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

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

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I. INTRODUCTION AND SUMMARY

The American Cable Association ("ACA") submits these comments in response to the Commission's Fifth Further Notice of Proposed Rulemaking ("Fifth FNPRM" or "FNPRM") in the above-captioned proceeding seeking comment on relief requested by ACA in its Petition for Rulemaking ("Petition" or "ACA Petition") from the Commission's rules requiring that high definition ("HD") must-carry broadcast signals be carried in HD.[1] The FNPRM tentatively concludes that the public interest would be served by extending for another three years the exemption from the HD carriage requirement for certain small cable systems, and seeks comment on ACA's request that the Commission confirm that analog-only systems are not subject to the requirement that they transmit must-carry signals in HD.[2]

[1] *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 (rel. Mar. 12, 2015) ("Fifth FNPRM"); *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, American Cable Association Petition for Rulemaking (filed Jan. 27, 2015) ("ACA Petition").

[2] Absent further action by the Commission, the HD exemption will expire on June 12, 2015.

ACA is pleased with the Commission's recognition that the public interest would be served by extending the HD carriage exemption until June 12, 2018 because the exemption remains necessary to protect subscribers of small cable systems from the costs and service disruptions that may result from requiring covered systems to deliver HD signals in HD when the present exemption expires in June.[3] Additionally, ACA urges the Commission to refrain from modifying its current definition of a small cable system eligible for the HD exemption; refrain from reconsidering whether systems that carry some HD signals are eligible for the HD exemption; and confirm that analog-only systems are exempt from the HD carriage requirement.

When the Commission adopted the small-system exemption, it recognized that requiring systems with 552 MHz or less capacity and systems with 2,500 or fewer subscribers to provide HD must-carry signals in HD would be not be appropriate, and in many cases, would push operators to the point "where per-subscriber upgrade costs would be so high as to make it not worthwhile to continue operating the system."[4] Data and analysis ACA supplied in its Petition confirms that remains the case today, as the vast majority of systems qualifying for the HD exemption face both capacity and financial constraints.

A three-year extension of the small-system exemption – with the same definition of "small system" – remains necessary because the same reasons the Commission relied on in implementing the exemption in 2008, and in extending it in 2012, still apply today. Small systems continue to face bandwidth issues and continue to experience financial strain. Forcing these systems to launch HD signals exacerbates these capacity and financial constraints and makes system shut-downs more likely, potentially removing a multichannel video programming distributor ("MVPD") competitor from small, rural markets. To the extent subscribers to these

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[3] Fifth FNPRM, ¶ 10.

[4] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fourth Report & Order, 23 FCC Rcd 13618, ¶ 7 (2008) ("Fourth Report & Order").

shut-down systems choose not to subscribe to another MVPD, or to subscribe to a DBS provider that does not carry local stations in their market (i.e., DirecTV or Dish Network), the outcome is likely to mean lower viewership for all the local broadcast stations.

The Commission should also continue to make the HD carriage exemption available to systems that carry some signals in HD. A small system's ability to offer some HD signals does not change the fact that it may be significantly more burdensome to offer multiple channels in HD, particularly because these systems already face capacity and financial constraints. Moreover, requiring these systems to offer all must-carry signals in HD would create a disincentive to incrementally add more HD programming.

Lastly, the Commission should confirm that analog-only systems are exempt from the HD carriage requirement because analog-only systems provide signals only in analog, and lack the equipment necessary to deliver signals in digital, or any other, format that would allow the delivery of HD programming. For these systems, requiring HD carriage of must-carry signals would be infeasible for both technical and operational reasons, particularly for small systems that have financial limitations. These systems would continue to receive the HD signals and down-convert them for retransmission to subscribers who would continue to be able to view them on their television sets without the need for additional equipment. Clarifying that the HD carriage requirement does not apply to analog-only systems would permit a small and decreasing number of systems to remain in operation, serving local needs, without adversely affecting either broadcast stations or consumers.

