Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast	)	CS Docket No. 98-120
Signals: Amendment to Part 76 of the	)	
Commission's Rules	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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April 16, 2015

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The National Association of Broadcasters (NAB)[1] responds to the Commission's request for comment[2] on extending for an additional three years the exemption for small cable systems to comply with the requirement to carry high definition (HD) broadcast signals in HD. As discussed in detail below, a blanket extension of this exemption is inconsistent with the signal quality provisions of the Communications Act of 1934 (Act), as amended, and contrary to the public interest.

I. INTRODUCTION AND SUMMARY

Under Section 614(b)(4)(A) of the Act, the "signals of local commercial television stations" carried by a cable operator must "be carried without material degradation."[3] That

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC No. 15-29 (Mar. 12, 2015) (Notice).

[3] 47 U.S.C. § 534(b)(4)(A). *See also* 47 U.S.C. § 535(g)(2) (applying "material degradation" requirement to noncommercial educational television stations).

same section also requires the Commission to adopt standards ensuring that, "to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal."[4] Since 2001, the Commission has interpreted the two provisions of Section 614(b)(4)(A) as: (i) prohibiting cable operators from discriminating in their carriage of broadcast and non-broadcast signals, and (ii) requiring cable operators to carry HD broadcast signals in HD.[5]

Despite the statutory requirements and its earlier decisions, the Commission in 2008 granted a three-year exemption from this HD carriage requirement to small cable systems.[6] Specifically, it adopted a "self-effectuating" exemption for systems that either (i) serve 2,500 or fewer subscribers and are not affiliated with a cable operator serving more than 10 percent of all multichannel video programming distributor (MVPD) subscribers, or (ii) have an activated channel capacity of 552 MHz or less.[7] The Commission originally scheduled this exemption to sunset on June 12, 2012 (three years after completion of the broadcaster

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[4] 47 U.S.C. § 534(b)(4)(A).

[5] *See Carriage of Digital Television Broadcast Signals*, First Report and Order, 16 FCC Rcd 2598, 2629 ¶73 (2001) (First Material Degradation Order); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules,* Third Report and Order, 22 FCC Rcd 21064, 21067 ¶7 (2007) (Viewability Order).

[6] *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fourth Report and Order, 23 FCC Rcd 13618 (2008) (HD Exemption Order).

[7] HD Exemption Order, 23 FCC Rcd at 13618, ¶2; 13622, ¶12. In adopting the HD exemption, the FCC did not require cable operators to certify that their systems met the subscribership or technical standards, even though it did not otherwise have information on whether or which systems qualify. NAB sought reconsideration on this basis. *See* Petition for Reconsideration of NAB and the Association for Maximum Service Television, Inc. (MSTV), *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, at 5 (filed Nov. 17, 2008) (urging FCC to adopt a notice requirement for cable operators that believe they qualify for an exemption to the material degradation standard because "[u]p-to-date information on the subscribership, technical capacity, and ownership structure of individual cable systems is not readily available via the Commission's website or public files.") (Reconsideration Petition).

digital transition), but subsequently extended it to June 12, 2015.[8] Now, the American Cable Association (ACA) seeks yet another blanket extension of this exemption, which would permit small cable systems to delay carrying HD broadcast signals in HD for a total of *nine years* following the end of the broadcast DTV transition—even though some of these systems are carrying one or more nonbroadcast signals in HD.[9]

NAB opposes ACA's proposal for another three-year blanket extension of the HD exemption. ACA's proposed exemption is inconsistent with *both* the material degradation and the nondiscrimination provisions of Section 614(b)(4)(A). Downconverting an HD broadcast signal to standard definition (SD) digital or to analog materially degrades that signal, contrary to the mandatory terms of the statute. In addition, if a small cable system carries other signals in HD, then permitting it to carry HD broadcast signals in a lesser format pursuant to a continued exemption improperly discriminates against broadcast signals. The Commission has never directly addressed these serious questions about the statutory basis for the categorical small cable HD exemption.

If the Commission ultimately determines to continue this exemption despite its shaky (at best) legal foundation, the Commission should not extend the exemption to systems carrying multiple nonbroadcast HD signals. Including such stations within any exemption would permit those systems to discriminate by downconverting broadcast HD signals. Moreover, the Commission should examine the eligibility standards for the HD exemption. The record suggests that a "small" cable system should be redefined as serving 1,000 or fewer subscribers and not affiliated with a cable operator serving more one million

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[8] *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report and Order, 27 FCC Rcd 6529, 6546-49, ¶¶ 19-23 (2012).

[9] *See* ACA Petition for Rulemaking, CS Docket No. 98-120 (filed Jan. 27, 2015) (ACA Petition); Notice at ¶1 (seeking comment on ACA's Petition).

subscribers (or about one percent of the approximately 101.6 million MVPD subscribers in the country). NAB additionally reiterates its support for a notice or certification requirement for cable operators claiming they qualify for the exemption, as set forth in our pending Reconsideration Petition.

