

Title: Section 76.59, Market Modification of Broadcast Television Stations for Purposes of the Cable and Satellite Mandatory Television Broadcast Signal Carriage Rules

Supporting Statement

A. Justification

PROPOSED MODIFICATION TO THIS EXISTING INFORMATION COLLECTION:¹

1. On March 26, 2015, the Commission released a *Notice of Proposed Rulemaking (NPRM)*, FCC 15-34, in MB Docket No. 15-71,² proposing satellite television “market modification” rules to implement Section 102 of the Satellite Television Extension and Localism Act (STELA) Reauthorization Act of 2014 (STELAR).³ The STELAR amended the Communications Act and the Copyright Act to give the Commission authority to modify a commercial television broadcast station’s local television market – defined by The Nielsen Company’s Designated Market Area (DMA) in which it is located – to include additional communities or exclude communities for purposes of better effectuating satellite carriage rights. The Commission previously had the authority to modify a station’s market only in the cable carriage context.⁴ With Section 102 of the STELAR, Congress provides regulatory parity in this regard and intends to promote consumer access to in-state and other relevant television programming. Congress’ intent through

¹ In addition to the proposed increase in burden estimates resulting from the proposed expansion of this collection to cover satellite market modification petitions and responsive pleadings, we also intend to make reductions to the existing burden estimates with respect to cable market modification petitions and responsive pleadings, based on FCC staff experience with such pleadings.

² See *Amendment to the Commission’s Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-71, Notice of Proposed Rulemaking, FCC 15-34 (rel. Mar. 27, 2015).

³ The STELA Reauthorization Act of 2014 (STELAR), §§ 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)). The STELAR was enacted on December 4, 2014 (H. R. 5728, 113th Cong.).

⁴ This existing collection covers the information collection requirements for

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this provision of STELAR, and the Commission's actions in this NPRM, seek to address satellite subscribers' inability to receive in-state programming in certain areas, sometimes called "orphan counties." In this *NPRM*, consistent with Congress' intent that the Commission model the satellite market modification process on the current cable market modification process, the Commission proposes to implement Section 102 of the STELAR by revising the current cable market modification rule, Section 76.59, to apply also to satellite carriage, while adding provisions to the rules to address the unique nature of satellite television service.

STELAR Section 102, which adds Section 338(l) of the Communications Act, creates a satellite market modification regime very similar to that in place for cable, while adding provisions to address the unique nature of satellite television service.⁵ Market modification, which has been available in the cable carriage context since 1992,⁶ will allow the Commission to modify the local television market of a commercial television broadcast station to enable satellite carriers to better serve the interests of local communities.⁷ Market modification provides a means to avoid rigid adherence to DMA designations and to promote consumer access to in-state and other relevant television programming. To better reflect market realities and effectuate the purposes of this provision, Section 338(l), like the corresponding cable provision in Section 614(h)(1)(C), permits the Commission to add communities to or delete communities from a station's local television market following a written request.⁸ Furthermore, as in the cable carriage context, the Commission may determine that particular communities are part of more than one television

⁵ See 47 U.S.C. §§ 338(l), 534(h)(1)(C).

⁶ See *supra* note 3 (citing 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59).

⁷ See *In-State Broadcast Programming: Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010*, MB Docket No. 10-238, Report, 26 FCC Rcd 11919, 11949-50, ¶ 55-59 (MB 2011) ("*In-State Programming Report*") (stating that "market modifications could potentially address special situations in underserved areas and facilitate greater access to local information"). See also *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1346, ¶ 49-50 (2008) ("*Broadcast Localism Report*").

