

informal decision-making processes or beneficial use programs relating to the use of solid wastes. Materials are no longer subject to the state's solid waste regulations under the state rules when a state determines that the secondary materials are no longer solid wastes when beneficially used.

The Agency acknowledges state beneficial use determinations and seeks comment on whether to consider secondary materials that receive a state beneficial use determination for use as a fuel or as an ingredient as not a solid waste, should also not be considered a solid waste under federal law. Commenters who support such a position should provide the basis or rationale for this position. For example, would a determination be needed that shows the beneficial use determination was in-line with EPA's principles as outlined in section V.A.2. (i.e., whether they were legitimate fuels or ingredients)?

#### D. Biofuels

Biofuels and byproducts from the production of biofuels are non-traditional alternative fuels being offered for stakeholder consideration. Biofuels can be generally described as a gas or liquid fuel made from biological materials, including plants, animal manure, and other organic sources. Thus, biofuels produced from these materials, such as ethanol and biodiesel are not considered to be solid wastes themselves, but rather are viewed as legitimate fuel products. Biofuels production has increased dramatically in the past few years and is expected to continue increasing over the coming years. The Energy Policy Act of 2005 amended the CAA to establish a Renewable Fuel Standard (RFS) program which established a major new federal renewable fuel volume mandate. While market forces initially caused renewable fuel use to far exceed these mandates, this program provided certainty that at least a minimum amount of renewable fuel would be used in the U.S. transportation market, which in turn provided assurance for investment in production capacity. The Energy Independence and Security Act of 2007 (EISA) updated the RFS program to include a new definition of renewable fuels that accounted for the fuel life-cycle emissions of greenhouse gases (GHG)<sup>63</sup> and also increased the

<sup>63</sup> A "renewable fuel" is defined in EISA as a fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in transportation fuel. "Renewable biomass" is defined as (1) Planted crops and crop residue, (2) planted trees and tree residue, (3) animal waste material and animal byproducts, (4)

total renewable fuel volume mandate to 36 billion gallons per year by 2022; the statute also established four specific categories of renewable fuels, each with a separate volume mandate. These categories are renewable fuel, advanced biofuel, biomass-based diesel, and cellulosic biofuel.

Biofuels production can be viewed as including both the feedstock materials that are used to produce biofuels, as well as the byproducts generated from the production of biofuels. EPA considers these materials to be legitimate alternative fuels when they have meaningful heating value, do not contain contaminants that are significantly higher in concentration than traditional fuels, and are handled as a valuable commodity. For example, a project completed by the University of Georgia (UGA) Engineering Outreach Service (EOS) demonstrated that biofuels processed from fats and grease (chicken fat, yellow grease, choice white grease, and beef tallow), either singly or blended with No. 2 fuel oil, are technically and economically viable alternatives to No. 2 fuel oil in industrial boilers.<sup>64</sup> We request additional data and comment on the extent to which fats, oils, and greases (FOGs) and related biomass materials that can be used as feedstocks to produce biofuels and that are not previously addressed in this ANPRM, are also used directly as fuels in stationary combustion sources. Further, the Agency requests comment on the extent to which FOGs and biomass materials are processed into biofuels for use in stationary combustion sources, such that their assessment as part of this rulemaking effort is warranted. For example, the U.S. Energy Information Administration estimated used cooking oil is produced at a rate of some 100 million gallons per day in the USA.<sup>65</sup> Literature suggests that biodiesel can be prepared from waste cooking oil. Although there are instances where such oil is used as a fuel for engines with only minimal processing (such as filtering), more intensive processing (such as the addition of ethyl alcohol with sodium hydroxide as a catalyst for the transesterification of vegetable oils and animal fats) is necessary to produce

slash and commercial thinnings, (5) biomass from the immediate vicinity of buildings, (6) algae, and (7) separated yard waste or food waste, including recycled cooking and trap grease.

<sup>64</sup> FY 2005 *FoodPAC* Final Report; "Combustion of Poultry Fat for Plant Heat and Steam," University of Georgia.

