

Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

**Authority:** This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: April 30, 2009.

**Lawrence E. Starfield,**

*Acting Regional Administrator, Region 6.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 74

[MB Docket No. 08-253; FCC 09-36]

### Replacement Digital Television Translator Service

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** With this *Report and Order*, and after seeking public comment, the Federal Communications Commission creates a new “replacement” digital television translator service to permit full-service television stations to continue to provide service to viewers within their analog coverage areas who have lost service as a result of those stations’ digital transition. Replacement digital translators can be licensed solely on digital television channels 2 through 51 and with secondary frequency status. Unlike other television translator licenses, the replacement digital television translator license will be associated with the full-service station’s main license and will have the same four letter call sign as its associated main station. As a result, a replacement digital television translator license may not be separately assigned or transferred and will be renewed or assigned along with the full-service station’s main license. Almost all other rules associated with television translator stations are applied to replacement digital television translators.

**DATES:** This final rule is effective June 19, 2009, except for § 74.787(a)(5)(i) which contains information collection requirements that have not been approved by the Office of Management and Budget (“OMB”). The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date.

**FOR FURTHER INFORMATION CONTACT:** Shaun Maher, *Shan.Maher@fcc.gov* of the Media Bureau, Video Division, (202) 418-1600. For additional information

concerning the information collection requirement contained in this *Report and Order*, contact the Office of Managing Director (“OMD”), Performance Evaluation & Records Management (“PERM”), Cathy Williams, *Cathy.Williams@fcc.gov*, at 202-418-2918.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission’s *Report and Order*, FCC 09-36, adopted on May 8, 2008, and released on May 8, 2009. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC 20554. It may also be purchased from the Commission’s duplicating contractor at Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554; the contractor’s Web site: <http://www.bcpweb.com>; or by calling (800) 378-3160, facsimile (202) 488-5563, or e-mail [FCC@BCPIWEB.com](mailto:FCC@BCPIWEB.com). The document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) Additionally, the complete item is available on the Federal Communications Web site at <http://www.fcc.gov>. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission’s Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

### Paperwork Reduction Act of 1995 Analysis

This *Report and Order* adopts a revised information collection requirement subject to the Paperwork Reduction Act of 1995 (“PRA”), Public Law 104-13 (44 U.S.C. 3501 through 3520) pertaining to DTV transition related issues. Specifically, this *Report and Order* will allow full-service stations seeking to use the new replacement digital television translator service to submit specified attachments to FCC Form 346 when applying for a construction permit.<sup>1</sup> OMB has consented to review the requirement under the emergency processing rules.<sup>2</sup> We believe there is good cause for requesting emergency PRA approval from OMB due to the statutory digital

<sup>1</sup> OMB Control Number 3060-1086 will be revised to include the information collection requirement.

<sup>2</sup> 5 CFR 1320.13.

television transition deadline of June 12, 2009.<sup>3</sup>

In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

### Synopsis

#### *Creation of New, Replacement Digital Television Translator Service*

Based upon the record, we adopt our proposal to create a new, “replacement” digital television translator service to enable full-service television stations to continue to provide service to viewers in loss areas inside their protected analog service contour created as a result of their transition to digital operations. Although we are sympathetic to the desires of the low power television community to provide new and expanded low power digital service, we continue to believe that we must place a priority on the facilitation of the full-service television digital transition and the avoidance of the loss of service that may result from the transition.<sup>4</sup> We also conclude that the licensing of replacement digital television translators must take precedence over the licensing of new digital translators and low power television stations. We do not believe

<sup>3</sup> Due to the short time frame provided for the Commission to act on the new replacement digital low power television translator service, we requested and received OMB approval to waive **Federal Register** notice for this emergency request under the PRA. *See* 5 CFR 1320.13(d).