II. THE COMMISSION SHOULD RETAIN ITS DEFINITION OF A SMALL CABLE SYSTEM, AND SYSTEMS CURRENTLY RELYING ON THE HD CARRIAGE EXEMPTION SHOULD BE GRANTED AN ADDITIONAL THREE YEARS TO COME INTO COMPLIANCE WITH THE REQUIREMENT TO CARRY HD MUST-CARRY SIGNALS IN HD

The FNPRM tentatively concludes that the public interest would be served by extending the HD carriage exemption, for another three years, for two categories of small cable systems –

those with 552 MHz or less of activated channel capacity and those that serve 2,500 or fewer subscribers and are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers.[5] Despite this tentative conclusion, the Commission nonetheless seeks comment on whether it should retain or revise the definition of small cable systems eligible for the exemption.[6] As set forth below, the Commission should extend the HD carriage exemption for an additional three years for the same categories of small cable systems covered by the exemption today.

A. The Commission Should Extend the Current HD Carriage Exemption for An Additional Three Years.

The Commission should extend the HD carriage exemption for an additional three years, until June 2018, as proposed in the FNPRM.[7] Much the same as when the exemption was first adopted in 2008, and extended in 2012, the cable industry's self-financed digital transition continues to exact an unusually high cost on small systems serving relatively few customers, particularly those in smaller, usually rural communities. This challenge for smaller systems has become more difficult in the last six years as the revenues derived from offering video service has grown at a slower pace than the expenditures necessary to provide the service. In particular, programming costs – the single largest cost of providing video service – are increasing faster than the rates smaller cable operators are able to charge customers, greatly pressuring their margins.[8] However, high and increasing programming costs are not the only

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[5] Fifth FNPRM, ¶ 10.

[6] *Id.*

[7] *Id.*

[8] *Inquiry Concerning the Deployment of Advanced Telecommunications to All American in a Reasonable Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, Comments of the American Cable Association at 4-9 (filed Mar. 6, 2015) (video programming is an anchor service on networks offering advance telecommunications capability – broadband – and is the most expensive input for MVPD service and the already high and increasing cost to acquire video programming is shrinking free cash flow and may inhibit investment by small and medium-sized providers in networks that would provide this capability); Reply Comments of the American Cable Association at 5 (filed Apr. 6, 2015) (ACA's research and analysis shows that, if current trend continue, traditional MVPD

financial challenge for small cable operators. Smaller operators tend to serve smaller cities and rural areas, and their other operating costs tend to be higher than for operators that serve more urban areas. Under these circumstances, to avoid untoward impacts on rates or worse yet system closures, operators of these small systems must be permitted the flexibility to phase-in upgrades on an economically feasible schedule. Three years ago, the Commission accounted for these factors by permitting small systems that meet specific eligibility criteria to meet their must-carry obligations by making must carry broadcast signals viewable by subscribers by down-converting the HD must-carry signals to standard definition and distributing them to all basic cable subscribers. During this period, many cable systems that could not offer all broadcast stations in HD at the start were able to upgrade and now no longer need the HD carriage exemption. For some, though, relief continues to remain necessary.

ACA's Petition documents the results of its member survey confirming the continued necessity of the HD exemption for the limited class of system operators relying on it today. First, for systems that serve 2,500 or fewer subscribers, each provided valid reasons for continuing to need the HD carriage waiver. In particular, over 90 percent of survey respondents stated that they would need to purchase additional equipment in order to offer must-carry signals in HD.[9] Of these systems, about 80 percent indicated that purchasing equipment would be a "significant burden."[10] It is therefore not surprising, as ACA explained, that 37 percent of operators of systems with 2,500 or fewer subscribers reported that that they would shut down their systems rather than invest in the equipment necessary to bring them into compliance with the HD must-carry rule, a result the Commission should studiously avoid.[11] Second, for

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margins will be reduced substantially each year, and multichannel video service, which was foundational for triple-play providers, may become a losing proposition for small and medium-sized providers within the next five years – 2020 – or even sooner should conditions deteriorate more rapidly than anticipated).

[9] ACA Petition at 13.

[10] *Id.*

[11] *Id.* at 14.

systems with 552 MHz or less capacity, a majority of survey respondents reported that they do not have the unused channel capacity to add HD must-carry signals without changing existing channels or services.[12] If forced to transmit must-carry signals in HD, these capacity-constrained systems will have to choose between dropping channels, shutting down their systems entirely, or continuing to offer signals only in a down-converted format while understanding the risks of the Commission imposing forfeiture penalties for non-compliance.