<sup>65</sup> Radich, A. Biodiesel performance, costs, and use. U.S. Energy Information Administration, 2006. <http://www.eia.doe.gov/oiaf/analysispaper/biodiesel/index.html>.

true biodiesel fuel.<sup>66</sup> Finally, we request comment on whether non-hazardous byproducts generated from the production of biofuels, such as dry distiller's grain from corn ethanol and lignin from cellulosic ethanol, are being used as alternative fuels, which therefore should be assessed as part of this rulemaking effort.

#### VII. Statutory and Executive Order Reviews

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

Generally, because this action is "advanced" in nature and does not, therefore, propose any requirements on any entities, the various administrative requirements EPA must address in the rulemaking process are not applicable. When EPA issues a notice of proposed rulemaking, EPA will address those requirements. EPA expects to prepare an Economic Assessment (EA) in support of the proposed action. We will submit this EA, along with the proposed rulemaking to OMB for review.

#### List of Subjects in 40 CFR Part 257

Environmental protection, Waste treatment and disposal.

Dated: December 22, 2008.

**Stephen L. Johnson,**

*Administrator.*

[FR Doc. E8-30987 Filed 12-31-08; 8:45 am]

**BILLING CODE 6560-50-P**

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 74

[MB Docket No. 08-253; FCC 08-278]

#### Replacement Digital Television Translator Service

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Commission proposes and seeks comment on rules that would create a new "replacement" digital television translator service. The new replacement

<sup>66</sup> *Energies* 2008, 1, 3-18; DOI: 10.3390/en1010003, "Waste Cooking Oil as an Alternate Feedstock for Biodiesel," <http://www.mdpi.com/1996-1073/1/1/3/pdf>.

digital television translator service will permit full-service television stations to continue to provide service to viewers within their coverage area who have lost service as a result of those stations' digital transition. We seek comment on how to implement this new service and tentatively conclude that it should be subject to all other rules for television translators with respect to secondary frequency use, filing and processing of applications, construction, and operation. Finally, we announce interim filing procedures to begin acceptance of applications for replacement translators and the authorization of temporary facilities.

**DATES:** Comments for this proceeding are due on or before January 12, 2009; reply comments are due on or before January 22, 2009.

**ADDRESSES:** You may submit comments, identified by MB Docket No. 08–253 and/or FCC 08–278, by any of the following methods:

■ **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

■ **Federal Communications Commission's Web Site:** <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.

■ **Mail:** Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail.) All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

■ **People with Disabilities:** Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Shaun Maher, [Shan.Maher@fcc.gov](mailto:Shan.Maher@fcc.gov) of the Media Bureau, Video Division, (202) 418–1600. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to [PRA@fcc.gov](mailto:PRA@fcc.gov) or contact Cathy Williams at (202) 418–2918, or via e-mail at [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Notice of Proposed Rulemaking*, FCC 08–278,

adopted on December 22, 2008, and released on December 23, 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). These documents 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).

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

■ **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the Web site for submitting comments.

■ For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the

message, "get form." A sample form and directions will be sent in response.

■ **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

■ The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

■ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

■ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

**People with Disabilities:** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

### Initial Paperwork Reduction Act of 1995 Analysis

This Notice of Proposed Rulemaking was analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA")<sup>1</sup> and will revise an existing information collection.<sup>2</sup> The Commission will seek approval under the PRA under OMB's emergency processing rules<sup>3</sup> for this information collection requirement in order to

<sup>1</sup> The Paperwork Reduction Act of 1995 ("PRA"), Public Law 104–13, 109 Stat 163 (1995) (codified in Chapter 25 of Title 44 U.S.C.).

<sup>2</sup> The existing information collection that will be revised to add the new proposed information collection requirement is OMB control number 3060–1086. The new proposed information collection requirement is contained in 47 CFR 74.787(a)(1)(5).

