with respect to the market for programming, a cable system's duplication of local programming via the signals of distant stations was not a fair method of competition with broadcasters. Prior to 1988, network non-duplication protection applied only to programming being broadcast simultaneously in the local market by a distant signal. In 1988, the Commission modified the rule to extend exclusivity protection to any time period specified in the contractual agreement between the network and the affiliate.

5. The Commission's rules contain several exceptions to application of the network non-duplication rules. First, because of the cost of the equipment necessary to delete programming, the Commission exempts cable systems having fewer than 1,000 subscribers. The rule also does not apply if the out-of-market station's signal is deemed ''significantly viewed'' in a relevant community. This latter exception was intended to prevent the deletion of programs on stations which the viewers could receive off-the-air.

6. *Satellite.* The Satellite Home Viewer Improvement Act of 1999 (''SHVIA'') directed the Commission to apply the cable network non-duplication rules to direct broadcast satellite (''DBS''), but only with respect to the retransmission of nationally distributed superstations. These nationally distributed superstations may be offered to any satellite subscriber, without the ''unserved household'' restriction that applies to other distant network stations. SHVIA directed the Commission to implement new exclusivity rules for satellite that would be ''as similar as possible'' to the rules applicable to cable operators. In general, the network non-duplication rules apply when a satellite carrier retransmits a nationally distributed superstation to a household within a local broadcaster's zone of protection and the nationally distributed superstation carries a program to which the local station has exclusive rights. In contrast to the mileage-based specified zones used in the cable context, zip codes are used to determine the areas to which the zone of protection applies for satellite carriers. As in the cable context, the broadcast station licensees may exercise their network non-duplication rights in accordance with the terms specified in a contractual agreement between the network and its affiliate within the zone of protection. The rules for satellite carriers also have exceptions for significantly viewed stations and for areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone.

7. *Open Video Systems.* The Telecommunications Act of 1996 (the ''1996 Act'') established the open video system as a new framework for entry into the video programming distribution market. Congress's intent in establishing the open video system framework was ''to encourage telephone companies to enter the video programming distribution market and to deploy open video systems in order to 'introduce vigorous competition in entertainment and information markets' by providing a competitive alternative to the incumbent cable operator.'' As an incentive for telephone company entry into the video programming distribution market, the 1996 Act provides for reduced regulatory burdens for open video systems subject to the systems' compliance with certain non-discrimination and other requirements. However, the 1996 Act directed the Commission to extend its network non-duplication rules to the distribution of video programming over open video systems. Accordingly, the Commission amended its rules in 1996 to directly apply the existing network non-duplication rules to open video systems.

*B. Syndicated Exclusivity*

8. The syndicated exclusivity rules are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming. In addition, the syndicated exclusivity rules apply only to commercial stations. The syndicated exclusivity rules allow a local commercial broadcast television station or other distributor of syndicated programming to protect its exclusive distribution rights within a 35-mile geographic zone surrounding a television station's city of license, although the zone may not be greater than that provided for in the exclusivity contract between the station and syndicator. Unlike the network non-duplication rule, however, the zone of protection is the same for smaller markets as it is for the top-100 markets. With only a few exceptions, a station that has obtained syndicated exclusivity rights in a program may request a cable operator to black out that program as broadcast by any other television station, and may request a satellite operator to provide such protection against any nationally distributed superstation. The cable or satellite system must comply if properly notified in accordance with the rules.

9. *Cable.* The Commission adopted the first syndicated exclusivity rules in 1972, consistent with a ''Consensus Agreement'' that was negotiated among the cable, broadcast, and program production industries in order to facilitate the passage of copyright legislation. These rules were considered necessary to ''protect local broadcasters and to ensure the continued supply of television programming.'' Shortly after Congress established a copyright compulsory license system in 1976, the Commission began an inquiry to review the ''purpose, effect, and desirability of'' the syndicated exclusivity rules. In 1979, the Commission adopted the Report on Cable Television Syndicated

Exclusivity Rules, which performed a cost-benefit analysis to determine whether retaining the syndicated exclusivity rules would be in the public interest. The Commission found that eliminating the rules would have negligible effects on the size of local station audiences and consequently would not significantly harm any broadcaster. The Commission concluded that, when weighed against the minimal negative impact on broadcasters and program supply, the increase in diversity and number of new cable systems that the rules' elimination would allow supported their repeal. Therefore, in 1980, the Commission repealed the syndicated exclusivity rules.

10. In 1988, however, the Commission reversed its decision, finding that the reasoning that shaped the 1980 decision to repeal the syndicated exclusivity rules was flawed in two significant respects. First, the Commission found that its prior inquiry had incorrectly examined the effects of repeal or retention on individual competitors rather than how the competitive process operates. Second, the Commission found that it had failed to analyze the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had to compete with cable operators, who could enter into such contracts. The Commission concluded that the absence of syndicated exclusivity rules both hurt the supply of programs to broadcasters and unfairly handicapped competition between broadcasters and cable systems to meet viewers' preferences in the distribution of existing programming. The Commission therefore reinstated its syndicated exclusivity rules.

11. The Commission's current cable syndicated program exclusivity rules allow commercial stations to protect their exclusive distribution rights for syndicated programming against local cable systems in a local market. Distributors of syndicated programming are allowed to seek protection for one year from the initial licensing of such programming anywhere in the United States, except where the relevant programming has already been licensed. The exceptions to application of the syndicated program exclusivity rules are similar to those that apply to the network non-duplication rules. Cable systems with fewer than 1,000 subscribers are exempt because of the cost of the equipment necessary to carry out deletions. The rules also do not apply if the distant station's signal is ''significantly viewed'' in a relevant cable community. In addition, the syndicated programming of a distant station need not be deleted if that station's Grade B signal encompasses the relevant cable community.

