FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 10–71; FCC 11–31]

Amendment of the Commission's Rules Related to Retransmission Consent

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (FCC) seeks comment on a series of proposals to streamline and clarify the Commission's rules concerning or affecting retransmission consent negotiations. The Commission believes that these rule changes could allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers.

DATES: Submit comments on or before May 27, 2011, and submit reply comments on or before June 27, 2011. See **SUPPLEMENTARY INFORMATION** section for additional comment dates.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site: http://www.fcc.gov/cgb/ecfs/.* 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 e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act proposed information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *nfraser@omb.eop.gov* or via fax at 202–395–5167. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov,* of the Media Bureau, Policy Division, 202–418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at 202–418–2918. To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of the ICR as show in the Supplementary Information section below (3060–0649) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM), MB Docket No. 10–71, FCC No. 11–31, adopted and released March 3, 2011. The full text of the NPRM is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; the contractor's Web site, *http://www.bcpiweb.com;* or by calling 800–378–3160, facsimile 202–488–5563, or e-mail *FCC@BCPIWEB.com.* Copies of the NPRM also may be obtained via the Commission's Electronic Comment Filing System (ECFS) by entering the docket number, MB Docket No. 10–71. Additionally, the complete item is available on the Federal Communications Commission's Web site at *http://www.fcc.gov.*

This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before May 27, 2011.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

OMB Control Number: 3060–0649.

Title: Sections 76.1601, Deletion or Repositioning of Broadcast Signals, 76.1617 Initial Must-Carry Notice, 76.1607 and 76.1708 Principal Headend.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Businesses or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 3,380 respondents and 4,200 responses.

Estimated Time per Response: 0.5 to 2 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement; Recordkeeping requirement.

Total Annual Burden: 2,400 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Section 4(i) of the

Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: No need for confidentiality required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 76.1601 requires that effective April 2, 1993, a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

47 CFR 76.1607 states that a cable operator shall provide written notice by certified mail to all stations carried on its system pursuant to the must-carry rules at least 60 days prior to any change in the designation of its principal headend.

47 CFR 76.1617(a) states within 60 days of activation of a cable system, a cable operator must notify all qualified NCE stations of its designated principal headend by certified mail.

47 CFR 76.1617(b) states within 60 days of activation of a cable system, a cable operator must notify all local commercial and NCE stations that may not be entitled to carriage because they either:

(1) Fail to meet the standards for delivery of a good quality signal to the cable system's principal headend, or

(2) May cause an increased copyright liability to the cable system.

47 CFR 76.1617(c) states within 60 days of activation of a cable system, a cable operator must send by certified mail a copy of a list of all broadcast television stations carried by its system and their channel positions to all local commercial and noncommercial television stations, including those not designated as must-carry stations and those not carried on the system.

47 CFR 76.1708(a) states that the operator of every cable television system shall maintain for public inspection the designation and location of its principal headend. If an operator changes the designation of its principal headend, that new designation must be included in its public file.

The NPRM proposes to redesignate 47 CFR 76.1601 as 47 CFR 76.1601(a), and to add a new 47 CFR 76.1601(b). If adopted, new 47 CFR 76.1601(b) would require broadcast television stations and multichannel video programming distributors (MVPDs) to notify affected subscribers of the potential deletion of a broadcaster's signal a minimum of 30 days in advance of a retransmission consent agreement's expiration, unless a renewal or extension agreement has been executed, and regardless of whether the signal is ultimately deleted. All other remaining existing information collection requirements would stay as they are, and the various burden estimates would be revised to reflect new 47 CFR 76.1601(b).

Synopsis of the Notice of Proposed Rulemaking

I. Introduction

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on a series of proposals to streamline and clarify our rules concerning or affecting retransmission consent negotiations. Our primary objective is to assess whether and how the Commission rules in this arena are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and, to the extent possible, minimize video programming service disruptions to consumers.

2. The Communications Act of 1934, as amended (the Act), prohibits cable systems and other multichannel video programming distributors (MVPDs) from retransmitting a broadcast station's signal without the station's consent. 47 U.S.C. 325(b)(1)(A). This consent is what is known as "retransmission consent." The law requires broadcasters and MVPDs to negotiate for retransmission consent in good faith. *See* 47 U.S.C. 325(b)(3)(C)(ii) and (iii); 47 CFR 76.65. Since Congress enacted the retransmission consent regime in 1992, there have been significant changes in the video programming marketplace. One such change is the form of compensation sought by broadcasters. Historically, cable operators typically compensated broadcasters for consent to retransmit the broadcasters' signals through in-kind compensation, which might include, for example, carriage of additional channels of the broadcaster's programming on the cable system or advertising time. *See, e.g., General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee,* Memorandum Opinion and Order, 19 FCC Rcd 473, 503, para. 56 (2004). Today, however, broadcasters are increasingly seeking and receiving monetary compensation from MVPDs in exchange for consent to the retransmission of their signals. Another important change concerns the rise of competitive video programming providers. In 1992, the only option for many local broadcast television stations seeking to reach MVPD customers in a particular Designated Market Area (DMA) was a single local cable provider. Today, in contrast, many consumers have additional options for receiving programming, including two national direct broadcast satellite (DBS) providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet. One result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.

3. Accordingly, we have concluded that it is appropriate for us to reexamine our rules relating to retransmission consent. We consider below revisions to the retransmission consent and related rules that we believe could allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. Accordingly, as discussed below, we seek comment on rule changes that would:

- Provide more guidance under the good faith negotiation requirements to the negotiating parties by:
  - Specifying additional examples of per se violations in § 76.65(b)(1) of the Commission's rules; and
  - Further clarifying the totality of the circumstances standard of § 76.65(b)(2) of the Commission's rules;
- Improve notice to consumers in advance of possible service disruptions by extending the coverage of our notice rules to non-cable MVPDs and broadcasters as well as cable operators, and specifying that, if a renewal or extension agreement has not been executed 30 days in advance of a retransmission consent agreement's expiration, notice of potential deletion of a broadcaster's signal must be given to consumers regardless of whether the signal is ultimately deleted;
- Extend to non-cable MVPDs the prohibition now applicable to cable operators on deleting or repositioning a local commercial television station during ratings "sweeps" periods; and
- Allow MVPDs to negotiate for alternative access to network programming by eliminating the Commission's network non-duplication and syndicated exclusivity rules.

We also seek comment on any other revisions or additions to our rules within the scope of our authority that would improve the retransmission consent negotiation process and help protect consumers from programming disruptions. The Commission does not have the power to force broadcasters to consent to MVPD carriage of their signals nor can the Commission order binding arbitration. *See infra* para. 18. *See also* Letter from Chairman Julius Genachowski, FCC, to The Honorable John F. Kerry, Chairman, Subcommittee on Communications, Technology, and the Internet, Committee on Commerce, Science, and Transportation, U.S. Senate, at 1 (Oct. 29, 2010) ("[C]urrent law does not give the agency the tools necessary to prevent service disruptions.").

II. Background

A. Retransmission Consent

4. The current regulatory scheme for carriage of broadcast television stations was established by the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Public Law 102–385, 106 Stat. 1460 (1992). In 1992, unlike today, local broadcast television stations seeking to reach viewers in a particular DMA through an MVPD service often had only one option—namely, a single local cable provider. While broadcasters benefited from cable carriage, Congress recognized that broadcast programming "remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations." *See* 1992 Cable Act sec. 2(a)(19). In adopting the retransmission consent provisions of the 1992 Cable Act, Congress found that cable operators obtained great benefit from the local broadcast signals that they were able to carry without broadcaster consent or copyright liability, and that this benefit resulted in an effective subsidy to cable operators. *See id.* Accordingly, Congress adopted its retransmission consent provisions to allow broadcasters to negotiate to receive compensation for the value of their signals. Through the 1992 Cable Act, Congress modified the Communications Act, inter alia, to provide television stations with certain carriage rights on cable television systems in their local market. *See* 47 U.S.C. 325, 534.