<sup>3</sup> See 5 CFR 1320.13.

implement the rules and policies for a new replacement digital low power television (LPTV) translator service that would permit full-service television stations to continue to provide service to viewers within their coverage area who have lost service as a result of those stations' digital transition. We believe there is good cause for requesting emergency PRA approval from OMB due to the statutory digital television transition deadline of February 17, 2009.<sup>4</sup>

## Synopsis

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

We tentatively conclude that replacement translators should be licensed only for digital operation and should be licensed only on channels 2–59 and not for out-of-core channels 60–69. In order to prevent possible interference to public safety entities, and avoid the potential for displacement of replacement translator facilities, we believe that replacement translators should not be licensed on channels 60–69. We tentatively conclude that stations seeking a replacement translator on channels 52–59 be required to certify in their applications the unavailability of any suitable in-core channel for this purpose. We propose defining “suitable in-core channel” as one that would enable the station to produce a digital service area comparable to its analog service area. This is similar to the requirement we adopted for stations proposing a digital companion channel on channels 52–59.<sup>5</sup> We further propose requiring stations seeking replacement translators on channels 52–59 to provide the notifications to wireless licensees that we adopted for low power television and TV translator stations seeking to flash cut or a digital companion channel on channels 52–59.<sup>6</sup> We seek comment on these proposals.

<sup>4</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>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, 19 FCC Rcd 19331, 71 (2004).

<sup>6</sup> *Id.* Low power television and TV translator station digital flash cut and digital companion channel applicants on channels 52–59 are required to notify all potentially affected 700 MHz commercial wireless licensees of the spectrum comprising the proposed TV channel and the spectrum in the first adjacent channels thereto. They are also required to provide notification to co-channel and first adjacent channel licensees whose

We further tentatively conclude that applications for replacement translators should 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). Therefore, a replacement translator application, when filed, would have processing priority over other applications for new stations, major changes and minor changes. Furthermore, we tentatively conclude that we 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<sup>7</sup> will not be served by their full, post-transition digital facilities and for translators to be used for that purpose. We seek comment on these tentative conclusions.

In *Unlicensed Operation in the TV Broadcast Bands*, we adopted rules to allow unlicensed radio transmitters to operate in the broadcast television spectrum at locations where that spectrum is not being used by licensed services (this unused TV spectrum is often termed “white spaces”).<sup>8</sup> Unlicensed devices must fully protect the licensed services, such as television translators, that operate in the TV bands. We seek to comment on the effect, if any, of this new translator service on the prospects for future white spaces use of the spectrum.

We further tentatively conclude that the service area of the replacement translator should be limited to only a demonstrated loss area and seek comment on whether a replacement translator should be permitted to expand nominally a full-service station's post-transition, digital service area in order to fully cover the loss area. We recognize that it may be impossible for some full-service stations to site a translator that replaces a loss area without also slightly expanding the

geographic service area boundaries lie within 75 miles and 50 miles, respectively, of the proposed digital LPTV or TV translator station location. A station seeking an on-channel digital conversion must provide such written notification at least 30 days in advance of filing its minor change application. An applicant for a digital companion channel must provide the required notifications within 30 days of submitting its “long-form” application. In both cases, applicants must certify in their applications that the notification requirements have been met.

<sup>7</sup> We define “analog service area” as the authorized service area actually served by the analog signal prior to analog termination for the transition, consistent with our approach in the DTS proceeding. See *DTS Report and Order* at 28.

<sup>8</sup> 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*).

station's digital service area. Although we seek to limit these new translators to replacing service in a loss area, and not to expanding service, we tentatively conclude that we should allow *de minimis* expansion of service and seek comment on how to define the term “*de minimis*” in this context.

We tentatively conclude that replacement digital television translator stations should be licensed with “secondary” frequency use status. These stations would 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.<sup>9</sup>

### *Licensing of Replacement Digital Television Translator Stations*

We tentatively conclude that, unlike other television translator licenses, the license for the replacement translator will be associated with the full power station's main license.<sup>10</sup> Therefore, the replacement translator license could not be separately assigned or transferred and would 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 restore service to a loss area and is used for that purpose.

We tentatively conclude that the other rules associated with television translator stations would apply to the new replacement translator service, including those rules concerning the filing of applications,<sup>11</sup> payment of filing fees,<sup>12</sup> processing of applications,<sup>13</sup> power limits,<sup>14</sup> out-of-channel emission limits,<sup>15</sup> call signs,<sup>16</sup> unattended operation,<sup>17</sup> and time of operation.<sup>18</sup> We tentatively conclude that stations seeking a replacement digital television translator would submit a completed FCC Form 346 and pay the requisite \$675.00 filing fee for a new station. The Commission would process such applications, and those found acceptable would be placed on a “proposed grant” public notice subject to petitions to deny. New stations would receive a call sign assigned to digital translator stations (e.g., K20AA–D). Although we expect full-service stations

<sup>9</sup> See, e.g., 47 CFR 74.703, 74.709, 90.303.

