

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



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**I. INTRODUCTION AND SUMMARY**

The American Cable Association (“ACA”) submits this reply to comments filed in response to the Commission’s Fifth Further Notice of Proposed Rulemaking (“Fifth FNPRM” or “FNPRM”) in the above-captioned proceeding proposing to extend for another three years the small system exemption from the Commission’s rules requiring that high definition (“HD”) broadcast signals be carried in HD.<sup>1</sup> In its comments, ACA recommended that the Commission adopt its tentative conclusion and extend the HD carriage exemption for three additional years without altering the definition of small systems eligible to take advantage of it, and requested that the Commission confirm that analog-only systems are permanently exempt from the HD

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<sup>1</sup> The Commission released the FNPRM in response to a Petition for Rulemaking filed by ACA. See *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*, CS Docket No. 98-120, American Cable Association Petition for Rulemaking (filed Jan. 27, 2015) (“ACA Petition”).

carriage requirement.<sup>2</sup> The record in response to the FNPRM overwhelmingly supports adoption of this relief for systems with 552 MHz or less channel capacity and for systems serving 2,500 or fewer subscribers and not affiliated with a multichannel video programming distributor (“MVPD”) serving more than 10 percent of all MVPD subscribers. Legal and policy objections to extension of the exemption lodged by the National Association of Broadcasters (“NAB”) lack merit and should not deter the Commission from adoption of its tentative conclusion that an additional three-year extension is warranted in the public interest. Moreover, given the lack of objection to ACA’s request that the Commission confirm that analog-only systems are not subject to the HD carriage requirement, the Commission must affirm this interpretation.

This proceeding is a continuation of the transition to digital television (“DTV”) broadcasting that began in 1998 and is ongoing for some actors in the market. Congress specifically directed the Commission when adopting new digital standards for broadcasters “to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage.”<sup>3</sup> In 2008, pursuant to this authority to alter existing carriage rules, the Commission recognized that not all cable operators were able to meet its requirement that signals broadcast in HD be carried by cable systems in HD and gave these operators more time to adapt to offering digital signals, including in HD.<sup>4</sup> The record shows that more time is needed for a small and declining number of cable systems, and the Commission’s granting of additional

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<sup>2</sup> *Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Comments of the American Cable Association (filed Apr. 16, 2015) (“ACA Comments”).

<sup>3</sup> 47 U.S.C. § 534(b)(4)(B).

<sup>4</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Fourth Report and Order, 23 FCC Rcd 13618, ¶ 2 (2008) (“Fourth Report and Order”) (“We hold that cable systems that either have 2,500 or fewer subscribers and are not affiliated with a large cable operator, or have an activated channel capacity of 552 MHz or less, are exempt from the requirement to carry high definition versions of broadcast signals for three years following the digital television (‘DTV’) transition.”)

time to operators of small systems to offer digital signals, including those in HD, in the past and its consideration of more time again is simply part of its continuing effort to ensure the success of the DTV transition and is fully consistent with its statutory authority.

An additional three-year extension of the HD carriage exemption will ensure that small systems utilizing the exemption today are able to time their investments in the transition of their systems to carry digital signals on a schedule that makes economic sense for both the system operator and its subscribers. The availability of the exemption for these systems ensures the continued operation of this small and dwindling class of cable systems, most of which are both capacity and resource-constrained, and in smaller and rural communities, thereby preserving a low-cost MVPD option for their residents. Confirmation that analog-only systems are permanently exempt from the HD carriage requirement would not only affirm the intent of Congress, but will similarly ensure the continued operation of systems that are incapable of offering digital, no less HD, signals.

Finally, the Commission should reject NAB's request that operators of small systems utilizing the HD carriage exemption give notice of or certify their eligibility, notify customers of their reliance on the exemption, and provide periodic progress reports to the Commission on their progress in upgrading their system. Such requirements would impose substantial administrative burdens on the small systems least able to bear them without providing any offsetting public interest benefits.

**II. THE RECORD STRONGLY SUPPORTS AN ADDITIONAL THREE-YEAR EXTENSION OF THE HD CARRIAGE EXEMPTION AND RETENTION OF THE CURRENT DEFINITION OF A SMALL CABLE SYSTEM**

The FNPRM tentatively concluded that the public interest would be served by extending the HD carriage exemption for another three years, and invited comment on whether the Commission should retain or revise the definition of a small cable system eligible for the

exemption.<sup>5</sup> In its Comments, ACA stressed that the HD carriage exemption remained necessary to protect subscribers of small cable systems from the costs and service disruptions that may result from requiring covered systems to deliver HD must-carry signals in HD when the exemption expires in June 2015.<sup>6</sup> Additionally, ACA urged the Commission to refrain from modifying its current definition of a small cable system eligible for the exemption.<sup>7</sup> The record supports ACA's requests.

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

In its Petition, ACA supplied data and analysis confirming that systems qualifying for the HD carriage exemption continue to face both capacity and financial constraints, conditions that warrant an additional three-year extension of the exemption.<sup>8</sup>

MVPD groups commenting on the record agree that the public interest would be harmed if the HD carriage exemption expires as currently scheduled in June 2015 and urge the Commission to extend it for an additional three years. The National Cable & Telecommunications Association ("NCTA") and WTA – Advocates for Rural Broadband ("WTA") both agree that a three-year extension is critical for small systems currently relying on the exemption.<sup>9</sup> These cable systems face both bandwidth and financial restraints that prevent them from upgrading.<sup>10</sup> As NCTA explains, operators of small systems that currently rely on the exemption would be forced to incur significant expenses to provide HD must-carry signals in

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<sup>5</sup> Fifth FNPRM, ¶ 10.

<sup>6</sup> ACA Comments at 4-8.

<sup>7</sup> *Id.* at 8-10.

<sup>8</sup> ACA Petition at 2-3, 14-16; *see also* ACA Comments at 4-7.

<sup>9</sup> *Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Comments of the National Cable & Telecommunications Association at 3-4 (filed Apr. 16, 2015) ("NCTA Comments"); *Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Comments of the WTA – Advocates for Rural Broadband at 3-7 (filed Apr. 16, 2015) ("WTA Comments").

<sup>10</sup> NCTA Comments at 4; WTA Comments at 7.

