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

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

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August 16, 2007

TABLE OF CONTENTS

Executive Summary. i

I. CABLE'S PROPOSALS WILL NOT ENSURE THAT CONSUMERS ARE NOT DISENFRANCHISED BY THE DIGITAL TRANSITION. 4

A. Cable Has a Statutory Obligation to Make Must-Carry Stations Viewable. 5

B. Because the Commission's Proposal Is Voluntary, There Are No Constitutional Considerations. 10

II. CABLE OPERATORS HAVE PROPOSED NO RELIABLE METHOD FOR PREVENTING MATERIAL DEGRADATION THAT WOULD BE DETRIMENTAL TO CONSUMERS. 17

A. The Record Includes No Evidence that Compression Techniques Do Not Harm Signal Quality. 18

B. MVPDs' Proposals Are Inconsistent with the Language and Purpose of Section 614 19

C. The Commission's Experience with Material Degradation Reflects a Need for Quantitative Standards. 21

D. Dispute Resolution Procedures by MVPDs Do Not Protect the Public's Access to High Quality Digital Broadcast Content 23

III. CONTRARY TO THE CABLE INDUSTRY'S SUGGESTION, THERE IS AMPLE JUSTIFICATION FOR THE COMMISSION'S PRO-CONSUMER PROPOSAL. 24

IV. CONCLUSION. 27

EXECUTIVE SUMMARY

The National Association of Broadcasters ("NAB") and the Association for Maximum Service Television, Inc. ("MSTV") hereby reply to certain comments on the Commission's *Second Further Notice of Proposed Rulemaking* concerning the carriage of digital broadcast signals after the conclusion of the digital television ("DTV") transition in February 2009. In this *Notice*, the Commission sought comment on (1) implementing the statutory requirement that cable operators must make the signals transmitted by broadcasters electing mandatory carriage viewable by all of their subscribers after the end of analog broadcasting on February 17, 2009, and (2) the statutory requirement that cable systems provide local broadcast signals without material degradation and on what precisely constitutes material degradation. To ensure that cable subscribers are not disenfranchised by the switch to digital-only broadcasting, the Commission proposed to permit cable operators, after the end of analog broadcasting, to choose between (a) downconverting the signals of digital must-carry channels for all analog cable subscribers and carrying both digital and analog signals for those channels on their systems, or (b) carrying local must-carry signals in digital only and providing cable subscribers with analog television sets with the necessary equipment to view those digital signals. The Commission also proposed to protect cable subscribers' access to high quality digital broadcast programming by moving away from a subjective standard for evaluating material degradation to an objective, measurable standard based on cable operators' carriage of all content bits transmitted by broadcast stations.

In our initial comments in this proceeding, NAB and MSTV applauded the Commission's efforts to put consumers first. We strongly agreed with the Commission about the importance of facilitating the DTV transition in a consumer-friendly manner. Accordingly, NAB and MSTV

supported the Commission's proposals to ensure that broadcasters' must-carry signals are viewable by all cable subscribers, and to prevent the material degradation of broadcast programming in the digital environment.

Conversely, the initial comments of the cable industry do not embrace the Commission's consumer-friendly approach, and their proposals will not ensure that consumers, including cable subscribers, will enjoy the benefits of the digital transition. Cable commenters oppose the Commission's "viewability" proposal as burdensome and an infringement of their First Amendment rights. However, their position fails to grapple with both the statutory requirement that all must-carry signals be viewable on the sets of all cable subscribers and the congressionally mandated transition to DTV. Cable's repetitive First Amendment arguments are also without merit. Because the Commission's proposal allows cable operators a voluntary choice between going all-digital and providing converters to subscribers with analog receivers, or providing must-carry signals in analog and digital formats, no constitutional issues are even raised. Moreover, particularly in light of cable's dramatic capacity expansion in recent years, the carriage of both digital and analog must-carry signals do not raise First Amendment concerns because any incremental capacity burden that such carriage would impose on cable operators is negligible. Indeed, there is no evidence whatsoever that cable operators' carriage of must-carry signals – in analog, digital or both – would take up anything close to the one-third of cable capacity limit set forth in the Cable Television Consumer Protection and Competition Act of 1992 and previously upheld by the Supreme Court in the *Turner* cases.

