

**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	)	
	)	

**Reply Comments of  
WTA – Advocates for Rural Broadband**

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## Executive Summary

The exemption for small cable systems and systems with capacity of 552 MHz or less from the HD carriage requirement under the Commission's material degradation rules currently allows small cable operators to continue providing video services to their customers without fear of regulatory action or the need to impose significant rate increases on their customers as a result of the substantial investment necessary to upgrade their systems with the capability to carry HD broadcast signals in HD. The text of Section 614(b)(4)(A) provides authority for the Commission to minimize unnecessary regulation and undue economic burdens on cable systems by providing an exemption from the HD carriage requirement for small cable systems. If the exemption is not extended beyond June 12, 2015, until at least June 2018, consumers—particularly those in rural areas—could experience service disruptions and discontinuations resulting in reduced competition in the multi-channel video programming distribution market and/or significant price increases in order to provide the financial resources to complete the necessary upgrades.

Furthermore, although cable systems of 2,000 or 2,500 subscribers might be larger than the “average” small system, such systems still lack the economies of scale and subscriber base necessary to reasonably support the additional investment that would be required to comply absent the exemption. Particularly if an exemption for capacity constrained and all-analog cable systems due to technical infeasibility is not extended or formally recognized by the Commission, requiring small cable operators with already constrained resources due to greater-than-inflation rises in programming costs to make the difficult decision of investing the substantial sums necessary to support retransmission of HD signals and passing those costs onto their customers or shutting down operations is contrary to the public interest. Additionally, requiring small cable operators to comply with additional certification and other reporting requirements at this time would only serve to unnecessarily divert limited resources from improving cable systems and services to fulfilling administrative requirements that provide no true public interest benefits.

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WTA – Advocates for Rural Broadband<sup>1</sup> respectfully submits these reply comments in response to the Fifth Further Notice of Proposed Rulemaking (“*Fifth FNPRM*”) in the captioned proceeding, which seeks comment on the Commission’s tentative conclusion to extend for an additional three years the exemption from the requirement to carry high definition (“HD”) broadcast signals in HD under the “material degradation” provisions of the Communications Act of 1934, as amended (“the Act”) that it previously granted to certain small cable systems.<sup>2</sup> Small cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all multichannel video programming distributor (“MVPD”) subscribers, and those with an activated channel capacity of 552 MHz or less are currently exempt from the HD carriage requirement.<sup>3</sup>

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<sup>1</sup> WTA – Advocates for Rural Broadband is a national trade association representing more than 280 rural telecommunications providers offering voice, broadband and video services in rural America. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities.

<sup>2</sup> See 47 U.S.C. §§ 534 (b)(4)(A), 535(g)(2) (material degradation requirements relating to signals of local commercial and noncommercial television stations, respectively).

<sup>3</sup> See *Carriage of Digital Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Fifth Report and Order, 27 FCC Rcd 6529, 6546-49, ¶¶ 19-23 (2012) (“*Fifth Report and Order*”).

As WTA stated in its initial comments, the Commission is correct in its tentative conclusion that “the exemption is still necessary to protect the subscribers of small cable systems from the costs and service disruptions that may result from requiring those systems to deliver HD signals in HD beginning in June 2015.”<sup>4</sup> As was the case when the Commission last extended the HD carriage exemption, “[t]he record shows that a significant number of small systems with financial or channel capacity constraints continue to rely on the HD carriage exemption and require additional time to come into compliance in a *cost-effective way*.”<sup>5</sup> Just as the Commission has previously concluded, “the challenges facing small systems have not diminished since the Commission adopted the exemption and . . . requiring small systems to comply . . . would result in these systems dropping existing channels or shutting down.”<sup>6</sup> The loss of a small cable system currently protected by the HD carriage exemption could mean the effective loss of all MVPD service for some customers,<sup>7</sup> reduced competition among MVPDs, loss of any access to some or all broadcast signals as well, particularly in small and rural markets.<sup>8</sup>

Accordingly, WTA supports the American Cable Association’s (“ACA’s”) request<sup>9</sup> and urges the Commission to adopt its tentative conclusion to extend the exemption through at least June 12, 2018, in order to allow small cable systems to continue operations until the business case to upgrade arises without risking regulatory enforcement actions. The Commission should

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<sup>4</sup> See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, FCC 15-29, ¶ 10 (rel. March 12, 2015) (“*Fifth FNPRM*”).