Finally, NAB agrees that the Commission, if it grants another HD exemption in some form, should work to facilitate small cable systems' compliance with the HD carriage requirement. One approach would be to require cable systems relying on the exemption to periodically submit information detailing their progress toward compliance with Section 614(b)(4)(A). Such a requirement or other similar steps would promote Congress's "ultimate goal" of every consumer "enjoy[ing] the benefits of the digital transition."[10] So long as small cable systems are permitted to downconvert HD broadcast signals, their subscribers will be unable to fully enjoy those benefits, contrary to Section 614(b)(4)(A) and clear congressional intent.

II. THE BLANKET HD EXEMPTION LACKS A STATUTORY BASIS

A. The Exemption Is Contrary To The "No Material Degradation" Mandate

The first sentence of Section 614(b)(4)(A) requires that the "local commercial television stations" carried by a cable operator "shall be carried without material degradation."[11] The Commission appropriately interpreted this provision by concluding in

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[10] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 8803, 8810 ¶18 (2007) (Second FNPRM).

[11] 47 U.S.C. § 534(b)(4)(A) ("The signals of local commercial television stations that a cable operator carries shall be carried without material degradation.").

2001 that a broadcast signal delivered in HD must be carried by a cable operator in HD.[12] Given the mandatory and unqualified language of the material degradation prohibition,[13] the categorical exemption allowing certain cable systems to downconvert HD broadcast signals cannot be squared with Section 614(b)(4)(A). Indeed, it is difficult to imagine what could "degrade" a broadcast television signal more substantially than replacing high-quality HD pictures and sound with SD digital or analog and delivering that downconverted signal to consumers. The Commission has never explained how a blanket exemption allowing such degradation of local commercial television stations' signals comports with the statute.[14]

B. If Granted to Cable Systems Carrying Other Signals In HD, The Categorical Exemption Violates The Nondiscrimination Provision

Beyond the prohibition on material degradation, Section 614(b)(4)(A) additionally includes an anti-discrimination provision. It directs the Commission to ensure that, "to the

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[12] First Material Degradation Order, 16 FCC Rcd at 2629, ¶73. The Commission subsequently reaffirmed this decision. *See* Second FNPRM, 22 FCC Rcd at 8804 ¶3; Viewability Order, 22 FCC Rcd at 21067, ¶7.

[13] *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall'" "normally creates an obligation impervious to . . . discretion").

[14] NAB further observes that ACA's Petition mistakenly characterizes Section 614(b)(4)(A) as applying only to the carriage of HD *must-carry* signals. *See, e.g.*, ACA Petition at 1-3. Given the "plain language" of Section 614(b)(4)(A) referring to "local commercial television stations," the Commission has properly found that this section applies "to all local commercial television stations carried by a cable system, and not just to must-carry stations." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 3004 ¶171 (1993). While Congress limited several provisions of Section 614(b) to must-carry stations (*e.g.*, the viewability provision of Section 614(b)(7)), it choose to apply the signal quality and certain other provisions in Section 614(b) to all "local commercial television stations." *See id*. at ¶¶165-66, 171. "Different language in separate clauses in a statute indicates Congress intended distinct meanings." *Barmes v. U.S.*, 199 F.3d 386, 389 (7th Cir. 1999). *See also, e.g., Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991) (where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion"). Because Congress "intentionally and purposefully" applied Section 614(b)(4)(A) to all local commercial television stations, ACA has no basis for contending that the requirement to carry HD broadcast signals in HD is limited only to must-carry stations.

extent technically feasible," cable systems provide the "local commercial television stations" they carry the same "quality of signal processing and carriage" as provided for "any other type of signal."[15] Since 2001, the Commission has appropriately interpreted this nondiscrimination requirement as prohibiting a cable operator from providing "'a digital broadcast signal in a lesser format or lower resolution than that afforded to any' other signal on the system."[16] Thus, if a small cable system carries other signals in HD, then permitting it to carry HD broadcast signals in a lesser format or lower resolution pursuant to a continued categorical exemption improperly discriminates against broadcast signals, in contravention of the statute and previous FCC decisions.

Based on responses to an online survey, ACA's Petition reports that 20.5 percent of its member systems with 552 MHz or less capacity, and 25.9 percent of those systems with 2,500 or fewer subscribers, offer "some HD digital television services."[17] In light of this data, the Notice (at ¶11) asks whether systems carrying "a significant amount of HD programming" should continue to qualify for the HD broadcast exemption—the answer to which is clearly no. Given the terms and the FCC's long-standing interpretation of Section 614(b)(4)(A)'s nondiscrimination prohibition, the Commission must make systems carrying nonbroadcast HD signals ineligible for an exemption that would permit those systems to discriminate by downconverting HD broadcast signals. NAB also observes that the technical infeasibility language of the statute does not justify continuation of the HD broadcast

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[15] 47 U.S.C. § 534(b)(4)(A) ("The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.").