HD.<sup>11</sup> Illustrating this point, WTA outlines the significant amounts that four members would be required to expend to upgrade their systems to add the capability to retransmit HD channels.<sup>12</sup> ACA, NCTA and WTA all observe that capital expenditures for small systems taking advantage of the HD carriage exemption are particularly significant because of their small customer bases and their often rural and include hard-to-reach service territories.<sup>13</sup> Highlighting the precarious financial position of some smaller systems, WTA notes several small systems owned by its members have ceased operations this year.<sup>14</sup> It is not surprising, therefore, that ACA, NCTA, and WTA all urge the Commission to permit operators of these small systems the flexibility to phase-in upgrades on an economically feasible schedule lest these systems be forced to consider shutting down.<sup>15</sup>

Despite this widespread support, NAB maintains that extending the HD carriage exemption is against the public interest. In particular, NAB argues that 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, and customers who invest in HDTVs are denied the ability to view broadcast signals in HD.<sup>16</sup> These claims lack merit. NAB cites no evidence of complaints by consumers lacking access to HD signals on small systems relying on

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<sup>11</sup> NCTA Comments at 3.

<sup>12</sup> WTA Comments at 4-5.

<sup>13</sup> ACA Comments at 5 ("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."); NCTA Comments at 3 ("Many small systems serve a small customer base, are located in rural communities characterized by small populations, few homes per mile, low activated bandwidth capacity, and in some cases, geographic isolation."); WTA Comments at 2-3 ("WTA's members provide voice, broadband, and video services to some of the most rural, remote and expensive-to-reach areas of the United States and are the carriers of last resort to those communities.").

<sup>14</sup> WTA Comments at 4 ("One WTA member that operates a cable system currently eligible for the HD carriage exemption has already decided to cease its CATV operations in May 2015 due to the financial difficulty of running a small cable operation, and several have already shuttered their CATV operations in 2015.").

<sup>15</sup> ACA Comments at 5; NCTA Comments at 2-3; WTA Comments at 8-10.

<sup>16</sup> *Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Comments of the National Association of Broadcasters at 10 (filed Mar. 16, 2015) ("NAB Comments").

the exemption or other indications that these systems' downconversion of the HD signals to SD or analog is undermining success of the DTV transition.

There is also no merit to NAB's claim that extension of the exemption will harm consumers. According to discussions with operators of systems relying on the HD carriage exemption, their customer bases include many households considered lower income or older, and are less likely to have HDTV sets. Despite the lack of HD service, these customers decline to subscribe to other available MVPD services, particularly direct broadcast satellite ("DBS") providers that offer HD video, either because the service is significantly more expensive, they lack the ability to meet DBS providers' credit requirements, or they lack interest or a TV capable of receiving advanced television services like HD.<sup>17</sup> In some cases, these systems also serve vacation areas and have mostly seasonal customer bases that value access at a low price over any advanced services. As ACA explained in its Petition and Comments, if the HD carriage exemption is eliminated, these systems will close or be forced to pass significant costs along to these customers. Whether a potential consumer is a permanent resident or seasonal, they have options. Consumers who are not satisfied with such basic cable offerings and have the financial means to do so may subscribe to either of the two DBS services.

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

In response to the FNPRM questioning whether the Commission should retain or revise the definition of a small cable system eligible for the HD carriage exemption, ACA strongly recommended that the Commission retain its current definition without alteration.<sup>18</sup> Like ACA, both NCTA and WTA urge the Commission to retain its current small cable system definition without alteration, and permit small systems that serve 2,500 or fewer subscribers and are not

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<sup>17</sup> ACA Comments at 6.

<sup>18</sup> *Id.* at 8-10.

affiliated with an MVPD serving more than 10 percent of all MVPD subscribers, and those with 552 MHz or less of activated channel capacity, to continue to be eligible for the exemption.<sup>19</sup>

NAB, to the contrary, argues that should the Commission extend the HD carriage exemption, it should revise its eligibility standards and limit the cable systems eligible for the exemption. Although NAB does not object to systems with 552 MHz or less of activated capacity qualifying for the exemption,<sup>20</sup> NAB requests that the Commission redefine small cable systems eligible for the HD carriage exemption as those systems serving 1,000 or fewer subscribers and not affiliated with an MVPD serving more than one million total subscribers.<sup>21</sup>

Unlike ACA, which has provided data and information demonstrating that systems with 2,500 or fewer subscribers that rely on the HD carriage exemption, including some with more than 1,000 subscribers, would be burdened by the exemption's elimination,<sup>22</sup> NAB provides no empirical basis for concluding that systems with more than 1,000 and fewer than 2,501 subscribers are less in need of the exemption than those with 1,000 or fewer subscribers. NAB simply points to other Commission rules setting 1,000 subscribers as the appropriate cut-off for exempting small cable systems from certain other regulatory requirements. Moreover, NAB provides no basis for its choice of a one million MVPD subscriber cap on availability of the exemption to small systems affiliated with a larger MVPD. Given the data and information in the record, adopting NAB's proposals would be arbitrary and capricious.

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<sup>19</sup> NCTA Comments at 2-4; WTA Comments at 8-10.

<sup>20</sup> See NAB Comments at 8-9, n.24 (asking the Commission to "establish the appropriateness" of the 552 MHz threshold if the exemption is extended).

<sup>21</sup> *Id.* at 7-8.

<sup>22</sup> See ACA Comments at 4-14.

NAB points to the fewer than 1,000 subscriber cut-off for exemption from recordkeeping purposes and suggests that the same be applied to the HD carriage exemption.<sup>23</sup> However, NAB fails to show that the burdens of recordkeeping are in any way equivalent to the burdens of providing the HD signals of must-carry stations in HD for smaller cable systems not currently offering such service. For this reason, the Commission must reject the basis that NAB proffers for determining systems that should qualify for a continued exemption. Each Commission rule establishing an exemption level for small systems or small operators is based on an economic calculation taking into account the relative costs and benefits of compliance of the particular rule at issue, and the Commission has determined with respect to the small system HD carriage exemption that the 2,500 subscriber cutoff is appropriate based on specific information provided by ACA and others.

Similarly, NAB has offered no data or analysis supporting its recommendation that the Commission lower the availability of the exemption to small systems not affiliated with an MVPD serving more than one million subscribers. Evaluation of the costs to upgrade a system are made on a system-by-system basis, taking into account the number of subscribers over which the system-specific costs can be spread and the likely revenues that can be generated from the upgrade. Large operators are no more inclined to keep a system running than a smaller operator when the cost of compliance will not provide any return on investment. NAB's proposal for alterations to the definition of small systems eligible for the HD carriage exemption should be rejected because it lacks adequate support and ignores the factual basis for the definition of a small system able to utilize the exemption.