The cable industry also opposes the Commission's important efforts to protect consumers' access to high-quality broadcast content and give effect to Congress' prohibition against material degradation of broadcast signals by cable operators in the digital environment.

In particular, cable commenters have asked the Commission to ignore newly available technology that can be used to quantify material degradation of digital signals and to instead retain an outdated standard that is no longer the best way to ensure that cable operators deliver broadcast signals to customers without degradation. As NAB and MSTV demonstrated in our initial comments, however, adoption of the Commission's proposed standard defining material degradation as the loss of bits is the most effective way to reduce regulatory uncertainty and ensure that the interests of consumers are protected.

In sum, the cable industry has shown no legal, constitutional or policy reason why the Commission should not adopt its pro-consumer proposals in this proceeding. To the contrary, the record demonstrates that adoption of the Commission's "viewability" and material degradation proposals will minimize the burden imposed on consumers by the end of analog broadcasting, and will ensure that all consumers, including cable customers, enjoy the full benefits of the DTV transition, as Congress clearly intended.

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The National Association of Broadcasters ("NAB") and the Association for Maximum Service Television, Inc. ("MSTV")[1] submit this reply to certain comments on the Commission's *Second Further Notice of Proposed Rulemaking* in this proceeding.[2] In the *Notice*, the Commission sought comment on two issues concerning the carriage of digital broadcast signals after the conclusion of the digital television ("DTV") transition: (1) implementing the statutory requirement that cable operators must make the signals transmitted by broadcasters electing mandatory carriage viewable by all of their subscribers after the end of analog broadcasting on February 17, 2009, and (2) the statutory requirement that cable systems provide local broadcast signals without material degradation and on what precisely constitutes material degradation. *Notice* at ¶¶ 3-4.

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[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. MSTV represents over 500 local television stations on technical issues relating to analog and digital television services.

[2] *Second Further Notice of Proposed Rulemaking* in CS Docket No. 98-120, FCC 07-71 (rel. May 4, 2007) ("*Notice*").

In our initial comments,[3] NAB and MSTV strongly agreed with the Commission that the implementation of these statutory requirements must be "mindful of the need to minimize the burden imposed upon consumers by the end of analog broadcasting in order to facilitate the successful and timely conclusion of the DTV transition." *Notice* at ¶ 5. NAB and MSTV thus fully supported the Commission's proposal to permit cable operators, after the end of analog broadcasting on February 17, 2009, to choose between (a) downconverting the signals of digital must-carry channels for all analog cable subscribers and carrying both digital and analog signals for those channels on their systems, or (b) carrying local must-carry signals in digital only and providing cable subscribers with analog television sets with the necessary equipment to view those digital signals. *Notice* at ¶ 17. As shown in NAB's and MSTV's comments, this "viewability" proposal will ensure that cable subscribers "are not disenfranchised by the switch to digital only-broadcasting," *Notice* at ¶ 16; is clearly supported by the provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"); and does not raise any constitutional concerns. *See* NAB/MSTV Comments at 4-15. NAB and MSTV also supported the Commission's pro-consumer proposal to extend signal degradation rules to digital carriage by moving away from a subjective standard for evaluating material degradation to an objective, measurable standard. As shown by NAB and MSTV, the Commission's proposal that all content bits transmitted by a broadcast station be carried by a cable operator is an objective standard that will effectively protect cable subscribers' access to high quality digital broadcast television programs. *See id*. at 16-25.

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[3] Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., CS Docket No. 98-120 (filed July 16, 2007) ("NAB/MSTV Comments").

Conversely, the initial comments of the cable industry do not embrace the Commission's consumer-friendly approach, and their proposals will not ensure that consumers, including cable subscribers, will "enjoy the benefits of the digital transition." *Notice* at ¶ 18. Cable commenters oppose the FCC's viewability proposal as burdensome and an infringement of their First Amendment rights. However, their position fails to grapple with both the statutory requirement that all must-carry signals be viewable on the sets of all cable subscribers and the congressionally mandated transition to DTV. Cable's repetitive First Amendment arguments are also without merit. Because the FCC's proposal allows cable operators a voluntary choice between going all-digital and providing converters to subscribers with analog receivers, or providing must-carry signals in analog and digital formats, no constitutional issues are even raised. Moreover, particularly in light of cable's dramatic capacity expansion in recent years, the carriage of both digital and analog must-carry signals do not raise First Amendment concerns because any incremental capacity burden that such carriage would impose on cable operators is negligible. Indeed, there is no evidence whatsoever that cable operators' carriage of must-carry signals – in analog, digital or both – would take up anything close to the one-third of cable capacity limit set forth in the Cable Act and previously upheld by the Supreme Court.