<sup>10</sup> See 47 CFR 73.3540(e).

<sup>11</sup> See 47 CFR 73.3572(a)(2).

<sup>12</sup> See 47 CFR 1.1102.

<sup>13</sup> See 47 CFR 73.3572(a). Cite rule on processing of translator applications.

<sup>14</sup> See 47 CFR 74.735.

<sup>15</sup> See 47 CFR 74.736.

<sup>16</sup> See 47 CFR 74.791.

<sup>17</sup> See 47 CFR 74.734.

<sup>18</sup> See 47 CFR 74.763.

to quickly construct their replacement translator facilities, we seek comment on whether to limit the construction period for replacement translators to six months. Although TV translators are ordinarily afforded a three-year period for completion of construction,<sup>19</sup> we believe that expedited construction of replacement translators is vital to the continued provision of television service following the digital transition and that a shorter construction period is warranted.

#### *Interim Filing Procedures*

In order to preserve service to possible loss areas and expedite the future consideration of applications for replacement translator facilities, we will begin accepting applications for replacement digital television translator stations following the release date of this Notice of Proposed Rulemaking. We will withhold the processing of such applications pending the outcome of this proceeding.<sup>20</sup> In the interim full-service stations will be permitted to submit requests for special temporary authority (STA) pursuant to our existing STA procedures in order to operate temporary replacement translator facilities during the pendency of this proceeding. Applications will be filed on a first-come, first-serve basis.<sup>21</sup> If we adopt our proposal to create this new service, and provide with them a processing priority, the processing of applications for replacement translators will be completed and mutually exclusive applications will be resolved by our broadcast competitive bidding rules.<sup>22</sup> We propose to allow a 10-day opportunity for mutually exclusive replacement translator applicants to settle or otherwise find an engineering solution to resolve their mutual exclusivity. We propose that this will expedite the final processing of such applications and ensure that stations are able to replace service to loss areas as quickly as possible.

#### **Initial Regulatory Flexibility Analysis**

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")<sup>23</sup> the Commission has

<sup>19</sup> See 47 CFR 73.3598.

<sup>20</sup> We delegate to the Media Bureau authority to announce the exact date that applications for replacement translator stations will begin to be accepted and the interim procedures and policies that will be applied to such filings.

<sup>21</sup> Any applications filed on or before the effective date of any rules adopted in this proceeding will be treated as if they were filed the day after the effective date.

<sup>22</sup> See 47 CFR 73.5000 *et seq.*

<sup>23</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

prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments indicated on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>24</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.<sup>25</sup>

#### **Need for and Objectives of the Proposed Rules**

Full-service television stations have been undertaking changes to their final, post-transition digital facilities in order to continue to provide the high level of service to their community of license after the completion of the digital transition. In some cases, a portion of the existing analog service areas of some full-service stations will no longer be able to receive service after the station transitions to digital broadcasting. Some of these "loss" areas are a result of unavoidable engineering changes that stations were required to implement in order to avoid interference or other problems on their post-transition digital channel. At times, the analog signal of certain full-service stations could not be replicated because of technical complexities. To assist full-service stations to replace service to these loss areas, this NPRM proposes to establish a new "replacement" digital television translator service that would permit full-service television stations to obtain new digital translators to maintain existing service and request comment on an expedited basis.

The NPRM tentatively concludes that replacement translators should be licensed only for digital operation and should be licensed on only channels 2–59 and not for out-of-core channels 60–69. The NPRM tentatively concludes that stations seeking a replacement translator on channels 52–59 be required to certify in their applications the unavailability of any suitable in-core channel for this purpose.

The NPRM further tentatively concludes that applications for replacement translators should be given licensing priority over all other low

("SBREFA"), Public Law 104–121, Title II, 110 Stat. 847 (1996).

<sup>24</sup> See 5 U.S.C. 603(a).

<sup>25</sup> See *id.* 603(a).

power television and TV translator applications except displacement applications (for which they would have co-equal priority). The NPRM also tentatively 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. The NPRM further tentatively 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. Finally, the NPRM tentatively concludes that replacement digital television translator stations should be licensed with "secondary" frequency use status.