12. *Satellite.* SHVIA directed the Commission to apply its cable syndicated exclusivity rules to DBS providers only with respect to retransmission of nationally distributed superstations. The Commission implemented this using zip codes rather than community units to determine zones of protection. The rules for satellite carriers also provide exceptions for significantly viewed stations and for areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone.

13. *Open Video Systems.* The 1996 Act also directed the Commission to apply its cable syndicated exclusivity rules to the distribution of video programming over open video systems. The Commission amended its rules in 1996 to apply the existing cable syndicated exclusivity rules directly to open video systems.

*C. The Compulsory Copyright License*

14. Under the Copyright Act, unlicensed retransmission of the copyrighted material in a broadcast signal constitutes copyright infringement. At the time the Commission initially adopted the exclusivity rules, cable systems were permitted under the Copyright Act to retransmit the signals of broadcast television stations without incurring any copyright liability for the copyrighted programs carried on those signals. In 1976, Congress enacted amendments to the Copyright Act which impose copyright liability on cable systems for retransmission of broadcast signals, but also create a permanent compulsory license under which cable systems may retransmit the signals of all local broadcast stations and distant broadcast stations to the extent that carriage of such distant stations is permitted under FCC rules. In 1988, Congress amended the Copyright Act to create a temporary compulsory license for satellite carriers. In 1999, a new temporary compulsory license was enacted to permit satellite carriers to retransmit the signals of local stations to any subscriber within a station's local market (''local-into-local'' service). The temporary compulsory license granted to satellite carriers under the Copyright Act for distant stations is more limited than that granted to cable systems. Satellite carriers may retransmit signals of nationally distributed superstations to any household but may retransmit the signals of distant network stations to subscribers only if local network stations are unavailable to the subscribers as part of a satellite carrier's local-into-local package and over the air, and only to the extent that carriage of such superstations and distant stations is permitted under the FCC rules.

*D. Petitions for Rulemaking*

15. In 2005, ACA filed a rulemaking petition asserting that broadcasters use exclusivity and network affiliation agreements to extract ''supracompetitive prices'' for retransmission consent from small companies, and that this practice harms competition and consumers. Similarly, the 2010 Petition argued that the network non-duplication and syndicated exclusivity rules provide broadcasters with a ''one-sided level of protection'' that is no longer justified. The *NPRM* in this proceeding sought comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity. While the Commission received numerous comments on this issue, the record in this proceeding to date does not provide a sufficient basis on which to make a determination whether the exclusivity rules are still needed in today's video marketplace and whether these rules should be eliminated. Accordingly, we are issuing this *FNPRM* to compile a more complete record on whether the exclusivity rules should be eliminated.

## III. Discussion

16. We seek further comment on whether we should eliminate or modify the network non-duplication and syndicated exclusivity rules. Settled case law confirms that the Commission has jurisdiction under the Communications Act to impose the cable exclusivity rules. We tentatively conclude that Congress has not withdrawn from the Commission the authority to amend or repeal the cable rules. In addition, we tentatively conclude that the Commission has the authority to eliminate the exclusivity rules for satellite carriers and open video systems. We request comment on whether the exclusivity rules are still needed to protect broadcasters' ability to compete in the video marketplace and to ensure that program suppliers have sufficient incentives to develop new and diverse programming. We seek comment on whether the Commission should eliminate these rules as an unnecessary regulatory intrusion in the marketplace if we determine that they are no longer needed to serve their intended purposes. In particular, we seek comment on the impact that elimination

of the exclusivity rules would have on all interested parties, including broadcasters, MVPDs, program suppliers, and consumers.

*A. Legal Authority*

17. We tentatively conclude that the Commission has authority to eliminate the exclusivity rules for cable operators, satellite carriers, and open video systems. As discussed above, Congress did not explicitly mandate that the Commission adopt the network non-duplication and syndicated exclusivity rules for cable. Rather, the Commission adopted these rules to provide a mechanism for broadcasters to enforce their exclusive contractual rights in network and syndicated programming by preventing cable systems from importing distant network station programming. Case law confirms that the Commission has the authority to impose exclusivity rules on cable operators under its broad grant of authority under the Communications Act. Section 653(b)(1)(D) of the Act, as codified by the 1996 Act, directed the Commission to extend to open video systems ''the Commission's regulations concerning . . . network non-duplication (47 CFR 76.92 et seq.), and syndicated exclusivity (47 CFR 76.151 et seq.).'' Similarly, Section 339(b) of the Communications Act, as codified by SHVIA in 1999, directed the Commission to ''apply network nonduplication protection (47 CFR 76.92) [and] syndicated exclusivity protection (47 CFR 76.151) . . . to the retransmission of the signals of nationally distributed superstations by satellite carriers.'' Reflecting the language used in these statutory provisions, the legislative history of Section 339(b) states that Congress's intent was to place satellite carriers on an equal footing with cable operators with respect to the availability of television programming.