<sup>4</sup> *See generally* Digital Television and Public Safety Act of 2005 (“DTV Act”), which is Title III of the Deficit Reduction Act of 2005, Public Law 109-171, 120 Stat. 4 (2006), codified at 47 U.S.C. 309(j)(14) and 337(e), as amended by DTV Delay Act, Public Law 111-4, 123 Stat. 112 (2009) (establishing June 12, 2009 as a new hard deadline for the end of analog transmissions by full-power stations); 47 U.S.C. 309 Note (directing the Commission to “take such actions as are necessary (1) to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009; and (2) to require by February 18, 2009, \* \* \* all broadcasting by full-power stations in the digital television service, occur only on channels between channels 2 and 36, inclusive, or 38 and 51, inclusive (between frequencies 54 and 698 megahertz, inclusive).”); *id.* at 336 Note (requiring the Commission to assign paired digital television channels “to further promote the orderly transition to digital television”), 336(b) (expressing Congressional interest in the transition from analog to digital television and reading, in pertinent part, “[i]n prescribing the regulations required by subsection (a), the Commission shall \* \* \* (5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.”).

that this approach will unduly diminish new low power digital service opportunities because we will shortly announce a near-term date upon which we will begin accepting applications pursuant to the first-come, first-serve licensing scheme for new digital translators and low power television stations originally envisioned in our 2004 LPTV digital order.<sup>5</sup> This action will create opportunities for new and expanded digital low power television service.

The rules we adopt today will limit the service areas of replacement translators to only those areas where an existing full-service television station is able to demonstrate a loss in service as a result of its transition to digital and *de minimis* extension areas where necessary to provide service to loss areas. With service limited to only those areas that were previously served by a full-service station, and with licenses associated with the full-service station license so that they cannot be separately assigned or transferred, it is not likely that replacement translators will have a substantial impact on other uses of this spectrum. Furthermore, we seek to provide full-service stations with the flexibility to employ the technical means they find most feasible to replace service to potential loss areas. While we therefore will not adopt a requirement that stations demonstrate that all other technical solutions are infeasible before authorizing a replacement translator, we do encourage stations to consider other, potentially more spectrally efficient solutions such as maximization and DTS.

As we stated in the *NPRM*, consistent with the *Unlicensed Operation in the TV Bands* decision,<sup>6</sup> unlicensed devices must continue to fully protect replacement digital television translators in order to ensure that full-power post-transition digital television stations can deliver uninterrupted service to their entire pre-transition analog service area through the use of this service. Furthermore, we find that

the importance of providing broadcasters flexibility to replace lost service with translator service outweighs concerns about impinging on the use of unlicensed white space devices in such a limited number of areas.

#### *Licensing of Replacement Digital Television Translators on Channels 2–51*

We adopt our tentative conclusion that replacement digital television translators should be licensed only for digital operation. We also conclude that we should forego licensing replacement translators on channels 60–69 in order to prevent possible interference to public safety entities and to avoid the potential for immediate displacement of critical replacement translator facilities.

Contrary to our tentative conclusion, we will not license replacement translators on television channels 52–59.<sup>7</sup> Based upon the record developed in this proceeding, we conclude that the use of channels 52–59 for the new fill-in translator service would not be appropriate. Although we have previously allowed for the licensing of digital LPTV and TV translator facilities on channels 52–59 in conjunction with the digital low power television transition,<sup>8</sup> we recognize the concerns of the 700 MHz wireless entities that oppose allowing new replacement translators to be licensed on channels 52–59. We also find that it is unlikely that television stations would seek a replacement translator on an out-of-core channel only to later be displaced by a primary wireless licensee. None of the applications we have received for replacement translators have proposed channels 52–59. Therefore, it does not appear that prohibiting the use of channels 52–59 for new replacement translators will diminish the opportunities for full-power stations to replace lost analog service. Therefore, we shall limit replacement translators to only in-core channels 2–51.

#### *Processing Priority*

We adopt our tentative conclusion that applications for replacement digital television translators will have processing priority over applications filed by other low power television and TV translator stations, except displacement applications (with which

they would have co-equal priority). Thus, replacement translator applications and low-power displacement applications will be processed on a first-come, first-served basis, and the earlier filed application will prevail. By contrast, a replacement translator application will receive priority over non-displacement low-power and translator applications even if the latter are first-filed. Applications for replacement translator stations, however, must provide the requisite interference protection to authorized analog and digital low power television, and TV translator facilities. We further clarify that applications filed for full-service television and Class A television stations will continue to have processing priority over applications for replacement digital television translators.

It is a Commission priority to expeditiously assist full-service television stations both to transition to digital broadcasting and to digitally replicate their pre-transition analog service areas by the DTV statutory deadline.<sup>9</sup> We envision that replacement digital television translators will be a tool that full-service stations can use to successfully provide digital television service to their entire pre-transition analog service areas. We conclude that applications for replacement translators must be given processing priority to ensure that stations are quickly able to obtain the necessary authorization to begin constructing their replacement facility. Low power television and TV translator stations are not currently required to convert to digital broadcast by a congressionally mandated date and therefore do not require the expedited processing needed for replacement translators.<sup>10</sup> We find that displaced low power television and television translator applicants, however, warrant co-equal priority because their viewers have lost television service that they are accustomed to receiving, and we seek to assist all television stations to maintain their existing analog service coverage through the digital transition.