The NPRM tentatively 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 could not be separately assigned or transferred and would be renewed or assigned along with the full-service station's main license. The NPRM also tentatively concludes that the other rules associated with television translator stations would apply to the new replacement translator service including those rules concerning the filing of applications, payment of filing fees, processing of applications, power limits, out-of-channel emission limits, call signs, unattended operation, and time of operation. The NPRM seeks comment whether to limit the construction period for replacement translators to six months.

In order to preserve service to possible loss areas, and expedite the future consideration of applications for replacement translator facilities, the NPRM announces that the Commission will begin accepting applications for replacement digital television translator stations following the release date of the NPRM. The Commission will withhold the processing of such applications pending the outcome of the rulemaking proceeding. In the interim, full-service stations will be permitted to submit requests for special temporary authority (STA) in order to operate temporary replacement translator facilities during the pendency of this proceeding. The NPRM delegates to the Media Bureau authority to announce the exact date that applications for replacement translator stations will begin to be

accepted and the interim procedures and policies that will be applied to such filings. Applications will be filed on a first-come, first-serve basis.

### Legal Basis

The authority for the action proposed in this rulemaking is contained in Sections 1, 4(i) and (j), 7, 301, 302, 303, 307, 308, 309, 312, 316, 318, 319, 324, 325, 336, 337, 614 and 615 of the Communications Act of 1934, 47 U.S.C. 151, 154(i) and (j), 157, 301, 302a, 303, 307, 308, 309, 312, 316, 318, 319, 324, 325, 336, 337, 534, and 535.

### *Description and Estimate of the Number of Small Entities to Which the Proposed 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 proposed rules, if adopted.<sup>26</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>27</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>28</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>29</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>30</sup> Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."<sup>31</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>32</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>33</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>34</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>35</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>36</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

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>32</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 1374. 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>33</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>34</sup> Broadcast Stations Total as of December 31, 2006.

<sup>35</sup> See 13 CFR 121.201, NAICS Code 515120.

<sup>36</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>.

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 does not exclude any television station from the definition of a small business on this basis and is 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 NPRM proposes one new reporting requirement. The NPRM proposes that full-service stations seeking a new replacement digital television translator station 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 any significant alternatives that it has considered in reaching its proposed 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,

<sup>26</sup> *Id.* at 603(b)(3).

<sup>27</sup> 5 U.S.C. 601(6).

<sup>28</sup> *Id.* Section 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>29</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>30</sup> See 13 CFR 121.201, NAICS Code 515120 (adopted Oct. 2002).

<sup>31</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

consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>37</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.

The NPRM tentatively concludes that replacement translators should be licensed only for digital operation and should be licensed on only channels 2–59 and not for out-of-core channels 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 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 NPRM tentatively concludes that stations seeking a replacement translator on channels 52–59 be required to certify in their applications the unavailability of any suitable in-core channel for this purpose. The alternative approach would be to not require a certification, but that could lead to administrative delay and a waste of administrative resources as the staff would have to verify the lack of channels.

The NPRM further tentatively concludes that applications for replacement translators should 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 NPRM also tentatively 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 NPRM further tentatively 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 NPRM tentatively concludes that replacement digital television translator stations should 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 NPRM tentatively 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 could not be separately assigned or transferred and would 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 NPRM also tentatively concludes that the other rules associated with television translator stations would apply to the new replacement translator service including those rules concerning the filing of applications, payment of filing fees, processing of applications, power limits, out-of-channel emission limits, call signs, 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 NPRM seeks comment whether to limit the construction period for replacement translators to six months. Alternatively, the Commission could have proposed that the existing three-year construction period be allowed, however that alternative was not proposed in an effort to ensure that replacement translators are built and operating quickly to replace loss areas.

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

None.

The Commission will send a copy of the Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

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

Television, Television broadcasting, Low power television.

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 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 73.787 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 replacement digital television translator may be filed by a full-service television station that can demonstrate that a portion of its analog service area will not be served by its full, post-transition digital facilities. Replacement digital television translator may operate on channels 2–59. Applications for replacement digital television translator shall be given licensing priority over all other low power television and TV translator applications except displacement applications (for which they shall have

<sup>37</sup> 5 U.S.C. 603(c)(1)–(c)(4).

co-equal priority). The service area of the replacement translator shall be limited to only a demonstrated loss area. The license for the replacement digital television translator will be associated with the full power station's main license and 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 six months 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) 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 subject to the appropriate application fee and shall be accepted on a first-come, first-serve 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.