18. Some broadcasters argue that eliminating the exclusivity rules for cable operators would be inconsistent with congressional intent and beyond the Commission's authority, given the longstanding Commission precedent involving the rules and a statement in the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 (''1992 Act'') that the exclusivity rules were integral to achieving congressional objectives. As the Commission has previously stated, however, ''[i]f the [exclusivity] rules should ultimately prove unnecessary or need modification in light of the passage of time, congressional action or other factors, they can be modified or rescinded.'' And we see no statutory provision that requires the Commission to keep the exclusivity rules on the books. Indeed, over the years, the Commission has made significant adjustments to the exclusivity regulatory scheme based on changed circumstances, for example, promulgating the syndicated exclusivity rules in 1972, repealing the syndicated exclusivity rules in 1980, and then reinstating the syndicated exclusivity rules in 1988. We tentatively conclude that, with full knowledge of these regulatory shifts, Congress nonetheless left intact the Commission's general rulemaking power with respect to the cable exclusivity rules, including the authority to revisit its rules and modify or repeal them should it conclude such action is appropriate. We seek comment on this tentative conclusion. We also tentatively conclude that we have the authority to eliminate the exclusivity rules for DBS and OVS and seek comment on this tentative conclusion. We note that, in enacting Sections 339(b) and 653(b)(1)(D) of the Act, Congress directed the Commission to apply to DBS and OVS the non-duplication and syndicated exclusivity protections that the Commission applied to cable, set forth in 47 CFR 76.92 and 76.151, rather than simply enacting exclusivity protection for those services or even directing the Commission to adopt exclusivity rules for those services. The statute does not withdraw the Commission's authority to modify its cable exclusivity rules at some point in the future, nor is there any indication in the legislative history that Congress intended to withdraw this authority. Given that the DBS and OVS provisions are expressly tied to the cable exclusivity rules, we tentatively conclude that this evinces an intent on the part of Congress that the Commission should accord the same regulatory treatment to DBS and OVS as cable, and seek comment on that tentative conclusion. Alternatively, are Congress's directives to the Commission regarding the application of network non-duplication and syndicated exclusivity protections to open video systems and to satellite carriers best interpreted to mean that the Commission does not have the authority to repeal the exclusivity rules for these types of entities, even if we decide to eliminate these rules for cable? Would elimination of the exclusivity rules for cable but not for DBS and/or OVS create undue regulatory disparities or disadvantages for these entities?

*B. Assessing the Continued Need for Network Non-Duplication and Syndicated Exclusivity Rules*

19. In this section, we seek comment on the extent to which the network non-duplication and syndicated exclusivity rules are still needed to serve their intended purposes in light of changes in the video marketplace and the legal landscape in the decades since their adoption. As discussed above, the network non-duplication and syndicated exclusivity rules were both intended in part to facilitate broadcasters' ability to compete in the video marketplace by protecting their exclusive contractual rights in network and syndicated programming from cable systems' importation of distant stations. We seek comment on how changes in the video marketplace have impacted local broadcasters' ability to compete fairly with cable operators and other MVPDs. At the time the exclusivity rules were adopted, the Commission was concerned that cable systems' importation of distant stations carrying network or syndicated programming would adversely impact local broadcast stations by diverting the station's audience to the distant station, resulting in a reduction of the local station's advertising revenues, essentially the only source of revenue for the stations at the time. To what extent would local broadcast stations' audiences likely be diverted to distant stations carried on cable systems if the exclusivity rules were eliminated? In this regard, we note that when the exclusivity rules were initially adopted, the Communications Act prohibited a broadcast station from rebroadcasting another station's signal without permission, but did not prohibit cable retransmission of broadcast stations without permission. In the 1992 Cable Act, Congress extended this restriction on unauthorized retransmission of broadcast stations to cable operators. The restriction on unauthorized retransmission of broadcast stations was later extended to all MVPDs. Thus, in general, an MVPD may not carry a broadcast station's signal today without the consent of the broadcaster. We seek comment on whether, given the extension of the prohibition on unauthorized retransmission of broadcast stations to MVPDs, the exclusivity regulations continue to be necessary or whether the retransmission consent requirement adequately addresses the Commission's regulatory goals and thus undercuts the basis for the exclusivity rules. Commenters argue that MVPDs are unlikely to seek to import a distant station's signal today unless they are

faced with the blackout of a local station as a result of a retransmission dispute, and that any such importation would likely be limited in duration. We seek comment on this view, and we request that commenters quantify or estimate any costs associated with importation of a distant station's signal and submit data supporting their positions. If MVPDs are unlikely to import distant stations except during an impasse in retransmission consent negotiations, does this support the view that the exclusivity rules are no longer needed? We further note that, given the prohibition on unauthorized retransmission of broadcast stations, a distant station would have to agree to be imported in such circumstances and that contractual arrangements between networks and their affiliates may bar a broadcaster from agreeing to the importation of its distant signal. To what extent do existing network/affiliate agreements prohibit a local broadcaster from allowing its signal to be imported by a distant cable operator without reference to the existence of a Commission prohibition? Similarly, we seek comment on whether judicial enforcement of an exclusivity provision in a network affiliation or syndication agreement would be sufficient to protect the interests of local broadcasters and whether the public interest would be served by requiring such enforcement to proceed through normal contractual means, subject to the normal grounds on which the enforcement of exclusive contracts can be challenged. Additionally, broadcasters have increasingly sought and received monetary compensation in exchange for retransmission consent. Would such demands for compensation or higher copyright license fees associated with carrying distant stations discourage an MVPD from importing duplicative programming? To the extent that an MVPD can import a distant station in an adjacent market for a lower retransmission consent fee, is the MVPD likely to carry that station instead of the local station? If an MVPD did choose to import duplicative programming, to what extent would such duplication likely result in diversion of the local station's audience?

