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Part II

Federal Communications Commission

47 CFR Part 76

Carriage of Digital Television Broadcast Signals; Proposed Rule and Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98–120, CS Docket No. 00–96; CS Docket No. 00–2, FCC 01–22]

Carriage of Digital Television Broadcast Signals

AGENCY: Federal Communications Commission.

ACTION: Further notice of proposed rulemaking.

SUMMARY: This document requests information concerning the issue of mandatory dual carriage. Specifically, the document seeks information to determine whether a cable operator will have the channel capacity to carry the digital television signal of a station, in addition to the analog signal of that same station, and without displacing other programming or services; whether market forces, through retransmission consent, will provide cable subscribers access to digital television signals and television stations' access to carriage on cable systems; and how the resolution of the carriage issues would impact the digital transition process.

DATES: Comments are due May 10, 2001. Replies are due June 25, 2001. Written comments by the public on the proposed information collections are due May 25, 2001. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed information collections on or before May 25, 2001.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20544, or via the Internet to jboley@fcc.gov, and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725—17th Street, NW., Washington, DC 20503 or via the Internet to Edward.Springer@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: Eloise Gore at (202) 418–7200 or via the internet at egore@fcc.gov. For additional information concerning the information collection(s) contained in this document, contact Judy Boley at 202–418–0214, or via the Internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking (FNPRM), FCC 01–22, adopted January 18, 2001; released January 23, 2001. The full text of the Commission's FNPRM is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257) at its headquarters, 445 12th Street, SW., Washington, DC 20554, or may be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036, or may be reviewed via internet at *http://www.fcc.gov/csb/*. This FNPRM contains proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed information collection(s) contained in this proceeding.

Further Notice of Proposed Rulemaking

Synopsis of the Further Notice of Proposed Rulemaking

I. Background

1. For background on this FNPRM, see final rule published elsewhere in this issue of the **Federal Register**. To ensure that the Commission has a sufficient body of evidence on which to evaluate the issue of dual carriage, the Commission finds it necessary to issue this FNPRM to address several critical questions at the center of the carriage debate including, inter alia; whether a cable operator will have the channel capacity to carry the digital television signal of a station, in addition to the analog signal of that same station, and without displacing other programming or services; whether market forces, through retransmission consent, will provide cable subscribers access to digital television signals and television stations access to carriage on cable systems and how the resolution of the carriage issues would impact the digital transition process. The Commission has also sent out a channel capacity and retransmission consent survey to 16 cable operators in a separately issued item. The responses from the survey will be incorporated into the Second Report and Order in this proceeding. The FNPRM also raises questions concerning the applicability of the rules and policies adopted in the Order to satellite carriers under the Satellite Home Viewer Improvement Act of 1999 (''SHVIA''). The Commission needs further information on a range of issues, including cable system channel capacity and digital retransmission consent agreements to build a substantial record upon which to develop the best policy for the various entities impacted in this area.

2. In the first Report and Order, the Commission tentatively concluded that a dual carriage requirement may burden cable operators' First Amendment interests more than is necessary to further the important governmental interests they would promote. However, in this FNPRM, we request further information on a number of matters, including, but not limited to the need for dual carriage for a successful transition to digital television and return of the analog spectrum; cable system channel capacity; and digital retransmission consent. In addition, we ask whether cable operators should be allowed to increase subscriber rates for each 6 MHz of capacity devoted to the carriage of digital broadcast signals.

3. To date in this proceeding, we have received comments arguing that the statute requires dual carriage or that the statute forbids it. It is our view, having deliberated extensively on this question, that neither of these views prevail. Based on the record currently before us, we believe that the statute neither compels dual carriage; nor prohibits it. It is precisely the ambiguity of the statute that has driven this policy debate. In order to weigh the constitutional questions inherent in a statutory construction that would permit dual carriage, we believe it is appropriate and necessary to more fully develop the record in this regard. Because any decision requiring dual carriage would likely be subject to a constitutional challenge, and because an administrative agency can consider potential constitutional infirmities in deciding between possible interpretations of a statute, we are compelled to further develop the record on the impact dual carriage would have on broadcast stations, cable operators and cable programmers, as well as consumers. We believe that more evidence is necessary because the Supreme Court sustained the Act's analog broadcast signal carriage requirements against a First Amendment challenge principally because Congress and the broadcasting industry built a substantial record of the harm to television stations in the absence of mandatory analog carriage rules. We are also mindful that the record must substantially reflect how Commission action in this proceeding will serve the three identified governmental interests supporting mandatory carriage in Turner, which are the preservation of the benefits of free over-the-air television; the promotion of

the widespread dissemination of information from a multiplicity of sources; and the promotion of fair competition.