Reducing availability of the exemption as NAB has suggested will negatively impact consumers of these small systems without any corresponding public interest benefit. As ACA

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<sup>23</sup> See NAB Comments at 7-8 (citing 47 C.F.R. § 76.1700(a) (records to be maintained by cable operators) as an example of a Commission rule setting the 1,000 subscriber level as an appropriate cut-off).

explained in its Petition, “very little has changed since 2012 to alter the conclusion reached by the Commission that the exemption is necessary to protect small system operators and consumers from the potential costs and service disruptions that immediate compliance would engender.”<sup>24</sup> In a similar vein, WTA explains that there would be “no consumer or public benefit” from lowering the exemption threshold because the vast majority of cable systems with 2,500 or fewer subscribers lack the ability to absorb the cost of system upgrades without substantial rate increases.<sup>25</sup> ACA’s data shows that at least six of the systems responding to its survey with more than 552 MHz of channel capacity have between 800 and 2,000 subscribers and would be significantly burdened by the elimination of the HD carriage exemption.<sup>26</sup> Were these systems required to carry HD must-carry signals in HD, they would be, as NCTA states, forced to “incur uneconomic investments to upgrade to carry HD broadcasts [that] would undermine their viability and their ability to compete.”<sup>27</sup>

As the Commission has previously found, requiring HD carriage by small systems with 2,500 or fewer subscribers would “create a regime that is too expensive to operate.”<sup>28</sup> This determination was based, in part, on the anticipated costs of equipment purchases necessary to provide HD signals, set against the number of subscribers over whom cost recovery could be spread. The challenges facing these small systems “ha[d] not diminished in 2012,”<sup>29</sup> and have not moderated today, particularly given the fact that programming costs for these systems have

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<sup>24</sup> ACA Petition at 2-3.

<sup>25</sup> WTA Comments at 8.

<sup>26</sup> ACA Comments at 9. More importantly, all six 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. *Id.* at 9, n. 23.

<sup>27</sup> NCTA Comments at 3.

<sup>28</sup> 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)).

<sup>29</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Fifth Report and Order, 27 FCC Rcd 6529, ¶ 21 (2012) (“Fifth Report and Order”).

increased faster than revenues. Cable systems with 2,500 or fewer subscribers that rely on the HD carriage exemption continue to struggle financially, and are unable to make the investments necessary to upgrade their systems without rate increases, service reductions, or worse, system shutdowns. Accordingly, the Commission should retain its definition of a small system for purposes of the HD carriage exemption as those systems serving 2,500 or fewer subscribers and not affiliated with an MVPD serving more than 10 percent of all MVPD subscribers.

### **III. THE COMMISSION HAS AUTHORITY TO EXEMPT SMALL SYSTEMS FROM ITS REQUIREMENT THAT HD SIGNALS BE CARRIED IN HD**

In its Comments, ACA urged the Commission to extend the small system HD carriage exemption consistent with Section 614, arguing that an extension would serve the public interest and that it remains as necessary today as when the Commission first implemented it in 2008 and last extended it in 2012.<sup>30</sup> NAB nonetheless argues that the HD carriage exemption lacks a statutory basis.<sup>31</sup> As an initial matter, the Commission plainly has broad authority over cable carriage of broadcast signals and digital television,<sup>32</sup> and the HD carriage exemption remains a valid exercise of that authority. Moreover, NAB's arguments fail under scrutiny, both as a matter of statutory construction and as a matter of sound policy.<sup>33</sup>

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<sup>30</sup> ACA Comments at 2.

<sup>31</sup> NAB Comments at 4-7.

<sup>32</sup> See 47 U.S.C. § 534(f) (requiring the Commission to issue rules implementing the requirements of Section 534); 47 U.S.C. § 534(b)(4)(B) (authorizing the Commission "to initiate a proceeding to establish changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of local commercial television stations which have been changed to conform" with modified standards prescribed by the Commission); 47 U.S.C. § 309(j)(14) (prohibiting the Commission from re-authorizing analog service by full-power stations after June 12, 2009).

<sup>33</sup> NAB argues that the Petition "mistakenly characterizes Section 614(b)(4)(A) as applying only to the carriage of HD *must-carry* signals" when "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.'" NAB Comments at 5, n.14 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, ¶ 171 (1993)). NAB concludes that "ACA has no basis for contending that the requirement to carry HD broadcast signals in HD is limited only to must-carry stations." *Id.* To the contrary, ACA finds ample basis in the plain language of the Communications Act for a conclusion that Section 614(b)(4)(A) does *not* apply to retransmission consent signals. Section 325(b)(4) provides that, for a station electing retransmission consent, "the provisions of Section 614 shall not apply to the carriage of the signal of such station by such cable system." 47 U.S.C.

**A. The Commission's Broad Authority Over Cable Carriage of Broadcast Signals and the Digital Television Provides a Statutory Basis for the HD Carriage Exemption.**

NAB takes aim at the statutory basis for the HD carriage exemption, arguing that the exemption is inconsistent with the material degradation standard found in Section 614(b)(4)(A) and that extending the exemption to systems carrying some signals in HD violates the non-discrimination provision of Section 614(b)(4)(A). These arguments are without merit. The Commission has broad authority over cable carriage of broadcast signals, particularly during the still-ongoing DTV transition, and the HD carriage exemption fits comfortably within this statutory authority.

The Commission first asserted authority over cable carriage of broadcast signals in the 1960s.<sup>34</sup> Congress codified the Commission's authority in 1992 after finding that:

The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of

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§ 325(b)(4). NAB's argument also relies on an authority that the Commission has repudiated in this proceeding. See *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, First Report and Order, 16 FCC Rcd 2598, ¶ 73 (2001) ("First Report and Order") (prohibition on material degradation applies "in the context of mandatory carriage of digital broadcast signals") (emphasis added); see also *In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, ¶ 4, n.12 (1998) ("First NPRM") ("The legislative history accompanying the retransmission consent section makes clear that stations which elect to require retransmission consent from a cable system will not have signal carriage rights under Section 614 on that cable system for the duration of the stations' election."). In any event, ACA did not address the carriage of retransmission consent stations in the Petition because the contract between the cable operator and the broadcaster governs carriage obligations for these stations. See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order, 22 FCC Rcd 21064, ¶ 21 (2007) ("Third Report and Order") ("retransmission consent stations may be carried in any manner that comports with the private agreements of the parties"). Nonetheless, the Commission need not resolve the scope of the HD carriage requirement in this proceeding. The question in this proceeding is only whether to extend the HD carriage exemption, and if so, whether to alter its eligibility criteria.