5. Pursuant to the statutory provisions enacted in 1992, television broadcasters elect every three years whether to proceed under the retransmission consent requirements of section 325 of the Act, or the mandatory carriage (must carry) requirements of sections 338 and 614 of the Act. *See* 47 U.S.C. 325(b), 338, 534. Section 338 governs mandatory carriage on satellite, and Section 614 (codified at 47 U.S.C. 534) governs mandatory carriage of commercial television stations on cable. There are important differences between the retransmission consent and must carry regimes. Specifically, a broadcaster electing must carry status is guaranteed carriage on cable systems in its market, and the cable operator is generally prohibited from accepting or requesting compensation for carriage, whereas a broadcaster who elects carriage under the retransmission consent rules may insist on compensation. In order to reach MVPD customers, most broadcasters elected carriage under the must carry rules in the early years following enactment of the new regime. By 2009, only 37 percent of stations relied on must carry. *See* Omnibus Broadband Initiative, *Spectrum Analysis: Options for Broadcast Spectrum,* OBI Technical Paper No. 3, at 8 (June 2010); *see also id.* at Exhibit C (showing decrease in must carry elections and increase in retransmission consent elections since 2003); *id.* at n. 23.

6. Since 2001, broadcasters have also had mandatory carriage rights on DBS systems. The Satellite Home Viewer Improvement Act of 1999 (SHVIA) gives satellite carriers a statutory copyright license to retransmit local broadcast stations to subscribers in the station's market, also known as "local-into-local" service. SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (IPACORA) (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Public Law 106–113, 113 Stat. 1501, Appendix I (1999). Generally, when a satellite carrier provides local-into-local service pursuant to the statutory copyright license, the satellite carrier is obligated to carry any qualified local television station in the particular DMA that has made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA or the station does not provide a good quality signal to the carrier's local receive facility. *See* 47 U.S.C. 338.

7. As an alternative to seeking mandatory carriage, a broadcaster may elect carriage under the retransmission consent rules, which allow for negotiations with cable operators and other MVPDs for carriage. A broadcaster electing retransmission consent may accept or request compensation for carriage in retransmission consent negotiations. The legislative history of section 325 indicates that Congress intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations." S. Rep. No. 92, 102nd Cong., 1st Sess. 1991, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169. Under section 325(b)(1)(A) of the Act, if a broadcaster electing retransmission consent and an MVPD are unable to reach an agreement, or do not agree to the extension of an existing agreement prior to its expiration, then the MVPD may not retransmit the broadcasting station's signal because the signal cannot be carried without the broadcast station's consent. Section 325(b)(1)(A) of the Act states, "No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—(A) with the express authority of the originating station. * * *" 47 U.S.C. 325(b)(1). Pursuant to section 325(b)(2), there are five circumstances in which the retransmission restrictions do not apply.

B. Good Faith Negotiations

8. Initially, section 325 of the Act did not include any standards governing retransmission consent negotiations between broadcasters and MVPDs. That changed in 1999 when Congress adopted SHVIA, which contained provisions concerning the satellite industry, as well as television broadcast stations and terrestrial MVPDs. Specifically, Congress required broadcast television stations engaging in retransmission consent negotiations with any MVPD to negotiate in good faith. *See* 47 U.S.C. 325(b)(3)(C). SHVIA also prohibited broadcasters from entering into exclusive retransmission consent agreements. *See* 47 U.S.C. 325(b)(3)(C). Congress required the Commission to revise its regulations so that they:

> * * * prohibit a television broadcast station that provides retransmission consent from * * * failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.

47 U.S.C. 325(b)(3)(C)(ii). The Joint Explanatory Statement of the Committee of Conference (Conference Report) did not explain or clarify the statutory language, instead merely stating that the regulations would:

* * * prohibit a television broadcast station from * * * refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The [Commission] may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.

Conference Report at 13. This good faith negotiation obligation was later made reciprocal to MVPDs as well as broadcasters by the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Public Law 108–447, 118 Stat. 2809 (2004).

9. In implementing the good faith negotiation requirement, the Commission concluded "that the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission. Instead, the order concludes that Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement." *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity,* 65 FR 15559, March 23, 2000 (*Good Faith Order*). Given the dearth of guidance in section 325 and its legislative history, the Commission drew guidance from analogous statutory standards, such as the good faith bargaining requirement of section 8(d) of the Taft-Hartley Act. *Id.* The Commission also looked to its own rules implementing the good faith negotiation requirement of section 251 of the Act, which largely relies on labor law precedent. *Id.*

10. The Commission adopted a two-part framework to determine whether broadcasters and MVPDs negotiate retransmission consent in good faith. First, the Commission established a list of seven objective good faith negotiation standards, the violation of which is considered a per se breach of the good faith negotiation obligation. *See* 47 CFR 76.65(b)(1). Second, even if the seven specific standards are met, the Commission may consider whether, based on the totality of the circumstances, a party failed to negotiate retransmission consent in good faith. *See* 47 CFR 76.65(b)(2). The Commission has stated that, where "a broadcaster is determined to have failed to negotiate in good faith, the Commission will instruct the parties to renegotiate the agreement in accordance with the Commission's rules and section 325(b)(3)(C)." *Good Faith Order.* While the Commission did not find any statutory authority to impose damages, it noted "that, as with all violations of the Communications Act or the Commission's rules, the Commission has the authority to impose forfeitures for violations of section 325(b)(3)(C)." *Id.* In discussing remedies for a violation of the good faith negotiation requirement, the Commission did not reference continued carriage as a potential remedy, and stated that it could not adopt regulations permitting retransmission during good faith negotiation or while a good faith complaint is pending before the Commission, absent broadcaster consent to such retransmission. *Id.*

11. The Commission concluded that Congress did not intend for it to sit in judgment of the terms of every executed retransmission consent agreement. *Id.* Rather, the Commission said, "[w]e believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process." *Id.* In adopting the good faith negotiation rules, the Commission pointed to commenters' arguments that intrusive Commission action was unnecessary because of the thousands of retransmission consent agreements that had been concluded successfully since the adoption of the 1992 Cable Act. *Id.*

12. There have been very few complaints filed alleging violations of the Commission's good faith rules. For example, in 2001, the former Cable Services Bureau issued an order denying EchoStar Satellite Corporation's retransmission consent complaint alleging that Young Broadcasting, Inc. et al. failed to negotiate in good faith. *See EchoStar Satellite Corp.* v. *Young Broadcasting, Inc. et al.,* Memorandum Opinion and Order, 16 FCC Rcd 15070 (CSB 2001). More recently, in 2007, the Media Bureau issued an order denying Mediacom Communications Corporation's (Mediacom) retransmission consent complaint alleging that Sinclair Broadcast Group, Inc. (Sinclair) failed to negotiate in good faith. *See Mediacom Communications Corp.* v. *Sinclair Broadcast Group, Inc.,* Memorandum Opinion and Order, 22 FCC Rcd 47 (MB 2007). Although Mediacom filed an application for review of the Media Bureau's order, Mediacom and Sinclair subsequently announced the completion of a retransmission consent agreement, and the Media Bureau thus granted Mediacom's motion to dismiss the case with prejudice. *See Mediacom Communications Corp.* v. *Sinclair Broadcast Group, Inc.,* Order, 22 FCC Rcd 11093 (MB 2007). Also in 2007, the Media Bureau ruled that a cable operator failed to negotiate in good faith under the totality of the circumstances, and ordered resumption of negotiations within 10 days and status updates every 30 days. *See* Letter to Jorge L. Bauermeister, 22 FCC Rcd 4933 (MB 2007); *see also infra* para. 33. Further, in 2009, the Media Bureau issued an order denying ATC Broadband LLC and Dixie Cable TV, Inc.'s retransmission consent complaint alleging that Gray Television Licensee, Inc. failed to negotiate in good faith. *See ATC Broadband LLC and Dixie Cable TV, Inc.* v. *Gray Television Licensee, Inc.,* Memorandum Opinion and Order, 24 FCC Rcd 1645 (MB 2009). Also in 2009, Mediacom filed another retransmission consent complaint alleging that Sinclair failed to negotiate in good faith, but, following an agreed-upon extension, the parties announced the completion of a retransmission consent agreement and the Media Bureau granted Mediacom's motion to dismiss the case with prejudice. *See Mediacom Communications Corp.* v. *Sinclair Broadcast Group, Inc.,* Order, 25 FCC Rcd 257 (MB 2010). Accordingly, there is little Commission precedent regarding the good faith rules, and there has only been one finding that a party to a retransmission consent agreement negotiated in bad faith.