\* \* \* \* \*

[FR Doc. E8-31227 Filed 12-29-08; 4:15 pm]

BILLING CODE 6712-01-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 697

[Docket No. 0812121592-81605-01]

RIN 0648-AX40

#### Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery; Control Date for American Lobster

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Advance notice of proposed rulemaking; Consideration of a control date for the American lobster fishery.

**SUMMARY:** NMFS announces that it is considering, and is seeking public comment on a proposed rulemaking that would limit or restrict future access to

the American lobster (*Homarus americanus*) trap fishery in the Federal waters of Lobster Management Area 1 (Area 1), the inshore Gulf of Maine, based upon a permit holder's ability to document a history of fishing with lobster traps in Area 1 prior to the date of this notice. This notice should discourage American lobster non-trap vessels from entering the lobster trap fishery, and discourage American lobster trap vessels fishing in other lobster management areas from entering the Area 1 lobster trap fishery, based upon economic speculation while NMFS, in consultation with the Atlantic States Marine Fisheries Commission (Commission), considers whether and how access and effort should be controlled. This document, therefore, gives the public two-fold notification: first, that interested participants should locate and preserve records that substantiate and verify their past participation in the American lobster trap fishery in Federal waters; and second, that new participants to the Area 1 lobster trap fishery may be restricted from fishing in Area 1 with traps in the future depending upon the limited access criteria developed if, in fact, NMFS proceeds forward in this rulemaking.

**DATES:** Comments must be received no later than 5 p.m. eastern standard time on or before February 2, 2009.

**ADDRESSES:** You may submit comments, identified by RIN number 0648-AX40, by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking portal <http://www.regulations.gov>.
- Fax: (978) 281-9117, Attn: Bob Ross.
- Mail: Harold Mears, Director, State, Federal and Constituent Programs Office, Northeast Regional Office, NMFS, 55 Great Republic Drive, Gloucester, MA 01930-2276. Mark the outside of the envelope: "Comments on Lobster Control Date."

Instructions: All comments received are part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted via Microsoft Word, Microsoft Excel,

WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Bob Ross, Supervisory Fishery Management Specialist, 978-281-9234.

**SUPPLEMENTARY INFORMATION:** The American lobster fishery in the United States takes place from North Carolina to Maine. Over three-quarters of all American lobsters are landed in Maine, with most of the other landings occurring in or from Massachusetts, Rhode Island, Long Island Sound, and Georges Bank. The majority of American lobsters are taken in state waters, which extend from the coast to 3 nautical miles (5.56 kilometers) from shore. The offshore trap fishery, which occurs primarily in the offshore canyon areas at the edge of the continental shelf, has developed in the past 25 years and accounts for most of the remaining landings. The American lobster fishery is a year-round fishery in the United States, including the summer and fall months when the lobsters are molting. Approximately 96 percent of lobsters are taken in lobster traps. The rest are taken in trawls, gillnets, dredges, and by divers.

The Commission develops fishery conservation and management strategies for certain coastal species and coordinates the efforts of the states and Federal Government toward concerted sustainable ends. The Commission, under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act), decides upon a management strategy and then forwards that strategy to the states and Federal Government, along with a recommendation that the states and Federal Government take action (e.g., enact regulations) in furtherance of this strategy. The Federal Government is obligated by statute to support the Commission's American Lobster Interstate Fishery Management Plan (ISFMP) and overall fishery management efforts. At its October 2008 Annual Meeting, the Commission voted to initiate an addendum to the ISFMP that includes options for a limited entry program for Area 1. In the same motion, the Commission voted to request the Secretary of Commerce publish a control date in the **Federal Register** that may be used to limit future participation in the Area 1 Federal American lobster trap fishery to those Federal permit holders who could document trap fishing history prior to the control date. The control date is the publication date of this advance notice of proposed rulemaking in the **Federal Register**.

There has been a dramatic increase in fishing effort since the 1970s and effort