<sup>34</sup> See *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (upholding Commission rules regulating CATV systems under the Commission's authority over local television broadcasting).

providing a fair, efficient, and equitable distribution of broadcast services.<sup>35</sup>

Based on this and other findings, in 1992 Congress adopted Section 614, providing for mandatory carriage of local commercial television stations by cable systems.<sup>36</sup> Section 614 required the Commission to regulate cable carriage of broadcast signals,<sup>37</sup> providing one broad source of statutory authority for the HD carriage exemption.

More specifically, the Commission also has authority over digital television and cable carriage of broadcast signals during the nationwide DTV transition – from which the HD carriage exemption arose. Congress first granted the Commission authority over digital television in 1996, and later created a process for broadcast stations to return analog spectrum and set a date certain for cessation of analog transmissions by full-power stations, thus launching the DTV transition process.<sup>38</sup> As part of the DTV transition, the Commission initiated this proceeding under its Section 614 authority, tentatively finding (and later concluding) that it had broad authority over cable carriage of broadcast signals during the DTV transition:

We read Section 614(b)(4)(B) of the 1992 Cable Act and Section 309(j) of the Balanced Budget Act, along with their respective legislative histories, to give us *broad authority to define the scope of a cable operator's signal carriage requirements during the period of change from analog to digital broadcasting*. Given this intent, and noting the significant changes that are taking place in the broadcast and cable television industries, as well as in the development of television reception devices, we tentatively conclude that the Commission should have, and does have, the ability to develop rules to facilitate the

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<sup>35</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(9).

<sup>36</sup> *Id.*, § 614 (codified at 47 U.S.C. § 534).

<sup>37</sup> *Id.*, § 614(f) (codified at 47 U.S.C. § 534(f) (“the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section”).

<sup>38</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 201 (1996) (Section 201 authorized the Commission to issue licenses and prescribe regulations for “advanced television services” (defined as “television services provided using *digital* or other advanced technology”)); 47 U.S.C. § 309(j)(14) (prohibiting the Commission from re-authorizing analog service by full-power stations after June 12, 2009).

transition process and to take into account the technical changes involved.<sup>39</sup>

The Commission did not depart from this tentative conclusion, finding in the First Report and Order that the “statutory provision triggering this rulemaking is found in Section 614(b)(4)(B).”<sup>40</sup> Thus, the Commission has broad authority over cable carriage of broadcast signals in connection with the DTV transition, and this necessarily encompasses the authority to exempt small systems from the HD carriage requirement.<sup>41</sup>

In summary, the Commission has broad authority over cable carriage of broadcast signals and, more specifically, over cable carriage of broadcast signals in connection with the DTV transition. Because the HD carriage exemption arose out of the DTV transition – and continues to be necessary as a small number of cable systems progress in their transition to digital – the Commission has statutory authority to extend the HD carriage exemption.

**B. The Section 614 Material Degradation Standard is Not a Technology-Forcing Provision and Must Be Read in Conjunction with the Technical Feasibility Standard.**

NAB next attacks the exemption’s statutory basis, arguing that it is contrary to the material degradation standard and “cannot be squared with Section 614(b)(4)(A).”<sup>42</sup> But, as both ACA and NCTA have argued, Congress did not intend the material degradation standard to require cable systems to upgrade to digital or add capacity to support HD signals.<sup>43</sup> The

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<sup>39</sup> First NPRM, ¶ 13 (emphasis added).

<sup>40</sup> First Report and Order, ¶ 8 and n. 25 (quoting Section 614(b)(4)(B) and citing legislative history: “when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems...”); see H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 67 (1992).

<sup>41</sup> See Fourth Report and Order, ¶ 11 (adopting the HD carriage exemption and tying its expiration to the date of the digital transition).

<sup>42</sup> NAB Comments at 5.

<sup>43</sup> *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) (“NCTA 2012 Reply Comments”) (“The requirement that signals be carried ‘without material degradation 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

Commission itself acknowledges that “[t]here are no federal digital cable transition requirements.”<sup>44</sup> Indeed, when Congress wants to mandate a certain technology, it knows how to do so – and it did not in Section 614(b)(4)(A).<sup>45</sup>

Moreover, NAB’s argument depends on an interpretation of the Section 614(b)(4)(A) material degradation standard wholly separate and apart from its technical feasibility standard, instead of reading the entire provision as a whole as the Commission must.<sup>46</sup> The technical feasibility standard requires the Commission to “adopt carriage standards to ensure that, *to the extent technically feasible*, the quality of signal processing and carriage provided” local commercial television stations is no less than for other signals on the system.<sup>47</sup> If the Commission were to adopt NAB’s interpretation of Section 614(b)(4)(A), it would need to force analog-only systems to upgrade by purchasing new equipment and force other systems to add capacity or drop other programming.<sup>48</sup> And doing so would effectively disregard not only its

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systems.”); ACA Comments at 13 (citing NCTA 2012 Reply Comments at 6 and arguing that the “Commission’s obligation here is to look at the capability of systems in the market in developing carriage standards for must-carry signals”).

<sup>44</sup> First NPRM, ¶ 9 (summarizing the complexities of the DTV transition, noting that there are no federal digital transition requirements on cable operators, and explaining that “[c]able operators are transitioning to digital on a voluntary basis...”); see also *DTV Transition Did Not Require Cable Systems to Switch to Digital*, Consumer & Governmental Affairs Bureau of the Federal Communications Commission, available at <http://www.fcc.gov/guides/dtv-transition-did-not-require-cable-systems-switch-digital>) (“The 2009 DTV transition required all full-power TV broadcast stations to switch from an analog to a digital format. Cable companies were not required to make this change. . . . The decision to carry channels in analog, analog and digital (sometimes referred to as a ‘hybrid’ system), or solely digital is left to the cable company’s discretion. There is no government requirement for the way cable companies transmit their signals.”).