Covered systems relying on the HD exemption in today's highly competitive multichannel video programming distribution market are doing so not out of choice but by necessity. These operators have adjusted to competitive pressures, particularly from direct broadcast satellite ("DBS") providers that offer HD services, by targeting lower income households through low-priced service packages for consumers who are either satisfied with basic cable service or unable to meet DBS providers' credit requirements. As described herein and in ACA's Petition, most cable systems currently relying on the HD exemption continue to be both bandwidth and financially constrained. Of the 143 systems responding to the survey, 117 were both under 2,500 subscribers and had less than 552 MHz of capacity; the remaining 26 had fewer than 2,500 subscribers and more than 552 MHz.[13] The Commission has accepted in the past that granting and extending temporary relief from the HD carriage requirement will give eligible small systems a greater opportunity to upgrade and expand their capabilities to deliver cable and other valued services, such as broadband Internet, at a measured economic pace while at the same time preserving the presence of a local provider in many small and rural communities.[14]

Extending the exemption from the HD carriage requirement for an additional three years will avoid needless system closures due to regulatory compliance costs and serve the same

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[12] *Id.* at 9.

[13] *Id.* at 5.

[14] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report and Order, 27 FCC Rcd 6529, ¶¶ 20-21 (2012) ("Fifth Report and Order").

goal of preserving access to a local cable system that may in the future present a business case for an upgrade. It will also save operators who continue to require exemption from the HD carriage requirement from incurring the high cost of filing individual waiver petitions, and save Commission staff from having to respond to multiple versions of such waiver requests. Moreover, the continued availability of a temporary extension of the HD exemption to systems that remain either channel locked or financially constrained (or both) will preserve their ability to utilize an extended timeframe over which to become compliant with the Commission's HD must-carry rule, while preserving small system customers' access to down-converted versions of HD must-carry signals.

Finally, as ACA has maintained, extending the HD exemption is particularly appropriate now as the upcoming broadcast spectrum incentive auction casts uncertainty on the number of must-carry stations that will continue to broadcast or continue to offer HD signals after the auction.[15] The Commission is in the process even now of revising its incentive auction rules to encourage greater participation by television stations in the auction and greater use of channel sharing by non-participants to ensure the success of the auction.[16] Changes in the incentive auction rules, coupled with the surprisingly high prices commanded for AWS3 spectrum at the Commission's last auction, suggest that participation in the incentive auction will be robust.[17]

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[15] ACA Petition at 3 ("It would be inequitable to force cable operators to incur the burdens of offering "must carry" signals in HD now when there is a degree of uncertainty over the number of must-carry stations that will continue to broadcast in their market or will continue to offer their signals in HD if, as a result of participating in the auction, they ultimately share spectrum with another station.").

[16] *See* Katy Bachman, *Skeptical Crowd for Wheeler's Auction Pitch*, TVNEWSCHECK (Apr. 15, 2015), *available at* http://www.tvnewscheck.com/article/84596/skeptical-crowd-for-wheelers-auction-pitch (Commission is actively encouraging increased incentive auction participation through relaxation of its proposed channel sharing rules.)

[17] *See* David S. Cohen, *NAB Chairman Hints at Support for Net Neutrality Rules*, VARIETY (Apr. 15, 2015), *available at* http://variety.com/2015/tv/news/nab-gordon-smith-hints-support-for-net-neutrality-1201473191. *See also* Tom Wheeler, Chairman, FCC, Prepared Remarks at the NAB Show (Apr. 15, 2015) (describing FCC efforts to interest broadcasters in participating in "once-in-a-lifetime" incentive auction following success of AWS-3 auction that brought bids of $41 billion; "Not surprisingly, broadcaster interest has gathered significant momentum. In addition to the hundreds of broadcasters of all sizes that

This will likely further reduce the number of stations using must carry. Given that uncertainty, forcing systems currently eligible for the HD exemption to incur the costs and bear the burdens of offering must carry signals in HD now would be inequitable and an inefficient use of these systems' scarce resources.

B. The Commission Should Retain Its Current Definition of a Small System Eligible for the HD Exemption.

The FNPRM seeks comment on whether the Commission should retain or revise the definition of a small cable system eligible for the exemption, and on the harms or benefits of narrowing the category.[18] ACA strongly recommends that the Commission retain its current definition without alteration. In 2008, and again in 2012, the Commission rightly found that the costs of mandatory HD carriage warranted an exemption from compliance for small systems with 552 MHz or less of channel capacity and small systems with 2,500 or fewer subscribers.[19] As discussed above, ACA's most recent member survey demonstrates that conditions have not appreciably changed in the past three years.