The cable industry also opposes the Commission's important efforts to protect consumers' access to high-quality broadcast content and give effect to Congress' prohibition against material degradation of broadcast signals by cable operators in the digital environment. In particular, cable commenters ask the Commission to ignore newly available technology that can be used to quantify material degradation of digital signals and to instead retain an outdated standard that is no longer the best way to ensure that cable operators deliver broadcast signals to customers without degradation. As NAB and MSTV previously demonstrated, however,

adoption of the Commission's proposed standard defining material degradation as the loss of bits is the most effective way to reduce regulatory uncertainty and ensure that the interests of consumers are protected.

I. CABLE'S PROPOSALS WILL NOT ENSURE THAT CONSUMERS ARE NOT DISENFRANCHISED BY THE DIGITAL TRANSITION.

In response to the Commission's viewability proposal ensuring that cable subscribers "are not disenfranchised by the switch to digital-only broadcasting" and will "enjoy the benefits of the digital transition," *Notice* at ¶¶ 16, 18, the cable industry has offered lengthy and overly complicated arguments that fail to assure that their subscribers can view must-carry signals after February 17, 2009. For example, even as NCTA says that "February 17, 2009 can and should be a non-event" for "households in which all their television sets are served by cable,"[4] cable commenters offer no commitment or solution to ensure that this critical piece of the DTV transition happens.

The central problem with the cable industry's position is that it fails to grapple with both the statutory mandate that all must-carry signals be viewable on the sets of all cable subscribers and the congressionally mandated transition to digital television. Section 614(b)(7) of the Communications Act unambiguously requires that all must-carry stations "shall be viewable via cable on *all* television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection."[5] And it is "the unambiguous

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[4] National Cable & Telecommunications Association ("NCTA") Comments at 2.

[5] 47 U.S.C. § 534(b)(7) (emphasis added).

command of an Act of Congress" that the DTV transition be achieved nationwide through government-established deadlines, not a "market-driven migration."[6] (*See* Part I.A, below.)

In response, the cable operators say it is simply too burdensome to provide all-digital service. As a result, they argue, a requirement to make must-carry signals viewable on analog sets amounts to dual carriage, which they claim would violate their First Amendment rights. But the fact that cable operators have a ***choice*** whether to carry local broadcast signals only in digital belies their argument because there is no compulsion of dual carriage. Indeed, some cable operators already have completed the transition to all-digital plant, and virtually *all* cable operators ultimately *will* do so. Moreover, even assuming *arguendo* the premise of their argument that there is a burden, carriage of analog and digital signals for stations electing must carry would occupy much less than the one-third of cable capacity previously upheld by the Supreme Court in the *Turner* cases. (*See* Part I.B, below.)

A. Cable Has a Statutory Obligation to Make Must-Carry Stations Viewable.

Congress required that must-carry signals "*shall* be viewable via cable on *all* television receivers" for which the cable operator provides the connection to the cable system.[7] Despite the

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[6] *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 301 (D.C. Cir. 2003) (Roberts, J.) (citing 47 U.S.C. § 309(j)(14)(A)). *See, e.g.*, NCTA Comments at 1-2 (arguing that there is no national mandate for a digital transition). The American Cable Association claims that a significant portion of its members will be unable to transmit a digital signal when the transition ends in 2009. American Cable Association ("ACA") Comments at 9. ACA confuses the construction of digital cable plant with the ability to transmit a digital signal; broadcast digital signals can be transmitted in their native format over analog cable channels.

clarity of this straightforward, consumer-friendly requirement, cable commenters offer a series of contradictory arguments about the meaning of this provision. We address each of the major arguments in turn.