<sup>45</sup> See, e.g., 47 U.S.C. § 309(j)(14) (prohibiting the Commission from re-authorizing analog service by full-power stations after June 12, 2009); 47 U.S.C. § 337(e) (prohibiting full power stations from operating a license between 698 and 806 MHz after June 12, 2009).

<sup>46</sup> See, e.g., *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (U.S. 2014) (“And reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole. A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”) (footnotes and internal punctuation omitted).

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

<sup>48</sup> See ACA Comments at 14 (noting that “analog-only systems lack the necessary equipment to receive and retransmit HD programming” and identifying the types of equipment necessary for these systems to offer HD programming); *id.* at 2 (“Small systems continue to face bandwidth issues and continue to

earlier conclusion that “[t]here are no federal digital cable transition requirements”<sup>49</sup> but also the technical feasibility standard, which requires the Commission to consider financial, operational, and capacity constraints in adopting carriage standards.<sup>50</sup> By reading the material degradation and technical feasibility standards together, as the Commission must and has done in the past,<sup>51</sup> the HD carriage exemption is readily squared with Section 614(b)(4)(A). Simply put, the Commission may exempt a system from the HD carriage requirement where carriage in HD is not technically feasible. And the HD carriage exemption is narrowly tailored to systems for which HD carriage of broadcast stations is not technically feasible due to a system’s bandwidth or lack of necessary equipment that the system operator is unable to acquire due to financial constraints occasioned by small subscriber bases, or due to both.<sup>52</sup> Thus, NAB’s argument that the HD carriage exemption is contrary to the material degradation standard must fail.

**C. The Material Degradation Standard Looks to Picture Quality, Not Merely Technical Changes in the Signal.**

NAB also argues that, “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.”<sup>53</sup> This is not the first

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experience financial strain. Forcing these systems to launch HD signals exacerbates these capacity and financial constraints and makes system shut-downs more likely...”)

<sup>49</sup> First NPRM, ¶ 9; *see also supra* note 44.

<sup>50</sup> As noted in ACA’s Comments, the Commission has not directly interpreted the technical feasibility standard in this context but, in interpreting technical feasibility in other contexts, considers financial, operational, and capacity constraints. ACA Comments at 14 (summarizing the technical feasibility standards used by the Commission in various contexts and applying them to analog-only systems in the HD carriage context).

<sup>51</sup> Third Report and Order, ¶ 8 (reading the material degradation and technical feasibility standards together and concluding that “the issue of material degradation is about the picture quality the consumer receives and is capable of perceiving”) (citing the First Report and Order, ¶ 72).

<sup>52</sup> Fifth Report and Order, ¶ 23 (declining to adopt a further restriction on the exemption as requested by NAB because the “Commission has already crafted the exemption quite narrowly to excuse only a limited number of systems with particularly limited channel capacity or low subscribership”).

<sup>53</sup> NAB Comments at 5.

time that NAB has made this argument. The Commission previously found it unavailing and should again now because material degradation is about picture quality and “not merely technical changes in the signal.”<sup>54</sup>

In the First Report and Order, the Commission noted NAB’s argument that “a digital signal would be materially degraded if it were not transmitted to the viewer in the format that the broadcaster intended.”<sup>55</sup> Other broadcasters urged the Commission to prohibit cable systems from blocking or deleting bits from broadcast signals.<sup>56</sup> The Commission disagreed, because “these arguments do not address the fundamental concern of the prohibition against material degradation.”<sup>57</sup> It explained:

From our perspective, the issue of material degradation is about the picture quality the consumer receives and is capable of perceiving and not about the number of bits transmitted by the broadcaster if the difference is not really perceptible to the viewer. Such an interpretation is consistent with the language of the Act, which applies to material degradation, not merely technical changes in the signals.<sup>58</sup>

In this case, converting a signal from one format to another (digital to analog) does not necessarily affect the picture quality the consumer receives and is capable of perceiving.<sup>59</sup> Instead, it’s a mere technical change in the format of the signal. Thus, the Commission can readily find that the HD carriage exemption is consistent with the material degradation standard.

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<sup>54</sup> First Report and Order, ¶ 72.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., *Digital vs. Analog*, PBS Online, Inc., available at [http://www.pbs.org/opb/crashcourse/digital\\_v\\_analog/](http://www.pbs.org/opb/crashcourse/digital_v_analog/) (“A digital image isn’t inherently better than an analog image, and in some cases it can be worse.”)

**D. Applying the Exemption to Systems Carrying Other Signals in HD Does Not Violate the Section 614 Non-Discrimination Standard.**

NAB next argues that exempting from the HD carriage requirement systems that carry other signals in HD “improperly discriminates against broadcast signals.”<sup>60</sup> NAB continues, “the technical infeasibility language of the statute does not justify” continuing the exemption because a cable system that carries other signals in HD “has the technical capability to carry broadcast signals in HD.”<sup>61</sup> This argument misconstrues the technical feasibility standard.

As NAB notes, Section 614(b)(4)(A) “directs the Commission to ensure that, ‘to the extent technically feasible,’ cable systems provide the ‘local commercial television station’ they carry the same ‘quality of signal processing and carriage’ as provided for ‘any other type of signal.’”<sup>62</sup> The Commission, however, interprets technical feasibility in this and other contexts with regard to financial, operational, and capacity constraints and not just with respect to “technical capability” as NAB wrongly suggests.<sup>63</sup> The Commission has already limited eligibility for the exemption to systems it knows are most likely to face financial, operational and capacity constraints.<sup>64</sup> Moreover, as the Commission recognized in 2012, “a small system’s ability to offer some HD service does not refute an argument that it may be significantly burdensome to

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<sup>60</sup> NAB Comments at 6.

<sup>61</sup> *Id.* at 6-7.

<sup>62</sup> *Id.* at 6.

<sup>63</sup> ACA Comments at 14 (summarizing the technical feasibility standards used by the Commission in various contexts: “In interpreting technical feasibility standards in this proceeding, the Commission considered financial and capacity constraints with respect to the small-system exemption. 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.” In other related contexts, such as IP closed captioning, the Commission has considered both technical and operational concerns. In its 2014 Video Description Order, the Commission considered costs and practical impact in the technical feasibility analysis.”) (footnotes omitted).