<sup>5</sup> *Fifth Report and Order* at ¶ 20 (emphasis added).

<sup>6</sup> *Id.* at ¶ 21.

<sup>7</sup> *Id.* (citing *Carriage of Digital Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Fourth Report and Order 23 FCC Rcd 13618, 13621, ¶ 7 (2008) (“*Fourth Report and Order*”).

<sup>8</sup> *Fifth Report and Order* at ¶ 21.

<sup>9</sup> See American Cable Association, Petition for Rulemaking, GS Docket No. 98-120 (filed Jan. 27, 2015).

also take this opportunity to confirm that all-analog cable systems are exempt from the requirement in perpetuity due to the technical infeasibility for analog systems to carry HD signals. Finally, the Commission should refrain at this time from further narrowing the definition of “small cable systems” as suggested in the Fifth FNRPM and by the National Association of Broadcasters (“NAB”),<sup>10</sup> as narrowing the definition would have little—if any—public interest benefits in comparison to the negative impacts on competition and availability of MVPD and broadband services in rural communities.

**I. The HD Carriage Exemption for Small and Capacity Constrained Cable Systems Comports With the Communications Act, the Intent of Congress, and Advances Broader Public Policy Goals of the Commission.**

In comments filed in response to the *Fifth FNPRM*, the NAB argues that down-converting an HD broadcast signal to standard definition by any cable system “materially degrades that signal, contrary to the mandatory terms of the [Communications Act].”<sup>11</sup> NAB further challenges the validity of the HD carriage exemption and alleges that the Commission has never explained how such an exemption comports with the statute.<sup>12</sup> However, the Commission was well within its statutory authority in adopting the limited exemption for small and capacity constrained cable systems in order to avoid placing an undue economic burden on small cable systems and their customers.

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<sup>10</sup> NAB Comments at 3-4 (filed Apr. 16, 2015).

<sup>11</sup> *Id.* at 3. NAB in its comments argues that the HD Carriage Requirement applies to carriage of all local commercial television stations while ACA argues that the requirement applies strictly to those stations electing must-carry status under Section 614. *Id.* at 5, n. 14 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 3004 ¶ 171 (1993) (“*Implementing Order*”). The Commission previously sought comment on the applicability of the material degradation rules to stations electing retransmission consent but has not definitively ruled on the statutory interpretation issue. *See Carriage of Digital Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, ¶ 78 (2007) (“*Third Report and Order*”).

<sup>12</sup> NAB Comments at 5.

Section 614(b)(4)(A) of the Communications Act, as amended, provides that “[t]he signals of local commercial television stations that a cable operator carries shall be carried without material degradation.”<sup>13</sup> Section 614(b)(4)(A) further provides that 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.”<sup>14</sup> When reading both sentences of Section 614(b)(4)(A) in tandem, it is reasonable to conclude that the intent of Congress with respect to material degradation was to ensure that, to the extent technically feasible, cable operators do not provide preferential treatment to non-broadcast signals over broadcast signals. Indeed, the Commission has previously interpreted this provision as only requiring equal treatment of broadcast signals by cable operators rather than imposing a rigid technical requirement on cable operators.<sup>15</sup>

Furthermore, Section 614(b)(4)(A) by its terms requires the Commission to adopt carriage standards enforcing the material non-degradation requirement “to the extent technically feasible[.]”<sup>16</sup> The Commission has previously found requirements imposed by the Communications Act to be “technical feasible” if only “nominal costs, additions or changes of equipment are necessary.”<sup>17</sup> As demonstrated in the record by ACA and WTA, the costs of compliance with the HD carriage requirement for small cable operators would be far more than “nominal” – in fact the costs would range from \$40,000 to \$500,000 for WTA members that

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<sup>13</sup> See 47 U.S.C. § 534(b)(4)(A). Section 614(b)(4)(B) directs the Commission to make changes to its rules that are necessary to effectuate the digital television transition.