4. We also recognize that the intermediate scrutiny factors established in *U.S.* v. *O'Brien* and applied in the Turner cases, for determining whether a content-neutral rule or regulation violates the Constitution, must also be satisfied here. A content-neutral regulation will be upheld if: (1) It furthers an important or substantial government interest; (2) the government interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. In sum, under the O'Brien test, a regulation must not burden substantially more speech than is necessary to further the government's legitimate interests. Thus, a dual carriage rule must satisfy the Turner factors and meet the O'Brien test. We invite commenters that support a dual carriage requirement to provide specific empirical information to demonstrate how mandatory dual carriage would satisfy the requirements of both Turner and O'Brien. We request that commenters that have previously submitted legal arguments on these points in response to the FNPRM, not repeat these arguments.

5. In the case of dual carriage, we believe that the record is insufficient to demonstrate the degree of harm broadcasters will suffer without the carriage of both signals. In addition, we must carefully consider the burden such a requirement would impose on the cable operator. We seek information on digital retransmission consent agreements to determine the degree to which cable operators are carrying digital signals on a voluntary basis. If broadcasters are being carried by agreement, then they may not be harmed in the absence of a digital carriage requirement. In addition, First Amendment precedent requires that we tailor the carriage requirement to avoid burdening more speech than necessary. In this regard, the impact of mandatory carriage on cable systems was relevant in Turner. We therefore seek substantive information to determine cable system channel capacity.

6. Concurrently with this FNPRM, we are sending out a survey to cable operators that asks specific questions concerning retransmission consent as well as cable system channel capacity. We believe that this form of inquiry is necessary because we need particularized system information that can only be obtained through a survey. The answers to this survey will be used to supplement the general responses we receive as a result of the questions we ask in the FNPRM. The cable operators' answers to the survey questions will be included in the record and available for public comment. We expect that the information provided by the cable operators will provide further insight regarding the constitutional questions inherent in the dual carriage discussion.

II. Issues

A. Digital Television Transition and Mandatory Carriage

7. Both Congress and the Commission have worked to develop a digital television transition that accounts for the needs of the broadcast industry, while recognizing the government's interest in the prompt return of the analog broadcast spectrum. The Commission's stated expectation when the DTV rules were adopted was that analog television broadcasting would cease no later than the end of 2006. With passage of the Balanced Budget Act of 1997, Congress codified the December 31, 2006 analog television termination date, but also adopted certain exceptions to it in section 309(j)(14) of the Communications Act which provides:

(A) Limitations on terms of terrestrial television broadcast licenses.—A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.

(B) Extension.—The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that—

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

(ii) digital-to-analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market—

(I) do not subscribe to a multichannel video programming distributor (as defined in section 522 of this title) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either—

(a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

8. The Notice of Proposed Rule Making (''NPRM'') 63 FR 42330, Aug 7,1998 in this proceeding discussed must carry rules for possible application during a temporary transitional period prior to the cessation of analog broadcasting. Because of the nature of the exceptions set forth in the Balanced Budget Act of 1997, questions have arisen as to how long the transition period might last either with or without a dual carriage requirement. Some have expressed doubt that the return of the analog broadcast spectrum will be completed by the end of 2006, regardless of whether there is a dual carriage requirement. Others have argued that dual carriage is necessary to enable broadcasters to meet the statutory tests and complete the transition on time. None of the participants in this proceeding, however, have provided a concise plan for how and when the transition will be completed. As such, a number of questions concerning the transition have arisen. For example, under what circumstances and statutory interpretations will the statutory criteria for the auction of recaptured broadcast television spectrum be satisfied? Will the analog television license be returned when 85% or more of the television households in a market either subscribe to an MVPD that carries all of the digital broadcast stations in the market or have a DTV receiver or digital downconverter to receive the digital signal over the air? Or is there a different interpretation of the statutory exceptions? Will the spectrum be returned if some of the MVPD subscribers are unable to receive and view the DTV programming notwithstanding that it is carried by the MVPD because they do not have a digital receiver or converter? How does the growth of competitive non-cable MVPD's change the analysis? Alternatively, would the analog licenses be returned in a market in which 85% of the television households had a DTV receiver or digital-to-analog converter, but only 30% subscribed to a MVPD

that carried all of the digital television stations in the market?