1. NCTA claims that the term "viewable" means only "viewable in all homes with the appropriate equipment if the customer chooses, or otherwise by agreement with the cable operator and broadcaster."[8] This argument makes no sense as a matter of statutory construction, and would conflict with the interpretation the Commission already has given the term. As the Commission has repeatedly recognized, the viewability provision of Section 614(b)(7) is an

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[7] 47 U.S.C. § 534(b)(7) (emphases added). As the Commission has recognized, the argument that analog television sets will no longer be "television receivers" at the end of the DTV transition, *see* Comcast Comments at 23; NCTA Comments n.14, is clearly incorrect. *See Notice* n.33; NAB/MSTV Comments at n.7. To conclude otherwise would eliminate any must-carry obligations for customers with analog sets – a result directly at odds with Congress' stated objective of ensuring that cable operators "provide[]" must-carry signals "to every subscriber of a cable system." 47 U.S.C. § 534(b)(7). If cable operators provide any video programming to analog receivers, they should not be permitted to contend that, while those receivers can display cable programming, they should not be regarded as "television receivers" for the display of broadcast programming. After all, even after February 17, 2009, many consumers will still be using analog sets to receive television programming, both cable and broadcast. Indeed, the government has set aside $1.5 billion for converter boxes to ensure that analog sets not connected to cable systems will still function after the transition. The legislative history of Congress' actions facilitating the DTV transition provides no support for cable industry arguments that Congress intended to *sub silentio* truncate mandatory carriage obligations.

[8] NCTA Comments at 12. NCTA's reference to an "agreement" between a broadcaster and a cable system is inexplicable in a proceeding dealing with must-carry obligations. For stations electing must-carry, carriage rights are not subject to negotiations with cable operators. Only for stations electing retransmission consent are carriage conditions subject to negotiations.

absolute, non-waivable requirement.[9] NCTA's argument that Section 614(b)(7) only requires cable operators to make broadcast must-carry signals available to subscribers in the format that they are transmitted over the air[10] is unnecessarily hostile to their subscribers, and cannot be squared with the Supreme Court's holding that the Cable Act is meant to "ensure that every individual with a television set can obtain access to free television programming." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 647 (1994) ("*Turner I*"). Nor is it consistent with the Commission's prior determinations that it is not enough for a cable operator merely to transmit must-carry signals to subscribers. In the *1993 Report and Order*, the Commission recognized that there may be some situations where converter boxes are needed to view must-carry signals, but concluded that cable operators are prohibited from using that fact as an excuse not to make such signals "viewable" to subscribers. Instead, the Commission found that only "in cases where converters or other equipment are needed to receive such signals, the subscriber elects not to obtain such equipment, *and* the cable operator does not provide the connections for all television receivers" will the operator have "fulfilled its obligations under the Act if it notifies the [subscriber] about the availability, through lease or sale, of individual converter boxes."[11]

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[9] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, ¶ 34 (1993) ("*1993 Report and Order*") (recognizing Commission lacks authority under the Cable Act "to exempt any class of subscribers from [viewability] requirement"); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723, ¶ 15 (1994) ("*1994 Memorandum Opinion and Order*") (noting that "Congress made clear its intent that all subscribers have access to local commercial broadcast signals," and reaffirming that no category of cable subscribers may be excepted from the viewability requirement of Section 614(b)(7)).

[10] NCTA Comments at 10.

[11] *1993 Report and Order* n.99 (emphasis added); *cf. id.* ¶ 91 (rejecting cable requests to re-position must-carry stations to different channels over a broadcaster's objection where the broadcaster's over-the-air channel is outside the cable operator's basic service channel tier, even where doing so would require the cable operator to "employ additional traps or make technical changes").

Conversely, where the cable operator *does* provide the connections for television receivers, including analog receivers, the operator does not satisfy the viewability requirement – nor the FCC's goal of a consumer-friendly DTV transition -- by making the signal available in a format that cannot be viewed.

2. Other cable commenters, including Time Warner and Comcast, assert that Section 614(b)(7) "at most imposes a duty to provide equipment – not a duty to carry signals in any particular way."[12] These commenters rely on the third sentence of Section 614(b)(7), which requires cable operators that allow their subscribers to install additional connections to notify such subscribers of stations that cannot be viewed without a converter box, to claim that "the statutory concern with viewability was tied to unique facts prevailing at the time," namely, the ubiquity of non-cable ready television sets that could not display channels above channel 13.[13] But there is no evidence that the third sentence of Section 614(b)(7) was intended to narrow the scope of the viewability requirement for sets connected by cable operators. Where Congress chooses to use different language in separate sentences of a statute, it is presumed to have intended different results. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). Here, the third sentence of Section 614(b)(7) limits cable operators' obligations only where sets are connected without their involvement, and appropriately does so, since cable operators could not be expected to make signals viewable on sets that they did not know were connected to their systems.