<sup>14</sup> *Id.* (emphasis added)

<sup>15</sup> See *Third Report and Order* at ¶ 7 (affirming a comparative approach for determining whether material degradation has occurred).

<sup>16</sup> 47 U.S.C. § 534 (b)(4)(A).

<sup>17</sup> See *Implementing Order* at ¶ 82 (discussing the standard of “technical infeasibility” relating to mandatory carriage of broadcast program material).

would need to pursue system upgrades in order to comply. This would negatively impact the amount and diversity of programming currently available in rural areas by jeopardizing the continued existence of affected small CATV systems.

In addition to the discretion provided by Congress in the text of Section 614, the section of the Communications Act at issue is intended to “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.”<sup>18</sup> As the Commission has repeatedly noted, the ability to offer a “triple-play bundle” of voice, broadband, and video services provides a competitive edge in the marketplace,<sup>19</sup> allowing small rural providers the ability to offer consumers an affordable basic video service alternative to expensive video offerings by national Direct Broadcast Satellite (“DBS”) providers Dish Network and DirecTV that typically have the ability to negotiate more favorable programming carriage agreements and have economies of scale impacting per-subscriber costs. Allowing small cable operators to continue providing this alternative for video services to rural consumers under the HD carriage exemption better serves consumers and broadcasters alike than a policy that would impose undue economic burdens on small cable operators and could ultimately serve only to hasten the rate of small cable systems shutting down operations altogether or to increase the rates their customers pay.

## **II. The Record Confirms That Requiring All-Analog Cable Systems to Retransmit HD Broadcast Signals in HD Is Unduly Burdensome for Small Cable Systems and Consumers Across Rural America.**

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<sup>18</sup> See 47 U.S.C. § 521(6).

<sup>19</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, ¶ 81 (rel. April 2, 2015) (“*16<sup>th</sup> Annual Video Competition Report*”) (stating that “[c]able and telephone MVPDs differentiate their services from DBS MVPDs, in part, by highlighting bundles of video, Internet access, and voice services and emphasizing that bundles offer better prices for consumers, relative to individual service offerings.”).

The Commission has previously noted that the material non-degradation requirement includes the obligation for cable operators to “carry high definition signals in HD to those subscribers who have signed up for an HD package.”<sup>20</sup> Analog cable system subscribers by definition, however, have not “signed up for an HD package.” Furthermore, the Commission has already found that down-conversion to analog does not implicate the HD carriage requirement.<sup>21</sup> Accordingly, the Commission should take the opportunity presented in this proceeding to formally declare that operators of analog cable systems are not obligated to retransmit to their subscribers HD broadcast signals in HD because carriage of HD broadcast signals on such systems is not “technically feasible” as such transmission is not technically possible without substantial system-wide upgrades to analog cable systems.

Requiring all-analog cable systems to comply with the HD carriage requirement would be contrary to Section 614(b)(4)(A) of the Communications Act and the Commission’s policy discussed above that a requirement is technically feasible only if nominal costs, additions and changes to equipment are necessary for a cable operator to comply.<sup>22</sup> Compliance with the HD carriage requirement would entail replacing most or all of a cable system’s headend, distribution plant, and customer premises equipment. The cost of analog system upgrades in order to allow for carriage of HD broadcast signals is prohibitive for most analog cable systems as these systems are typically in operation only in some of the most rural areas of the country serving a limited number of customers to ultimately bear the cost of such upgrades and that benefit from having an alternative to DBS subscriptions that provide HD. Had the resources been available

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<sup>20</sup> *Third Report and Order* at ¶ 6.