C. Petition for Rulemaking

13. In March 2010, 14 MVPDs and public interest groups filed a rulemaking petition arguing that the Commission's retransmission consent regulations are outdated and are harming consumers. Time Warner Cable Inc. et al. Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10–71, at 1 (filed Mar. 9, 2010) (the Petition). The petitioners argued that changes in the marketplace, and the increasingly contentious nature of retransmission consent negotiations, justify revisions to the Commission's rules governing retransmission consent. Specifically, the Petition stated that, in 1992, Congress acted out of "concern that cable operators were functioning as monopolies and in turn threatened to undercut the public interest benefits associated with over-the-air broadcasting." Petition at 2–3 (footnote omitted). The petitioners argued that broadcasters today "enjoy distribution options beyond the cable incumbent in

nearly every [DMA].” *Id.* at 4. The Petition also contended that Congress expected broadcaster demands for compensation, if any, to be modest, because of the benefits that broadcasters derive from carriage. *Id.* The Petition argued that the recent shift of bargaining power to broadcasters has resulted in retransmission consent negotiations in which MVPDs must either agree to the significantly higher fees requested by broadcasters or lose access to programming. *Id.* at 5.

14. On March 19, 2010, the Media Bureau released a Public Notice inviting public comment on the Petition. *See* Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* DA 10–474 (MB 2010) (the Public Notice). Following the grant of an extension, comments were due May 18, 2010, and reply comments were due June 3, 2010. *See Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* Order, 25 FCC Rcd 3334 (MB 2010). While some commenters agree with the petitioners that the retransmission consent regime is in need of reform, others argue that the retransmission consent process is working as intended and that the shift in retransmission consent pricing represents a market correction reflecting the increased competition faced by incumbent cable operators.

D. Consumer Impact

15. In the past year, we have seen high profile retransmission consent disputes result in carriage impasses. When Cablevision Systems Corp. (Cablevision) and News Corp.'s agreement for two Fox-affiliated television stations and one MyNetwork TV-affiliated television station expired on October 15, 2010 and the parties did not reach an extension or renewal agreement, Cablevision was forced to discontinue carriage of the three stations until agreement was reached on October 30, 2010. The carriage impasse resulted in affected Cablevision subscribers being unable to view on cable the baseball National League Championship Series, the first two games of the World Series, a number of NFL regular season games, and other regularly scheduled programs. Previously, on March 7, 2010, Walt Disney Co. (Disney) and Cablevision were unable to reach agreement on carriage of Disney's ABC signal for nearly 21 hours after a previous agreement expired. As a result, the approximately 3.1 million households served by Cablevision were unable to view the first 14 minutes of the Academy Awards through their cable provider. Most recently, we are aware of losses of programming resulting from retransmission consent carriage impasses involving DISH Network and Chambers Communications Corp., Time Warner Cable and Smith Media LLC, DISH Network and Frontier Radio Management, DirecTV and Northwest Broadcasting, Mediacom and KOMU–TV, and Full Channel TV and Entravision.

16. In addition, consumers have been concerned about other high profile retransmission consent negotiations that seemed close to an impasse. For example, a retransmission consent agreement with Time Warner Cable for News Corp.'s Fox television stations expired at midnight on December 31, 2009. A statement from FCC Chairman Julius Genachowski at the time acknowledged that a failure to conclude a new agreement could harm consumers, noting that “[c]ompanies shouldn't force cable-watching football fans to scramble for other means of TV delivery on New Year's weekend.” *See* News Release, *FCC Chairman Julius Genachowski Statement on Retransmission Disputes,* (rel. Dec. 31, 2009). Ultimately, Fox and Time Warner reached agreement without any carriage interruption, but consumers who were aware of the dispute were unsure if they would have continued access to Fox programming through their Time Warner subscription. We are concerned about the uncertainty that consumers have faced regarding their ability to continue receiving certain broadcast television stations during recent contentious retransmission consent negotiations. The early termination fees imposed by some MVPDs may cause consumers faced with a potential retransmission consent negotiating impasse to be unwilling or unable to consider switching to another MVPD to maintain access to a particular broadcast station. *See infra* para. 30. Accordingly, recognizing the consumer harm caused by retransmission consent negotiation impasses and near impasses, the Commission seeks comment on certain proposals to modify the rules governing retransmission consent.

III. Discussion

17. Our goal in this proceeding is to take appropriate action, within our existing authority, to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services. Subscribers are the innocent bystanders adversely affected when broadcasters and MVPDs fail to reach an agreement to extend or renew their retransmission consent contracts. In light of the changing marketplace, our proposals in this NPRM are intended to update the good faith rules and remedies in order to better utilize the good faith requirement as a consumer protection tool. While one way to protect consumers' interests might be for the Commission to order that a station continue to be carried notwithstanding the parties' failure to reach an agreement, the statute does not authorize carriage without the station's consent, as discussed below. Therefore, we have identified other measures that we could take to improve the process and decrease the occurrence of these disruptions. As detailed in this NPRM, we seek comment on these measures and on others that could be beneficial and constructive. Is there an impact on the basic service rate that consumers pay as a result of the retransmission consent fees or disputes?

18. As a threshold matter, we note that the Petition proposed, among other suggestions, that the Commission adopt a mandatory arbitration mechanism for retransmission consent disputes, and provide for mandatory interim carriage while an MVPD negotiates in good faith or while dispute resolution proceedings are pending. Petition at 31–40. In response to the Public Notice seeking comment on the Petition, some commenters have agreed that the Commission should adopt mandatory dispute resolution procedures and/or interim carriage mechanisms. In contrast, other commenters have argued that the Commission should not, as a matter of policy, adopt mandatory dispute resolution procedures or interim carriage mechanisms, and/or that in any event the Commission lacks authority to adopt such procedures and mechanisms. We do not believe that the Commission has authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations. First, regarding interim carriage, examination of the Act and its legislative history has convinced us that the Commission lacks authority to order carriage in the absence of a broadcaster's consent due to a retransmission consent dispute. Rather, section 325(b) of the Act expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent. 47 U.S.C. 325(b)(1)(A) (“No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—(A) with the express authority of the originating station”). Furthermore, consistent with the

statutory language, the legislative history of section 325(b) states that the retransmission consent provisions were not intended "to dictate the outcome of the ensuing marketplace negotiations" and that broadcasters would retain the "right to control retransmission and to be compensated for others' use of their signals." S.Rep.No. 92, 102nd Cong., 1st Sess. 1991, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169. We thus interpret section 325(b) to prevent the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement. Consistent with this interpretation, the Commission previously found that it has "no latitude * * * to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission." *Good Faith Order.* Contrary to the suggestion of some commenters, section 4(i) of the Act does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act, and thus does not support Commission-ordered carriage in this context. Second, we believe that mandatory binding dispute resolution procedures would be inconsistent with both section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements, and with the Administrative Dispute Resolution Act (ADRA), which authorizes an agency to use arbitration "whenever all parties consent." 5 U.S.C. 575(a)(1).

19. In light of the statutory mandate in section 325 and the restrictions imposed by the ADRA, we do not believe that we have authority to require either interim carriage requirements or mandatory binding dispute resolution procedures. Parties may comment on that conclusion. We seek comment below on other ways the Commission can protect the public from, and decrease the frequency of, retransmission consent negotiation impasses within our existing statutory authority.

A. Strengthening the Good Faith Negotiation Standards of § 76.65(b)(1) of the Commission's Rules

20. When the Commission originally adopted the good faith standards in 2000, the circumstances were different from the conditions industry and consumers face today. At that time programming disruptions due to retransmission consent disputes were rare. The Commission's approach then was to provide broad standards of what constitutes good faith negotiation but generally leave the negotiations to the parties. *See, e.g., Good Faith Order* ("[T]he Commission concluded in the *Broadcast Signal Carriage Order* that Congress did not intend that the Commission should intrude in the negotiation of retransmission consent. We do not interpret the good faith requirement of SHVIA to alter this settled course and require that the Commission assume a substantive role in the negotiation of the terms and conditions of retransmission consent."). As the Commission stated, "The statute does not appear to contemplate an intrusive role for the Commission with regard to retransmission consent." *See id.* Instead, the Commission stated that "[w]e believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process." *See id.* The good faith provision of SHVIA was specifically targeted at constraining unacceptable negotiating conduct on the part of broadcasters, but Congress subsequently recognized that it is necessary to constrain unacceptable retransmission consent negotiating conduct of MVPDs as well as broadcasters, and thus imposed a reciprocal bargaining obligation in SHVERA. *See, e.g., Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation,* 70 FR 40216, July 13, 2005 (*SHVERA Reciprocal Bargaining Order*) ("Section 207 [of SHVERA] * * * amends [section 325(b)(3)(C) of the Act] to impose a reciprocal good faith retransmission consent bargaining obligation on [MVPDs]. This section alters the bargaining obligations created by [SHVIA] which imposed a good faith bargaining obligation only on broadcasters.") (footnote omitted). In recent times, the actual and threatened service disruptions resulting from increasingly contentious retransmission consent disputes present a growing inconvenience and source of confusion for consumers. We believe that these changes in circumstances support reevaluation of the good faith rules, particularly to ameliorate the impact of retransmission consent negotiations on innocent consumers. We note that recent letters from members of Congress have emphasized the effect of retransmission consent negotiations on consumers.