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[12] Time Warner Comments at 19; *see also* Comcast Comments at 21-23.

[13] *See* Time Warner Comments at 19-21; *see also* Comcast Comments at 22 & n.61.

Nor is there any evidence that the viewability requirement was only meant to apply to the television technology that was extant at the time the Cable Act was passed. If anything, the authority that Congress gave the Commission under Section 614(b)(4)(B) to make rules regarding advanced television[14] reflects Congress' understanding that broadcast technology certainly would change over time, and that the Commission was expected to modify the carriage rules as needed. If Congress meant the viewability provision only to solve the problem of non-cable ready analog television sets, it almost certainly would have said so. *Accord Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) (Roberts, J.) (although legislative history of All Channel Receiver Act shows "Congress was most immediately concerned with empowering the FCC to address the problem of UHF reception," statute's broad language rebuts "conclusion that Congress intended to limit the statute to that specific application").[15]

3. Time Warner and NCTA also claim that any post-DTV transition viewability obligations that Section 614(b)(7) imposes on cable operators are trumped by Section 629 of the Telecommunications Act of 1996,[16] which requires the Commission to ensure competition in the marketplace for cable set-top boxes.[17] According to Time Warner, this provision "effectively

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[14] 47 U.S.C. § 534(b)(4)(B).

[15] Cable's argument that the Commission should disregard Section 614(b)(7) because it is rooted in analog technology is directly inconsistent with the cable arguments that the "primary video" language in Section 614(b)(3)(A), which is equally if not more rooted in analog technology, must be applied as written to digital broadcast signals. *See* A&E Television Networks Opposition to Petition for Reconsideration, CS Docket No. 98-120 (filed May 26, 2005), at 10-11; Opposition of Comcast Corp. to Petitions for Reconsideration, CS Docket No. 98-120 (filed May 26, 2005), at 14-15 & n.45. Instead, as broadcasters have consistently argued, the Commission's mandate is to adjust must-carry obligations for the digital era, as the Commission here proposes to do.

[16] 47 U.S.C. § 549.

[17] *See* Time Warner Comments at 22; NCTA Comments at 11-12.

supersedes any obligation that could be read into Section 614(b)(7) with respect to digital set-top boxes."[18] To the contrary, Section 629(f) expressly provides that "[n]othing in this section shall be construed as . . . *limiting* any authority that the Commission may have under law in effect" before the enactment of the Telecommunications Act of 1996,[19] including the viewability provisions of the Cable Act. Section 629, therefore, cannot be read to implicitly repeal Section 614(b)(7).[20]

B. Because the Commission's Proposal Is Voluntary, There Are No Constitutional Considerations.

Cable's other main argument – that the Commission's viewability proposal would violate cable operators' First Amendment rights – repeats with little variation the familiar complaint that must-carry is unconstitutional. Neither prong of this argument – that the Commission's proposal compels carriage in both analog and digital formats, and that that resulting compulsion is unconstitutional – has any validity for two principal reasons. First, the Commission's proposal is entirely voluntary and offers a meaningful choice. It allows cable operators to choose between going all-digital and providing converters to subscribers with analog receivers, or providing must-carry signals in analog and digital formats. The Commission's well considered voluntary choice raises no constitutional issues. (*See* Part II.B.1 below.) Second, even if some operators could not convert their systems to digital transmission, this still would not mean that they would have any unconstitutional burden under the *Turner* cases. Given the substantial capacity increase

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18 *See* Time Warner Comments at 22.

19 47 U.S.C. § 549(f) (emphasis added).