9. Understanding how the affected parties expect to complete the transition, and exactly how the law applies, substantially affects the Commission's policy approach to the digital television transition as well as to the overall issue of cable carriage. A mandatory dual carriage requirement, for example, would place a more significant and lasting burden on a cable operator's constitutional rights if in fact there will be a substantially extended transition to a digital-only environment. We seek comment on these transition issues and ask for more specific comment on when the analog spectrum is likely to be returned under both mandatory and non-mandatory dual carriage scenarios. We also seek comment on whether and how the dual carriage burden on cable operators may be lessened by using a transitional approach limiting dual carriage to a specified period of time. For example, in this regard, how would a three year limit on dual carriage affect the constitutional question?

10. There are several other issues concerning the rollout of digital broadcast television that still remain. For example, a number of digital television licensees in markets 11–30, that were required to begin digital broadcasting on November 1, 1999 have asked for extensions of time to build out their facilities. Such petitions assert that these extensions may have been necessary because local zoning requirements have hindered the construction of digital broadcast towers or because there are construction and equipment delays. Whatever the case may be, it is difficult to proceed with the dual carriage question if it remains unclear how and when digital signals will become available in any particular market. Because an operator is only required to carry broadcast signals up to one-third of its channel capacity, to rule on the dual carriage issue now may result in on-air digital signals being carried, at the expense of those yet-to-air digital signals that may not be carried because the operator's one-third cap has been met and the operator is reluctant to disrupt viewers by changing signals carried. In this regard, we ask whether we should wait for all or a more significant number of broadcasters to build out their facilities before considering a dual carriage rule to avoid this potential disruption.

11. We also note that there appears to be a limited amount of original digital programming being broadcast. This calls into question the practicality of imposing a dual carriage rule at this time. Cable subscribers would not immediately benefit from a dual carriage rule if there is little to view but duplicative material. In addition, there is a risk that if carriage were mandated, cable subscribers would lose existing cable programming services that would be replaced on the channel line-up by digital television signals with less programming. It is difficult to decide definitional issues, such as what would be considered a ''duplicative signal'' without more information. We ask broadcasters to describe what part of their planned digital programming streams will be devoted to simulcast of their analog programming and what parts are, or will be, used for other programming. We ask broadcasters to provide us with information on the exact amount of digital programming, on a weekly basis, being aired in a high definition format and the exact amount of original digital programming. We also seek comment on the number of hours, in an average day, that a broadcaster currently airs digital television, and specifically high definition digital programming.

12. We also seek further comment on issues relevant to the carriage of digital signals by small operators. As described in the First Report and Order, the SCBA expressed concern that allowing broadcasters to tie analog and digital retransmission consent could have a negative financial effect on small cable operators. The current record does not contain adequate evidence on this point. We specifically request information on small cable operators' equipment costs to deliver digital signals to subscribers and experiences thus far with retransmission consent negotiations involving both analog and digital signals.

13. *Program-related.* In addition, as discussed in the final rule published elsewhere in this issue of the **Federal Register**, cable operators are required to carry ''program-related'' material as part of the broadcaster's primary video. We seek comment on the proper scope of program-related in the digital context. As noted in the Report and Order, we believe that digital television offers the ability to enhance video programming in a number of ways. For example, a digital television broadcast of a sporting event could include multiple camera angles from which the viewer may select. In addition, a digital broadcast could enable viewers to select other embedded information such as sports statistics to complement a sports broadcast or detailed financial information to complement a financial news broadcast. We seek comment on whether such information or interactive enhancements like playing along with a game or chatting during a TV program should qualify as ''program related.'' What are broadcasters' plans in this regard? What are the technical requirements for broadcasting, receiving and viewing this programming material? Would they be viewed on a screen simultaneously or is it necessary to change channels or select a different view on the same screen? What is the proper relationship between ''program-related'' and ''ancillary or supplementary'' in terms of the statutory objectives? To what extent, if any, is ''program-related'' limited by ancillary or supplementary? We also note that the statutory language that describes ''program-related'' in the context of NCE stations differs in some respects from the language regarding program-related content for commercial stations. Specifically, section 615(g)(1), establishing the content of NCE stations to be carried by cable operators, tracks the language of section 614(b)(3)(A), the provision for commercial broadcasters, except that the NCE provision goes on to include in the definition of ''program related'' material: ''that may be necessary for receipt of programming by handicapped persons or for educational or language purposes.'' In light of the foregoing, we seek comment on how to define ''program related'' material for NCE stations. How, if at all, should it differ from ''program-related'' in the context of commercial stations? For example, some commenters have argued that if an NCE station multicasts programming for ''educational'' purposes, the cable operator should carry all such program streams. We seek comment on whether these ''educational'' program streams should qualify as ''program related'' in the context of must carry, particularly in light of the language in 615(g)(1) noted above.