The FNPRM nonetheless questions whether the threshold of the exemption for systems with 2,500 or fewer subscribers should be lowered. Citing ACA survey results showing that small operators who continue to rely on the exemption have, on average, only 348 subscribers per system, the FNPRM suggests that the Commission's current definition of "small system" is overly broad.[20] ACA counsels against any change in the small system subscriber thresholds.

ACA reported in its Petition that its member survey covered 143 systems, serving a total of 49,490 subscribers, or on average, 348 subscribers per system.[21] However, 117 of the 143

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have privately expressed interest in the auction, Fox, ION, Tribune, and Univision have publicly expressed their interest in participating.")

[18] Fifth FNPRM, ¶ 10.

[19] Fourth Report and Order, ¶ 7; Fifth Report and Order, ¶¶ 20-21.

[20] Fifth FNPRM, ¶ 10.

[21] ACA Petition at 6.

systems serving 2,500 or fewer subscribers that responded to the survey also reported having 552 MHz or less capacity.[22] These capacity-constrained systems serve 35,758 subscribers, constituting the majority of the 49,490 subscribers covered by systems responding to the survey. Thus, if the waiver for systems with less than 552 MHz of capacity, which is not limited by the system's subscribership, was extended, it would cover all but the remaining 26 small systems that have more than 552 MHz capacity and fewer than 2,500 subscribers. These systems serve, on average, 540 subscribers. Yet this number represents just the average. From the survey, ACA can confirm that at least six of these systems (23 percent of the total) have more than 540 subscribers, ranging from 800 to 2,000 subscribers. Among these systems, if the HD carriage waiver was not renewed, two indicated they would shut down their systems and three indicated they would pass along the cost to subscribers.[23] Properly viewed, the results of ACA's member survey support retention of the 2,500 subscriber cut-off in the small system definition without alteration. More importantly, these numbers only include respondents to ACA's member survey. The total number of ACA members and the total number of their systems that currently utilize the HD exemption could be higher - a factor that could affect the average size of systems relying on the HD exemption.

In support for its decision to adopt the HD carriage exemption for systems with 2,500 or fewer subscribers, the Commission cited evidence in the record demonstrating that requiring HD carriage by small systems with 2,500 or fewer subscribers would "create a regime that is too expensive to operate."[24] Subsequently, in 2012, the Commission extended the exemption after

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[22] *Id.*

[23] All of these systems also stated that purchasing the additional equipment needed for these systems to comply would be at least somewhat of a burden with two-thirds saying it would be a significant burden.

[24] Fourth Report and Order, ¶ 7 (*quoting Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket 98-120, Reply Comments of the Rural Independent Competitive Alliance, at 4 (filed Mar. 17, 2008)).

finding that the challenges facing these small systems "ha[d] not diminished."[25] Today, as outlined above, the circumstances that justified the HD carriage exemption and its initial extension have not improved. Accordingly, the Commission should retain its current small cable system definition without alteration, and permit small systems with 552 MHz or less of activated channel capacity and those that serve 2,500 or fewer subscribers and are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers to continue to be eligible for the small system HD must-carry exemption.

III. THE HD EXEMPTION SHOULD CONTINUE TO BE AVAILABLE TO SYSTEMS THAT CARRY SOME SIGNALS IN HD

The FNPRM seeks comment on whether changed circumstances warrant reconsideration of the Commission's decision not to eliminate the HD carriage exemption for systems carrying any signal in HD, and whether systems carrying a significant amount of HD programming, such as ten channels, should continue to be able to qualify for the exemption.[26] ACA maintains that circumstances for such systems have not changed since 2012 and counsels against elimination of the exemption for this class of systems or limitation of the exemption to systems carrying more than a set number of HD channels. As the Commission correctly recognized in 2012, a small system's ability to offer some HD service does not change the fact that it may be significantly burdensome to offer additional multiple additional channels of programming in HD services.[27] Small systems that utilize the HD carriage exemption but nonetheless offer some programming in HD are in all material respects similarly situated to the small systems that provide no HD programming. Of the 143 systems that utilize the HD carriage exemption and serve fewer than 2,500 subscribers represented in ACA's most recent

[25] Fifth Report and Order, ¶ 21.

