

ALERT

# FCC Requests Comment on Determining the “Significantly Viewed” Status of Television Broadcast Stations

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April 3, 2020

On March 31, 2020, the Federal Communications Commission (FCC or Commission) released a Notice of Proposed Rulemaking (NPRM) requesting comment on whether to modernize the process used to determine whether a television broadcast station is “significantly viewed” for purposes of implementing the agency’s network non-duplication and syndicated exclusivity rules. Comments are due 30 days after the NPRM is published in the Federal Register and reply comments are due 60 days after publication in the Federal Register.

The network non-duplication and syndicated exclusivity rules are designed to protect a local broadcast station’s exclusive rights to distribute network or syndicated programming by generally precluding cable operators and satellite distributors from carrying a duplicating network or syndicated program broadcast by a distant station. Under the significantly viewed exception, however, cable operators and satellite carriers are not required to delete the duplicative network or syndicated programming of a station that is deemed “significantly viewed” in the relevant community.

Establishing that a station is “significantly viewed” requires both a sufficient share of viewing hours (the time households watched the station as a percentage of the time households watched all stations) and net weekly circulation (the percent of households that viewed the station for five minutes or more during the entire week). The required percentages vary based on whether a station is a “network station” affiliated with ABC, CBS, or NBC, or an “independent station.”

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## Practice Areas

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Media

Telecom, Media & Technology

When it adopted its significantly viewed rules in 1972, the FCC established a list of significantly viewed stations based on viewership surveys from 1970 and 1971. Currently, a television station, cable operator, or satellite carrier can petition to add a station to the significantly viewed list based on the following criteria:

- For stations that were not covered by the 1970-71 surveys (e.g. stations that were not on the air at that time), independent professional audience surveys must demonstrate that the station is significantly viewed on a county-wide basis over three separate, consecutive four-week periods during the first three years of the subject station’s operation.
- Alternatively, independent professional audience surveys must demonstrate that the station is significantly viewed during at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September.

In addition, a station may lose its significantly viewed status if another station petitions for a waiver of the significantly viewed exception to reinstate its exclusive rights with respect to that station. In order to obtain a waiver, the petitioning station must demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community specific or system-specific over-the-air viewing data, following the procedures set out in the FCC’s rules.

The Commission maintains a list of these stations known as the Significantly Viewed List.

Nielsen has been the primary source for the data required to make a showing that a station is significantly viewed. However, in 2019, Nielsen completed a substantial modernization of its audience survey process, switching to electronic measurement only. This measurement includes meters that measure the video content playing on a screen and return path data (RPD) from set-top boxes.

In the NPRM, the Commission asks whether the current process of showing a station’s significantly viewed status is outdated or overly burdensome, and if so, what effect those costs and burdens have on stations and viewers.

Among the questions asked by the Commission are:

- Whether, given Nielsen’s recent methodology change, electronic measurement techniques satisfy the requirement for an “audience survey of over-the-air television homes” as required by the rules and whether Nielsen, or anyone else, can provide sufficient data in smaller markets.
- What modifications, if any, should be made to the methodology in the rule, reflecting electronic data-gathering, any data scarcity in certain communities, lower numbers of over-the-air viewers, and ways to reduce the costs and burdens of the process.
- Whether alternative methodologies, such as through the use of a technical showing using a Longley-Rice analysis to demonstrate the reach of a station’s signal, can be utilized.
- Whether to stop reading Section 122 of the Copyright Act, which requires the use of the FCC’s significantly viewed methodology in place in 1976 for the purpose of determining statutory copyright licenses, as preventing the FCC from altering the significantly viewed methodology for purposes of the

Communications Act.

- Whether the Satellite Home Viewer Extension and Reauthorization Act’s efforts to create parity between cable operators and satellite carriers restricts the FCC’s ability to alter the methodology.
- Whether to alter the Commission’s definitions of “network station” (which, for purposes of these rules, includes only stations affiliated with ABC, CBS and NBC) “partial network station,” and “independent station” to conform to current market realities.

If you are interested in submitting comments, or for more information about the FCC’s significantly viewed rules, please contact one of the attorneys listed on this alert or the Wiley attorney who regularly handles your FCC matters.