20. We also seek comment on the likely impact that any diversion of a local station's audience to a distant station would have on the station's advertising revenues. Would any such impact be different for a distant station in an adjacent market than for a distant station in a market that is very far away and with no connection to the local area? To the extent possible, we request that commenters quantify or estimate the likely effect of any such audience diversion on a station's advertising revenues and provide data supporting their positions. Moreover, we seek comment on the extent to which changes in the sources of local broadcast station revenues may impact the need for retaining the exclusivity rules. At the time the exclusivity rules were adopted, on-air advertising revenues were essentially the only source of revenue for broadcasters. Today, on-air advertising revenues still constitute about 85 percent of broadcasters' revenues, but they are increasingly turning to additional revenue sources, including retransmission consent fees from MVPDs and advertising sold on their Web sites. Do the existence of those alternative revenue sources provide any new basis for either the abolition or retention of the exclusivity rules? That is, what effect, if any, do these changes in local broadcasters' sources of revenue have on the need for the exclusivity rules? What effect would repeal of the exclusivity rules have on the retransmission consent fees received by broadcasters and what are the public interests implications of any such effect?

21. As discussed above, the exclusivity rules were based in part on the Commission's concern that a cable system's duplication of local programming via the signals of distant stations was not a fair method of competition with broadcasters because broadcasters and cable systems were on an unequal footing with respect to the market for programming. Is this reasoning still valid today, given that MVPDs now do compete with broadcasters for access to programming? Additionally, we invite comment on whether and how the growth in the number of video programming options available to consumers since the exclusivity rules were first adopted impacts the need for the exclusivity rules. Specifically, while a consumer seeking to purchase video programming service previously had one cable operator as the only video service option, today consumers may choose among several MVPDs and also may access video programming on the Internet. Do broadcasters' demands for larger retransmission consent fees from the MVPDs in their market suggest a significant increase in their leverage in the marketplace? Would such an increase in broadcasters' leverage and market power suggest that the exclusivity rules are no longer needed to protect broadcasters' ability to compete with MVPDs? Why or why not? Would broadcasters' increase in leverage and market power be attributed to the exclusivity rights broadcasters have with respect to network and syndicated programming? Are there any other changes in the video marketplace that are relevant to whether the exclusivity rules are still needed to ensure fair and open competition between broadcasters and MVPDs?

22. Further, we seek comment on the extent to which the exclusivity rules are still needed to provide incentives for program suppliers to produce syndicated and network programming and promote program diversity. In reinstating the syndicated exclusivity rules in 1988, the Commission concluded that financial incentives for program suppliers to develop new programming are greater with syndicated exclusivity rules than they are without them. Specifically, the Commission found that duplication of syndicated programming diverts a substantial portion of the local broadcast audience to a distant station carried on a cable system, thereby lessening the value of syndicated programming to broadcast stations and lowering the price that syndicated program suppliers receive for their programming, which in turn reduces incentives for syndicated program suppliers to develop new programs. Such reduced incentives, the Commission stated, translate into a reduction in the diversity of programming available to the public. Are the Commission rules still necessary to the effectuation of that goal, or are alternative remedies available to private parties?

23. Commenters have argued that MVPDs would be unlikely to seek to import a distant station's signal unless they are faced with a blackout situation during an impasse in retransmission consent negotiations and that any such importation would probably be of limited duration. If this argument is valid, we would not expect to see significant duplication of syndicated programming if we repeal our exclusivity rules. We seek comment on this view and the extent to which it should inform the Commission's decision. To the extent that duplication of syndicated and network programming is unlikely in today's competitive marketplace, are the exclusivity rules still needed to provide incentives for program suppliers to produce syndicated and network programming? In particular, we seek input from suppliers of syndicated programming on how elimination of our exclusivity rules would affect their incentives to develop new and diverse programming. One

commenter notes that, unlike when the exclusivity rules were adopted, some program suppliers today ''dilute'' broadcasters' exclusive rights by selling DVDs or downloads of popular programs, by making programming available on mobile devices and online, in some cases at no charge to the audience but with associated advertising, and by licensing programs for distribution over cable networks at the same time they are distributed through broadcast stations. We seek comment on the extent to which program suppliers currently dilute broadcasters' exclusive rights by making their programming available through multiple outlets. Does this existing duplication of programming undercut arguments that repeal of the exclusivity rules would adversely affect program suppliers' incentives to produce new and diverse programming? Are there other factors that we should consider in determining whether eliminating the exclusivity rules would adversely impact the diversity and supply of syndicated and network programming? Are there any factors or theories that would support retention of one set of exclusivity rules and not the other?

24. We note that the Commission previously relied in part on economic studies and other empirical data in considering the need for the syndicated exclusivity rules. We seek evidence to assist in our determination as to whether the exclusivity rules are still needed today and to assess the potential impact of eliminating the exclusivity rules. To the extent commenters support repealing or maintaining the rules, we seek empirical data and other evidence to support elimination or retention of the exclusivity rules. To the extent that economic studies or other empirical data relevant to our inquiries in this proceeding are available, we urge commenters to submit such data.

*C. Impact of Eliminating Network Non-Duplication and Syndicated Exclusivity Rules*

25. If we determine that the network non-duplication and syndicated exclusivity rules are no longer needed to ensure fair competition between local broadcasters and MVPDs and to ensure the diversity and supply of syndicated programming, would there be any reason to retain these rules? In particular, we seek comment on the costs and benefits of eliminating the exclusivity rules on all interested parties, including broadcasters, MVPDs, and program suppliers, and, of course, consumers. To the extent possible, commenters are requested to quantify any costs or benefits and submit supporting data. How should we weigh the costs and benefits of eliminating the exclusivity rules? Would any costs associated with eliminating the exclusivity rules outweigh the benefits of eliminating unnecessary or obsolete rules?