[26] Fifth FNPRM, ¶ 11. The FNPRM seeks comment both on retention of the exemption for such systems, and on whether systems that carry a significant amount of HD programming, such as ten HD channels, should continue to be able to qualify for the exemption.

[27] Fifth Report and Order, ¶ 23.

member survey, about 26 percent (37 in total) report offering some HD services. The FNPRM observes this fact, stating that at least 20 percent of the systems relying on the HD exemption today are currently offering some HD digital television services.[28] However, it is also the case that all but one of the operators of these systems reported in the member survey that it would be burdensome to purchase additional equipment for their systems to carry must-carry signals in HD, and 80 percent of these said it would be a significant burden. Moreover, of the systems with 552 MHz or less capacity, 83 percent of the operators of these systems reported that it would be a burden to make capacity available on their systems to add must-carry signals in HD, and 80 percent said it would be a significant burden. Again, many systems have fewer than 2,500 subscribers *and* less than 552 MHZ of capacity, and therefore would find purchasing the equipment and locating channel space to be two separate, but compounding, problems.

Because these small systems generally suffer the same channel capacity and financial constraints that other small non-HD hybrid and analog-only systems face, there is no logical reason for treating them differently for purposes of the HD exemption. Loss of the exemption for this limited class of systems would have precisely the same adverse impacts as loss of the exemption for all small systems. In 2012, the Commission agreed with ACA that using the carriage of any HD signals as a threshold for withdrawing the HD exemption from small systems could create a disincentive for them to take any incremental steps toward adding HD programming to their systems, and loss of the exemption could lead to operators ceasing to carry any HD signals presently carried as part of their channel lineups to avoid the significant burden of the HD carriage mandate.[29] Neither of these results would be in the public interest.

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[28] Fifth FNPRM, ¶ 11.

[29] Fifth Report & Order, ¶ 23; *see also Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket 98-120, Reply Comments of the American Cable Association, at 6-7 (filed Mar. 22, 2012).

Nor is there any reason for the Commission to attempt to set a limit on the number of channels of HD programming that an operator may provide without loss of the availability of the HD exemption to guard against potentially discriminatory carriage arrangements.[30] As the Commission noted in 2012, "to the extent that cable operators utilizing the exemption do start to carry a wide range of HD channels, broadcasters are free to bring such evidence to the Commission's attention."[31] ACA appreciates the concern, but notes that broadcasters have had nearly three years to provide at least one example of a small cable operator taking advantage of the waiver by offering dozens of HD signals, and it is telling that no formal complaints[32] or public requests for adjustment of the exemption's contours have apparently been lodged. Thus, the evidence in the record to justify a change in the exemption is lacking.

IV. THE COMMISSION SHOULD CONFIRM THAT ANALOG-ONLY SYSTEMS ARE NOT SUBJECT TO THE HD CARRIAGE REQUIREMENT

The FNPRM also seeks comment on ACA's request that the Commission confirm that a cable system offering programming only in analog format (an "analog-only system") is not subject to the HD carriage requirement on the basis that carriage of must-carry signals in HD is not "technically feasible" within the meaning of Section 614(b)(4)(A) of the Communications Act and the Commission's rules.[33] Section 614(b)(4)(A) requires that cable operators transmit must-

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[30] *See* Fifth FNPRM, ¶ 11 (seeking comment on whether such discrimination is occurring).

[31] Fifth Report & Order, ¶ 23.

[32] ACA's research has revealed only one must-carry complaint addressed by the Commission alleging, in part, that the cable operator did not carry the station's HD broadcast signal in HD. Although the Commission found that the cable operator violated its statutory viewability requirement by carrying the station only in SD digital, and not also in SD analog, it determined that the operator was not required to carry the station in HD because it qualified for the small system HD must-carry exemption. *The Board of Trustees of the University of Alabama, Licensee of WUOA, Tuscaloosa, Alabama v. Cablestar, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 410, ¶ 6 (2010) (Cablestar qualified for the small system HD must-carry exemption because it had fewer than 2,500 subscribers and was not affiliated with a large MVPD, and because it had an activated channel capacity of less than 552 MHz). In that case, the Media Bureau found that the small operator qualified for the exemption. There is no indication from the order that the complaint alleged that the operator provided other HD signals and was discriminating against the must carry station. *Id.*

[33] Fifth FNPRM, ¶ 15.

carry local broadcast signals "without material degradation," and instructs the Commission to "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."[34] Although the Commission has determined that the must carry obligation includes the obligation to carry HD broadcast signals in HD, the requirement to carry signals "without material degradation," as NCTA has previously observed, "is not a technology-forcing provision and was never intended to require cable operators to provide must-carry signals at a higher level of quality than other programming on their systems."[35] The Commission's obligation here is to look at the capability of systems in the market in developing carriage standards for must-carry signals.