<sup>5</sup> See *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Report and Order, 19 FCC Rcd 19331, 19354, para. 71 (2004) (“*Digital Low Power Report and Order*”).

<sup>6</sup> *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations*, MB Docket No. 08–253, Notice of Proposed Rulemaking, 23 FCC Rcd 18534, para. 6 (2008) (“*NPRM*”). See *Unlicensed Operation in the TV Broadcast Bands*, ET Docket No. 04–186, Second Report and Order and Memorandum Opinion and Order, FCC 08–260, November 14, 2008 (“*Unlicensed Operation in the TV Broadcast Bands*”).

<sup>7</sup> Channels 60–69, 746–806 MHz, have been reallocated to Public Safety Entities upon completion of the digital television transition. *Reallocation of Television Channels 60–69, the 746–806 MHz Band*, Report and Order, 12 FCC Rcd 22953 (1997).

<sup>8</sup> See *Digital Low Power Report and Order*, 19 FCC Rcd at 19354, para. 71.

<sup>9</sup> See *supra* n.4.

<sup>10</sup> 47 U.S.C. 309(j)(14) and 337(e). The Commission previously determined that it has discretion under 47 U.S.C. 336(f)(4) to set the date by which analog operations of stations in the low power and translator service must cease. *Digital Low Power Report and Order*, 19 FCC Rcd at 19336, para. 12. The Commission opted not to establish a fixed termination date for the low power digital television transition until it resolved the issues concerning the transition of full-power television stations. *Id.* at 19336 para. 19.

### Eligibility

We also adopt our tentative conclusion that eligibility for the replacement digital television translator service be limited to only those full-service television stations<sup>11</sup> that can demonstrate that a portion<sup>12</sup> of their analog service areas will not be served by their full, post-transition digital facilities and that the proposed replacement digital television translator service will be used for that purpose. We adopt this requirement because only full-service television stations are required to transition to digital broadcast by June 12, 2009, and the Commission's priority is to expeditiously assist full-service stations to maintain their analog service areas through the digital transition. Furthermore, the goal of this new service is digital replication of full-power analog television service areas, not their expansion.

### Service Area

We adopt our tentative conclusion to limit the service area of the replacement translator to post-transition full-service stations' analog loss areas.<sup>13</sup> All applicants for the replacement digital television translator service must submit an engineering study that depicts both the full-service station's analog service area, as well as its post-transition digital facility which does not serve that station's entire analog service area and therefore demonstrates an analog loss area. The purpose of replacement digital television translators is to provide service to analog loss areas, not to expand full-service post-transition stations' service areas. However, we recognize that it may be impossible for some post-transition full-service stations to site translators that replace analog loss areas without also slightly expanding their analog service areas. Therefore, as outlined below, we adopt our proposal and allow full-service stations seeking replacement digital television translators to propose a *de minimis* expansion of their analog service areas upon a showing that it is

<sup>11</sup> "Full-service television stations," as used in the context of this Report and Order, is defined as any operating full-service television station, including full-service stations that are operating under special temporary authority ("STA") to maintain existing service.

<sup>12</sup> We did not intend in the *NPRM* to imply that a minimum or maximum amount of analog loss area is required for a full-service post-transition digital station to apply for the replacement digital television translator service. Rather, any full-service post-transition digital station has the flexibility to serve any size analog loss area as long as the station is otherwise able to comply with the other technical requirements adopted in this proceeding.

<sup>13</sup> *NPRM*, 23 FCC Rcd at 18536, para. 7.

necessary<sup>14</sup> to replace service in their post-transition analog loss areas.

In addition, we adopt our conclusion that "analog service area" be defined "as the existing, authorized, protected service area actually served by the analog signal prior to analog termination for the [DTV] transition, consistent with our approach in the DTS proceeding."<sup>15</sup> We adopt this definition because the purpose of this new service is to provide digital television service to post-transition analog loss areas. Replacement digital television translators are intended to serve digital full-service stations' analog loss areas. This new service is not intended for digital full-service stations to use in proposed digital service areas, where analog service did not formerly exist. Traditional, lower priority translators can be used to improve service in these areas.