21. As discussed above, in implementing the reciprocal good faith negotiation requirement of section 325 of the Act, the Commission established a list of seven objective good faith negotiation standards. Violation of any of these standards by a broadcast station or MVPD is considered a per se breach of its obligation to negotiate in good faith. The record indicates that there is some uncertainty in the marketplace about whether certain conduct constitutes a failure to negotiate in good faith. Accordingly, we seek comment on augmenting our rules to include additional objective good faith negotiation standards, the violation of which would be considered a per se breach of § 76.65 of the Commission's rules. We believe that additional per se good faith negotiation standards could increase certainty in the marketplace, thereby promoting the successful completion of retransmission consent negotiations and protecting consumers from impasses or near impasses. In addition, we seek comment on clarifying various aspects of our existing good faith rules.

22. First, we seek comment on whether it should be a per se violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision. In response to the Public Notice seeking comment on the Petition, certain commenters discussed network involvement in the retransmission consent process. Some commenters have argued that the Commission should consider preventing networks from dictating whether and by what terms an affiliated station may grant retransmission consent. Others have argued that provisions in network-affiliate agreements do not interfere with the requirement that broadcasters negotiate retransmission consent in good faith. Interested parties have argued that, in recent retransmission consent negotiations, a network's exercise of its contractual approval right has hindered the progress of the negotiations. The good faith rules currently require the Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent and not unreasonably delay negotiations. 47 CFR 76.65(b)(1)(ii) and (iii). If a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has arguably impaired its own ability to designate a representative who can

bind the station in negotiations, contrary to our rules. Do provisions in network affiliation agreements giving the network approval rights over the grant of retransmission consent by its affiliate represent a reasonable exercise by a network of its distribution rights in network programming? If so, in considering revisions to the good faith rules, how should the Commission balance the networks' rights against the stations' obligation to negotiate in good faith and the regulatory goal of protecting consumers from service disruptions? We seek comment on the appropriate parameters of network involvement in retransmission consent negotiations. We would also welcome comment and data regarding how frequently a network's assertion of the right to review or approve an agreement affects negotiations. In our consideration of the role of the network in its affiliates' retransmission consent negotiations, we do not intend to interfere with the flow of revenue between networks and their affiliates. We recognize the special value of broadcast network programming to local broadcast television stations and to MVPDs. Accordingly, we do not propose to prevent a network from contracting to receive a portion of its affiliates' retransmission consent fees. Rather, we seek comment on the permissible scope of a network's involvement in the negotiations or right to approve an agreement. If the Commission decides to prohibit stations from granting networks the right to approve their affiliates' retransmission consent agreements, should we, on a going-forward basis, abrogate any provisions restricting an affiliate's power to grant retransmission consent without network approval that appear in existing agreements?

23. Second, we seek comment on whether it should be a per se violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned. Such consent might be reflected in local marketing agreements (LMAs), Joint Sales Agreements (JSAs), shared services agreements, or other similar agreements. Some commenters have noted problems that occur when one station or station group negotiates retransmission consent on behalf of a station or station group that is not commonly owned. The Commission believes that, when a station relinquishes its responsibility to negotiate retransmission consent, there may be delays to the negotiation process, and negotiations may become unnecessarily complicated if an MVPD is forced to negotiate with multiple parties with divergent interests, potentially including interests that extend beyond a single local market. The proposal on which we seek comment would effectively prohibit joint retransmission consent negotiations by stations that are not commonly owned. Should the Commission, on a going-forward basis, abrogate any such terms that appear in existing agreements? One commenter has argued that the negotiating arrangements about which others complain are rare, and that they are largely in small markets "where such sharing agreements may well be necessary for the stations to survive economically." Accordingly, we seek comment on the prevalence of agreements that grant one station or station group the right to negotiate or approve the retransmission consent agreement of a station or station group that is not commonly owned; the impact of such arrangements on the negotiation process; and the potential harms and benefits of prohibiting such agreements. How should the Commission balance any asserted benefits of such sharing agreements against the goal of protecting consumers from service disruptions?

24. Third, we seek comment on whether it should be a per se violation for a Negotiating Entity to refuse to put forth bona fide proposals on important issues. One commenter has stated that a refusal to make proposals as to key issues is a bad faith tactic in retransmission consent negotiations. How should we identify the category of issues about which a Negotiating Entity is required to put forth a bona fide proposal? How should we determine what constitutes a bona fide proposal, or whether a proposal is sufficiently unreasonable as to constitute bad faith? We note that the Commission has defined a bona fide request in the context of a programmer's request for leased access on a system of a small cable operator. *See* 47 CFR 76.970(i)(3).

25. Fourth, we seek comment on whether it should be a per se violation for a Negotiating Entity to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement. We seek comment on whether 30 days from the expiration of the retransmission consent agreement is the appropriate time frame within which to require non-binding mediation. In previous retransmission consent disputes, the Commission has encouraged parties to engage in voluntary dispute resolution mechanisms as a means to reach agreement because a neutral third party may be able to facilitate agreement where the parties have otherwise failed. The Commission previously stated its belief "that voluntary mediation can play an important part in the facilitation of retransmission consent and [we] encourage parties involved in protracted retransmission consent negotiations to pursue mediation on a voluntary basis." *See Good Faith Order* (also stating that the Commission would revisit the issue of mandatory retransmission consent mediation if its experience in enforcing the good faith provision indicates that it is necessary). If parties are unable to reach agreement on their own and the expiration of their existing agreement is imminent, should we consider it bad faith for them to refuse to participate in non-binding mediation? Would mediation advance the successful completion of retransmission consent negotiations, even if it is not binding on the parties? Although as noted above we do not believe we have authority to mandate binding arbitration, we believe that we have authority to require non-binding mediation. Because the mediation would be non-binding, we believe that it would be consistent with the statutory prohibition on retransmission without the originating station's express authority. Non-binding mediation would also be consistent with the ADRA, which prohibits compelled binding arbitration. *See* 5 U.S.C. 571 through 584. We seek comment on our proposal to require non-binding mediation. If we require mediation, how should a mediator be selected, and how should the parties determine who is responsible for the costs of mediation? How would the ground rules of the mediation be determined?

26. Fifth, we seek comment on what it means to "unreasonably" delay retransmission consent negotiations. Section 76.65(b)(1)(iii) of the Commission's rules currently provides that "[r]efusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations," constitutes a violation of the Negotiating Entity's duty to negotiate retransmission consent in good faith. 47 CFR 76.65(b)(1)(iii). Commenters report that negotiations have been adversely affected by a party—either a broadcaster or an MVPD—delaying the commencement or progress of a negotiation as a tactic to gain advantage rather than out of necessity. We believe that delaying retransmission consent negotiations could predictably and intentionally lead

to the type of impasse and threat of disruption that inconveniences consumers. Accordingly, we seek comment on what standards we should consider in determining whether a Negotiating Entity has acted in a manner that "unreasonably" delays retransmission consent negotiations and thus violates the duty to negotiate in good faith.