20 Moreover, the Commission has waived the application of Section 629 to systems that convert to all-digital operation. *See, e.g.*, Memorandum Opinion and Order, *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CS Docket No. 97-80, DA 07-2921 (Media Bureau rel. June 29, 2007). For cable systems that choose to provide signals only in digital and make them viewable on analog receivers, therefore, they are permitted to continue to provide integrated set-top boxes to subscribers.

that cable systems have accomplished in recent years and the negligible burden that carriage of a few must-carry signals in digital and analog formats would impose, the proposed rule raises no serious constitutional question. (*See* Part II.B.2 below.)

1. **<u>The Plan Is Voluntary</u>**. It is well settled that voluntarily assumed speech burdens do not implicate the First Amendment, even where those burdens might represent an unconstitutional infringement on speech if involuntarily imposed. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (plurality opinion). Here, the Commission's viewability proposal allows cable operators to select between two alternatives: (a) downconverting the signals of digital must-carry channels for all cable subscribers with analog receivers and carrying both digital and analog signals for those channels on their systems, or (b) carrying local must-carry signals in digital only and providing cable subscribers with analog television sets with the necessary equipment to view those digital signals. *Notice* at ¶ 17. It is undisputed that virtually all cable operators ultimately will convert to all-digital operations as cable networks convert to digital transmissions and to obtain the increased capacity that comes when analog transmissions are eliminated.[21] As a result, the option of going all-digital, and providing equipment to subscribers with analog receivers, boils down to the question of whether it makes sense to make the investment in digital plant now or later. The fact that some cable operators might choose to wait to upgrade their plant, and carry the signals of local must-carry stations in two formats in the interim, does not change the voluntary nature of that decision.

The threshold argument that cable makes – that the Commission's viewability proposal effectively deprives cable operators of any meaningful choice other than carriage of must-carry signals in both analog and digital formats – closely resembles the argument that Direct Broadcast

[21] NAB, *Ex parte*, *Multicast Carriage Will Not Affect Cable's Ability to Carry Other Program Networks*, CS Docket No. 98-120 (filed June 12, 2006).

Satellite providers unsuccessfully made with respect to the "carry one, carry all" requirement of the Satellite Home Viewer Improvement Act ("SHVIA"). Pursuant to this provision, any satellite MVPD provider that carries one local broadcast station is required to carry all of the other local broadcast stations in that market to receive the copyright protection for the retransmission of local broadcast signals that SHVIA provides. *See* 47 U.S.C. § 338(a). In challenging that provision on First Amendment grounds, satellite carriers argued that while this rule ostensibly provided them with a choice, effectively it required that they carry all local signals or abandon local-into-local service altogether in many markets. The Fourth Circuit rejected their argument, concluding that the "carriage requirement imposed by SHVIA is not an excessive burden on satellite carriers because it leaves them with the choice of when and where they will become subject to the carry one, carry all rule." *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 365 (4th Cir. 2001); *see also id.* at 368 (rejecting satellite carriers' Takings Clause argument because "the statute does not *require* the satellite carriers to do anything.") (emphasis in original).

Similarly, under the Commission's viewability proposal, any decision by a cable operator to offer both the digital and analog signals of a broadcaster entitled to mandatory carriage would be based on the operator's judgment that it is not yet preferable from an economic perspective to convert to all-digital plant. It may be that for any particular cable operator the benefits and detriments of the two choices are not evenly balanced, or that either choice is not the operator's preference at this time. But having to make a choice does not make either option "compelled" for purposes of the First Amendment. Nor does the fact that the one option that is not available is for cable operators to deny the need of analog-only customers to have access to all local broadcast signals.

NAB and MSTV further observe that the timing of the digital conversion is not the consumers' choice either. Broadcasters have made very significant investments and adjustments to many facets of their station operations and financial planning to meet the government's February 2009 mandate. It only seems fair for cable operators, rather than their subscribers, to bear the burden of the cable industry's digital conversion.