We believe that some post-transition full-service stations should be allowed a *de minimis* expansion of their analog service areas, in order to properly engineer their replacement translators. We find that *de minimis* expansion is necessary and unavoidable due to the nature of certain analog loss areas and therefore should be permitted in such circumstances upon a suitable showing. The Commission will determine the *de minimis* threshold on a case-by-case basis, consistent with our approach in the DTS proceeding,<sup>16</sup> that which is necessary to provide service to loss areas.

### Licensing of Replacement Digital Television Translator Stations Associated With Main Station License

We conclude that, unlike other television translator licenses, the license for replacement digital television translators will be associated with the full-service station's main license.<sup>17</sup> Therefore, the replacement digital translator license may not be separately assigned or transferred and will be renewed or assigned along with the full-service station's main license. We believe that such a measure is necessary to ensure that the replacement translator service is limited to only those situations where a station seeks to

<sup>14</sup> In this context, a showing of "necessary" requires that the post-transition full-service digital television station demonstrate, through an engineering exhibit, that it is not possible to site a replacement digital television translator without "*de minimis*" expansion of the station's analog service area.

<sup>15</sup> *NPRM*, 23 FCC Rcd at 18535, para. 5, ft. note 5 (citing *DTS Report and Order*, 23 FCC Rcd 16745, para. 28).

<sup>16</sup> *DTS Report and Order*, 23 FCC Rcd 16750, para. 33.

<sup>17</sup> See 47 CFR 73.3540(e).

restore service to a loss area and the license is used for that purpose. This measure will also prevent a replacement translator from being converted to an LPTV station, thus defeating its purpose.

Given our decision that replacement translator stations shall be associated with the full-service station's main license, we will not adopt our proposal in the *NPRM* that stations seeking a replacement digital television translator be required to submit a completed FCC Form 346 and pay the requisite \$675.00 filing fee for a new station, but rather will treat applications for replacement translators like those for auxiliary facilities. Thus, applications for replacement translators will be filed on FCC Form 346, will be treated as a minor change application, and there will be no filing fee.

### Secondary Frequency Use Status

We adopt our tentative conclusion that replacement digital television translator stations be licensed with "secondary" frequency use status. These stations will not be permitted to cause interference to, and must accept interference from, full-service television stations, certain land mobile radio operations and other primary services. We clarify that replacement translator stations are subject to the interference protections to land mobile station operations in the 470–512 MHz band set forth in the rules.<sup>18</sup>

### Other Translator Rules Apply

In order to facilitate the application and licensing of replacement translators, except as specified herein,<sup>19</sup> we will apply the rules associated with television translator stations to the replacement digital television translator service, including the rules concerning power limits,<sup>20</sup> out-of-channel emission limits,<sup>21</sup> unattended operation,<sup>22</sup> and time of operation.<sup>23</sup> Although mutually exclusive applications for replacement translators are unlikely, given the limited service area of these translators, if mutually exclusive applications are received, they will be resolved through the Commission's part 1 and part 73 competitive bidding rules and procedures.<sup>24</sup> Mutually exclusive applicants for replacement translators stations will be permitted a limited

<sup>18</sup> See 47 CFR 74.709.

<sup>19</sup> See *supra* paras. *Secondary Frequency Use Status, Other Translator Rules Apply, and Call Signs*.

<sup>20</sup> See 47 CFR 74.735.

<sup>21</sup> See 47 CFR 74.736.

<sup>22</sup> See 47 CFR 74.734.

<sup>23</sup> See 47 CFR 74.763.

<sup>24</sup> See 47 CFR 1.2100 *et seq.* & 73.5000 *et seq.*

period of time to resolve their mutual exclusivity through settlement or engineering solutions.<sup>25</sup>

#### Call Signs

After consideration of the comments received, we will not adopt our proposal to assign the same type of call sign to replacement translators that is assigned to all other digital translator stations. In the 2004 *Digital Low Power Report and Order*, we determined that digital translators should receive a unique call sign such as “K20AA-D.”<sup>26</sup> We made this determination to prevent confusion with other call sign combinations as well as possible technical problems.<sup>27</sup> We believe, however, that in regards to replacement digital television translators, the associated costs to stations and technical problems outweigh any benefit that would be received by assigning replacement translators a separate call sign. To eliminate these burdens and avoid technical problems, we will not adopt our proposal and instead will assign to replacement translators the same four letter call sign as their associated full-service station.