<sup>21</sup> *See, id.* at ¶ 13.

<sup>22</sup> *See Implementing Order* at ¶ 82.

for small cable operators to upgrade to hybrid or all-digital systems, these analog systems likely would have already upgraded or begun the process.<sup>23</sup>

Because the result of applying the HD carriage requirement to analog cable systems would impose substantially more than nominal costs on small cable operators and their customers, it is not technically feasible nor would it serve the public interest to impose such a requirement on analog cable systems.<sup>24</sup> Accordingly, the Commission should recognize a permanent exemption from the requirement for those cable operators still utilizing all-analog cable systems to provide MVPD services.

### **III. The Commission Should Reject Calls to Further Narrow the Current 2,500 Subscriber Threshold for “Small Cable Systems.”**

In the *Fifth FNPRM*, the Commission expressed concern that its current definition of “small system” is overly broad based on the fact that small operators that continue to rely on the exemption serve on average 348 subscribers per system.<sup>25</sup> Recognizing that being part of a large, multiple-cable-system-network “potentially allows even very high costs to be spread over large numbers of subscribers, [thereby] easing the upgrade cost burden” for small systems, the Commission adopted a benchmark of 10% of MVPD subscribers below which a small cable system serving 2,500 or fewer customers must remain in order to be eligible for the HD carriage exemption.<sup>26</sup> In its comments, NAB suggests that a “small” cable system should be redefined as

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<sup>23</sup> Indeed, when the factual circumstances arise to support such an upgrade, operators have acted to upgrade their facilities. *See* WTA Comments at 6.

<sup>24</sup> NAB argues that cable operators that have yet to upgrade their systems deny consumers the benefit of their “invest[ment] in HDTV.” NAB Comments at 10. However, the public interest in facilitating competition in the MVPD marketplace and reducing unnecessary regulatory burdens for small cable operators would be better served by allowing often the only competitor to the national DBS providers in many rural communities to continue providing a lower-cost alternative video service via analog cable systems than by forcing these operators and their customers to bear the high per-subscriber costs associated with system-wide upgrades.

<sup>25</sup> *Fifth FNPRM* at ¶ 10.

<sup>26</sup> *Fourth Report and Order* at ¶ 9.

one serving 1,000 or fewer subscribers that is unaffiliated with a cable operator serving more than one million subscribers, or approximately one percent of total MVPD subscribers.<sup>27</sup>

As stated in its initial comments, WTA believes that there would be no consumer or public benefit at this time from lowering the exemption threshold, and such a change could in fact have a negative impact particularly for consumers in rural areas. The vast majority of cable systems with 2,500 or fewer customers—including those with between 1,000 and 2,500 subscribers—are operated in rural areas by small independent cable operators that continue to struggle with minimal economies of scale and other financial difficulties that preclude the investments necessary to comply with HD carriage requirements without crippling CATV rate increases or service reductions. The MVPD industry served a total of approximately 100.9 million subscribers at the end of 2013.<sup>28</sup> Accordingly, a cable system serving up to 2,500 subscribers constitutes a minuscule 0.00248 percent portion of the industry.

The benefit to the customers of these systems of increased competition among MVPDs resulting from existence of an alternative to expensive satellite services outweighs the benefits to broadcasters and consumers that *might* result from requiring small cable systems (and ultimately their customers) representing such a small portion of the MVPD ecosystem and that lack any meaningful economies of scale to bear the cost of upgrades despite having more than the “average” number of subscribers. Accordingly, the Commission should at this time refrain from reducing its definition of “small systems” for purposes of the HD carriage exemption below the current 2,500 subscriber level in order to avoid negative impacts for small independent cable system subscribers without providing any true public interest benefits.

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<sup>27</sup> See NAB Comments at 3-4. See also *16<sup>th</sup> Annual Video Competition Report*, ¶ 133, Table 7.