27. Sixth, we seek comment on whether a broadcaster's request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market "significantly viewed" (SV) station violates § 76.65(b)(1)(vi) of the Commission's rules. Section 76.65(b)(1)(vi) of the Commission's rules provides that "[e]xecution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor" is a violation of the Negotiating Entity's duty to negotiate in good faith. *See* 47 CFR 76.65(b)(1)(vi). Despite the existence of this rule, in the Commission's proceeding implementing section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA), DISH Network L.L.C. requested that the Commission adopt a rule to "clarify that tying retransmission consent to restrictions on SV station carriage" violates the requirement that parties negotiate retransmission consent in good faith. *See* Comments and Petition for Further Rulemaking of DISH Network L.L.C., MB Docket No. 10–148, at 9 (filed Aug. 17, 2010). DISH Network stated that some "local stations have tied the grant of their retransmission consent for local-into-local service to concessions from satellite carriers that the carriers will not introduce any SV stations of the same network." *Id.* (footnote omitted). We note that the Commission previously interpreted § 76.65(b)(1)(vi) of the Commission's rules narrowly, as involving collusion between a broadcaster and an MVPD. *See, e.g., Good Faith Order* ("For example, Broadcaster A is prohibited from agreeing with MVPD B that it will not reach retransmission consent with MVPD C."); *SHVERA Reciprocal Bargaining Order* ("As is evidenced by the discussion in the *Good Faith Order,* that provision is intended to cover collusion between a broadcaster and an MVPD requiring non-carriage by another MVPD * * *."); *see also ATC Broadband LLC and Dixie Cable TV, Inc.* v. *Gray Television Licensee, Inc.,* 24 FCC Rcd at 1649, para. 7. We seek comment on whether to interpret this rule more expansively to preclude a broadcast station from executing an agreement prohibiting an MVPD from carrying an out-of-market SV station that might otherwise be available to consumers as a partial substitute for the in-market station's programming, in the event of a retransmission consent negotiation impasse. Should we expand our prior interpretation of this rule to cover any additional scenarios? Have there been instances in which an MVPD would have carried an out-of-market SV station, but for a local broadcaster's request or requirement to the contrary? Do the holders of the rights to certain programming, including but not limited to broadcast networks, impose geographic restrictions on the stations to which they license programming, such that an out-of-market SV station may be prohibited from consenting to carriage, in any event? We also invite comment on whether stations have threatened to delay or refuse to reach a retransmission agreement unless the MVPD commits to forego carriage of out-of-market SV stations without including such commitment in the executed agreement. Do such threats circumvent the rule as written by keeping the commitment out of the executed document? Should we revise the rule to prevent such circumvention?

28. Finally, we seek comment on whether there are any additional actions or practices that should be deemed to constitute per se violations of a Negotiating Entity's duty to negotiate retransmission consent agreements in good faith under § 76.65 of the Commission's rules, or that we should otherwise prohibit in order to protect consumers. For example, if a broadcaster or MVPD repeatedly insists on month-to-month retransmission consent agreements or a new agreement term of less than one year, should that constitute a per se violation of the Negotiating Entity's duty to negotiate retransmission consent in good faith? Month-to-month retransmission consent agreements are different from short-term extensions to existing retransmission consent agreements for the purpose of negotiating a mutually satisfactory long-term retransmission consent agreement, which the Commission encourages as a means of avoiding a loss of programming. In addition, how should the Commission view the required inclusion of a "most favored nation" (MFN) clause in a retransmission consent agreement? An MFN clause refers to an agreement that if Party A awards terms or conditions to a third party that are more favorable than those currently in place with Party B, then Party A must offer the more favorable terms or conditions to Party B. How often are MFN clauses included in retransmission consent agreements, what is their intended purpose, and what is their effect on retransmission consent negotiations?

29. With respect to other practices the Commission should consider, one commenter stated, "Small and mid-size MVPDs could greatly enhance their ability to negotiate with broadcasters if they were permitted to pool their resources, appoint an agent, and negotiate as a group." We seek comment on this proposal, including how to reconcile it with the proposal described above that would prevent a broadcast station from granting to another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned. In addition, we ask parties to comment on whether small and new entrant MVPDs are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so, whether this is fair. And, several commenters have suggested that the Commission should address the ability of broadcasters to condition retransmission consent on the purchase of other programming services, such as the programming of affiliated non-broadcast networks. We note that a number of commenters see problems with such broadcaster requirements. Is this something that the Commission should consider in evaluating whether broadcasters have negotiated in good faith?

30. Are there additional actions that should be listed as presumptive breaches of good faith but subject to arguments rebutting the presumption in special circumstances? Would the approach of rebuttable presumptions rather than per se violations offer beneficial flexibility or diminish the benefits of greater specificity in the good faith rule? We also invite comment on ways the Commission can strengthen the remedies available upon finding a violation of the good faith standards to encourage compliance with the rules. Are there additional penalties that the Commission can impose for failure to negotiate in good faith that would provide a meaningful incentive for compliance with the good faith standard, such as considering such failure in the context of license renewals, including, *e.g.,* satellite and CARS licenses? *See, e.g.,* 47 CFR 25.102, 25.156, 25.160, 78.11 *et seq.;* 47 U.S.C. 301, 308(b), 309. Finally, to what extent do MVPDs impose early termination

fees (ETFs) on their subscribers, and what effect, if any, do ETFs have on retransmission consent negotiations and on consumers' ability to switch MVPDs in the event of a negotiation impasse? What actions, if any, could the Commission take to address any problems involving ETFs?

B. Specification of the Totality of the Circumstances Standard of § 76.65(b)(2) of the Commission's Rules

31. We seek comment on revising the "totality of the circumstances" standard for determining whether actions in the negotiating process are taken in good faith, in an effort to improve the standard's utility and to better serve innocent consumers. As described in greater detail below, we invite comment on how the Commission can more effectively evaluate complaints that do not allege per se violations but involve behavior calculated to threaten disruption of consumer access as a negotiating tactic. We seek comment on particular behavior that the Commission should evaluate in the context of the "totality of the circumstances" standard.

32. Pursuant to § 76.65(b)(2) of the Commission's rules, "a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith * * *." 47 CFR 76.65(b)(2). The Commission has stated, "[w]e do not intend the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties." *Good Faith Order.* Rather, the totality of the circumstances test enables the Commission to consider a complaint alleging that, while a Negotiating Entity did not violate the per se objective standards, its proposals or actions were "sufficiently outrageous," or included terms or conditions not based on competitive marketplace considerations, so as to violate the good faith negotiation requirement. *See id.*

33. Some commenters have argued that the Commission should clarify or expand on the totality of the circumstances standard, including the related concept of competitive marketplace considerations, while others do not support changes to our rules governing retransmission consent. We seek comment on whether to provide more specificity for the meaning and scope of the "totality of the circumstances" standard of § 76.65(b)(2) of the Commission's rules, in order to define more clearly the instances in which a Negotiating Entity may violate this standard. For example, the Media Bureau previously found a violation of the totality of the circumstances standard, in response to a petition filed by WLII/WSUR Licensee Partnership, G.P. against Choice Cable T.V. (Choice), regarding the parties' negotiations for carriage of WLII–TV and its booster stations WSUR–TV and WORA–TV. *See* Letter to Jorge L. Bauermeister, 22 FCC Rcd 4933. While Choice stated that it halted negotiations because it began carrying WLII's programming through arrangements with WORA, Choice failed to provide evidence of a valid retransmission consent agreement with WORA, and thus the Media Bureau found that Choice breached its duty to negotiate in good faith. *See id.* at 4933–34. Are there additional circumstances that the Commission should consider in evaluating the totality of the circumstances, or is the "totality of the circumstances" best left as a general provision to capture those actions and behaviors that we do not now foresee but that may impede productive and fair negotiations? We note that the Commission previously provided examples of bargaining proposals that are presumptively consistent and presumptively inconsistent with competitive marketplace considerations and the good faith negotiation requirement. *See Good Faith Order.* Should any of the potential additional per se violations proposed in Section III.A., above, instead be considered as part of the totality of the circumstances of a particular negotiation? Is it sufficient to retain the existing flexible standard, and look to precedent to provide specificity as warranted? We seek comment on particular ways in which we could provide more specificity in defining when conduct would breach the duty of good faith negotiation under the "totality of the circumstances."

C. Revision of the Notice Requirements

34. Adequate advance notice of retransmission consent disputes for consumers can enable them to prepare for disruptions in their video service. However, such notice can be unnecessarily costly and disruptive when it creates a false alarm, i.e., concern about disruption that does not come to pass, and induces subscribers to switch MVPD providers in anticipation of a service disruption that never takes place. We seek comment on how best to balance useful advance notice against the potential for causing unnecessary anxiety to consumers. We invite comment on how best to revise our notice rules in light of these considerations, as well as the economic impact of notice requirements on both broadcasters and MVPDs.