2. **The Plan Imposes No Meaningful Burdens**. Because the Commission's viewability proposal does in fact represent a real choice, cable's lengthy constitutional arguments about "compelled" carriage are entirely beside the point. *See, e.g.*, *Buckley*, 424 U.S. at 57; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 215-17 (1997) ("*Turner II*") (upholding *mandatory* analog must-carry scheme as constitutional); Second Report and Order, *Carriage of Digital Television Broadcast Signals*, 20 FCC Rcd 4516, ¶ 13 (2005) (Cable Act does not "preclude[] the *mandatory* simultaneous carriage of both a television station's digital and analog signals") (emphasis added). But even if it could be said that the Commission's viewability proposal did require some cable operators to provide must carry signals in two formats, it still would not be unconstitutional.[22] As NAB and MSTV demonstrated in their earlier submissions in this proceeding, carriage of both digital and analog must-carry signals does not raise First Amendment concerns because any incremental capacity burden that such carriage would impose

[22] NAB/MSTV do not understand the American Cable Association's argument that the Commission's viewability provision represents a "triple carriage requirement" if the broadcaster transmits a high-definition ("HD") signal and a standard definition signal. *See* ACA Comments at 3. If ACA believes that cable systems would have to convert HD signals into both standard definition and analog formats, their concerns are off the mark. Because digital converters offered by cable operators will either be able to downconvert a broadcaster's HD signal into an analog format, or the cable operator will convert it at the headend, there will be no obligation to offer the same signal in three formats.

on cable operators is negligible, particularly in light of cable's dramatic capacity expansion.[23] Indeed, there is no evidence whatsoever that cable operators' carriage of must-carry signals – in analog, digital, or both – would take up anything close to the Cable Act's one-third capacity limit[24] that the Supreme Court upheld in the *Turner* cases. This is particularly true since, as even Time Warner admits, "the vast majority" of local broadcast stations are now carried voluntarily by cable systems under retransmission consent agreements,[25] and stations carried voluntarily cannot be viewed as a burden on cable. *Turner II*, 520 U.S. at 215-17. In fact, cable operators' carriage of *all* local broadcast digital *and* analog signals in 2003 (both must-carry and retransmission consent signals) would have taken up less than 8.5 percent of the capacity of the average cable operator's system.[26] That low percentage will only be lower today as cable capacity has further increased with technological innovation.[27]

Cable commenters do not provide any evidence to the contrary. The most they offer is unsupported statements to the effect that carriage of both digital and analog broadcast signals might force cable operators to place certain cable channels on different programming tiers or to

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[23] *See, e.g.*, NAB/MSTV Comments at 13-15; *see also* Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., CS Docket No. 98-120 (filed Apr. 21, 2005), at 13-14 ("NAB/MSTV Recon. Pet.").

[24] *See* 47 U.S.C. § 534(b)(1)(B).

[25] Time Warner Comments at 16.

[26] *See* NAB/MSTV Comments at 13; *see also* NAB/MSTV Recon. Pet. at 13-14 (citing Merrill Weiss Group, *Analysis of Cable Operator Responses to FCC Survey of Cable MSOs*, Attachment A to the Reply Comments of NAB/MSTV/ALTV, CS Docket No. 98-120 (filed Aug. 16, 2001)); NAB, *Ex parte*, *Multicast Carriage Will Not Affect Cable's Ability to Carry Other Program Networks*, CS Docket No. 98-120 (filed June 12, 2006).

[27] *See* NAB/MSTV Recon. Pet. at 13-14.

remove them from the lineup altogether.[28] Because these cable commenters do not show that any capacity shortfall that might exist is attributable to must-carry as opposed to cable operators' choices to offer other services, including non-video services, they have failed to demonstrate that the viewability proposal infringes on cable operators' First Amendment rights. *See, e.g.*, *Turner I*, 512 U.S. at 667-68 (observing that, on remand, constitutionality of analog must-carry would depend on "findings concerning the *actual effects* of must-carry on the speech of cable operators and cable programmers") (emphasis added). Cable's assertion that ensuring that all their subscribers have access to local broadcast television signals would have a substantial impact on capacity is simply not credible, given that many cable operators are voluntarily providing carriage of local broadcasters' digital *and* analog signals today for the very purpose of providing access. And in the absence of a significant impact on cable capacity, carriage rules raise no First Amendment issue.[29]

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[28] Time Warner Comments at 5-6; Discovery Comments at 5-8. Similar cable predictions in the past have proven to be meritless. *See Turner II*, 520 U.S. at 205 (even in the analog environment, cable systems, "in the vast majority of cases," were "able to fulfill their must-carry obligations using spare channels, and did not displace cable programmers"). *See also* Letter from Edward O. Fritts to Brian Lamb, Exh. C to Reply Comments of NAB, CS Docket No. 98-120 (filed Dec. 22, 1998) (contrary to cable claims, C-SPAN *gained* subscribers after enactment of must carry).