<sup>28</sup> See *16<sup>th</sup> Annual Video Competition Report* at ¶ 133, Table 7.

**IV. Imposing Additional Certification and Reporting Requirements on Operators Utilizing the HD Carriage Exemption Would Unnecessarily Divert Limited Resources and Would Result in Few Public Interest Benefits.**

While WTA members and other small cable operators would like to upgrade their MVPD facilities to support HD programming, not every company is or will be in the financial position to undertake such substantial investments before expiration of the HD carriage exemption in June 2015, or more candidly in the foreseeable future absent substantial reform in current regulation in video marketplace to control skyrocketing programming costs. In the face of per-subscriber programming price increases that surpass the growth rate of inflation and show no signs of slowing down (in the context of both broadcast and satellite video programming), cable providers serving small rural communities across the country are in a particularly precarious financial situation that simply is unlikely to support the amount of investment necessary to retransmit HD broadcast signals in HD. That is not to say that small cable operators will not undertake to make facilities upgrades once the business case to do so arises; many have already completed upgrades or are in the process of doing so.

Imposing additional administrative burdens on already financially constrained small cable operators at this time is simply not justified, particularly when compared to the minimal public interest benefits that could result from the increased reporting requirements. Requiring additional certifications and progress reports to the Commission at this time would only serve to divert resources that could be better used by small cable operators for acquiring must-have programming and actually pursuing system and equipment upgrades once the business case to make such investments arises. These CATV systems are small, are struggling to provide service to their customers, and lack resources to spend on expensive and unnecessary reporting requirements. In most cases, they don't have a sufficient number of customers (even if close to

2,500) to have a material impact upon the sizes of the audiences or ad revenues of NAB's member TV stations. Why, other than to punish them, does NAB want reporting requirements?

When further viewed in light of the limited number of cable systems that take advantage of the HD carriage exemption and the dearth of actual complaints filed with the Commission relating to carriage of HD broadcast signals, imposing additional reporting obligations on small cable operators relying on the exemption as proposed by NAB is unlikely to provide meaningful benefits that would outweigh the diversion of resources on an annual basis from the provision of cable service to compliance with certification and administrative reporting requirements.

## **V. Conclusion**

The Commission is correct in tentatively concluding that the HD broadcast signal carriage exemption to the material degradation requirements of the Communications Act and Commission rules should be extended at least until June 2018 to allow the business case for small cable operators to make the necessary investments in upgrades that would enable HD signal carriage. Particularly if an exemption for capacity constrained and all-analog cable systems due to technical infeasibility were not extended or formally recognized by the Commission, requiring small cable operators at this point to make the difficult decision of investing the substantial sums necessary to support retransmission of HD signals and passing those costs onto their customers or shutting down operations. If forced to cease providing cable video services as a result of the expiration of the exemption, small operators would be at an even greater competitive disadvantage in the provision of broadband Internet access services, ultimately reducing competition as well as broadband deployment and adoption in the areas that the Commission recognizes have the greatest need.<sup>29</sup>

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<sup>29</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the*

The Commission should also retain the current definition for “small systems” as those with fewer than 2,500 subscribers because although systems of 2,000 or 2,500 might be larger than the “average” small system, such systems still lack the economies of scale and subscriber base to support the additional investment that would be required to comply absent the exemption. Furthermore, the Commission should refrain from imposing additional certification and reporting requirements on cable operators utilizing the HD carriage exemption, as so few companies take advantage of the exemption and imposing additional administrative burdens on small cable operators is only likely to result in diversion of limited resources to administrative matters rather than towards providing video and broadband services to consumers.

Respectfully Submitted,

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*Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry, FCC 15-10, at ¶ 79, table 4 (rel. Feb. 4, 2015) (noting that 53% of consumers in rural areas lack access to broadband at the Commission’s 25 Mbps/3 Mbps definition for broadband as compared to just 8% of urban consumers that lack access at such speeds).*