26. We seek comment on the impact of eliminating the exclusivity rules on retransmission consent negotiations. Would eliminating the rules merely eliminate a government-imposed barrier to free market negotiations? We note, in this regard, that broadcasters assert that eliminating the exclusivity rules would give MVPDs unfair leverage in retransmission consent negotiations. The Commission has previously found that ''Congress intended that local stations electing retransmission consent should be able to invoke network nonduplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system.'' In support of this finding, the Commission cited the legislative history of the 1992 Act, which states that

> the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted [sic] on cable systems for carriage or [sic] local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in [the 1992 Act].

We seek comment on the relationship between exclusivity protection and the retransmission consent regime and whether elimination of the exclusivity rules would be ''inconsistent with the regulatory structure created in [the 1992 Act].'' As discussed above, Congress appeared to be concerned with the importation of distant programming that would compete with local programming carried by the cable system. Arguably, that concern does not extend to retransmission consent negotiation impasses, where the local broadcaster pulls its station from a cable system or other MVPD. We seek comment on this proposition. What effect would the compulsory licenses have on broadcasters' ability to obtain through market-based negotiations the same exclusivity protection currently provided by our rules? One commenter suggests that, because most broadcast network affiliation and syndicated exclusivity agreements grant exclusivity in the entire Designated Market Area, which is beyond the scope of exclusivity protected by the FCC rules, elimination of the exclusivity rules would likely result in a substantial expansion of exclusivity. We seek comment on this view. If elimination of the exclusivity rules would likely result in expansion of exclusivity, does this argue in favor of or against elimination?

27. We seek comment on how elimination of the exclusivity rules would affect existing exclusivity contracts and broadcasters' ability to enforce those contracts. We note that upon elimination of our exclusivity rules, free market negotiations between broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity terms of affiliation and syndicated programming agreements, and broadcasters and MVPDs would continue to conduct retransmission consent negotiations in light of these privately negotiated agreements, but without Commission intrusion in the form of a regulatory enforcement mechanism. Thus, parties seeking to enforce contractual network non-duplication and syndicated exclusivity provisions would need to seek recourse from the courts (or, if contracts permit, alternative dispute resolution mechanisms) rather than the Commission. While some commenters assert that judicial enforcement of exclusive arrangements would be too difficult or costly, they have not provided specific, detailed data in support of their assertions. To the extent that commenters assert that judicial enforcement of exclusivity agreements would be too difficult or costly, we request that they quantify or estimate any costs associated with judicial enforcement and submit data supporting their positions. We also specifically request comment on the impact that broadcasters' lack of direct privity of contract with MVPDs with respect to the exclusivity rights arising from network affiliation or syndication agreements would likely have on broadcasters' judicial recourse. As a practical matter, in the absence of the exclusivity rules, how would a local station seeking to enforce an exclusivity agreement proceed against an MVPD that is importing the duplicative programming of a distant station, and how difficult and costly would that be? In this regard, one commenter suggests that a local station seeking to enforce an exclusivity agreement would have to proceed against the network or distant station (assuming that all network affiliates are made parties to all affiliation agreements with that network), which in turn would have to proceed against the MVPD. Is this accurate? What costs would the local station incur? Could the local station instead, if made a party to

other stations' affiliation agreements, bring a court action against the distant station that allowed its signal to be carried in the local station's market? If the record demonstrates that judicial enforcement of exclusivity agreements is too unwieldy and expensive, is there some other enforcement mechanism that could serve in the Commission's stead? Is there any legitimate reason that the Commission should provide a regulatory mechanism for enforcement of private exclusivity agreements?

28. Time Warner Cable suggests that exclusivity agreements could be viewed as unreasonable restraints on trade under traditional antitrust principles if subjected to judicial scrutiny. We seek comment on how application of antitrust principles might impact exclusivity agreements. Would the prospect of antitrust review of exclusivity agreements make broadcasters reluctant to seek recourse from the courts? And, if so, should this be a factor in our consideration of whether to retain these rules? Or should the possibility that exclusivity agreements could be anti-competitive in some circumstances militate against providing an enforcement mechanism that bypasses judicial review?

29. The NBC Affiliates assert that exclusivity rights are not free-standing rights that affiliates could enforce in the courts because network affiliation agreements grant exclusivity rights in terms of the Commission's rules. Specifically, the NBC Affiliates state that its standard affiliation agreement provides that an affiliate is ''entitled to invoke protection against the simultaneous duplication of NBC's network programming . . . to the maximum geographic extent from said community of license permitted under the present Sections 76.92 and 73.658(m) of the FCC's Rules and in accordance with the terms and conditions of said Rules.'' The NBC Affiliates note, in this regard, that the Commission requires specific language referencing its rules in order for broadcasters to obtain network non-duplication and syndicated exclusivity rights with respect to DBS and to obtain syndicated exclusivity rights with respect to cable. We seek comment on the impact of eliminating the exclusivity rules on such language in existing exclusivity agreements. To what extent do contracts for network and syndicated programming include such language? To what extent do such contracts include change of law provisions? If we eliminate the exclusivity rules, would it be necessary or appropriate to grandfather existing exclusivity contracts to ensure that such contracts are enforceable by the Commission for a period of time sufficient to allow existing contracts to be reformed, if the parties wish to retain the exclusivity provisions? If we grandfather existing exclusivity contracts, what would be a reasonable period of time to accord such contracts grandfathered status? Should we allow a period of time for renegotiation of contracts before the rule goes into effect? On the other hand, does the reference to Commission rules signal an intent by the contracting parties that exclusivity provisions should not exist if the Commission concludes that the exclusivity rules should not be maintained? Additionally, we seek comment on whether network affiliation agreements typically grant broadcasters exclusive distribution rights for any multicast streams of network programming that they air and how these multicast streams should figure in our analysis of whether to eliminate the exclusivity rules.