#### Construction Period

Although we expect full-service stations to quickly construct their replacement digital television translator facilities, we will not adopt our original proposal and require that replacement digital television translators be constructed within six months. We now believe that such a requirement would unfairly disadvantage certain licensees and would actually be counterproductive. Affording stations building replacement translators a full three-year period for completion of construction is necessary to ensure the successful implementation of this new service and will not undermine our desire that replacement translators be quickly constructed. We conclude that stations do not need a shortened construction period to motivate expedited construction of replacement digital translators. Stations that voluntarily seek authority to build a replacement digital translator would not likely do so absent an intent to construct. Moreover, forcing licensees to construct in a much abbreviated period could discourage them from applying in the first instance, a result clearly contrary to our purpose. We are also persuaded that the benefits of the replacement translator service

established herein will be obtained even if some interruption of service occurs because a broadcaster is unable to complete construction and initiate service within the first six months.

#### Other Issues

Certain engineering firms raised issues that were not addressed in the *NPRM*. We find that these issues are beyond the scope of this proceeding or are being addressed in other proceedings. Therefore, we shall not address them in this proceeding.

#### Final Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>28</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was included in the Notice of Proposed Rulemaking in this proceeding.<sup>29</sup> Written public comments were requested on the IRFA. This presents Final Regulatory Flexibility Analysis.<sup>30</sup>

#### Need for and Objectives of the Rules

This Report and Order (“*R&O*”) establishes a new “replacement” digital television translator service that will allow full-service television stations to obtain new digital translators to maintain existing service.

The *R&O* concludes that replacement translators will be licensed only for digital operation and only on channels 2–51 and not for out-of-core channels 52–59 and 60–69.

The *R&O* concludes that applications for replacement translators will be given licensing priority over all other low power television and TV translator applications except displacement applications (for which they will have co-equal priority). The *R&O* concludes that the eligibility for such service will be limited to only those full-service television stations that can demonstrate that a portion of their analog service area will not be served by their full, post-transition digital facilities and for translators to be used for that purpose. The *R&O* concludes that the service area of the replacement translator will be limited to only a demonstrated loss area but that a replacement translator should be permitted to expand slightly a full-

service station’s post-transition, digital service area. Finally, the *R&O* concludes that replacement digital television translator stations will be licensed with “secondary” frequency use status.

The *R&O* concludes that, unlike other television translator licenses, the license for the replacement translator will be associated with the full power station’s main license. Therefore, the replacement translator license may not be separately assigned or transferred and will be renewed or assigned along with the full-service station’s main license. The *R&O* concludes that most of the other rules associated with television translator stations will apply to the new replacement translator service including those rules concerning the filing of applications, processing of applications, power limits, out-of-channel emission limits, unattended operation, and time of operation. The *R&O* concludes that replacement translators will not be assigned a separate call sign but rather will have the same call sign as their associated full-service station. Finally, the *R&O* concludes that the construction period for replacement translators will be the standard three-year period that is provided for other low power television digital facilities.

#### Summary of Significant Issues Raised by Public Comments in Response to the IRFA

TCA, Inc. (“TCA”) argued that the IRFA “shows that very little consideration was made towards the many wireless license holders that could be affected.” TCA maintains that the *NPRM* “calls for small wireless entities to incur additional costs by hiring counsel, monitoring Commission filings, and obtaining technical assistance to prove interference from a translator station.” TCA concludes that this “additional and unnecessary expense is an unacceptable burden for a small company to bear.” TCA is concerned with the Commission’s proposal to require that replacement digital translators proposed for out-of-core channels 52–59 to be subject to the requirements previously adopted by the Commission for proposed facilities on these channels. Specifically, applicants for a digital translator on channels 52–59 must demonstrate that no in-core channel is available and must notify wireless entities on the affected channel(s) of their filing. The Commission decided to not allow replacement translators on channels 52–59, thus TCA’s concerns are moot.

<sup>28</sup> See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Public Law 104–121, Title II, 110 Stat. 847 (1996).

<sup>29</sup> See *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations*, MB Docket No. 08–253, Notice of Proposed Rulemaking, 23 FCC Rcd 18534 (2008) (“*NPRM*”).

<sup>30</sup> See 5 U.S.C. 604.

<sup>25</sup> See 47 CFR 73.5002(c).