A. An Analog-Only System is Incapable of Providing HD Programming.

The Fifth FNPRM asks about the ability of analog-only systems to pass an ATSC digital broadcast signal through to customers with digital TVs and about the equipment that would be required for an all-analog system to provide HD programming.[36] ACA reiterates its position that it has never been and will never be feasible for analog-only systems to provide HD programming. In this context, an analog-only system is a cable system that provides signals only in analog format and lacks the equipment necessary to deliver signals in digital format, or any other format that allows delivery of HD signals. Thus, analog-only systems, by definition, are unable to carry *any* HD signals.

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[34] 47 U.S.C. § 534(b)(4)(A) (emphasis added).

[35] *Carriage of Digital Television Broadcast Signals: Amendment to the Part 76 of the Commission's Rules*, CS Docket No. 98-120, Reply Comments of National Cable & Telecommunications Association at 6 (filed Mar. 22, 2012).

[36] Fifth FNPRM, ¶ 15.

While the Commission has not directly interpreted the technical feasibility standard in this context, its interpretation of the standard in other contexts supports the conclusion that carriage of HD programming on analog-only systems is not technically feasible as the Commission interprets that term. In interpreting technical feasibility standards in this proceeding, the Commission considered financial and capacity constraints with respect to the small-system exemption.[37] In addition, as NCTA previously pointed out, "there is ample precedent to interpret the phrase, 'to the extent technically feasible,' with reference to the costs imposed by complying with the general rule."[38] In other related contexts, such as IP closed captioning, the Commission has considered both technical and operational concerns.[39] In its 2014 Video Description Order, the Commission considered costs and practical impact in the technical feasibility analysis.[40] Here, requiring carriage of HD carriage of must-carry signals on analog-only systems would be infeasible for both technical and operational reasons, particularly for small systems that have financial limitations.

As they exist in the marketplace today, analog-only systems lack the necessary equipment to receive and retransmit HD programming. To offer HD programming, an analog-only system would need to purchase and install in the headend both a QAM modulator and a

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[37] Fifth Report and Order, ¶ 21 (extending the small-system exemption after concluding that "the same financial and capacity constraints that faced small cable operators when we initially adopted this exemption continue to exist").

[38] Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy for NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 98-120, at 2 (filed Apr. 28, 2008) (summarizing cases in which the Commission has considered costs in interpreting technical feasibility standards and urging the Commission to do so in the context of the small-system exemption).

[39] *See, e.g.*, *Closed Captioning of Internet Protocol-Delivered Video Programming*, Report and Order, 27 FCC Rcd 787, ¶98, n. 388 (2012) (summarizing "technical feasibility" standards used in various contexts and applying a technical feasibility standard to its requirement that apparatus include captioning capability).

[40] *See Promoting Innovation & Competition in Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, ¶ 55 (2014) (in the context of video description rules, seeking comment on "costs as well as the practical impact" of the Commission's rule that apparatus must decode and make available secondary audio streams "if technically feasible").

demodulator input module. Moreover, for customers with analog TV sets, the operator would need to either deliver a given must-carry signal in both HD and down-converted analog format or stock and make available for customers HD-DTAs to ensure that all customers can receive must-carry signals in compliance with the Communications Act's viewability requirements, which are the linchpin of the must-carry rules.[41] Without this equipment, an analog-only system is incapable of delivering any programming in HD. For analog-only systems, most of which serve fewer than 1,000 subscribers, the costs of obtaining this equipment have become prohibitive.