30. We also seek comment on whether and how our analysis of the issues should differ for any subset of the affected parties, such as small market stations. Should the costs and benefits of eliminating the exclusivity rules be weighed differently for different sized broadcast stations? Two commenters assert that elimination of the exclusivity rules would be particularly harmful to small market stations, many of which operate in communities adjacent to larger markets with powerful stations. We seek comment on the impact of elimination of the exclusivity rules on small market stations. We request that commenters quantify or estimate any costs of eliminating the exclusivity rules on small market stations and provide data supporting their submission. If we decide to eliminate the exclusivity rules, should the rules be retained, either permanently or for some period of time, for a class of smaller market stations? If so, how should we define that class and for what period of time should we retain the rules? Are there other classes of entities that warrant different treatment? We further note that the exclusivity rules currently exempt certain small MVPDs. Should those exemptions be retained if we decide to retain the exclusivity rules? We also seek comment on how these exemptions have worked in practice. Do small systems often import distant broadcast stations? Does the experience of small systems shed any light on what is likely to happen if we eliminate our exclusivity rules? If so, does that experience suggest that the rules should be eliminated or retained?

31. In addition, we request comment on the impact of eliminating the exclusivity rules on localism. A number of broadcasters have suggested that eliminating the exclusivity rules would have a negative impact on localism. For example, the NBC Affiliates assert that ''the loss of exclusivity would severely impair local broadcasters' ability to underwrite the costs associated with providing news and other locally responsive programming. This, in turn, would harm local businesses and local economies generally, given the importance of local broadcasting in connecting businesses with potential customers.'' As discussed above, however, commenters claim MVPDs would be unlikely to seek to import a distant station's signal unless they are faced with a blackout situation in the context of a retransmission consent negotiation impasse. If this is the case, is localism likely or unlikely to suffer if we eliminate the exclusivity rules? We invite comment on arguments in the record that elimination of the exclusivity rules is unlikely to harm localism. We ask commenters to quantify as specifically as possible the economic impact, if any, of the elimination of the exclusivity rules on broadcasters' ability to provide news and other locally responsive programming. Moreover, we seek comment on whether elimination of the exclusivity rules would lead to migration of network and syndicated programming to non-broadcast networks and what that would mean in practical terms for local broadcasters, syndicators, networks, MVPDs, and consumers.

32. We seek comment on whether there are any other entities that would be impacted by elimination of the exclusivity rules. If so, what are the benefits and costs of eliminating the rules for those entities? In particular, we seek comment on the potential impact on consumers of elimination of the exclusivity rules. We request that commenters quantify any benefits and costs to the extent possible and submit supporting data.

33. Under the Satellite Home Viewer Extension and Reauthorization Act of 2004, Congress authorized satellite carriers to carry out-of-market significantly viewed stations and applied the exclusivity rules insofar as local stations could challenge the significantly viewed status of the out-of-market station and thus prevent its carriage, just as in the cable context. We seek comment on whether new rules would be needed to permit local stations to challenge the significantly viewed status of an out-of-market station if the exclusivity rules are eliminated or modified. We also seek

comment on whether we should make any modifications to the process for obtaining or challenging significantly viewed status if we retain the exclusivity rules.

34. Finally, we request comment on whether, as an alternative to elimination of the exclusivity rules, we should make modifications to these rules. ACA and BCI suggest that if we do not eliminate the exclusivity rules, we should harmonize these rules by applying the Grade B or noise limited service contour exception for syndicated exclusivity to the network non-duplication rules. Under the Grade B service contour exception, a station may not obtain syndicated exclusivity protection against another station if such station places a Grade B signal over the cable community. According to ACA, ''[b]roadcast stations should have no reasonable expectation of exclusivity against adjacent-market stations receivable in the community over-the-air, as the Commission intended the exclusivity rules to prevent importing duplicative distant signals that are not available over-the-air in the community.'' We seek comment on this proposal. We also seek comment on whether we should modify the network non-duplication and syndicated exclusivity rules to apply only where the local station has granted retransmission consent to, and is carried by, the MVPD. Under this approach, a television station would only be permitted to assert network non-duplication or syndicated exclusivity protection if it is actually carried on the cable system. What effect would this approach have in situations where a cable system and broadcast station reach an impasse in retransmission consent negotiations? We observe that retransmission by an MVPD of the signal of certain superstations is not subject to retransmission consent requirements. Does the fact that the statute exempts this class of stations from retransmission consent requirements militate in favor of or against eliminating the network non-duplication and syndicated exclusivity rules? Should the Commission modify its exclusivity rules in light of the Middle Class Tax Relief and Job Creation Act of 2012, which provides full power and Class A television stations an opportunity to relinquish their existing channels by auction in order to channel share with another television licensee? Commenters that support these or any other such modifications should quantify the benefits and costs of the proposed modifications and provide supporting data. Are there any other modifications that we should consider if we decide to retain the exclusivity rules?

## IV. Procedural Matters

### *A. Initial Regulatory Flexibility Act Analysis*

35. 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 this *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

36. The *FNPRM* seeks comment on whether the Commission should eliminate or modify the network non-duplication and syndicated exclusivity rules for cable systems, satellite carriers, and open video systems. The network non-duplication rules permit a station with exclusive rights to network programming to assert those contractual rights, using notification procedures set forth in the Commission's rules, to prohibit an MVPD from carrying within a specified geographic zone the same network programming as broadcast by any other station. Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity within a specified geographic zone to prevent an MVPD from carrying the same syndicated programming aired by another station.

