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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 20-31; FCC 20-63; FRS 16773]

Implementation of Provisions of the Television Viewer Protection Act of 2019 Governing Negotiation of Retransmission Consent between Qualified Multichannel Video Programming Distributor Buying Groups and Large Station Groups

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) revises its rules governing good faith negotiation of retransmission consent, to implement provisions of the Television Viewer Protection Act of 2019 governing negotiations between qualified multichannel video programming distributor buying groups and large broadcast station groups.

DATES: These rule revisions are effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Raelynn Remy of the Policy Division, Media Bureau at Raelynn.Remy@fcc.gov, or (202) 418-2936.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (Order), FCC 20-63, adopted on May 12, 2020, and released on May 13, 2020. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. This document will also be available via ECFS at [FCC-20-63A1.docx](#). Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio

format), by sending an e-mail to fcc504@fcc.gov or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

1. In this Report and Order (Order), we revise § 76.65 of our rules, which governs good faith negotiation of retransmission consent, to implement provisions in section 1003 of the Television Viewer Protection Act of 2019 (TVPA).¹ Under section 1003, the Commission must adopt rules that provide for negotiation of retransmission consent between “qualified multichannel video programming distributor [MVPD] buying group[s]” and “large [broadcast] station group[s]” as those terms are defined in the TVPA. As discussed below, we adopt our proposals from the NPRM in this proceeding: (i) to define the term “large station group” as used in section 1003 to mean, in relevant part, an entity whose individual television broadcast station members *collectively* have a national audience reach of more than 20 percent;² (ii) to define the term “qualified MVPD buying group” as used in section 1003 to mean, in relevant part, an entity that negotiates on behalf of MVPDs that collectively serve no more than 25 percent of all households receiving service from any MVPD in a given local market;³ and (iii) to codify in § 76.65 of our rules the provisions governing negotiation of retransmission consent between qualified MVPD buying groups and large station groups, as well as the definitions of “local market” and “multichannel video programming distributor” set forth in section 1003(b)(3). As proposed, we also make minor conforming changes to § 76.65.

I. BACKGROUND

2. In December 2019, Congress enacted the TVPA, which is the latest in a series of statutes that have revised the Communications Act of 1934 (Act) to establish parameters for the carriage of

¹ This Order adopts rules that implement only section 1003 of the TVPA. The Media Bureau has addressed implementation of section 1004 of the TVPA, which establishes truth-in-billing requirements applicable to MVPDs and providers of fixed broadband Internet access service, in a separate proceeding. Through this rulemaking, we fulfill our statutory obligation to revise our rules to specify that “certain small MVPDs can meet the obligation to negotiate [retransmission consent] in good faith . . . by negotiating with a large station group through a qualified MVPD buying group.”

² Aside from satisfying the audience reach requirement, a “large station group” otherwise must meet the definition set forth in section 325(b)(7)(D) of the Act.

³ Aside from satisfying this requirement, a “qualified MVPD buying group” otherwise must meet the definition set forth in section 325(b)(7)(C) of the Act.

television broadcast stations by MVPDs. Section 1003 of the TVPA revised section 325(b) of the Act principally by allowing smaller MVPDs to negotiate collectively as a buying group for retransmission consent with large broadcast station groups. Specifically, section 1003(a)(3) revised section 325(b)(3)(C) by adding new subsection 325(b)(3)(C)(vi), which directs the Commission to commence a rulemaking proceeding to revise its retransmission consent rules to specify that: (1) a [MVPD] may satisfy its obligation to negotiate retransmission consent in good faith under section 325(b)(3)(C)(iii) with a large broadcast station group by designating a qualified MVPD buying group to negotiate on its behalf, so long as the qualified MVPD buying group itself negotiates in good faith in accordance with such clause; (2) it is a violation of the obligation to negotiate in good faith under section 325(b)(3)(C)(iii) for the qualified MVPD buying group to disclose the prices, terms, or conditions of an ongoing negotiation or the final terms of a negotiation to a member of such group that is not intending, or is unlikely, to enter into the final terms negotiated by the group; and (3) a large broadcast station group has an obligation to negotiate [retransmission consent] in good faith under section 325(b)(3)(C)(ii) with respect to a negotiation with a qualified MVPD buying group.