B. Channel Capacity

14. In the NPRM, we sought quantified estimates and forecasts of available usable channel capacity. We asked whether there were differences in channel capacity that are based on franchise requirements, patterns of ownership, geographic location, or other factors. We also inquired about the average number of channels dedicated to various categories of programming, such as pay-per-view, leased access, local and non-local broadcast channels, and others that would assist us in understanding the degree to which capacity is, and will be, available over the next several years. We sought system upgrade information. For example, we asked for comment on

whether 750 MHz is the proper cutoff for defining an upgraded system or should a lower number, such as 450 MHz, be used instead. We also asked commenters to provide information on the expected growth rate for cable channel capacity between now and 2003. In addition, we sought comment about cable programmer plans to convert to digital and what additional carriage needs these programmers would have in the future. These questions were posed to generate a record on available channel capacity for digital carriage purposes and help the Commission determine the speech burden on cable operators under the First Amendment and the Turner cases.

15. We received widely divergent information concerning cable channel capacity availability. For example, NAB asserts that current channel capacity is substantial and a significant number of channels are unutilized, particularly in large markets where the Commission has required the construction of the first DTV stations. NCTA disputes this claim and asserts that what matters is not whether a cable system has adequate capacity to add new digital must carry signals during the transition, but whether a significant number of actual systems serving a significant number of customers will be forced to remove services to accommodate both analog and digital must carry signals. We find the comments and analyses provided by the commenters are useful for establishing the framework for this inquiry. However, a number of the commenters rely on data sources that are either incomplete, or draw upon an unrepresentative sample of cable systems. Moreover, some of the data are outdated for future channel capacity estimates. For all of these reasons, as well as the fact that accurate capacity information is essential for a well articulated and constitutionally sustainable dual carriage decision under O'Brien and Turner, we seek further information on current capacity and forecasts for capacity growth in the future.

16. We first reiterate the questions we posed in the NPRM, as summarized elsewhere in this FNPRM. We then note that the NCTA, on its website, has stated the following: ''It is estimated that 82% of all cable homes now are passed by at least 550 MHz plant—with 65% of cable homes passed by systems with 750 MHz or higher, positioning cable to compete more effectively with DBS companies, who typically offer more than 100 channels.'' While this information is more recent than the data submitted by the NAB, it is still tabulated from reports in 1999. Thus, we ask for any information on system upgrades current through January, 2001. We specifically seek comment on the number of cable systems nationwide, on a percentage basis, that are now, or soon will be, upgraded to 750 MHz. With regard to these kinds of systems, we ask how many channels are now, or soon will be available for video programming. We seek comment on whether it is possible for 750 MHz systems to be channel-locked and have no capacity to carry additional digital broadcast signals. We seek comment on cable industry plans to build systems of greater capacity in the future.

17. We also seek comment on techniques that conserve or recapture cable channel capacity. Data on this matter is important because it may belie the cable industry's claim that there is, or will be, no channel capacity to add more programming. For example, an operator that uses 256 QAM will have 40% more capacity than an operator that does not. With this noted, we ask how many cable systems are now, or soon will be, using 256 QAM. In addition, we ask if there are certain set top boxes or related software that can further increase capacity for systems using 256 QAM. Some operators are also using specialized techniques that can comb packages of digital cable programming sent by digital compression operations such as Headend in the Sky (''HITS'') or other digital compression program delivery services. Using such filtering technology, an operator can select the digital cable programming it wants to carry and discard that programming it prefers not to carry. Through this process, an operator can save as much as 10 MHz of cable channel capacity. We seek comment on how many operators are currently using combining technology to recapture spectrum. A third technique used by some cable operators to save channel capacity is to shift certain services from an analog tier to a digital tier where such programming will be digitally compressed. By doing this, an operator could free up additional analog space for other uses. We seek comment on this technique and ask how many operators are now exercising this option.

18. In its comments, New World Paradigm (''NWP'') states that the Commission should adopt digital carriage rules that allow or motivate cable operators to deliver services from video servers through the internet's channel addressing methodology. According to NWP, channel addressing uses existing capacity very efficiently and asserts that adoption of the internet's channel addressing method would serve the public interest because it expands cable channel capacity to accommodate an infinite amount of services. NWP believes that accessing programming residing in a video server, and then sending that specific programming to the subscriber, is a far more efficient way of using channel capacity than shipping all channels to the subscriber at the same time. NWP states that a channel should be defined as ''any internet addressable video service engineered for the electromagnetic spectrum carried solely in wired networks from the producer of the video service and delivered through a video server and made available for and to subscribers of a cable system.'' NWP argues that expanding the definition of ''cable channel'' would position cable to be a communications medium merging voice, internet and video services into a characterless digital data stream. We seek comment on NWP's proposal, in general, and ask whether it is technically feasible for cable operators to cache broadcast programming in this manner. We also ask what statutory or rule changes would be necessary to accomplish what NWP proposes. Finally, we ask what copyright issues may arise in this context, how this approach would affect the advertising rate structure for broadcasters, and whether cable operators are contractually or otherwise restricted from implementing a video server model of distributing local broadcast programming.