[16] Viewability Order, 22 FCC Rcd at 21067, ¶7, *quoting* First Material Degradation Order, 16 FCC Rcd at 2629, ¶73.

[17] ACA Petition at 5-7.

exemption in such circumstances. If a cable system is carrying other, particularly multiple, signals in HD, then it has the technical capability to carry broadcast signals in HD.[18]

III. IF RETAINING THE HD EXEMPTION IN SOME FORM, THE COMMISSION SHOULD REVISE ITS ELIGIBLITY STANDARDS AND REQUIRE OPERATORS TO CERTIFY THAT THEY QUALIFY

If the Commission ultimately determines to extend the small cable exemption in some form, despite its highly questionable legal foundation, the Commission should reexamine the eligibility standards for the exemption. ACA states that its members reporting continued reliance on the HD exemption have, on average, only 348 subscribers per system,[19] thereby indicating that the FCC's current definition of "small" system is "overly broad."[20]

NAB agrees with the Commission. We propose that "small" cable systems should be redefined as those serving 1,000 (rather than 2,500) or fewer subscribers, and not affiliated with a cable operator serving more than one million total subscribers, or about one (rather than ten) percent of all MVPD subscribers.[21] The Commission has found the 1,000

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[18] NAB stresses that Section 614(b)(4)(A) speaks in terms of *technical* feasibility, not the preferences of a cable system to carry certain signals but not others in HD, or its economic choice not to expend resources to permit carriage of HD broadcast signals while still carrying other signals in HD. We also note there is no statutory basis for continuing to exempt small cable systems from carriage of HD broadcast signals if they carry fewer than ten other HD channels, as the Notice suggests. *Id*. at ¶11 (requesting comment on whether systems carrying significant amounts of HD programming, "such as ten HD channels," should continue to qualify for the exemption). Obviously, a cable system carrying ten other signals in HD would be technically capable of carrying broadcast signals in HD, but so would a system carrying seven, eight or nine other signals in HD. The Commission previously indicated that the nondiscrimination provision prohibits cable operators from providing digital broadcast signals in a lesser format or lower resolution than that "afforded to *any*" other signal or programmer on the system. Viewability Order, 22 FCC Rcd at 21067, ¶7; First Material Degradation Order, 16 FCC Rcd at 2629, ¶73 (emphasis added).

[19] ACA Petition at 4.

[20] Notice at ¶10.

[21] As of the end of 2014, SNL Kagan estimated that 101.6 million households subscribed to an MVPD. Ten percent of 101.6 million is 10.16 million subscribers; one percent is 1.016 million.

subscriber level appropriate for exempting small cable operators from certain regulatory requirements,[22] and given ACA's data, that level appears more than sufficient for any continuing exemption.

In addition, under the current exemption standards, cable systems affiliated with a cable operator serving as many as *ten million* subscribers can take advantage of the "small" cable exemption. By no stretch of the imagination should a cable system affiliated with such a large and highly profitable cable multiple system operator (MSO) be considered "small." As the Commission explained when first adopting the HD broadcast exemption, small cable systems "part of larger, multiple-cable-system networks" would be able to spread the costs of technically upgrading to digital and/or expanding their capacity "over large numbers of subscribers," thereby easing the burden of upgrading.[23] NAB urges the Commission to reexamine the current affiliation standard. We believe that a small cable system affiliated with a cable operator serving more than *one million* total subscribers (approximately one percent of the 101.6 million MVPD households in the country) should be ineligible for an exemption intended to benefit only "small" cable systems unable to upgrade their service.[24]

According to SNL Kagan, the top eleven MVPDs in the U.S. all have over one million subscribers. Significantly, the publicly traded cable MSOs ranking among these "one million plus" MVPDs have revenues in the *billions* and cash flow margins between 30-40 percent. *See* Tony Lenoir, *Cable Posts 5th Consecutive Year of Mid-single Digit Revenue Growth in 2014*, SNL Kagan (Mar. 24, 2015). In other contexts, Congress has defined "small cable operator" as one that, directly or through an affiliate, serves fewer than one percent of all subscribers in the U.S. and "is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed" 250 *million*. 47 U.S.C. § 543(m)(2).

[22] *See, e.g.*, 47 C.F.R. § 76.1700(a) (records to be maintained by cable operators).

[23] HD Exemption Order, 23 FCC Rcd at 13622, ¶9.