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market.⁹ Similar to the cable carriage context, when the Commission modifies a station's market to add a community for purposes of carriage rights, the station is considered local and is covered by the local statutory copyright license and may assert mandatory carriage (or retransmission consent) by the applicable satellite carrier in the local market.¹⁰ Likewise, if the Commission modifies a station's market to delete a community, the station is considered "distant" and loses its right to assert mandatory carriage (or retransmission consent) by the applicable satellite carrier in the local market.¹¹

The NPRM proposes to revise Section 76.59 of the rules to apply it to the satellite television context, thus permitting commercial TV broadcast stations and satellite carriers to file petitions seeking to modify a commercial TV broadcast station's local television market for purposes of satellite carriage rights.¹² Under Section 76.59 of the rules, commercial TV broadcast stations and cable system operators may already file such requests for market modification for purposes of cable carriage rights. Consistent with the current cable requirement in Section 76.59, the proposed rules would require commercial TV broadcast stations and satellite carriers to file market modification requests and/or responsive pleadings in accordance with the procedures for filing Special Relief petitions in Section 76.7 of the rules.¹³ Consistent with the current cable

⁸ 47 U.S.C. §§ 338(l)(1), 534(h)(1)(C).

⁹ *Id.* § 338(l)(2)(A).

¹⁰ Section 204 of the STELAR amends the local statutory copyright license in 17 U.S.C. § 122 so that when the Commission modifies a station's market for purposes of satellite carriage rights, the station is considered local and is covered by the local statutory copyright license. *See* 17 U.S.C. § 122(j)(2)(E) (as amended by STELAR § 204); 47 U.S.C. § 338. *See also* 17 U.S.C. § 111(f)(4) (defining "local service area of a primary transmitter" for cable carriage copyright purposes); 47 U.S.C. § 534(h)(1)(C).

¹¹ *See id.*

¹² *See* NPRM ¶ 8.

¹³ *See* NPRM ¶ 10. Broadcasters and satellite carriers that want to oppose market modification requests would need to file responsive pleadings in accordance with 47 C.F.R. § 76.7.

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requirement in Section 76.59, the proposed rules would require commercial TV broadcast stations and satellite carriers to provide specific forms of evidence to support market modification petitions, should they chose to file such petitions.¹⁴ The proposed rules would also require a satellite carrier to provide specific evidence to demonstrate its claim that satellite carriage resulting from a market modification would be technically or economically infeasible.¹⁵

Proposed Rule Changes to Section 76.59

§76.59 Modification of television markets.

(a) The Commission, following a written request from a broadcast station, cable system **or satellite carrier**, may deem that the television market, **as defined either by §76.55(e) or §76.66(e)**, of a particular commercial television broadcast station should include additional communities within its television market or exclude communities from such station's television market. In this respect, communities may be considered part of more than one television market.

(b) Such requests for modification of a television market shall be submitted in accordance with §76.7, petitions for special relief, and shall include the following evidence:

(1) A map or maps illustrating the relevant community locations and geographic features, station

¹⁴ See NPRM ¶¶ 12-13.

¹⁵ See NPRM ¶ 19-20.

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transmitter sites, cable system headend **or satellite carrier local receive facility** locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) **Noise-limited service contour maps (for digital stations) or** Grade B contour maps (**for analog stations**) delineating the station's technical service area and showing the location of the cable system headends **or satellite carrier local receive facilities** and communities in relation to the service areas.

Note to paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guide.

(5) Cable system **or satellite carrier** channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(6) Published audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period)

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for both **multichannel video programming distributor (MVPD) and non-MVPD** households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.

(c) Petitions for Special Relief to modify television markets that do not include such evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee.

(d) A cable operator **or satellite carrier** shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this section.

(e) A market determination under this section shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination.

(f) No modification of a commercial television broadcast station's local market pursuant to this section shall have any effect on the eligibility of households in the community affected by such modification to receive distant signals from a satellite carrier pursuant to 47 U.S.C. 339.

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History:

On March 29, 1993, the Commission released a *Report and Order*, FCC 93-144.¹⁶ Among other things, this *Report and Order* implemented procedures that enable the Commission to add communities to or delete communities from a station's television market to better reflect marketplace conditions following a written request. Such written requests to modify a television station's must-carry market may be filed by television stations or cable operators, pursuant to 47 CFR Section 76.59 of the Commission's rules.

On May 24, 1996, the Commission released a *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-197.¹⁷ The *First Report and Order* established new television market definitions for purposes of the cable television signal carriage and retransmission consent rules. The Commission concluded that it was appropriate to change market definitions from Arbitron areas of dominant influence ("ADIs") to Nielsen Media Research designated market areas ("DMAs") for must-carry/retransmission consent elections beginning with the must-carry/retransmission consent cycle that is to commence on January 1, 2000. The *Further Notice* provided parties an opportunity to further consider issues relating to the transition to

¹⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965 (1993).