Further, carriage of HD must-carry signals could trigger contractual carriage obligations with other broadcasters and programmers, causing a ripple effect on an analog-only system's budget. Specifically, some retransmission consent contracts require carriage of retransmission consent signals in HD when the system offers any other signal in HD. Cable programming contracts may have similar requirements. Thus, a system's carriage of must-carry signals in HD may trigger contractual launch obligations that many analog-only systems cannot satisfy because they lack the equipment necessary to deliver the signals in this format. This means that the costs of compliance with the HD carriage requirement for analog-only systems are likely to exceed the cost of carrying just the must-carry signals in HD.

It is noteworthy that NAB has previously recognized that the HD exemption should be available if the Commission were presented with information that confirms "that a large number of small cable systems continue to be unable to carry HD signals."[42] ACA agrees with NCTA's earlier assessment: "Obviously, if a system is unable to – and does not – carry any HD signals, it should have no obligation to carry broadcast signals in HD."[43] Information recently submitted

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[41] *See* Fourth Report and Order, ¶ 2 ("The mandatory carriage rules serve their purpose only when must-carry stations are viewable by all cable subscribers.").

[42] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Comments of the National Association of Broadcasters at 7 (filed Mar. 12, 2012).

[43] NCTA HD Exemption Comments at 6.

by ACA in its Petition confirms that it is infeasible for analog-only systems to carry HD signals, and these systems, therefore, should not be obligated to carry the broadcasters' HD signals in HD.[44]

These technical, operational, and financial hurdles underscore the infeasibility of HD carriage on analog-only systems without significant expenditures and re-engineering by the system operator and support clarifying that the HD must-carry requirements do not apply to analog-only systems.

B. The Commission Has Already Recognized that Analog-Only Systems Cannot Carry Digital Signals.

The Commission has recognized that all-analog systems cannot carry digital signals and that analog carriage of must-carry signals is consistent with viewability requirements. In allowing its viewability rules to sunset, the Commission reminded cable operators that:

> [T]he sunset of our viewability rules does not otherwise affect the must-carry requirements of Section 76.56 of our rules. Cable operators providing digital cable service must continue to carry local broadcast stations electing mandatory carriage, including in HD format when broadcast in such format, and *cable operators providing only analog cable service (no digital service) must continue to carry local broadcast stations electing mandatory carriage in analog format*.[45]

Thus, the Commission made clear that analog carriage of must-carry signals by "operators providing only analog cable service (no digital service)" satisfies the viewability requirements. At the same time, the Commission distinguished those operators from "operators providing digital cable service," who are required to carry HD signals in HD to satisfy the viewability requirements. In doing so, the Commission implicitly recognized that analog-only systems cannot provide HD or other digital format services as digital systems can. The Commission has also clarified that "it is not material degradation to downconvert [a] signal to

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[44] ACA Petition at 17 ("ACA believes that, by definition, it has *never* been and will *never* be feasible for analog-only systems to provide HD programming. Put another way, analog-only systems are unable to carry <u>any</u> HD signals.").

[45] Fifth Report and Order, ¶ 18 (footnotes omitted) (emphasis added).

comply with the "viewability" requirement…"[46] Thus, an analog-only system that maintains analog carriage of must-carry signals complies with its viewability obligations, which are the linchpin of the Commission's must-carry rules.[47]

C. Clarifying that the HD-Carriage Requirement Does Not Apply to Analog-Only Systems Would Permit a Small and Decreasing Number of Systems to Remain In Operation Without Adversely Affecting Broadcast Stations or Consumers.

The Fifth FNPRM asks how many cable systems that currently rely on the HD carriage exemption are analog-only.[48] The number of analog-only systems is small and is expected to continue to decrease over time. In 2013, ACA identified 987 analog-only systems among its membership.[49] Those systems served approximately 203,000 subscribers, accounting for about 0.15 percent of all MVPD subscribers.[50] At that time, only 23 analog-only systems served more than 1,000 subscribers, and a vast majority of the systems averaged fewer than 100 subscribers.[51] The number of analog-only systems (and, by extension, subscribers served by them) has likely decreased since 2013 as some systems shut down and others upgraded to hybrid analog/digital or all-digital.[52]

Nonetheless, some analog-only systems will remain in operation for a variety of reasons. Many of these provide the only available video service in hard-to-reach, rural areas where over-the-air antenna reception is not feasible. These systems provide an important competitive

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[46] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, ¶ 13 (2007).