<sup>26</sup> See *Digital Low Power Report and Order*, 19 FCC Rcd at 19396, para. 197.

<sup>27</sup> *Id.*

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

The RFA 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 rule.<sup>31</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.”<sup>32</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>33</sup> 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.<sup>34</sup>

*Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$14 million in annual receipts.<sup>35</sup> Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”<sup>36</sup> According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television

stations<sup>37</sup> (or approximately 72 percent) have revenues of \$13.5 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>38</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission has estimated the number of licensed NCE television stations to be 380.<sup>39</sup> The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

*Class A TV, LPTV, and TV translator stations.* The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than \$14 million in annual receipts.<sup>40</sup>

Currently, there are approximately 567 licensed Class A stations, 2,227 licensed LPTV stations, 4,518 licensed TV translators and 11 TV booster stations.<sup>41</sup> Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA’s definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. We do not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than \$13 million and thus may be categorized as

small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

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

*Description of Projected Reporting, Recordkeeping and Other Compliance Requirements*

The R&O adopts one new reporting requirement. Full-service stations seeking a new replacement digital television translator station must submit a showing with their FCC Form 346 that they have a loss area as a result of their transition to digital and that the proposed replacement translator will serve the loss area. The new reporting requirement will not differently affect small entities.

*Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered*

The RFA requires an agency to describe “the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.”<sup>42</sup>

The Commission is aware that some full service television stations operate with limited budgets. Accordingly, every effort was taken to propose rules that impose the least possible burden on all licensees, including smaller licensed entities. Existing rules, forms and procedures will be used to implement this new service thereby reducing the burden on small entities.

<sup>31</sup> *Id.* at 604(a)(3).

<sup>32</sup> 5 U.S.C. 601(6).

<sup>33</sup> *Id.* at 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.” 5 U.S.C. 601(3).

<sup>34</sup> 15 U.S.C. 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

<sup>35</sup> See 13 CFR 121.201, NAICS Code 515120 (adopted Oct. 2002).

<sup>36</sup> NAICS Code 515120. This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS Code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

<sup>37</sup> Although we are using BIA’s estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1,374. See News Release, “Broadcast Station Totals as of December 31, 2006” (dated Jan. 26, 2007); see <http://www.fcc.gov/mb/audio/totals/bt061231.html>.

<sup>38</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 CFR 121.103(a)(1).

<sup>39</sup> Broadcast Stations Total as of December 31, 2006.

<sup>40</sup> See 13 CFR 121.201, NAICS Code 515120.

<sup>41</sup> See News Release, “Broadcast Station Totals as of December 31, 2006” (dated Jan. 26, 2007); <http://www.fcc.gov/mb/audio/totals/bt061231.html>.

<sup>42</sup> U.S.C. 604(a)(5).

The *R&O* concludes that replacement translators will be licensed only for digital operation and should be licensed on only channels 2–51 and not for out-of-core channels 52–59 and 60–69. Alternatively, the Commission could have allowed stations to file for analog facilities but the digital transition for full power stations is closely approaching thus making the need for further analog service unnecessary. Further, the Commission could have allowed for replacement translators to be filed on channels 52–59 and 60–69, but it is likely that these stations would very quickly be displaced by wireless and public safety entities and small entities would waste their resources and time having to find a new channel for their proposed facility.

The *R&O* further concludes that applications for replacement translators shall be given licensing priority over all other low power television and TV translator applications except displacement applications (for which they would have co-equal priority). The Commission could have proposed allowing no such priority, but this alternative was not considered because it would result in many more mutually exclusive filings and delay the implementation of this valuable service. The *R&O* also concludes that the Commission should limit the eligibility for such service to only those full-service television stations that can demonstrate that a portion of their analog service area will not be served by their full, post-transition digital facilities and for translators to be used for that purpose. Alternatively, the Commission could have allowed all interested parties to file for new translators, however such approach was not considered because it would also result in numerous mutually exclusive filings and would greatly delay implementation of this needed service. The *R&O* further concludes that the service area of the replacement translator should be limited to only a demonstrated loss area and seeks comment on whether a replacement translator should be permitted to expand slightly a full-service station's post-transition, digital service area. Once again, the Commission could have allowed stations to file for expansion of their existing service areas but such an alternative was not seriously considered because it could result in the use of valuable spectrum that the Commission seeks to preserve for other uses such as new digital low power service. Finally, the *R&O* concludes that replacement digital television translator stations will be licensed with "secondary" frequency

use status. The Commission could have proposed that replacement translators be licensed on a primary frequency use basis, but this alternative was not proposed because it would result in numerous interference and licensing problems and could disrupt the full-power digital transition.