C. Voluntary Carriage Agreements

19. In the NPRM, we recognized that most commercial broadcast stations, at least 80% in 1993 for example, were carried by cable systems through retransmission consent and asked whether this general pattern would be repeated with respect to digital broadcast television signals during the transition period. We stated that the broadcasters that are most likely to elect must carry are those stations that are not affiliated with the four major networks. Many of these stations will not commence digital operations until 2002 when they are required to do so under the Commission's rules. We sought comment on these general suppositions and on the effect these market factors would have on the need to implement a digital carriage requirement. We also asked what effect not setting rules would have on television stations not affiliated with the top four networks that want to commence digital broadcasting before 2002. We sought comment on how retransmission consent, rather than mandatory carriage,

could speed the transition to digital television.

20. According to the cable commenters, several digital retransmission consent agreements have been reached. For example, AT&T Broadband has arrangements with NBC and FOX to carry their owned and operated stations' digital signals for the next several years. Time Warner states it has digital carriage arrangements with all four major networks, some network affiliate owners, as well as a group of public broadcasters. While we are encouraged that some broadcasters, such as those noted, have been able to obtain cable carriage through retransmission consent agreements, outstanding questions remain concerning the scope and pace of the retransmission consent process. For example, MSTV reports that cable operators have negotiated digital carriage with network owned and operated stations but have refused to discuss digital retransmission consent with several network affiliated station groups. We seek comment on whether this statement is correct. If so, why haven't cable operators entered into negotiations with network affiliated broadcast groups?

21. With regard to the retransmission consent deals already concluded, we seek comment on the scope of such agreements. For example, while Time Warner has deals with CBS, ABC, NBC, FOX, and several PBS affiliates, we seek comment on how many digital television signals are now available for purchase by subscribers. Moreover, on what tier of service are these signals being carried? We also ask whether such signals are being carried in 8 VSB or in QAM. What television markets do these deals affect? And in those markets, what percentage of cable subscribers are served by a Time Warner system? And of those systems, do the deals apply only to upgraded 750 MHz systems or all systems regardless of capacity? At first glance, Time Warner's efforts seem to satisfy our goal of providing cable subscribers' access to digital television signals on a voluntary basis, but if the agreements only concern certain areas and certain systems, it would call into question the extent to which the marketplace is actually working. We pose the same set of questions and concerns to the other publicly announced arrangements involving other cable operators, such as AT&T and its respective broadcast station partners.

22. We also note that in August of 1999, the Commission adopted new ownership rules that affect the number of television stations in any given market that can be owned or controlled by a single broadcaster. We seek comment on the effect of these ownership changes on carriage of broadcast signals and ask how the potential changes in the broadcast industry will affect the retransmission consent process.

D. Tier Placement

23. As discussed, section 623(b)(7)(A) of the Act requires that the basic tier on a rate regulated system include all signals carried to fulfill the must carry requirements of sections 614 and 615 and ''any signal of any television broadcast station that is provided by the cable operator to any subscriber * * *'' We believe that it would facilitate the digital transition to permit cable operators that are carrying a broadcast station's analog signal on the basic tier to carry that broadcast station's digital signal on a digital tier pursuant to retransmission consent. We seek comment on permitting such carriage and whether it would encourage more cable operators to voluntarily carry a broadcaster's digital signal. We believe that such an approach, which is necessarily limited to the duration of the transition in a given market, is consistent with the flexibility given the Commission by section 614(b)(4)(B) to prescribe rules for the transition. We seek comment on this interpretation. We also seek comment on limiting this approach to those situations in which the digital programming is a simulcast of the analog programming available on the basic tier. We reiterate that, as discussed, if a cable operator is carrying only the broadcaster's digital signal, and not the analog signal, the digital signal must be available to subscribers on a basic tier to which subscription is required for access to any other tier.