¹⁷ *Definition Of Markets For Purposes Of The Cable Television Mandatory Television Broadcast Signal Carriage Rules; Implementation of Section 301(d) of the Telecommunications Act of 1996, Market Determinations*; CS Docket No. 95-178, Report and Order and Further Notice of Proposed Rulemaking 11 FCC Rcd 6201 (1996).

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market designations based on DMAs and sought comment on procedures for refining the market modification process.

On May 26, 1999, the Commission released an *Order on Reconsideration and Second Report and Order*, FCC 99-116.¹⁸ Among other things, the Commission established final rules for procedures for refining the cable market modification process by adopting a standardized evidence approach to the market modification process. The Commission sets forth specific information submission requirements for the market modification process, as detailed in the amended 47 CFR Section 76.59. The intent of specific submission requirements was to bring greater uniformity and certainty to the market modification process and to avoid unnecessary reconsideration petitions and appeals. This collection accounts for the paperwork burden imposed on entities when undergoing the market modification request process.

This information collection does not affect individuals or households; thus, there are no impacts under the Privacy Act.

Statutory authority for this collection of information is contained in Section 102 of the STELA Reauthorization Act of 2014 (STELAR), Pub. L. No. 113-200, 128 Stat. 2059 (2014), and Sections 1, 4(i), 303(r), 338 and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 338 and 534.

2. TV broadcast stations, cable system operators and satellite carriers may file a petition with the

¹⁸ *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, CS Docket No. 95-178, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366, 8385-86, ¶ 44 (1999).

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Commission seeking to modify the local television market of a commercial television broadcast station to better serve the programming needs of local communities. The Commission will use information collected in order to determine whether the grant of such a market modification request would be in the public interest.

3. The Commission requires petitioners filing a market modification requests (*e.g.*, TV broadcast station, cable system operator, or satellite carrier) to file such request electronically in accordance with the procedures in 47 C.F.R. § 76.7 for filing Special Relief petitions. Special Relief petitions must be submitted electronically using the Commission's Electronic Comment Filing System (ECFS), <http://www.fcc.gov/cgb/ecfs/>.¹⁹ Petitions must be initially filed in MB Docket No. 12-1. A fee is generally required for the filing of Special Relief petitions; 47 C.F.R. §§ 1.1104, 1.1117, 76.7.

4. This agency does not impose a similar information collection requirement on the respondents. There are no similar data available.

5. The requirements accounted for in this information collection do not have a significant impact on a substantial number of small businesses or other small entities.

6. The Commission is required by Sections 338(l) and 614(h)(1)(C) of the Communications Act to permit the filing of market modification requests. If this collection of information were not sponsored by the Commission, then broadcast TV stations, cable system operators and satellite

¹⁹ See *Media Bureau Announces Commencement of Mandatory Electronic Filing for Cable Special Relief Petitions and Cable Show Cause Petitions Via the Electronic Comment Filing System*, Public Notice, 26 FCC Rcd 17150 (MB 2011).

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carriers would not have filing procedures available to them to request modifications of a broadcast station's local television market to better reflect marketplace conditions. Furthermore, if these information collection requirements were not conducted, the Commission would be unable to fulfill its obligation to ensure that a grant of a market modification request is in the public interest. (The frequency for this collection of information is determined by respondents, as necessary.)

7. There are no special circumstances associated with this information collection. This information collection is consistent with the guidelines in 5 CFR 1320.5(d)(2).

8. The Commission published a Federal Register Notice (80 FR 19594) on April 13, 2015 seeking comments on the information collection requirements contained in this supporting statement. No comments have been received from the public.

9. There are no payments or gifts given to respondents.

10. There is no assurance of confidentiality provided to petitioners or other respondents; however, in accordance with the Commission's rules, 47 C.F.R. § 0.459, a TV broadcast station, cable system operator, or satellite carrier may request confidential treatment for financial or other information supplied with its petition or responsive pleading.