[47] *See* Fourth Report and Order, ¶ 2 ("The mandatory carriage rules serve their purpose only when must-carry stations are viewable by all cable subscribers.").

[48] Fifth FNPRM, ¶ 15.

[49] *See* Letter from Barbara S. Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-107, at 9 (filed Mar. 7, 2013) ("ACA Mar. 7, 2013 Ex Parte").

[50] ACA Mar. 7, 2013 Ex Parte at 9.

[51] *Id.*

[52] *See Id.* at 6-7 (summarizing members' responses to a survey on all-analog systems, some of which were struggling financially, and others were planning system upgrades).

alternative to satellite TV services in their rural markets, offering a locally-operated, lower-cost service that allows customers to receive basic cable channels without needing costly set-top boxes. For these customers, many of whom have low incomes, these systems provide an affordable alternative to more expensive satellite TV services.

Moreover, many marketplace participants recognize the constraints faced by analog-only systems. Neither broadcasters that elect retransmission consent nor national cable networks require carriage of their signals in HD on analog-only systems. ACA can think of no discernable policy justification for must-carry signals to receive more favorable treatment than other signals carried on the system.[53]

Further, some of these operators have plans to upgrade their systems to all-digital,[54] creating the ability to offer HD programming and advanced services such as video-on-demand and freeing up bandwidth to provide Internet access services. Many of these systems are in precarious financial situations,[55] and requiring them to launch HD services now, before they have the financial resources, could force them to shut down rather than upgrade the systems over time.

Finally, clarifying that the HD carriage requirement does not apply to analog-only systems would not harm customers or broadcasters. Customers who receive all signals in analog format today would continue to receive those signals in analog format. Broadcasters whose programming is available to and viewable by customers would likewise face no harm or

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[53] Indeed, the Commission's interpretation of "material degradation" under the must-carry statute makes clear that cable operators cannot discriminate "in their carriage between broadcast and non-broadcast signals." *See, e.g.,* Fifth FNPRM, ¶ 2. The Commission's "material degradation" interpretation also requires operators to carry HD broadcast signals to their viewers in HD. *Id.* But the Commission has never directly addressed the application of that standard to all-analog systems, and, as noted above, ACA's position is that it is not technically feasible for these systems to carry HD programming.

[54] ACA Mar. 7, 2013 Ex Parte at 7 (summarizing responses from a member survey, with several members transitioning to all-digital or planning transitions to all-digital).

[55] *Id.* at 6-7 (summarizing responses from a member survey, with several members noting that they operate at a loss or with very narrow profit margins).

disruption as their signals would continue to be available to and viewable by the same customers who receive them today, including many who cannot receive those signals over-the-air. On the other hand, requiring HD carriage on analog-only systems would, at best, impose significantly increased costs on cable operators and their customers and, at worst, result in the loss of cable service altogether if the system cannot bear the costs and shuts down.[56] To the extent subscribers to these shut-down systems choose not to subscribe to another MVPD, or to subscribe to an MVPD that does not carry local stations in their market (i.e., DBS), the outcome is likely to mean lower viewership for all the local broadcast stations.

In sum, HD carriage is not technically feasible on analog-only systems because, by definition, they lack equipment that permits them to offer programming in digital, or any other format. The number of these systems is small (and decreasing). Further, analog carriage of must-carry signals is consistent with all-analog systems' viewability obligations and with their carriage of other broadcast and cable programming. Clarifying that the HD requirement does not apply to all-analog systems would result in no harm to customers or broadcasters. Accordingly, the Commission should confirm that analog-only systems are not subject to the requirement to carry must-carry signals in HD.

V. CONCLUSION

For the foregoing reasons, ACA respectfully requests that the Commission extend the HD exemption for three additional years without altering the definition of small systems eligible to take advantage of it. For systems that are channel-locked or are financially unable to purchase equipment to expand their channel capacity the HD carriage exemption remains essential. At the same time, as predicted in 2012, the number of systems that qualify for the HD exemption has been and continues to steadily decrease, and can be expected to further decrease over the next three years. The Commission should also recognize that for analog-

[56] *See infra* at Section III.A.

only systems, transmitting must-carry broadcast signals in HD to their subscribers is infeasible for both technical and operational reasons, particularly for small systems that have financial limitations. For this reason, ACA requests that the Commission confirm that analog-only systems are permanently exempt from the HD carriage requirement.

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