35. Our current notice requirements apply to cable operators only and are not violated by a failure to provide notice unless service is actually disrupted. Specifically, section 614(b)(9) of the Act requires a cable operator to notify a local commercial television station in writing at least 30 days before either deleting or repositioning that station. 47 U.S.C. 534(b)(9). Section 76.1601 of the Commission's rules further specifies that a cable operator must "provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system." 47 CFR 76.1601. (§§ 76.1602 and 76.1603 of the Commission's rules contain additional requirements for notifying subscribers and cable franchise authorities. 47 CFR 76.1602, 76.1603.) Accordingly, under the current rule, if a cable operator fails to give notice 30 days before the retransmission consent agreement's expiration, and the agreement is ultimately renewed without the station being deleted, then the cable operator has not violated the rule. If, however, the station is ultimately deleted, and the cable operator has not given the required 30 day notice, then the cable operator is in violation of § 76.1601 of the Commission's rules. Of course, the cable operator does not know whether the negotiations will ultimately fail and it will be required to delete the broadcast signal until the agreement actually expires. We note that, notwithstanding the fact that the Commission may not have enforced the current notice requirements in all instances in which a station is deleted without notice, it reserves the right to do so in its discretion. *See Heckler* v. *Chaney,* 470 U.S. 821, 831 (1985) ("an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

36. Some commenters have proposed that we not only clarify but also expand our existing notice requirements so that consumers will have sufficient time to determine their options and take appropriate action in the event that a broadcast signal is deleted from an MVPD's service. Asserted benefits of enhanced notice include providing consumers with sufficient time to obtain access to particular broadcast signals by alternative means, and encouraging the successful completion of renewal

retransmission consent agreements more than 30 days before an existing agreement expires. In contrast, other commenters have argued that enhanced notice would have negative results such as unnecessarily alarming consumers and public officials, making negotiations increasingly contentious, providing broadcasters and rival MVPDs with more time to encourage customers to switch MVPDs, and causing customers who do switch to bear the associated costs unnecessarily if the negotiations are resolved without service disruption. We note that some cable operators have expressed their view that the existing notice requirements are not triggered by failed retransmission consent negotiations because the loss of the signal is not within the cable operators' "control." *See* 47 CFR 76.1603(b) ("Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator."). We clarify that the notice requirements of § 76.1601 of the Commission's rules do not vary based on whether a change is within the cable operator's control. Our focus in this NPRM is on § 76.1601 of the Commission's rules, which requires notice when a cable operator deletes or repositions broadcast signals, rather than § 76.1603 of the Commission's rules, which addresses customer service rules applicable to cable operators. Additionally, even if we were concerned with § 76.1603 of the Commission's rules, we would consider retransmission consent negotiations to be within the control of both parties to the negotiations, and thus, failure to reach retransmission consent agreement would not be an excuse for failing to provide notice.

37. We seek comment on whether we should revise our notice rules to require that notice of potential deletion of a broadcaster's signal be given to consumers once a retransmission consent agreement is within 30 days of expiration, unless a renewal or extension has been executed, and regardless of whether the station's signal is ultimately deleted. Under this approach, if parties have not reached a new agreement prior to 30 days from the agreement's expiration, notice must be given to consumers. Would the requirement to provide such notice encourage the parties to conclude their negotiations more than 30 days before the expiration of the existing agreement, and thus help avoid the station deletions that deprive MVPD customers of local broadcast stations? Should we require notice to be given by any particular means? How should the Commission avoid imposing notice requirements that become so frequent that MVPD customers discount the notices? We have observed that the notices of impending impasses that generally have been provided by broadcasters and MVPDs alike are often little more than ad hominem attacks on the other party. We seek comment on what steps the Commission could take to ensure, to the extent possible, that required notifications provide useful information to consumers instead of merely serving as a further front in the retransmission consent war. For example, LIN objects to notices in which MVPDs "discount the possibility of a carriage interruption." If the parties to a retransmission consent agreement begin giving notice, and subsequently agree to an extension pending further negotiations, should new notice be required of the extension agreement, and when should that notice be given? Where the parties enter into multiple extensions of their existing agreement, should notice be given of each extension? Would multiple notices be confusing to consumers? We also seek comment on extending the notice requirements with respect to deletions associated with retransmission consent disputes to non-cable MVPDs and broadcasters. What sources of authority does the Commission possess to support imposing notice requirements on non-cable MVPDs and broadcasters? *See, e.g.,* 47 U.S.C. 154(i), 301, 303(r), 303(v), 307, 309, 335(a). Would the benefits of advance notice to subscribers, particularly in allowing customers to switch providers in order to avoid service disruptions and possibly reducing their likelihood, exceed the costs to subscribers, particularly in encouraging unnecessary switching of MVPDs when service disruptions do not occur?

D. Application of the "Sweeps" Prohibition to Retransmission Consent Disputes

38. We seek comment on whether we should extend the Commission's "sweeps" prohibition to non-cable MVPDs. Section 614(b)(9) of the Act states:

> A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

47 U.S.C. 534(b)(9). Note 1 to § 76.1601 of the Commission's rules states:

> No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods—generally including February, May, July and November—commonly known as audience sweeps.

47 CFR 76.1601, Note 1. Commenters have expressed differing views about the scope of this provision.

39. We note that the record evidences some confusion about whether, despite the prohibition on deletion during the sweeps period, a broadcaster may require a cable operator to delete the broadcaster's signal when the retransmission consent agreement expires during sweeps and the parties do not reach an extension or renewal agreement. The sweeps prohibition, found in section 614(b)(9) of the Act, states that "No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations." 47 U.S.C. 534(b)(9). The provision is contained within Section 614 which imposes carriage obligations on cable operators. 47 U.S.C. 534(a). Although the language of the statute is broadly worded, there is nothing in section 614(b)(9) to suggest that Congress intended to impose a reciprocal obligation on broadcasters during sweeps. To the contrary, the legislative history explains that "A cable operator may not drop or reposition any such station during a 'sweeps' period when ratings services measure local television audiences." *See* S. Rep. No. 92, 102nd Cong., 1st Sess. 1991, at 86, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1219. Moreover, this reading of the statute would eliminate any tension with the retransmission consent provisions, which provide that "No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except with the express authority of the originating station." 47 U.S.C. 325(b)(1)(A). Interpreting section 614(b)(9) to prohibit broadcasters from withholding retransmission consent during sweeps would run counter to section 325(b)(1)(A)'s express limitation on broadcast carriage without a broadcaster's consent. 47 U.S.C. 534(b)(9), 325(b)(1)(A). While DirecTV

and DISH have stated that permitting broadcasters to withhold programming during sweeps would be contrary to precedent (*citing Northland Cable TV, Inc.,* 23 FCC Rcd 7865 (MB 2008), which cites *Time Warner Cable,* 15 FCC Rcd 7882 (CSB 2006)), we note that neither of those bureau-level decisions involved a retransmission consent agreement expiring during sweeps and the broadcaster requesting deletion of its own signal. In any event, to the extent that language in any prior cases could be read as precluding a broadcaster from requiring a cable operator to delete its signal during sweeps, staff-level decisions are not binding on the Commission. *See Comcast Corp.* v. *FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008). We seek comment on the above analysis.

40. Likewise, it does not appear that section 335(a) grants the Commission authority to impose a sweeps limitation on broadcasters. Section 335(a) directs the Commission to "initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming." 47 U.S.C. 335(a). Thus, while section 335 would arguably grant the Commission authority to extend the sweeps rule to DBS providers, it does not appear to confer authority to extend the sweeps rule to broadcasters. We invite comment on this view.

41. The sweeps prohibition generally prevents a cable operator from deleting a station during the sweeps period if the retransmission consent agreement expires during sweeps. We do not believe that the existing prohibition on deleting or repositioning a local commercial television station during sweeps periods applies to non-cable MVPDs, such as DBS, given that the provision appears within section 614, a section that focuses on the carriage obligations of cable operators. *See* 47 U.S.C. 534(b)(9). We further note that the prohibition on deleting a local station during sweeps periods appears inextricably intertwined with the prior sentence expressly requiring a "cable operator" to provide at least 30 days notice to a local station prior to deletion of that station. *Id.* We see nothing in the legislative history of the statute to suggest that Congress intended section 614(b)(9) to apply to non-cable MVPDs. Consistent with the statute, § 76.1601 of the Commission's rules expressly applies to cable operators only. *See* 47 CFR 76.1601. A different provision of the Act, section 338, governs satellite carriage of local broadcast stations, and it does not include a prohibition on deletion or repositioning during sweeps. *See* 47 U.S.C. 338. Accordingly, to achieve regulatory parity between cable systems and other MVPDs, we seek comment on whether we should extend the Commission's "sweeps rule" to non-cable MVPDs. Does the Commission have authority to extend the prohibition to DBS and other non-cable MVPDs, such as through sections 154(i), 303(r), 303(v), and 335(a) of the Act? 47 U.S.C. 154(i), 303(r), 303(v), 335(a).