The *R&O* concludes that, unlike other television translator licenses, the license for the replacement translator should be associated with the full power station's main license. Therefore, the replacement translator license may not be separately assigned or transferred and will be renewed or assigned along with the full-service station's main license. Alternatively, the Commission could have proposed that the replacement translator license be separate from the main station's license however this approach was not seriously considered because it could result in licenses being sold or modified to serve areas outside of the loss area, would undermine the purpose of this new service. The *R&O* also concludes that most of the other rules associated with television translator stations would apply to the new replacement translator service including those rules concerning the filing of applications, processing of applications, power limits, out-of-channel emission limits, unattended operation, and time of operation. The alternative could have been to design all new rules for this service, but that alternative was not considered as it would adversely impact stations ability to quickly implement these new translators. The *R&O* concluded that replacement translators not be assigned a separate call sign, as the record demonstrated that assigning a separate call sign would be costly and cause technical problems. The *R&O* adopts a three-year construction period for replacement translators finding that the proposed shorter construction period in the NPRM would unfairly affect certain licensees and be counterproductive.

*Federal Rules Which Duplicate, Overlap, or Conflict With the Commission's Proposals*

None.

*Report to Congress*

The Commission will send a copy of the *R&O*, including the FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>43</sup> In addition, the Commission will send a copy of the *R&O*, including FRFA, to the Chief Counsel for Advocacy of the Small

<sup>43</sup> See 5 U.S.C. 801(a)(1)(A). The Congressional Review Act is contained in Title II, sec. 251, of the CWA, see Public Law 104–121, Title II, sec. 251, 110 Stat. 868.

Business Administration. A copy of this *R&O* and FRFA (or summaries thereof) will be published in the **Federal Register**.<sup>44</sup>

**List of Subjects in 47 CFR Part 74**

Television, Television broadcasting, Low power television.

**Marlene H. Dortch,**

*Secretary, Federal Communications Commission.*

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 74 as follows:

**PART 74—EXPERIMENTAL RADIO AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES**

■ 1. The authority for part 74 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

**§ 74.787 [Amended]**

■ 2. Section 74.787 is amended by adding paragraph (a)(5) to read as follows:

**§ 74.787 Digital licensing.**

(a) \* \* \*

(5) *Application for replacement digital television translator.* (i) An application for a replacement digital television translator may be filed at any time. A license for a replacement digital television translator will be issued only to a television broadcast station licensee that demonstrates in its application that a portion of the station's pre-transition analog service area will not be served by its full, post-transition digital facilities and that the proposed translator will be used to provide service to the area where service has been lost." Replacement digital television translators may operate on channels 2–51. Applications for replacement digital television translator shall be given processing priority over all other low power television and TV translator applications except displacement applications (with which they shall have co-equal priority) as set forth in 47 CFR 73.3572(a)(4)(ii). The service area of the replacement translator shall be limited to only a demonstrated loss area within the full-service station's pre-transition analog service area. "Analog service area" is defined as the existing, authorized, protected service area actually served by the analog signal prior to analog termination for the DTV transition. An applicant for a replacement digital television translator

<sup>44</sup> See 5 U.S.C. 604(b).

may propose a *de minimis* expansion of its full-service pre-transition analog service area upon demonstrating that the expansion is necessary to replace its analog loss area. The license for the replacement digital television translator will be associated with the full power station's main license, will be assigned the same call sign, may not be separately assigned or transferred, and will be renewed with the full-service station's main license.

(ii) Each original construction permit for the construction of a replacement digital television translator station shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. The provisions of § 74.788(c) of this chapter shall apply for stations seeking additional time to complete construction of their replacement digital television translator station.

(iii) A public notice will specify the date upon which interested parties may begin to file applications for replacement digital television translators. Such applications shall be filed on FCC Form 346, shall be treated as an application for minor change and shall be accepted on a first-come, first-served basis. Mutually exclusive applications shall be resolved via the Commission's part 1 and broadcast competitive bidding rules, § 1.2100 *et seq.* and § 73.5000 *et seq.* of this chapter.