E. Per Channel Rate Adjustments

24. We recognize that cable operators will be adding digital broadcast services to their channel line-ups in the years ahead. While the addition of such channels implicates our rate regulation rules, we received no comment on what impact this occurrence will have on our per channel rate adjustment methodology. Thus, in addition to providing for the direct recovery of costs associated with adding digital broadcast programming, as explained, we now propose to permit cable operators to adjust BST rates to reflect the addition of channels of digital broadcast programming, if the operator decides to place such programming on that tier. When developing rate regulations pursuant to the 1992 Cable Act, the Commission recognized that pricing incentives were important to encouraging voluntary increases in the number of channels of programming offered to cable subscribers. The Commission also recognized that, even in a competitive environment, service increases would result in higher prices, just as service decreases should result in lower prices. The Commission developed a table of per channel rate adjustment factors based on an econometric model of the pricing behavior of systems facing competition. The amount of the permitted adjustment varied with the number of channels offered on the system, the permitted adjustment per channel decreasing as the number of channels increases. After gaining experience with rate regulation, the Commission concluded that optional additional incentives should be available to stimulate the addition of new services to the CPST or to the BST when it was the only tier of service offered. The Commission established a per channel adjustment factor of up to 20 cents per channel exclusive of programming costs for channels added to CPSTs , subject to a cap of $1.20 on rate increases through December 31, 1996 and $1.40 through December 31, 1997. An additional capped amount was allowed for license fees associated with the channels. Operators were required to offset any revenues received from a channel from the programming costs and per-channel adjustment associated with the channel. The Commission limited the per channel adjustment incentive to the CPST to maximize subscriber choice where cable operators could choose between the BST and the CPST when selecting a tier for a new nonbroadcast service and also to avoid increasing the complexity of the regulatory task faced by local regulatory authorities. The Commission also recognized that the base cost for a tier should be adjusted under some circumstances to reflect the reallocation of system costs to programming tiers when channels are moved between tiers.

25. We believe that cable operators should have sufficient incentives to add digital television broadcast programming, particularly where operators carrying a broadcast station's analog signal during the transition period must assign spectrum to accommodate digital signals. Because the cable industry operates in an increasingly competitive environment, we tentatively conclude that subscribers who purchase digital programming, including digital broadcast programming, should bear a fair share of the overall system costs associated with the number of channels delivered on the tier relative to the system's overall

capacity, and that subscriber rates be reasonable. Thus, we propose to allow cable operators adding digital broadcast signals to their channel line-ups, to increase rates for each 6 MHz of capacity devoted to carriage of such signals. We seek comment on this general policy and ask for comment on the proper adjustment methodology the Commission should adopt. For example, should the Commission revise § 76.922(g), and the accompanying per channel adjustment table, for this purpose? Alternatively, is the Form 1235 process outlined in the final rule published elsewhere in this issue of the **Federal Register**, adequate to account for such costs? We also seek comment on how channels should be counted in light of the sunset of CPST rate regulation. What methods are there for valuing cable channels? How would they work?

F. Satellite Home Viewer Improvement Act of 1999

26. Section 338 of the Act, adopted as part of the SHVIA, requires satellite carriers, by January 1, 2002, ''to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast station signal,'' subject to the other carriage provisions contained in the Act. Until January 1, 2002, satellite carriers, such as DirecTV and Echostar, are granted a royalty-free copyright license to retransmit television broadcast signals on a station-by-station basis, subject to obtaining a broadcaster's retransmission consent. This transition period is intended to provide the satellite industry with time to begin providing local television signals into local markets, otherwise known as ''local-into-local'' satellite service. We recently adopted rules to implement the satellite carriage provisions contained in section 338. (*See* 66 FR 7410, Jan. 23, 2001.)

27. The rules we adopted in the satellite carriage proceeding specifically concerned the carriage of a television station's analog signal by a satellite carrier. While issues related to the carriage of a television station's digital signal were discussed, the Commission stated that the digital carriage requirements for satellite carriers should be addressed in the context of this docket. Herein, we have adopted policies governing the cable carriage of digital television signals. Given the SHVIA's general thrust that the Commission issue satellite carriage rules comparable to the cable carriage rules, we seek comment on how we should apply the digital cable carriage rules to satellite carriers. We note that satellite carriers provide video programming on a national basis through a space-based delivery facility while cable operators provide video service on a local franchise-area basis through a terrestrial delivery facility. Given these distinctions, we ask whether we should take into account the differences between the two technologies when implementing digital broadcast signal carriage rules for satellite carriers. Interested parties need not file additional comments on the constitutional or public policy aspects of satellite digital broadcast signal carriage, as we shall incorporate the relevant statements made in the satellite carriage proceeding into this docket.