3. In addition, section 1003(b) of the TVPA amended section 325(b)(7) of the Act principally by adding new subsections 325(b)(7)(C) and (D), which define the terms “qualified MVPD buying group” and “large station group,” respectively, for the purpose of applying the new good faith negotiation provisions of section 325(b)(3)(C)(vi).⁴ New section 325(b)(7)(C) of the Act defines “qualified MVPD buying group,” in relevant part, as an entity that:

- negotiates [retransmission consent] on behalf of two or more multichannel video programming distributors—
- none of which is a [MVPD] that serves more than 500,000 subscribers nationally; and
- that do not collectively serve more than 25 percent of all households served by a [MVPD] in any single local market in which the applicable large station group operates.

⁴ Section 1003(b) also amended section 325(b)(7) of the Act by adding subsections (b)(7)(E) and (F), which define the terms “local market” and “multichannel video programming distributor,” respectively.

4. Moreover, new section 325(b)(7)(D) of the Act defines “large station group” as a group of television broadcast stations that are directly or indirectly under common de jure control permitted by the regulations of the Commission, generally negotiate agreements for retransmission consent as a single entity, and include only television broadcast stations that have a national audience reach of more than 20 percent.

5. In January 2020, the Commission issued the NPRM, which proposed to revise section 76.65 of its rules as set forth above. The pleading cycle for the NPRM ended on March 16, 2020. Three parties filed comments in response to the NPRM,⁵ and no parties filed reply comments. Commenters uniformly support our proposals.

II. DISCUSSION

6. We adopt the unopposed revisions to section 76.65 of our rules proposed in the NPRM. First, we revise § 76.65 to define the term “large station group” as, among other things, an entity whose individual television station members collectively have a national audience reach of more than 20 percent. We conclude that this interpretation of the term “large station group” finds support in the text and structure of the TVPA, and would best effectuate Congressional intent.⁶ In particular, as we noted in the NPRM, the text of the first two clauses in the definition of “large station group” require, respectively, that stations comprising a “large station group” be under “common de jure control” and negotiate agreements as a “single entity.” We find that these two requirements properly characterize only stations that collectively comprise a group, rather than individual stations, and that the third clause of the definition thus should be interpreted as imposing a requirement that must be true of the stations collectively. Moreover, as we observed in the NPRM, the TVPA contemplates that “qualified MVPD buying groups” and “large station groups” would be counterparties in a retransmission consent negotiation. Because the former term imposes a market share cap of 25 percent on the MVPDs “collectively,” we conclude that the 20 percent market share threshold for “large station groups” similarly should be construed to apply to the

⁵ These parties are: ACA Connects – America’s Communications Association (ACA Connects); the National Association of Broadcasters (NAB); and NTCA – the Rural Broadband Association (NTCA).

⁶ As we noted in the NPRM, this interpretation also is harmonious with the Commission’s ownership restrictions.

stations collectively.⁷ Finally, given that a key purpose of the new good faith negotiation provisions is to level the playing field by “allow[ing] smaller MVPDs to collectively negotiate as a buying group [with large station groups] for retransmission consent,” we adopt our tentative finding that Congress could not have intended to create a collective negotiation mechanism to address the growing bargaining power of large station groups but then defined those groups in a way that would render the mechanism unavailable as a practical matter. As we stated in the NPRM, a contrary interpretation, whereby each station in the group individually must have at least a 20 percent national audience reach, would be illogical given that there are currently no stations that meet this threshold.

7. We also adopt our proposal to construe the phrase “all households served by a [MVPD]” in the statutory definition of “qualified MVPD buying group” to mean all households that receive service from any MVPD, rather than all households served by a specific MVPD in a given local market. Because the percentage of households that subscribe to a particular MVPD (or class of MVPDs) relative to the total number of households that subscribe to any MVPD in a given market is a competition metric that the Commission historically has utilized, we conclude that this is the most reasonable reading of the relevant phrase. We also believe, as noted in the NPRM, that adopting the alternative interpretation would create practical problems given that the statute provides no guidance as to which MVPD in a given market should serve as the benchmark for the relevant threshold.

8. Finally, we adopt our proposals: (i) to codify in § 76.65 the provisions governing negotiation of retransmission consent between qualified MVPD buying groups and large station groups set forth in section 325(b)(3)(C)(vi)(I)-(III) of the Act, as added by section 1003(a)(3) of the TVPA and the definitions of “local market” and “multichannel video programming distributor” set forth in section 325(b)(7)(E) and (F) of the Act, as added by section 1003(b)(3) of the TVPA; and (ii) to delete the phrase “as defined in 17 U.S.C. 122(j)” in § 76.65(b)(1)(viii) and (ix). Commenters uniformly support these

⁷ We do not find that the presence of the term “collectively” in the statutory definition of “qualified MVPD buying group,” as contrasted with the absence of that term in the definition of “large station group,” compels a different reading of the statute. In particular, we agree with ACA Connects’s assertion that the structure of the respective definitions required that Congress insert the word “collectively” in the former definition, but not in the latter.

revisions to § 76.65, and no party has opposed them.⁸

9. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Final Regulatory Flexibility Analysis (FRFA) concerning the possible significant economic impact on small entities by the rules adopted in the attached Order. The Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the Order and FRFA (or summaries thereof) will be published in the Federal Register.