[24] With regard to the exemption for cable systems with 552 MHz or less channel capacity, the Commission gave the 552 MHz threshold little scrutiny when adopting it, even though the FCC had earlier observed that small systems "with fewer than 330 MHz" might find it burdensome to carry HDTV signals "if they are not otherwise providing any HDTV programming." First Material Degradation Order, 16 FCC Rcd at 2629 n.216. *Accord* Second FNPRM, 22 FCC Rcd at 8807 n.23. If the FCC

Beyond more appropriately limiting eligibility for any continued HD exemption, NAB repeats its support for a notice or similar certification requirement for cable operators claiming they qualify for the exemption. NAB's still pending Reconsideration Petition noted that cable operators had not been required to certify that their systems met the subscribership or capacity limit requirements necessary to qualify for the exemption, even though the Commission did not otherwise have information on which systems actually met those standards.[25] If the Commission extends its HD exemption for small cable operators in some form in this proceeding, it should remedy this oversight. Cable operators claiming the benefits of the exemption should be required to certify or otherwise establish, in a publicly available manner, that their subscribership levels, ownership structure and technical capacity comport with the standards for the exemption. This type of requirement would aid the Commission in ensuring compliance with the exemption and provide more information to viewers about the services offered by small cable systems and how those services compare to their other video options.[26]

IV. PROMOTING SMALL CABLE SYSTEMS' COMPLIANCE WITH THE HD CARRIAGE REQUIREMENT WOULD SERVE THE PUBLIC INTEREST

NAB strongly agrees that the Commission, if it grants another HD exemption of any type, should work to facilitate small cable systems' compliance with the HD carriage

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continues to rely on the 552 MHz threshold for exempting cable operators from carrying HD broadcast signals, it must establish the appropriateness of that threshold.

[25] *See* Reconsideration Petition and note 7, *supra*.

[26] *See* Reconsideration Petition at 4 (explaining that the availability of HD channels may likely to be relevant to a consumer's decision about subscribing to a particular cable service if other available MVPD or over-the-air options will allow greater access to HD programming).

requirements without further delay.[27] As the Commission observed, ACA's data indicate that the number of ACA members relying on the broadcast HD exemption has not changed significantly since 2012.[28] Because a number of cable systems need to make additional progress to comply with statutory requirements on signal quality, the Commission, for example, should require cable systems relying on the exemption to periodically submit specific factual information describing their progress toward compliance with Section 614(b)(4)(A) and detailing the remaining steps they must take to comply with the statute and the FCC's 2001 order requiring cable systems to carry HD broadcast signals in HD.

Without full compliance by all cable operators with Section 614(b)(4)(A), Congress's goal of every consumer enjoying the benefits of the DTV transition will remain unfulfilled. In particular, so long as small cable systems are permitted to downconvert HD broadcast signals, their subscribers who have "invest[ed] in a HDTV" are "denied the ability to view broadcast signals transmitted in this improved format."[29] Today, 81 percent of U.S. households have at least one HDTV set, up from only 46 percent just five years ago.[30] As more and more consumers purchase HDTV sets, the cost to the public of allowing small cable systems to fail to comply with their statutory requirements to carry HD broadcast signals in HD increases. Local broadcast stations, including those earning very limited revenues in the smallest markets, successfully converted to digital six years ago. Allowing

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[27] *See* Notice at ¶14.

[28] *Id*. at ¶13.

[29] Second FNPRM, 22 FCC Rcd at 8804 ¶5.

[30] Press Release, *HDTV Sets Now in Over 80% of U.S. Households*, Leichtman Research Group (Mar. 13, 2015). Fifty-two percent of all households have multiple HDTV sets. Nearly 90 percent of homes with at least one HDTV subscribe to a pay-TV service.

small cable operators an indefinite period to continue downconverting broadcasters' HD signals before delivering them to consumers does not remotely serve the viewing public.[31]

V. CONCLUSION

As explained in detail above, the blanket exemption from carrying HD broadcast signals in HD lacks a statutory basis. In particular, it is contrary to the "no material degradation" mandate of Section 614(b)(4)(A). If granted to cable systems carrying other signals in HD, the categorical exemption also violates the nondiscrimination provision of that section.

If, despite its highly dubious legal foundation, the Commission nonetheless extends the HD exemption in some form, the FCC should revise its eligibility standards and require operators to establish that their systems qualify for the exemption. The Commission also should work to facilitate small cable systems' compliance with the HD carriage requirement. Given that over four-fifths of U.S. households now have purchased HDTV sets and clearly want to receive HD programming, the public interest is not served by continuing to allow certain cable systems to deny consumers the benefit of their investments.

Respectfully submitted,

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April 16, 2015

[31] *See* ACA Petition at 15 (stating its members expect to have some systems still relying on the HD exemption as of June 2018).