37. Petitions for rulemaking filed in 2005 and in 2010 raised questions about the continued need for the exclusivity rules. The *NPRM* in this proceeding sought comment on the potential benefits and harms of eliminating the exclusivity rules. While the Commission received numerous comments on this issue, the record in this proceeding to date does not provide a sufficient basis on which to make a determination as to whether the exclusivity rules are still needed today and to assess the potential impact on affected parties of eliminating these rules. Accordingly, we have concluded that is necessary and appropriate to issue a *FNPRM* to undertake a more comprehensive review of the exclusivity rules and to compile a more complete record.

38. The *FNPRM* requests comment on whether the exclusivity rules are still needed to protect broadcasters' ability to compete in the video marketplace. In particular, the *FNPRM* seeks comment on the extent to which local broadcast stations' audiences would likely be diverted to distant stations carried on MVPDs if the exclusivity rules were eliminated; the argument that MVPDs are unlikely to seek to import a distant station's signal today unless they are faced with the blackout of a local station as a result of a retransmission dispute and that any such importation would likely be limited in duration; the likely impact that any diversion of a local station's audience to a distant station would have on the local station's advertising revenues and the extent to which changes in the sources of local station revenues may impact the need for retaining the exclusivity rules; and concerns that an MVPD's duplication of local programming via the signals of distant stations was not a fair method of competition with broadcasters are still valid today, given that MVPDs now do compete with broadcasters for access to programming. The *FNPRM* also invites comment on the extent to which the exclusivity rules are still needed to provide incentives for program suppliers to produce syndicated and network programming and promote program diversity.

39. The *FNPRM* seeks comment on the impact of eliminating the exclusivity rules on all interested parties, including broadcasters, MVPDs, program suppliers, and consumers. The *FNPRM* seeks comment on the impact of eliminating the exclusivity rules on retransmission consent negotiations. Additionally, the *FNPRM* invites comment on how elimination of the exclusivity rules would affect existing exclusivity contracts and broadcasters' ability to enforce those contracts. Upon elimination of the exclusivity rules, broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity terms of affiliation and syndicated programming agreements through free market negotiations, but without a Commission enforcement mechanism. Instead, parties seeking to enforce contractual exclusivity provisions would need to seek recourse from the courts. The *FNPRM* seeks comment on the costs and difficulty of pursuing judicial enforcement of exclusive arrangements. Further, the *FNPRM* asks whether, if we eliminate the exclusivity rules, it would be necessary or

appropriate to grandfather existing exclusivity contracts to ensure that such contracts are enforceable by the Commission for a period of time sufficient to allow existing contracts to be reformed, if the parties wish to retain the exclusivity provisions. To the extent that we grandfather existing exclusivity contracts, the *FNPRM* invites comment on what would be a reasonable period of time to accord such contracts grandfathered status and whether we should allow a period of time for renegotiation of contracts before repeal of the rules takes effect.

40. The *FNPRM* seeks comment on whether and how the Commission's analysis of the impact of eliminating the exclusivity rules should differ for any subset of the affected parties, such as small market stations. The *FNPRM* asks whether, if the Commission decides to eliminate the exclusivity rules, these rules be retained, either permanently or for some period of time, for a class of smaller market stations. If so, the *FNPRM* seeks comment on how we should define that class and for what period of time we should retain the rules. The *FNPRM* also asks whether the existing exemptions from of certain small MVPDs from the exclusivity rules should be retained if we decide to retain the exclusivity rules. In addition, the *FNPRM* requests comment on the impact of eliminating the exclusivity rules on localism.

41. Finally, the *FNPRM* seeks comment on whether, as an alternative to elimination of the exclusivity rules, the Commission should make modifications to the rules. Specifically, the *FNPRM* invites comment on whether the Commission should (1) extend the Grade B service or noise limited service contour exception for syndicated exclusivity to the network non-duplication rules; (2) modify the network non-duplication and syndicated exclusivity rules to apply only where the local station has granted retransmission consent to, and is carried by, the MVPD; or (3) modify the exclusivity rules in light of the Middle Class Tax Relief and Job Creation Act of 2012, which provides full power and Class A television stations an opportunity to relinquish their existing channels by auction in order to channel share with another television licensee.

Legal Basis

42. The proposed action is authorized pursuant to Sections 4(i), 4(j), 301, 303(r), 307, 339, 340, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(r), 307, 339, 340, and 573.

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

43. 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.

44. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined 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.'' The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, we estimate that the majority of such businesses can be considered small entities.

45. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Industry data shows that there were 1,100 cable companies at the end of December 2012. Of this total, all but ten cable operators nationwide 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. Current Commission records show 4,945 cable systems nationwide. Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

46. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' There are approximately 56.4 million incumbent cable video subscribers in the United States today. Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but ten incumbent 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. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

47. *Television Broadcasting.* This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' The SBA has created the following small business size standard for such businesses: those having $35.5 million or less in annual receipts. The 2007 U.S.

Census indicates that 2,076 television stations operated in that year. Of that number, 1,515 had annual receipts of $10,000,000 dollars or less, and 561 had annual receipts of more than $10,000,000. Since the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded $35.5 million in that year, the Commission concludes that the majority of television stations were small under the applicable SBA size standard.

48. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,388. In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14 million or less. We therefore estimate that the majority of commercial television broadcasters are small entities.