10. In this Order, pursuant to section 325(b)(3)(C) of the Act, as amended by section 1003 of the Television Viewer Protection Act of 2019 (TVPA), we revise our retransmission consent rules to specify, among other things, that certain small multichannel video programming distributors (MVPDs) may satisfy their obligation to negotiate retransmission consent in good faith by negotiating with a large broadcast station group through a qualified MVPD buying group. In particular, we revise § 76.65 of our rules to define: (i) the term “large station group” as used in section 1003 of the TVPA to mean, in relevant part, an entity whose individual television station members collectively have a national audience reach of more than 20 percent; and (ii) the term “qualified MVPD buying group” as used in section 1003 to mean, in relevant part, an entity that negotiates on behalf of MVPDs that collectively serve no more than 25 percent of all households receiving service from any MVPD in a given local market. In addition, we codify in § 76.65 the provisions governing negotiation of retransmission consent between qualified MVPD buying groups and large station groups, as well as the definitions of “local market” and “multichannel video programming distributor” set forth in section 1003(b)(3). We also make minor conforming changes to § 76.65.

11. The action in this Order is authorized pursuant to sections 4(i), 4(j), 303(r), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), and 325, and section

⁸ Although NTCA – the Rural Broadband Association “supports the Commission’s proposal as an initial first step toward fixing the broken retransmission consent process,” it asserts that the Commission must go further to address anticompetitive behavior by content providers, including forced tying, tiering, and other unfair bargaining tactics. Those issues, however, were not discussed in the NPRM and are therefore beyond the scope of this proceeding.

1003 of the Television Viewer Protection Act of 2019.

12. Without mentioning the IRFA, a couple of parties commented on the impact of the rules adopted in this Order on small entities. For example, NTCA asserts that a major challenge faced by smaller MVPDs in negotiating retransmission consent is the unequal bargaining power they possess due to their size relative to the bargaining power of programmers. NTCA argues that large MVPDs are able to obtain more favorable retransmission consent rates because they provide broadcasters with a larger number of potential viewers that, in turn, generates additional advertising revenue. By contrast, NTCA contends, broadcasters are able to extract higher per-subscriber rates from smaller MVPDs because the broadcaster stands to lose little by denying the smaller MVPD access to programming. According to NTCA, smaller MVPDs often do not have the option of discontinuing video programming because a substantial portion of their customers cannot receive an over-the-air broadcast signal, and thus rely on their MVPD to carry broadcast stations that serve as a principal source for local news and weather reports. NTCA argues that allowing smaller MVPDs to negotiate retransmission consent agreements through a larger buying group will enable them to obtain access to programming at more reasonable rates. ACA Connects argues that swift adoption of the proposed rules will enable smaller MVPDs to utilize the TVPA's new protections promptly.

13. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Below is a list of such small entities:

- Cable Companies and Systems
- Cable System Operators

- Open Video Services.
- Satellite Master Antenna Television (SMATV) Systems
- Direct Broadcast Satellite (DBS) Service
- Television Broadcasting

14. The Order does not adopt any reporting or recordkeeping requirements. The Order revises the Commission's rules to permit certain small MVPDs to meet their statutory obligation to negotiate retransmission consent in good faith by designating a qualified MVPD buying group to negotiate on their behalf with a large broadcast station group. In particular, the Order revises such rules by clarifying the meaning of the statutory terms "large station group" and "qualified MVPD buying group" so as to facilitate smaller MVPDs' use of the new collective bargaining provisions consistent with Congressional intent. These rule revisions impose no new regulatory compliance burdens on small television broadcast stations.

15. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such 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."

16. In this Order, the Commission implements section 1003 of the TVPA in a way that will reduce burdens on smaller MVPDs that negotiate retransmission consent against large broadcast station groups with greater bargaining leverage by allowing such MVPDs to negotiate collectively as a buying group. As noted, the rule revisions adopted in the Order will not have an adverse economic impact on any small entities, and would have a positive economic impact on smaller MVPDs that choose to avail themselves of the TVPA's new collective bargaining provisions in their negotiations with large broadcast station groups that possess market power.

17. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The Order and FRFA (or summaries thereof) will also be published in the Federal Register.

18. This document does not contain proposed new or revised information collection requirements subject to the Paperwork Reduction Act of 1995. In addition, therefore, it does not contain any new or modified “information burden for small business concerns with fewer than 25 employees” pursuant to the Small Business Paperwork Relief Act of 2002.

19. Accordingly, it is ordered that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), and 325, and section 1003 of the Television Viewer Protection Act of 2019, this Report and Order is adopted, effective thirty (30) days after the date of publication in the Federal Register. It is ordered that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), and 325, and section 1003 of the Television Viewer Protection Act of 2019, the Commission’s rules are hereby amended. It is further ordered that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 20-31 shall be terminated, and its docket closed. It is further ordered that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Report and Order, including the Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration. It is further ordered that, pursuant to section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), the Commission shall send a copy of the Report and Order to Congress and the Government Accountability Office.

List of Subjects in 47 CFR Part 76

Cable television, Communications.

FEDERAL COMMUNICATIONS COMMISSION.

Cecilia Sigmund,

Federal Register Liaison Officer.

For the reasons discussed in the preamble, the Federal Communications Commission amends part 76 of title 47 of the Code of Federal Regulations (CFR) as set forth below:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.65 by revising paragraphs (b)(1)(viii) and (ix) and (b)(2) and adding paragraphs (b)(3) and (4) to read as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

* * * * *

(b) * * *

(1) * * *

(viii) Coordination of negotiations or negotiation on a joint basis by two or more television broadcast stations in the same local market to grant retransmission consent to a multichannel video programming distributor, unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission.

(ix) The imposition by a television broadcast station of limitations on the ability of a multichannel video programming distributor to carry into the local market of such station a television signal that has been deemed significantly viewed, within the meaning of § 76.54 of this part, or any successor regulation, or any other television broadcast signal such distributor is authorized to carry under 47 U.S.C. 338, 339,

340 or 534, unless such stations are directly or indirectly under common de jure control permitted by the Commission.

(2) *Negotiation of retransmission consent between qualified multichannel video programming distributor buying groups and large station groups.* (i) A multichannel video programming distributor may satisfy its obligation to negotiate in good faith for retransmission consent with a large station group by designating a qualified MVPD buying group to negotiate on its behalf, so long as the qualified MVPD buying group itself negotiates in good faith in accordance with this section.

(ii) It is a violation of the obligation to negotiate in good faith for a qualified MVPD buying group to disclose the prices, terms, or conditions of an ongoing negotiation or the final terms of a negotiation to a member of the qualified MVPD buying group that is not intending, or is unlikely, to enter into the final terms negotiated by the qualified MVPD buying group.

(iii) A large station group has an obligation to negotiate in good faith for retransmission consent with a qualified MVPD buying group.

(A) “Qualified MVPD buying group” means an entity that, with respect to a negotiation with a large station group for retransmission consent—

(1) Negotiates on behalf of two or more multichannel video programming distributors—

(i) None of which is a multichannel video programming distributor that serves more than 500,000 subscribers nationally; and

(ii) That do not collectively serve more than 25 percent of all households served by multichannel video programming distributors in any single local market in which the applicable large station group operates; and

(2) Negotiates agreements for such retransmission consent—

(i) That contain standardized contract provisions, including billing structures and technical quality standards, for each multichannel video programming distributor on behalf of which the entity negotiates; and

(ii) Under which the entity assumes liability to remit to the applicable large station group all fees received from the multichannel video programming distributors on behalf of which the entity negotiates.

(B) “Large station group” means a group of television broadcast stations that –

(1) Are directly or indirectly under common de jure control permitted by the regulations of the Commission;

(2) Generally negotiate agreements for retransmission consent under this section as a single entity; and

(3) Include only television broadcast stations that collectively have a national audience reach of more than 20 percent;

(3) *Definitions.* For purposes of this section and section 76.64 of this subpart, the following definitions apply:

(i) “Local market” has the meaning given such term in 17 U.S.C. 122(j); and

(ii) “Multichannel video programming distributor” has the meaning given such term in 47 U.S.C. 522.

(4) *Totality of the circumstances.* In addition to the standards set forth in paragraphs (b)(1) and (2) of this section, a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in paragraph (a) of this section.

* * * * *

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