28. Pursuant to the SHVIA, the Commission also adopted rules implementing section 339(b) of the Act. (*See* 65 FR 68082, Nov. 14, 2000.) This provision directs the Commission to apply the cable television network non-duplication, syndicated program exclusivity, and sports blackout requirements to satellite carriers. Congress directed the Commission to implement the new satellite rules so that they will be ''as similar as possible'' to the rules applicable to cable operators. In general, the new network non-duplication, syndicated program exclusivity, and sports blackout rules require a satellite carrier to delete programming when it retransmits a nationally distributed superstation to a household within the relevant zone of protection, and the nationally distributed superstation carries a program to which the local station or the rights holder to a sporting event has exclusive rights. In addition, the SHVIA requires that the Commission apply the sports blackout rule to satellite carriage of network stations. In all cases covered by the statute and the rules, the entity holding exclusive rights may require the satellite carrier to black out these particular programs for the satellite subscriber households within the protected zone. In the Report and Order implementing section 339(b), the Commission noted that it would consider the application of the satellite exclusivity rules to digital broadcast signals in another proceeding. We now seek comment on the application of the section 339(b) provisions, and our implementing rules, to the carriage of digital television signals by satellite carriers. We specifically seek comment on the application of the exclusivity requirements in light of the statements made. The comments filed on this subject in CS Docket 00–2 will be incorporated by reference in this proceeding.

III. Procedural Matters

A. Paperwork Reduction Act of 1995 Analysis

29. The requirements contained in this Further Notice of Proposed Rulemaking have been analyzed with respect to the Paperwork Reduction Act of 1995 (the ''1995 Act'') and would impose proposed information collection requirements on the public. 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 take this opportunity to comment on the proposed information collection requirements contained in this Further Notice of Proposed Rulemaking, as required by the 1995 Act. 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 would 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; and (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. Written comments by the public on the proposed information collections are due on or before May 25, 2001. Any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 12th St, SW., Room 1–0804, Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information on the proposed information collection requirements, contact Judy Boley at 202–418–0214 or via the Internet at the above address.

OMB Control Number: 3060–0844.

Title: Digital Broadcast Carriage.

From Number: n/a.

Type of Review: Revision of a currently approved collection.

Respondents: 99,278.

Estimated Time Per Response: .5–1 hours.

Total Annual Burden: 2,355.

Total Annual Costs: $2,355.12.

Needs and Uses: The information collection requirements under this control number are used to seek comment on possible changes to mandatory carriage rules, and explore the impact that cable carriage of digital television signals may have on other Commission rules.

B. Ex Parte Rules

30. 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. 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. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b).

C. Filing of Comments and Reply Comments

31. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the FNPRM on or before May 10, 2001 and reply comments on or before June 25, 2001. Comments may be filed using the Commission's Electronic Comment Filing System (''ECFS'') or by filing paper copies. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, ''get form<your e-mail address.'' A sample form and directions will be sent in reply.

32. Parties who choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. If more than one docket or rulemaking number appears in the caption of this proceeding commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. The Cable Services Bureau contact for this proceeding is Eloise Gore at (202) 418–7200, TTY (202) 418–7172, or at *egore@fcc.gov.*

33. Parties who choose to file by paper should also submit their comments on diskette. Parties should submit diskettes to Eloise Gore Cable Services Bureau, 445 12th Street NW., Room 4–A803, Washington, DC 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible form using MS DOS 5.0 and Microsoft Word, or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the party's name, proceeding (including the lead docket number in this case [CS Docket No. 98–120]), type of pleading (comments or reply comments), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleadings, referable in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, 1231 20th Street, NW., Washington, DC 20036.

E. Initial Regulatory Flexibility Act Analysis

34. As required by the Regulatory Flexibility Act (''RFA''), the Commission has prepared this Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on small entities by the policies and rules referenced in this FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the IRFA (or summaries thereof) will be published in the **Federal Register**.

35. Need for, and Objectives of, the Proposed Rule Changes. The objective of the FNPRM is to gather more information, and build the necessary record, in order to implement a constitutionally sustainable digital broadcast signal carriage policy.

36. Legal Basis. The authority for the action proposed in this rulemaking is contained in sections 1, 4(i) and (j), 309(j), 325, 336, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 309(j), 325, 336, 534, and 535.

37. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply. The IRFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The IRFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small business concern'' under section 3 of the Small Business Act. Under the Small Business Act, a small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA''). The rules we are considering in this proceeding generally, will affect cable operators, OVS operators, and television station licensees.

38. Small MVPDs. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in annual receipts. This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,758 total cable and other pay television services and 1,423 had less than $11 million in revenue. We address below each service individually to provide a more precise estimate of small entities.

39. Cable Systems. The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. We last estimated that there were 1439 cable operators that qualified as small cable companies. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this Report and Order.

40. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% 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.'' The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals approximately 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

41. Open Video Systems. The Commission has certified 31 OVS operators with some now providing service. Affiliates of Residential Communications Network, Inc. (''RCN'') received approval to operate OVS systems in New York City, Boston, Washington, DC and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

42. Program Producers and Distributors. The Commission has not developed a definition of small entities applicable to producers or distributors of cable television programs. Therefore, we will use the SBA classifications of Motion Picture and Video Tape Production (SIC 7812), Motion Picture and Video Tape Distribution (SIC 7822), and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922). These SBA definitions provide that a small entity in the cable television programming industry is an entity with $21.5 million or less in annual receipts for SIC 7812 and SIC 7822, and $5 million or less in annual receipts for SIC 7922. Census Bureau data indicate the following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (SIC 7812), and that 6,987 of these firms had $16.999 million or less in annual receipts and 7,002 of these firms had $24.999 million or less in annual receipts; (b) there were 1,139 firms classified as Motion Picture and Video Tape Distribution (SIC 7822), and 1007 of these firms had $16.999 million or less in annual receipts and 1013 of these firms had $24.999 million or less in annual receipts; and (c) there were 5,671 firms in the United States classified as Theatrical Producers and Services (SIC 7922), and 5627 of these firms had $4.999 million or less in annual receipts.

43. Each of these SIC categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated. Thus, we estimate that our rules may affect approximately 6,987 small entities primarily engaged in the production and distribution of taped cable television programs and 5,627 small producers of live programs that may be affected by the rules adopted in this proceeding.

44. DBS: There are four licensees of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees that are operational have annual revenues which may be in excess of the threshold for a small business. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge that there are entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

45. HSD: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled. HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) Viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.

46. According to the most recently available information, there are approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers. These program packagers provide subscriptions to approximately 2,314,900 subscribers nationwide. This is an average of about 77,163 subscribers per program package. This is substantially smaller than the 400,000 subscribers used in the commission's definition of a small MSO. Furthermore, because this is an average, it is likely that some program packagers may be substantially smaller.

47. Television Stations. The proposed rules and policies will apply to television broadcasting licensees, and potential licensees of television service. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.

48. 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 SBA 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**.''

49. 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 estimates that follow 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 overinclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

50. There were 1,509 television stations operating in the nation in 1992. That number has remained fairly constant as indicated by the approximately 1,616 operating television broadcasting stations in the nation as of September 30, 1999. For 1992, the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments. Thus, the new rules will affect approximately 1,616 television stations; approximately 77%, of those stations are considered small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

51. Small Manufacturers. The SBA has developed definitions of small entity for manufacturers of household audio and video equipment (SIC 3651) and for radio and television broadcasting and communications equipment (SIC 3663). In each case, the definition includes all such companies employing 750 or fewer employees. Census Bureau data indicates that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would be classified as small entities.

52. Electronic Equipment Manufacturers. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment. Therefore, we will use the SBA definition of manufacturers of Radio and Television Broadcasting and Communications Equipment. According to the SBA's regulations, a TV equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. The Census Bureau category is very broad, and specific figures are not available as to how many of these firms are exclusive manufacturers of television equipment or how many are independently owned and operated. We conclude that there are approximately 778 small manufacturers of radio and television equipment.

53. Electronic Household/Consumer Equipment. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will use the SBA definition applicable to manufacturers of Household Audio and Visual Equipment. According to the SBA's regulations, a household audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicates that there are 410 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 386 of these firms have fewer than 500 employees and would be classified as small entities. The remaining 24 firms have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Furthermore, the Census Bureau category is very broad, and specific figures are not available as to how many of these firms are exclusive manufacturers of television equipment for consumers or how many are independently owned and operated. We conclude that there are approximately 386 small manufacturers of television equipment for consumer/household use.

54. Description of Projected Reporting, Recordkeeping and other Compliance Requirements. There are compliance requirements for cable operators and OVS operators. An attempt has been made to propose streamlined compliance requirements, especially for small cable operators, in this docket.

55. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (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. We have proposed streamlined rules for the carriage of digital broadcast signals for small cable operators in this proceeding. We will examine this alternative in more detail in the next phase of this rulemaking.

56. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals. None.

57. Report to Congress. The Commission will send a copy of the final rule published elsewhere in this issue of the **Federal Register**, including this IRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. In addition, the Commission will send a copy of the FNPRM, including IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FNPRM and IRFA (or summaries thereof) will also be published in the **Federal Register**.

F. Ordering Clauses

58. Accordingly, *it is ordered* that the Consumer Information Bureau, Reference Information Center, *shall send* a copy of this Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–7324 Filed 3–23–01; 8:45 am]

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