49. 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, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

50. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396. These stations are non-profit, and therefore considered to be small entities.

51. *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, which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small entities. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled ''Cable and Other Program Distribution.'' The definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts. Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network. Each currently offer subscription services. DIRECTV and DISH Network 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 under the superseded SBA size standard would have the financial wherewithal to become a DBS service provider.

52. *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, which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 show that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small entities.

53. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer employees. Census data for 2007 show that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small entities.

54. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the other entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

55. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: ''This industry comprises establishments

primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.'' The SBA has developed a small business size standard for this category, which is: All such businesses having $35.5 million dollars or less in annual revenues. Census data for 2007 show that there were 659 establishments that operated that year. Of that number, 462 operated with annual revenues of $9,999,999 dollars or less. One hundred ninety-seven (197) operated with annual revenues of between $10 million and $100 million or more. Thus, under this size standard, the majority of such businesses can be considered small entities.

56. *Motion Picture and Video Production.* These entities may be indirectly affected by our action. 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 note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: All such businesses having $30 million dollars or less in annual revenues. Census data for 2007 show that there were 9,478 establishments that operated that year. Of that number, 9,128 had annual receipts of $24,999,999 or less, and 350 had annual receipts ranging from not less than $25,000,000 to $100,000,000 or more. Thus, under this size standard, the majority of such businesses can be considered small entities.

57. *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 establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: All such businesses having $29.5 million dollars or less in annual revenues. Census data for 2007 show that there were 477 establishments that operated that year. Of that number, 448 had annual receipts of $24,999,999 or less, and 29 had annual receipts ranging from not less than $25,000,000 to $100,000,000 or more. Thus, under this size standard, the majority of such businesses can be considered small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

58. The *FNPRM* does not propose any recordkeeping requirements. The *FNPRM* seeks comment on whether the Commission should eliminate the network non-duplication and syndicated exclusivity rules. If the Commission eliminates the exclusivity rules, broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity terms of affiliation and syndicated programming agreements through free market negotiations, but there would be no Commission enforcement mechanism for such exclusivity provisions. Instead, parties seeking to enforce contractual exclusivity provisions would need to seek recourse from the courts.

Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

59. 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.

60. The *FNPRM* seeks comment on whether, if we eliminate the exclusivity rules, it would be necessary or appropriate to grandfather existing exclusivity contracts to ensure that such contracts are enforceable by the Commission for a period of time sufficient to allow existing contracts to be reformed, if the parties wish to retain the exclusivity provisions. To the extent that the Commission grandfathers existing exclusivity contracts, the *FNPRM* asks what would be a reasonable period of time to accord such contracts grandfathered status and whether the Commission should allow a period of time for renegotiation of contracts before repeal of the rule takes effect. Such grandfathering might reduce any adverse economic impact of eliminating the exclusivity rules on broadcast stations, including small broadcast stations.

61. The *FNPRM* also asks whether, if the Commission decides to eliminate the exclusivity rules, the rules should be retained, either permanently or for some period of time, for a class of smaller market broadcast stations. If so, the *FNPRM* seeks input on how we should define that class and for what period of time should we retain the exclusivity rules. Retaining the exclusivity rules permanently or for some period of time for small broadcast stations might reduce any adverse economic impact of eliminating the exclusivity rules on small broadcast stations.

62. Further, the *FNPRM* notes that the exclusivity rules currently exempt certain small MVPDs and asks whether those exemptions should be retained if the Commission decides to retain the exclusivity rules. Retaining the existing exemption for small MVPDs might be appropriate to avoid any adverse economic impact on small MVPDs if the exclusivity rules are retained.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

63. None.

*C. Paperwork Reduction Act*

64. This *FNPRM* proposes no new or modified information collection requirements. In addition, therefore, it does not propose 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.

*D. Ex Parte Rules*

65. *Permit-But-Disclose.* The proceeding this *FNPRM* initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules. 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. 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 rule § 1.1206(b). In proceedings governed by rule § 1.49(f) 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.

*E. Filing Requirements*

66. 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).

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

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

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

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

68. For additional information on this proceeding, contact Kathy Berthot, *Kathy.Berthot@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–2120.

**V. Ordering Clauses**

69. Accordingly, *it is ordered* that, pursuant to the authority found in sections 1, 4(i), 4(j), 301, 303(r), 307, 339(b), 340, and 653(b) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 301, 303(r), 307, 339(b), and 573(b) this *Further Notice of Proposed Rulemaking is adopted.*

70. *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. 10–71, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS–R8–ES–2013–0104; 4500030113]**

**RIN 1018–AY53**

## Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Western Distinct Population Segment of the Yellow-Billed Cuckoo (Coccyzus americanus)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** On October 3, 2013, we, the U.S. Fish and Wildlife Service (Service), announced a proposal to list the yellow-billed cuckoo in the western portion of the United States, Canada, and Mexico (western yellow-billed cuckoo) as a threatened distinct population segment (DPS) under the Endangered Species Act of 1973, as amended (Act). On December 26, 2013, we reopened the comment period for an additional 60 days to ensure the public had sufficient time to comment on the proposal for this species. We now announce another reopening of the comment period for our October 3, 2013, proposed rule to allow for us to accept and consider additional public comments on the proposed rule.

**DATES:** We request that comments on this proposal be submitted by the close of business on April 25, 2014.

**ADDRESSES:** *Document availability:* You may obtain copies of the proposed rule on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0104, or contact the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

*Comment Submission:* You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. In the Search box, enter FWS–R8–ES–2013–0104, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule link to locate the document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2013–0104; Division of Policy and Directives