E. Elimination of the Network Non-Duplication and Syndicated Exclusivity Rules

42. We seek comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity. *See* 47 CFR 76.92 *et seq.,* 76.101 *et seq.,* 76.122, 76.123. The network non-duplication rules permit a station with exclusive rights to network programming, as granted by the network, to assert those rights by using notification procedures in the Commission's rules. *See* 47 CFR 76.92 through 76.94. The rules, in turn, prohibit the cable system from carrying the network programming as broadcast by any other station within the "geographic zone" to which the contractual rights and rules apply. *See* 47 CFR 76.92. (The size of the geographic zone depends upon the size of the market in which the station is located. *See* 47 CFR 76.92(b).) Thus, a cable system negotiating retransmission consent with a local network affiliate may face greater pressure to reach agreement by virtue of the cable system's inability to carry another affiliate of the same network if the retransmission consent negotiations fail. Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station. *See* 47 CFR 76.101 *et seq.* These rules are collectively referred to as the "exclusivity rules." They are grounded in the private contractual arrangements that exist between a station and the provider of network or syndicated programming. The Commission's rules do not create these rights but rather provide a means for the parties to the exclusive contracts to enforce them through the Commission rather than through the courts. In fact, the Commission's rules limit the circumstances in which the private contracts can be enforced by, for example, limiting the geographic area in which the exclusivity applies or exempting small cable systems and significantly viewed stations. *See, e.g.,* 47 CFR 76.92(b) and (f), 76.95(a); *see also* 47 CFR 76.93 ("Television broadcast station licensees shall be entitled to exercise non-duplication rights * * * in accordance with the contractual provisions of the network-affiliate agreement.").

43. The Petition argued that the Commission's rules provide broadcasters with a "one-sided level of protection" that is no longer justified, including through the network non-duplication and syndicated exclusivity rules. Petition at 12–15. Commenters also argued that the exclusivity rules provide broadcasters with artificially inflated bargaining leverage in retransmission consent negotiations. In addition, ACA filed a Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 on March 2, 2005 (ACA's 2005 Petition), asserting that competition and consumers are harmed when broadcasters use exclusivity and network affiliation agreements to extract "supracompetitive prices" for retransmission consent from small cable companies. *See Public Notice,* Report No. 2696, RM–11203 (Mar. 17, 2005). We hereby incorporate in this proceeding by reference ACA's 2005 Petition, as well as the comments filed in response thereto. In contrast, other commenters have asserted that network non-duplication and syndicated exclusivity provisions are important to foster localism. Some commenters have also suggested that eliminating the Commission's exclusivity rules may have little effect on retransmission consent negotiations, because private exclusive contracts between broadcasters and programming suppliers would remain in place.

44. We seek comment on whether eliminating the Commission's network non-duplication and syndicated exclusivity rules, without abrogating any private contractual provisions, would have a beneficial impact on retransmission consent negotiations. Would eliminating these rules help to minimize regulatory intrusion in the market, thus better enabling free market negotiations to set the terms for retransmission consent? The Commission previously stated in discussing its exclusivity rules, "By requiring MVPDs to black out duplicative programming carried on any distant signals they may import into a local market, the Commission's network non-duplication and syndicated exclusivity rules provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights." *See Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite*

Home Viewer Extension and Reauthorization Act of 2004, para. 17 (Sept. 8, 2005), *available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–260936A1.pdf.* Are these rules still necessary, or is any benefit of these rules outweighed by a negative impact on retransmission consent negotiations? Do these rules serve a useful purpose in today's marketplace? Should exclusivity in this area be left entirely to the private marketplace, without providing any means of enforcement through the Commission? Would there be a beneficial impact to removing these rules if the contractual provisions that the rules enforce stay in place? Would the elimination of the network non-duplication and syndicated exclusivity rules have a negative impact on localism? We seek comment on the impact of our network non-duplication and syndicated exclusivity rules on the distribution of programming by television stations. Do these rules provide stations and networks with any rights that cannot be secured through a combination of network-affiliate contracts and retransmission consent? Under the existing exclusivity rules, the in-market television station has the right to assert network non-duplication and syndicated exclusivity protection based on its contractual relationship with the network, regardless of whether it is actually carried by the cable system. *See Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries,* Report and Order, 3 FCC Rcd 5299, 5313–14, 5320, para. 92, 95, 122 (1988). As an alternative to eliminating the network non-duplication rule completely as discussed above, we seek comment on revising the network non-duplication rule so that it does not apply to a television station that has not granted retransmission consent. Thus, a television station would only be permitted to assert network non-duplication protection if it is actually carried on the cable system. We seek comment on this proposal.

45. We note that in SHVIA Congress extended the network non-duplication and syndicated exclusivity rules to DBS but only in extremely limited situations that are not equivalent to their application to cable systems. *See* 47 U.S.C. 339(b)(1) (applying network non-duplication protection and syndicated exclusivity protection only to "nationally distributed superstations," which are defined so that they are limited to six stations); 47 U.S.C. 339(d)(2). *See also Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals,* 65 FR 68082, November 14, 2000 (*SHVIA Exclusivity Rules Order*). In contrast, the cable network non-duplication rules may apply to any station broadcasting network programming. *See* 47 CFR 76.92(a) and 76.93 (subject to geographic limitations and exemptions based on the cable system's size or a station's "significantly viewed" status, §§ 76.92(f) and 76.95(a) of the Commission's rules). *See also* 47 CFR 76.101 and 76.106 (governing syndicated exclusivity). As specified in SHVIA, the Commission's rules apply the exclusivity requirements only to "nationally distributed superstations." *See SHVIA Exclusivity Rules Order.* We do not propose to eliminate or revise these statutorily mandated rules. In SHVERA, Congress permitted DBS to carry out-of-market significantly viewed stations (currently, 17 U.S.C. 122(a)(2) and 47 U.S.C. 340) 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. *See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act,* 70 FR 76504, December 27, 2005 (*SHVERA Significantly Viewed Report and Order*). (SV status is an exception to the network non-duplication rules. 47 CFR 76.92(f). SHVERA provided that if a station was to be carried out-of-market as a SV station, it would be subject to the rules allowing an in-market station to assert network non-duplication to prevent carriage of the SV station if it demonstrated that the SV status was no longer valid. *See SHVERA Significantly Viewed Report and Order.* Thus, for DBS, if a station is demonstrated to no longer be significantly viewed, it is not eligible for carriage as an out-of-market SV station. We do not propose to change this result.) We seek comment on whether and, if so, how, this limited application of the exclusivity rules would apply to DBS if we eliminate the rules as they apply to cable and whether eliminating rules as to cable systems would create undue disparities or unintended consequences for DBS. We also 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 network non-duplication rules are revised or eliminated.

F. Other Proposals

46. We seek comment on whether there are other actions the Commission should take either to revise its existing rules or adopt new rules in order to protect consumers from harm as a result of impasses or threatened impasses in retransmission consent negotiations. Commenters advocating rule revisions or additions should address the Commission's authority to adopt their proposals.

IV. Conclusion

47. In conclusion, in this NPRM, we seek comment on proposed changes to our rules to provide greater certainty to parties engaged in retransmission consent negotiations and to better protect consumers from the uncertainty and disruption that they may experience when such negotiations fail to yield an agreement.

V. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

48. 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 Notice of Proposed Rulemaking (NPRM). *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed in accordance with the same filing deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). *See* 5 U.S.C. 603(a). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register.** *See id.*

Need for, and Objectives of, the Proposed Rule Changes

49. The NPRM seeks comment on a series of proposals to streamline and clarify the Commission's rules concerning or affecting retransmission consent negotiations. The Commission's primary objective is to assess whether and how the Commission rules in this arena are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and,

to the extent possible, minimize video programming service disruptions to consumers.

50. Since Congress enacted the retransmission consent regime in 1992, there have been significant changes in the video programming marketplace. One such change is the form of compensation sought by broadcasters. Historically, cable operators typically compensated broadcasters for consent to retransmit the broadcasters' signals through in-kind compensation, which might include, for example, carriage of additional channels of the broadcaster's programming on the cable system or advertising time. *See, e.g., General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee,* Memorandum Opinion and Order, 19 FCC Rcd 473, 503, para. 56 (2004). Today, however, broadcasters are increasingly seeking and receiving monetary compensation from multichannel video programming distributors (MVPDs) in exchange for consent to the retransmission of their signals. Another important change concerns the rise of competitive video programming providers. In 1992, the only option for many local broadcast television stations seeking to reach MVPD customers in a particular Designated Market Area (DMA) was a single local cable provider. Today, in contrast, many consumers have additional options for receiving programming, including two national direct broadcast satellite (DBS) providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet. One result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.