11. This information collection does not address any private matters of a sensitive nature.

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12. We estimate that 20 market modification requests (petitions) will be filed annually with the Commission by TV broadcast stations, cable system operators and satellite carriers (collectively).²⁰ In addition, parties may file responsive pleadings, such as comments or oppositions to the petitions, and petitioners may file replies responding to such comments or oppositions. We estimate that 80 responsive pleadings, or about four responsive pleadings for each petition filed (20 x 4 = 80). The resulting total is 100 responses (20 petitions + 80 responsive pleadings). However, we expect that the petitioner will reply to comments/oppositions and that this reply will constitute one of the four responsive pleadings per petition/proceeding. Accordingly, we do not double-count the petitioner in our estimate of 80 respondents.

Total Annual Respondents: 20 TV Stations/Cable Operators/Satellite Carriers
60 Commenting Parties
80 respondents²¹

Total Annual Responses: 20 Market Modification Petitions
80 Responsive Pleadings²²

²⁰ This estimate is based on the addition of satellite market modification petitions and on staff experience with receiving cable market modification petitions. This estimate includes a downward adjustment from 15 to 10 cable petitions, and then a proposed program change from 10 to 20 to reflect the addition of satellite market modification petitions.

²¹ This estimate assumes the petitioner will file two pleadings and that three other interested parties will file comments/oppositions per petition/proceeding (4 different parties x 20 petitions/proceedings). This estimate includes a downward adjustment from 75 to 40 respondents in the cable context, and then a proposed program change from 40 to 80 to reflect the addition of respondents in the satellite context.

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100 responses

Market Modification Petitions. We estimate that all 20 market modification petitions will be filed by parties using outside legal assistance. Therefore, we estimate that each such petitioner/respondent will take about 4 hours to consult with an outside attorney to prepare a market modification petition.²³ We estimate that the respondent would have an average salary of \$100,000/year (\$48.08/hour). All estimates are based on Commission staff's knowledge and familiarity with the availability of the data required.

Responsive Pleadings. In addition, we estimate that 16 responsive pleadings (20% of the 80 responsive pleadings) will be filed using "in-house" legal staff, whereas we estimate that 64 responsive pleadings (80% of the 80 responsive pleadings) will use an outside attorney to prepare such responsive pleadings. For the estimated 16 responsive pleadings prepared in-house, we estimate that each commenting party/respondent will take about 40 hours²⁴ to prepare a responsive pleading. For the estimated 64 responsive pleadings prepared by an outside attorney, we estimate that each commenting party/respondent will take about 4 hours to consult with an outside attorney to prepare a responsive pleading.²⁵ We estimate that the respondent would have an average salary of \$100,000/year (\$48.08/hour).

²² This includes comments or oppositions to petitions, as well as replies to comments/oppositions by the original petitioner. This estimate includes a downward adjustment from 75 to 50 responses in the cable context, and then a proposed program change from 50 to 100 to reflect the addition of responses in the satellite context.

²³ The estimated time for outside attorney review of a market modification petition is provided in item 13's cost to respondents.

²⁴ This adjustment from 80 hours to 40 hours to prepare a pleading reflects that a responsive pleading (*e.g.*, comment, opposition, reply) will take substantially less time to prepare than the market modification petition initiating the proceeding. This change accounts for much of the downward adjustment.

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Total Annual Burden Hours:

20 market modification petitions	x 4 hours =	80 hours
16 “in-house” responsive pleadings ²⁶	x 40 hours =	640 hours
64 outside attorney pleadings ²⁷	x 4 hours =	<u>256 hours</u>
Total Annual Burden Hours:		976 hours²⁸

Annual “In-House” Cost:

80 hours	x \$48.08/hour =	\$3,846.40
640 hours	x \$48.08/hour =	\$30,771.20
256 hours	x \$48.08/hour =	<u>\$12,308.48</u>
Total Annual In-House Cost:		\$46,926.08²⁹

²⁵ The estimated time for outside attorney review of a market modification petition is provided in item 13’s cost to respondents.

²⁶ (20% of 80 responsive pleadings)

²⁷ (80% of 80 responsive pleadings)

²⁸ This estimate includes a downward adjustment from total burden hours of 1,440 hours to 488 hours in the cable context, and then a proposed program change from 488 hours to 976 hours to reflect the additional burden hours to cover satellite petitions.