(iv) The following sections are applicable to replacement digital television translator stations:

- § 73.1030 Notifications concerning interference to radio astronomy, research and receiving installations.
- § 74.703 Interference.
- § 74.709 Land mobile station protection.
- § 74.734 Attended and unattended operation.
- § 74.735 Power Limitations.
- § 74.751 Modification of transmission systems.
- § 74.763 Time of Operation.
- § 74.765 Posting of station and operator licenses.
- § 74.769 Copies of rules.
- § 74.780 Broadcast regulations applicable to translators, low power, and booster stations (except § 73.653—Operation of TV aural and visual transmitters and § 73.1201—Station identification).
- § 74.781 Station records.
- § 74.784 Rebroadcasts.
- \* \* \* \* \*

**DEPARTMENT OF HOMELAND SECURITY**

**Transportation Security Administration**

**49 CFR Part 1580**

[Docket No. TSA-2006-26514; Amendment Nos. 1520-7, 1580-2]

RIN 1652-AA51

**Rail Transportation Security**

**AGENCY:** Transportation Security Administration (TSA), DHS.

**ACTION:** Final rule; correcting amendments.

**SUMMARY:** This action contains minor technical corrections to the Rail Transportation Security final rule, which was published on November 26, 2008. That document incorrectly referenced certain paragraphs in various sections of 49 CFR part 1580 and included an incorrect telephone number for reporting significant security concerns to TSA. This document corrects the final regulations by revising these paragraph citations and providing the appropriate telephone number.

**DATES:** This correction is effective on May 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** David H. Kasminoff, Office of Chief Counsel, TSA-2, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598-6002; telephone (571) 227-3583; facsimile (571) 227-1378; e-mail [david.kasminoff@dhs.gov](mailto:david.kasminoff@dhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On November 26, 2008 (73 FR 72131), TSA issued a final rule to enhance the security of our Nation's rail transportation system. This rule established security requirements for freight railroad carriers; intercity, commuter, and short-haul passenger train service providers; rail transit systems; and rail operations at certain, fixed-site facilities that ship or receive specified hazardous materials by rail. As published, the regulatory text in the final rule contains several incorrect references to other provisions in the rule. First, the rule as published, in stating that §§ 1580.100, 1580.101, and 1580.105 apply to a freight railroad carrier hosting a passenger operation described in § 1580.1, incorrectly cites to nonexistent paragraph (d) in § 1580.1, instead of paragraph (a)(4). Second, § 1580.103(g), which requires each person described in paragraph (a) of that section to provide a telephone number for TSA to use to request location and

shipping information, incorrectly refers to information required in paragraph (a)(4) of § 1580.103 instead of paragraph (c). Third, § 1580.103(g)(2), in stating that a covered person may not provide a telephone number that requires a call back (such as an answering service, answering machine, or beeper device) to meet the requirements of § 1580.103, incorrectly refers to paragraph (f) of that section instead of paragraph (g). Fourth, § 1580.107(a), in referencing the paragraph that contains an exception to the requirements imposed upon a rail hazardous materials shipper transferring to a rail car containing rail security-sensitive materials to a railroad carrier, incorrectly refers to paragraph (e) of § 1580.107 instead of paragraph (g). This final rule correction replaces the incorrect citations with the correct ones.

Finally, the telephone numbers provided in §§ 1580.105(b) and 1580.203(b) of the final rule for reporting significant security concerns to DHS have been changed. The new telephone number at the TSA Freedom Center designated to receive reports of significant security concerns is 1-866-615-5150. This final rule correction inserts the correct telephone number in the rule text.

**List of Subjects in 49 CFR Part 1580**

Hazardous materials transportation, Mass transportation, Rail hazardous materials receivers, Rail hazardous materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures.

**II. Corrections to the Rule**

■ Accordingly, 49 CFR part 1580 is corrected by making the following correcting amendments:

**PART 1580—RAIL TRANSPORTATION SECURITY**

■ 1. The authority citation for part 1580 continues to read as follows:

**Authority:** 49 U.S.C. 114.

■ 2. In § 1580.100, paragraph (a)(4) is correctly revised to read as follows:

**§ 1580.100 Applicability.**

(a) \* \* \*

(4) Each freight railroad carrier hosting a passenger operation described in § 1580.1(a)(4) of this part.

\* \* \* \* \*

■ 3. In § 1580.101, paragraph (a)(4) is correctly revised to read as follows:

**§ 1580.101 Rail security coordinator.**

(a) \* \* \*