51. Accordingly, we have concluded that it is appropriate for us to reexamine our rules relating to retransmission consent. In the NPRM, we consider revisions to the retransmission consent and related rules that we believe could allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. Accordingly, the NPRM seeks comment on rule changes that would:

- Provide more guidance under the good faith negotiation requirements to the negotiating parties by:
  - Specifying additional examples of per se violations in § 76.65(b)(1) of the Commission's rules; and
  - Further clarifying the totality of the circumstances standard of § 76.65(b)(2) of the Commission's rules;
- Improve notice to consumers in advance of possible service disruptions by extending the coverage of our notice rules to non-cable MVPDs and broadcasters as well as cable operators, and specifying that, if a renewal or extension agreement has not been executed 30 days in advance of a retransmission consent agreement's expiration, notice of potential deletion of a broadcaster's signal must be given to consumers regardless of whether the signal is ultimately deleted;
- Extend to non-cable MVPDs the prohibition now applicable to cable operators on deleting or repositioning a local commercial television station during ratings "sweeps" periods; and
- Allow MVPDs to negotiate for alternative access to network programming by eliminating the Commission's network non-duplication and syndicated exclusivity rules.

We also seek comment on any other revisions or additions to our rules within the scope of our authority that would improve the retransmission consent negotiation process and help protect consumers from programming disruptions.

Legal Basis

52. The proposed action is authorized pursuant to sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 534.

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

53. 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. 5 U.S.C. 603(b)(3). The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." 5 U.S.C. 601(6). In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**." 5 U.S.C. 601(3). 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. 15 U.S.C. 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

54. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (NAICS) defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.* The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers." 13 CFR 121.201 (NAICS code 517110). Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or

more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

55. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

56. *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. 47 CFR 76.901(e). Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. 47 CFR 76.901(c). Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers. Thus, under this standard, most cable systems are small.

57. *Cable System Operators.* 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." 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3. The Commission has determined that an operator serving fewer than 677,000 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. 47 CFR 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001). Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small 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, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

58. *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" (*see* 13 CFR 121.201, NAICS code 517110 (2007)), which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. 13 CFR 121.201, NAICS code 517110 (2007). Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.* Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (EchoStar) (marketed as the DISH Network). Each currently offers subscription services. DIRECTV and EchoStar each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

59. *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," (*see* 13 CFR 121.201, NAICS code 517110 (2007)) which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. 13 CFR 121.201, NAICS code 517110 (2007). Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

60. *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. 13 CFR 121.201, NAICS code 517110 (2007). The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or

fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

61. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. 47 CFR 21.961(b)(1). The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

62. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4) through (6). We do not collect annual revenue data on EBS licensees. Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that 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." U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.* The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

63. *Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. *See* 47 CFR 101.533 and 101.1017. At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons. 13 CFR 121.201, NAICS code 517210. Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS). For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year. U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.* Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note

that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

64. *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. 47 U.S.C. 571(a)(3) through (4). 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." U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.* The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.* In addition, we note that the Commission has certified some OVS operators, with some now providing service. A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.* 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 entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

65. *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." U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; *http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.* To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, which supersedes data from the 2002 Census, there were 396 firms that in 2007 were engaged in production of Cable and Other Subscription Programming. Of these, 386 operated with less than 1,000 employees, and 10 operated with more than 1,000 employees. However, as to the latter 10 there is no data available that shows how many operated with more than 1,500 employees. Thus, under this category and associated small business size standard, the majority of firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

66. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." 15 U.S.C. 632. The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

67. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 13 CFR 121.201 (2007 NAICS code 517110). Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

68. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs),* "*Shared-Tenant Service Providers,*" *and* "*Other Local Service Providers.*" Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 13 CFR 121.201 (2007 NAICS code 517110). Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.* Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

69. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts. *See* 13 CFR 121.201, NAICS Code 515120 (2007). Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound." *Id.* The Commission has estimated the number of licensed commercial television stations to be 1,392. *See* News Release, "Broadcast Station Totals as of December 31, 2009," 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) (*Broadcast*

Station Totals); also available at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–296538A1.pdf.* According to Commission staff review of the BIA/Kelsey, MAPro Television Database (BIA) as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations (or about 74 percent) have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390. *See Broadcast Station Totals, supra.* 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. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

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

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

71. Certain proposed rule changes discussed in the NPRM would affect reporting, recordkeeping or other compliance requirements. Specifically, a potential rule change would (1) revise the Commission's notice rules to specify that, if a renewal or extension agreement has not been executed 30 days in advance of a retransmission consent agreement's expiration, notice of potential deletion of a broadcaster's signal must be given to consumers regardless of whether the signal is ultimately deleted; and (2) extend the coverage of this notice rule to non-cable MVPDs and broadcasters.

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

72. 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. 5 U.S.C. 603(c)(1) through (c)(4).

73. As discussed in the NPRM, our goal in this proceeding is to take appropriate action, within our existing authority, to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services. The specific changes on which we seek comment are intended to allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. The improved successful completion of retransmission consent negotiations would benefit both broadcasters and MVPDs, including those that are smaller entities, as well as MVPD subscribers. Thus, the proposed rules would benefit smaller entities as well as larger entities. For this reason, an analysis of alternatives to the proposed rules is unnecessary. Further, we note that in its discussion of whether there are any additional actions or practices that should be deemed to constitute per se violations of a negotiating entity's duty to negotiate retransmission consent agreements in good faith, the Commission specifically references a proposal to permit small and mid-size MVPDs to "pool their resources, appoint an agent, and negotiate as a group." Such a proposal would provide particular benefit to small entities. The NPRM further considers the impact of retransmission consent on small entities by asking whether small and new entrant MVPDs are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so, whether this is fair.

74. We invite comment on whether there are any alternatives we should consider to our proposed modifications to rules that apply to or affect retransmission consent negotiations that would minimize any adverse impact on small businesses, but which maintain the benefits of our proposals.

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

75. None.

B. Ex Parte Rules

76. *Permit-But-Disclose.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under § 1.1206(b) of the Commission's rules. *See* 47 CFR 1.1206(b); *see also id.* §§ 1.1202 and 1.1203 of the Commission's rules. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required. *See id.* § 1.1206(b)(2) of the Commission's rules. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules.

C. Filing Requirements

77. *Comments and Replies.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated in the DATES section of this document. To the extent any filings in response to this NPRM relate to issues pending in MB Docket No. 07–198, where the Commission sought comment on the issue of tying of an MVPD's rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks, they must also be filed in MB Docket No. 07–198. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies 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. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. The filing hours are 8 a.m. to 7 p.m.
- ○ 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.

78. *Availability of Documents.* Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

79. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov.*

80. *Additional Information.* For additional information on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–2120.

VI. Ordering Clauses

81. Accordingly, *it is ordered* that pursuant to the authority contained in sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 534, this Notice of Proposed Rulemaking *is adopted.*

82. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Political candidates, and Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

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

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

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

2. Amend § 76.65 by revising paragraph (b)(1)(iv) and by adding paragraphs (b)(1)(viii) through (x) to read as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

* * * * *

(b) * * *

(1) * * *

(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal, or to provide a bona fide proposal on an important issue;

* * * * *

(viii) Agreement by a broadcast television station Negotiating Entity to provide a network with which it is affiliated the right to approve the station's retransmission consent agreement with an MVPD;

(ix) Agreement by a broadcast television station Negotiating Entity to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned; and

(x) Refusal by a Negotiating Entity to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement.

* * * * *

3. Revise § 76.1601 to read as follows:

§ 76.1601 Deletion or repositioning of broadcast signals.

(a) Effective April 2, 1993, a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

Note 1 to § 76.1601(a): No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods—generally including February, May, July and November—commonly known as audience sweeps.

(b) Broadcast television stations and multichannel video programming distributors shall notify affected subscribers of the potential deletion of a broadcaster's signal a minimum of 30 days in advance of a retransmission consent agreement's expiration, unless a renewal or extension agreement has been executed.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. 0910301387–91390–01]

RIN 0648–AY33

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.