<sup>64</sup> See, e.g., Fifth Report and Order, ¶ 23 (noting that the Commission “crafted the exemption quite narrowly to excuse only a limited number of systems with particularly limited channel capacity or low subscribership”).

offer additional HD service.”<sup>65</sup> The results of ACA’s most recent member survey confirm that this continues to be the case for systems that rely on the exemption.<sup>66</sup> Thus, the Commission is well within its discretion in finding that HD carriage of all signals is not always technically feasible, and the exemption does not violate Section 614(b)(4)(A)’s non-discrimination provision.

**E. Sound Policy Reasons Counsel Against Eliminating the HD Carriage Exemption For Systems Offering Some Signals in HD.**

There are also sound policy reasons for allowing systems that carry some signals in HD to remain eligible for the exemption. First, as the Commission has recognized, eliminating the exemption for these systems could “create a disincentive for these systems to take incremental steps toward offering more HD programming to their subscribers. . . .”<sup>67</sup> Second, the purpose of the exemption “is to provide small systems with additional time to upgrade and, where necessary, expand their systems to come into full compliance with the material degradation provisions of the carriage rules by carrying HD versions of all HD broadcast signals without having to make relatively large expenditures over a short period of time.”<sup>68</sup> The exemption remains necessary to achieve that purpose for a small and decreasing number of systems.<sup>69</sup> Indeed, as WTA notes, upgrading a system to allow HD carriage can be quite costly and time-consuming.<sup>70</sup> For many operators, the alternative to incurring those costs is shutting down a

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<sup>65</sup> *Id.*

<sup>66</sup> ACA Comments at 10-11 (summarizing the results of a member survey indicating that a large majority of ACA members operating systems that utilize the exemption would find burdensome or significantly burdensome a requirement to purchase equipment or add capacity necessary to deliver HD must-carry signals to subscribers in HD).

<sup>67</sup> Fifth Report and Order, ¶ 23.

<sup>68</sup> *Id.*, ¶ 22.

<sup>69</sup> ACA Comments at 5-6 (summarizing the results of a member survey: 90% of respondents would need to purchase additional equipment to offer must-carry signals in HD; 80% of those respondents would consider these equipment purchases to be a “significant burden”; 37% would consider shutting down their systems rather than investing in the necessary equipment).

<sup>70</sup> WTA Comments at 4-5 (citing member estimates of the costs and timeframes required to upgrade systems to be HD-capable; the costs ranged from \$40,000 to \$500,000; the time investments ranged from 2 months to 2 years).

system altogether,<sup>71</sup> a result the Commission should strive to avoid, particularly in the small, rural markets often served by these systems, where the loss of an MVPD competitor is felt more acutely.<sup>72</sup>

In summary, the same financial and capacity constraints that faced small systems when the Commission adopted the HD carriage exemption in 2008, and extended it in 2012, continue to exist today, and the exemption remains necessary for the same sound policy reasons that have justified it since 2008.

#### **IV. THE RECORD SUPPORTS CONFIRMATION THAT ANALOG-ONLY SYSTEMS ARE NOT SUBJECT TO THE HD CARRIAGE REQUIREMENT**

As ACA has explained, analog-only systems are technically incapable of providing HD programming because, by definition, “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.”<sup>73</sup> Further, ACA noted in its comments that analog carriage of must-carry signals is consistent with analog-only systems’ viewability obligations and with their carriage of other broadcast and cable programming, all of which is provided to subscribers in analog format.<sup>74</sup> Requiring HD carriage of must-carry signals delivered in HD on analog-only systems would, “at best, impose significantly increased

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<sup>71</sup> *Id.* at 5 (“Spreading such a substantial investment among so few subscribers, however, simply is not realistic in these and most similar cases. Were the Commission to decide not to extend the exemption, affected TWA members would “strongly consider” shuttering their cable operations...”); ACA Comments at 2 (“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.”)

<sup>72</sup> Fifth Report and Order, ¶ 21 (“Notably, these small systems often serve rural and smaller market consumers, making the potential loss of such service particularly troubling. As noted in the *Fourth Report & Order*, the loss of a small cable system could mean the effective loss of all MVPD service for some customers. Moreover, in some areas, due to poor over-the-air reception, the loss of a small cable system could mean the loss of any access to some or all broadcast signals as well.”).

<sup>73</sup> ACA Comments at 13.

<sup>74</sup> *Id.* at 19.

costs on cable operators and their customers, and, at worst, would result in the loss of cable service altogether if the system cannot bear the costs and shuts down.”<sup>75</sup> Under these circumstances, clarifying that the HD carriage requirement does not apply to analog-only systems would harm neither customers, who would be spared from either steep increases in their cable subscription rates or loss of cable service, nor broadcasters, whose signals would continue to be available and viewable in analog format.

The record is unanimous on this issue. NAB, the sole broadcaster group to file comments, took no position on the relief ACA requested. MVPD groups are united in their view that analog-only systems should not be required to carry HD signals because it is technically infeasible for them to do so and requiring them to incur the substantial investments needed to upgrade their systems would be contrary to the public interest. WTA asks the Commission to confirm that “all analog cable systems are permanently exempt from the ‘material degradation’ requirements relating to HD broadcast signal carriage due to the technical infeasibility of retransmitting HD signals over an analog cable system.”<sup>76</sup> Like ACA, WTA argues that failure to confirm that analog-only systems are exempt from the HD carriage requirement due to technical infeasibility would be contrary to the public interest because it would force “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. . . .”<sup>77</sup> NCTA similarly argues that, “for the limited sub-set of analog-only systems, the Commission should confirm that such systems are not subject to the HD carriage requirement because such carriage is technically infeasible.”<sup>78</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> WTA Comments at 2, 7.

<sup>77</sup> *Id.* at 10.

<sup>78</sup> NCTA Comments at 5.

ACA and NCTA both note that the number of analog-only systems is small and decreasing.<sup>79</sup> Despite their dwindling numbers, these systems remain in operation, providing a valuable video service available to customers who cannot afford other options, particularly a more expensive DBS service.<sup>80</sup>

ACA agrees with NCTA that if the Commission concludes that analog-only systems are not exempt under a technical feasibility exemption, it should grant a permanent exemption from the HD carriage requirement rather than “repeatedly require such systems – which, by NCTA’s estimation serve slightly more than one half of one percent of basic cable subscribers – to expend resources to pursue additional waivers when the economics make it impractical for them to upgrade to digital.”<sup>81</sup> Accordingly, the Commission should confirm that analog-only systems are not subject to the requirement to carry HD must-carry signals in HD.