²⁹ This in-house cost estimate includes a downward adjustment from \$69,235.20 to \$23,463.04 in the cable context, and then a proposed program change from \$23,463.04 to \$46,926.08 to reflect the additional in-house cost to cover satellite petitions.

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Summary:

- **Total Number of Respondents: 80 respondents**
- **Total Number of Responses: 100 responses**
- **Total Annual Burden Hours: 976 hours**
- **Total Annual In-House Cost: \$46,926.08**

13. **Cost to Respondents:** As noted in item 12, above, we estimated that all 20 market modification petitions will be prepared using an outside attorney. We also estimated that 64 responsive pleadings will be prepared using an outside attorney. With respect to the 20 market modification petitions prepared using an outside attorney, we estimate that it will take the outside attorney 80 hours to research and prepare a market modification petition. With respect to the 64 responsive pleadings prepared using an outside attorney, we estimate that it will take the outside attorney 40 hours to prepare a responsive pleading. We estimate that an outside attorney will charge an average of \$300 per hour for providing legal services to respondents. In addition, a filing fee of \$1,465.00 is generally required for the filing of Special Relief petitions, such as a market modification petitions.³⁰

Outside Attorney Cost:

20 market modification petitions	x 80 hours/petition =	1,600 hours
64 responsive pleadings	x 40 hours/pleading =	2,560 <u>hours</u>
Total Outside Attorney Hours :		4,160 hours

³⁰ See 47 C.F.R. §§ 1.1104, 1.1117.

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Subtotal: 4,160 hours x \$300/hour = **\$1,248,000.00**

Filing Fees:

20 market modification petitions x 1,465.00 Fee/petition = **\$29,300.00 filing fees**

➤ **Total Cost to Respondents:** \$1,248,000.00 + \$29,300.00 = **\$1,277,300.00**

14. Cost to the Federal Government: As noted in item 12, above, we estimated that 20 market modification requests (petitions) will be filed annually with the Commission by TV broadcast stations, cable system operators and satellite carriers (collectively). Each petition will initiate a market modification proceeding. As noted in item 12, above, we estimate about four responsive pleadings will be filed in response to a petition (in each proceeding). We estimate that the Commission will use clerical staff at the GS-9, Step 5 grade level (\$28.60) and attorney or other professional staff at the GS 15, Step 5 level (\$68.56/hour) to review the record of each proceeding, which includes the initiating market modification petition and associated responsive pleadings.³¹ We estimate that the average processing time for Commission staff for reviewing the filings in each proceeding will be 85 hours.³²

<u>Filed</u>	<u>Filing</u>	<u>per hour</u>	<u>Cost per filing</u>
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³¹ Our burden estimate will include time to review and evaluate the market modification petition and any associated responsive pleadings filed in the market modification proceeding.

³² Our increased burden hours estimate (39 to 85 hours) is based on staff experience with receiving cable market modification petitions.

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FCC Attorneys: 20 x 80 hours x \$68.56 = \$2,193,920.00

(20x80=1,600 hours)

FCC Clerical: 20 x 5 hours x \$28.60 = \$57,200.00

(20x5=100 hours)

Total Cost to the Federal Government

\$2,251,120.00

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15. There are proposed program changes to this collection which are due to the proposed information collection requirements adopted in FCC 15-34. Therefore, if the proposed requirements are adopted in a final rulemaking by the Commission, the following will occur to OMB's inventory: an increase of 40 to the number of respondents, an increase of 50 to the number of responses, an increase of 488 to the annual burden hours and an increase of \$638,650.00 to the annual burden cost.

There are adjustments to this collection which are due to the Commission reevaluating the existing burdens for this collection. Therefore, the adjustments are as follows: a decrease to the number of respondents of 35, a decrease to the number of responses of 25, a decrease to the annual burden hours of 952 and a decrease to the annual cost of \$801,350.00.

16. The data will not be published.

17. OMB approval of the expiration of the information collection will be displayed at 47 C.F.R. § 0.408.

18. There are no exceptions to the Certification Statement.

B. Collections of Information Employing Statistical Methods

No statistical methods are employed.