**V. THE COMMISSION SHOULD REJECT NAB’S REQUESTS THAT SMALL SYSTEMS BE REQUIRED TO NOTIFY OR CERTIFY THAT THEY QUALIFY FOR THE HD CARRIAGE EXEMPTION AND REPORT PERIODICALLY ON PROGRESS TOWARD COMPLIANCE**

**A. There is No Need for a Notification or Certification Program for Small Systems Utilizing the HD Carriage Exemption.**

NAB renews its earlier request that the Commission impose a notice or similar certification requirement on cable operators relying on the HD carriage exemption.<sup>82</sup>

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<sup>79</sup> ACA Petition at 17; ACA Comments at 17-19; NCTA Comments at 5, n. 17.

<sup>80</sup> ACA Comments at 17.

<sup>81</sup> NCTA Comments at 5.

<sup>82</sup> NAB Comments at 9. After the Commission first implemented the exemption in the Fourth Report and Order, NAB petitioned the Commission for reconsideration proposing that “the Commission require every cable system seeking to benefit from the HD exemption to notify consumers, affected must carry stations, and the Commission of the system’s intent to utilize the exemption and the factual basis supporting its qualification for the exemption.” *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Petition for Reconsideration of National Association of Broadcasters and The Association of Maximum Service Television, Inc., (filed Nov. 17, 2008). The Commission put the Petition out for Public Notice on November 25, 2008. ACA and NCTA filed Oppositions to the Petition on December 16, 2008, and NAB and MSTV replied to those oppositions on December 23, 2008. The Commission has taken no further action in the proceeding.

Specifically, NAB requests that cable operators be required to provide notice or otherwise certify, in a publicly available manner, that their subscribership levels, ownership structure or technical capacity comport with the standards for the exemption and its request for additional compliance reporting mandates.<sup>83</sup> NAB argues that this would benefit the Commission “and provide more information to viewers about the services offered by small cable systems and how those services compare to other video options.”<sup>84</sup> The Commission should reject NAB’s request for small system notifications or certifications as both unnecessary and contrary to the public interest.

The point of exempting small systems from the HD carriage requirement was precisely to alleviate the burdens these system operators would incur to satisfy their obligations in recognition of their lack of operational and financial resources.<sup>85</sup> Imposing NAB’s recommendation for notifications or certifications would impose administrative costs and man-hour burdens on systems utilizing the HD carriage exemption, contrary to NAB’s blithe suggestion to the contrary.<sup>86</sup> Providing notices or certifications is undoubtedly burdensome, particularly for smaller entities, and Congress sought to keep such obligations to a minimum where appropriate. In fact, the Commission would be acting consistent with the Paperwork Reduction Act by *not* adopting NAB’s proposal.<sup>87</sup> Moreover, such requirements were not proposed or specifically discussed in the FNPRM and therefore cannot be adopted at this time.

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<sup>83</sup> NAB Comments at 9.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Third Report and Order, ¶¶ 83-86 (seeking comment on proposals to “minimize the impact on small operators”); Fourth Report and Order, ¶ 3 (noting concern about “impact these rules might have on small cable operators” and seeking comment on ways to minimize any harm).

<sup>86</sup> See NAB Comments at 9.

<sup>87</sup> See 44 USC § 3506(b)(1)(A) (requiring federal agencies to manage resources to “reduce information collection burdens”).

NAB cites no precedent where the Commission has required entities benefiting from such temporary exemptions from its rules to file certifications attesting to the fact that they qualify for the exemption. To the contrary, such “self-executing” exemptions are common. For example, in recent years, the Commission has issued two self-executing temporary exemptions from its advanced communications services (“ACS”) accessibility rules – one to small providers of ACS and manufacturers of ACS equipment,<sup>88</sup> and another for customized equipment,<sup>89</sup> without requiring the entity utilizing the exemption to either certify or formally seek approval by the Commission. The Commission used the same self-implementing approach with respect to video description, where video programmers and distributors were deemed exempt from the video description rules on the basis that they were not technically capable of compliance; no certifications were required, entities refraining from passing through video description would only need to defend eligibility in the event a complaint was filed.<sup>90</sup> In addition, the Commission’s recent Open Internet Order temporarily exempts small broadband Internet access providers from enhanced disclosure obligations pending a final determination on the matter without requiring these providers to certify or otherwise establish their eligibility for the exemption.<sup>91</sup>

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<sup>88</sup> *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Amendments to the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, ¶ 208 (2011) (“ACS Accessibility Order”) (“This temporary exemption is self-executing. Entities must determine whether they qualify for the exemption based upon their ability to meet the SBA’s rules and the size standard for the relevant NAICS industry category for the industry in which they are primarily engaged. Entities that manufacture ACS equipment or provide ACS may raise this temporary exemption as a defense in an enforcement proceeding.”)

<sup>89</sup> ACS Accessibility Order, ¶ 178 (“The customized equipment exemption will be self-executing. That is, manufacturers and providers need not formally seek an exemption from the Commission, but will be able to raise 716(i) as a defense in an enforcement proceeding.”).

<sup>90</sup> *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, ¶ 26 (2011).

<sup>91</sup> *Protecting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, ¶¶ 172-175 (rel. Mar. 12, 2015).

Finally, NAB's argument that such notifications or certifications would benefit consumers is specious and should be rejected. NAB provides no reason why cable customers need to be informed that broadcast signals are available in standard definition or analog only, and cites no evidence that customers of cable systems utilizing the HD carriage exemption are unaware that the broadcasters' over-the-air signal is not being offered to them in its native format. It is noteworthy that broadcast stations themselves are under no obligation to tell the cable operator, the public, or the Commission about the HD content of their signals, or what day parts are actually broadcast in HD.<sup>92</sup> Under these circumstances, it is far from clear what good it would do to have small cable systems incur the costs and burden of informing customers that broadcast stations are not being retransmitted in HD or provide them with notice of the factual basis of the system's claim of eligibility for the exemption. Indeed, as NCTA has argued, such a requirement would do more harm than good.<sup>93</sup>

**B. There is No Need for the Submission of Periodic Progress Reports to the Commission.**

In addition to certifications, NAB requests that the Commission require cable systems relying on the HD carriage exemption to periodically submit specific factual information describing their progress toward compliance with and detailing the remaining steps they must take to comply with the HD carriage requirement.<sup>94</sup> Again, for the reasons stated above, the

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<sup>92</sup> Furthermore, despite NAB's claims that "local broadcast stations, including those earning very limited revenues in the smallest markets, successfully converted to digital six years ago," low-power and Class A television stations have not been required to transition to digital. NAB Comments at 10; *Suspension of September 1, 2015 Digital Transition Date for Low Power Television and TV Translator Stations*, Public Notice, MB Docket No. 03-185 (rel. Apr. 24, 2015) (confirming September 1, 2015 digital transition deadline for Class A television stations and postponing deadline for low-power and translator stations). These analog stations are not required to notify the cable operator, the public, or the Commission that they have yet to convert to digital.

<sup>93</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Opposition of the National Cable & Telecommunications Association at 2-4 (filed Dec. 16, 2008) (notice requirement imposes unnecessary burdens and costs on small operators, is contrary to the Paperwork Reduction Act's protections, would represent "bad customer care philosophy," is impractical, and could be potentially misleading and confusing to customers).

<sup>94</sup> NAB Comments at 10.

Commission should just say no. NAB may think that cable systems are dragging their feet with respect to coming into compliance with the HD carriage requirement, but NAB provides no evidence that cable systems utilizing the HD carriage exemption are unreasonably delaying their compliance, nor any evidence that progress reports would, if implemented, reveal unreasonable delays. Moreover, NAB fails to show that burdening these systems with the significant costs of providing such periodic progress reports will even serve the intended purpose. In fact, imposing these added costs on these systems may actually slow down financially constrained systems' progress towards transitioning to digital. The record shows that the number of systems utilizing the exemption continues to decline, suggesting that market forces are facilitating and will continue to facilitate compliance if the exemption is extended once again.

NAB's suggestion that small systems have made insufficient progress in transitioning to digital carriage is not only disproved by the record,<sup>95</sup> the claim is in flagrant disregard of the fact that the period of time the extension has been in effect – 2009 through 2015 – coincides with the financial crisis of 2008 and the recession that followed it.<sup>96</sup> The effects of these events are still being felt by many areas of the country six years after the “Great Recession” officially ended, and are likely most acutely felt in smaller cities, towns, and rural and sparsely populated areas, where the per-subscriber costs of service are higher than in larger and more densely populated areas. This, combined with the deleterious effects of steadily increasing per-

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<sup>95</sup> NCTA Comments at 2-3 (citing NCTA estimates that there are 1,571 fewer systems eligible for the small system exemption today than in 2011 and that over one million fewer subscribers are served by those systems today than in 2011); ACA Comments at 17 (citing decline in the number of analog-only systems as some systems shut down and others upgraded).

<sup>96</sup> See Craig Moffett, *The Poverty Problem, Six Years On*, MOFFETT/NATHANSON RESEARCH (Mar. 12, 2015) (analysis of “the affordability problem” facing subscription TV providers six years after the end of the “Great Recession” that resulted in stagnant incomes and widening income distribution gaps for consumers and flat subscribership since 2009 and lower penetration for operators; predicting an even greater uptick in future of cord cutting); see also Michael Farrell, *Moffett: 18M U.S. Homes Without Pay TV*, BROADCASTING AND CABLE (Mar. 12, 2015), available at <http://www.broadcastingcable.com/news/technology/moffett-18m-us-homes-without-paytv/138748>.

subscriber programming costs that severely pressure small systems' margins as recently documented by ACA, makes additional investment in equipment and outside plant difficult, to say the least.<sup>97</sup> Against this backdrop, small systems have made admirable progress in providing digital and HD signals to their subscribers. There have been legitimate reasons, already explained by ACA members in ACA's survey, why certain systems have been unable to upgrade to comply with the HD carriage requirement. NAB has provided no reason or benefit to be gained from requiring these operators to provide periodic progress reports to the Commission or the public. Moreover, progress reports were not proposed or specifically discussed in the FNPRM and therefore cannot be adopted at this time.

Instead of prodding smaller cable systems to satisfy the HD carriage requirement, periodic reporting requirements may serve to delay compliance. Many operators of these systems have only a handful of employees to run the system and oversee regulatory compliance. Imposing yet another reporting requirement would simply impose another administrative burden. Between now and then, such systems are unlikely to come into compliance more quickly simply because they are required to report on progress to the Commission. Their ability to come into compliance will depend solely on having the available bandwidth or financial resources to do so. Adding another costly reporting obligation for these systems is more likely to retard, rather than speed, full compliance. Rather than imposing additional burdens on these smaller systems through periodic progress reports, the Commission

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<sup>97</sup> *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); Reply Comments of the American Cable Association at 9-11 (filed Apr. 6, 2015) (describing the drastic rises in video programming fees and their effects on broadband investment).

and the NAB should be considering means of easing the burdens on these systems so that they have better access to capital to come into full compliance with the HD carriage requirement.<sup>98</sup>

## VI. CONCLUSION

The record supports an additional three-year extension of the HD carriage exemption for small systems, and it supports continued eligibility for the exemption by the same class of systems that have been eligible for the exemption since its inception. Moreover, the Commission has ample statutory authority to support the exemption, despite NAB's claims to the contrary. The record also shows unanimous support from MVPD groups – and no opposition from NAB – for ACA's request for the Commission to clarify that the HD carriage requirement does not apply to analog-only systems. Lastly, there is no basis for requiring small systems using the HD carriage exemption to notify or otherwise certify their eligibility for the Commission, or to provide periodic progress reports.

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<sup>98</sup> In other proceedings, such as the Online Public File rulemaking, ACA has proposed relaxed regulatory burdens for smaller operators. *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No. 14-127, Comments of the American Cable Association at 4, 7-10 (filed Mar. 16, 2015). See also *Protecting the Open Internet Petition for Rulemaking Framework for Broadband Internet Service*, GN Docket Nos. 14-28, 10-127, Comments of the American Cable Association at 37-39 (filed July 17, 2014). Relaxing rather than increasing regulatory burdens on small cable systems would eliminate a future burden on these operators, and make it easier for them to upgrade their systems to provide HD carriage. NAB has opposed ACA's proposal in the Online Public File proceeding, but perhaps may come to reconsider its stance when considering how the Commission's imposition of additional costs in one context can impact the ability of these systems to come into full compliance with other regulatory mandates, such as the HD carriage requirement. See *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No. 14-127, Reply Comments of the National Association of Broadcasters at 3-4 (filed Apr. 14, 2015).

Respectfully submitted,

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