[29] *See Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734, 743 n.22 (D.D.C. 1995) ("if the burden to the cable industry [from must-carry] were much smaller, then the First Amendment would not even be implicated."); *aff'd*, 520 U.S. 180 (1997); *see also* NAB/MSTV Recon. Pet. at 11-16; Reply in Support of Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., CS Docket No. 98-120 (filed June 6, 2005), at 12-16.

Cable's assertion that the viewability proposal is unnecessary because we can collectively trust the marketplace to satisfy consumer demand fares no better.[30] This is the very same argument that cable made – and lost – when it challenged the constitutionality of analog must-carry more than a decade ago. *See, e.g.*, *Turner II*, 520 U.S. at 202 (rejecting notion that cable operators "would not risk dropping a widely viewed broadcast station in order to capture advertising revenues"). To be sure, cable would prefer to "choose whether to provide dual carriage for digital must-carry signals" – in other words, whether to provide carriage of some broadcast stations differently than other stations.[31] But this is precisely the type of discriminatory power that Congress believed cable operators should not have. *See Turner I*, 512 U.S. at 633 (noting that enactment of Cable Act was motivated in part by Congress' finding that cable operators, "as owner of the transmission facility" that provides broadcast signals to their subscribers, have "the power and the incentive to harm broadcast competitors"); *see also* 47 U.S.C. § 534(b)(4)(A) (requiring the Commission to ensure that, "to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage

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In any event, cable's constitutional arguments are no different than those they have made in the past, and implicate not just the viewability proposal, but the validity of the must carry statute itself. The Commission, of course, cannot consider arguments about the constitutionality of its governing statute. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (noting that "the constitutionality of a statutory requirement [is] a matter which is beyond [the] jurisdiction [of an agency] to determine"). Further, broadcasters have previously demonstrated that none of these constitutional arguments have merit. *See Ex Parte* Letter from Jack N. Goodman, NAB, to Marlene H. Dortch, Federal Communications Commission, CS Docket No. 98-120 (filed Aug. 5, 2002); Reply Comments of the National Association of Broadcasters, CS Docket No. 98-120 (filed Dec. 22, 1998), at 70-88; Comments of the National Association of Broadcasters, CS Docket No. 98-120 (filed Oct. 13, 1998), at 42-46.

[30] NCTA Comments at 8 (arguing that cable has "strong marketplace reasons to continue to provide signals in a format that their customers desire – or lose that customer to a competitor who does"); *see also* Comcast Comments at 4.

[31] ACA Comments at 4.

of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal"). It is for this very reason that the Commission should ensure that cable operators apply whatever decision they make in fulfillment of the viewability obligation to all must-carry stations. This approach will best fulfill the Commission's goal of ensuring that cable subscribers "are not disenfranchised by the switch to digital-only broadcasting." *Notice* at ¶ 16.

In sum, the cable industry has not offered any persuasive legal or constitutional grounds for the Commission to decline to adopt its viewability proposal. For the reasons NAB and MSTV set forth above and in their initial comments, this proposal will promote Congress' goals of ensuring that the DTV transition is completed as promptly and smoothly as possible, while ameliorating adverse consumer effects from the transition, and should therefore be adopted.

II. CABLE OPERATORS HAVE PROPOSED NO RELIABLE METHOD FOR PREVENTING MATERIAL DEGRADATION THAT WOULD BE DETRIMENTAL TO CONSUMERS.

In its comments, the cable industry has encouraged the Commission to retain the comparative material degradation standard in order to give cable operators nearly unlimited latitude to compress or degrade broadcast signals carried on their systems.[32] Congress included this comparative standard in Section 614 as a floor for future Commission rules because, in 1992, there was no more accurate way to quantify material degradation. As NAB and MSTV have explained, the technology now exists to measure degradation of digital television signals in an objective rather than subjective way,[33] and cable has offered no reason why that technology

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[32] *See, e.g.*, Qwest Comments at 2 (arguing that the "competitive marketplace" is sufficient to protect consumers against material degradation). *See also* ACA Comments at 8; AT&T Comments at 4; Comcast Comments at 7-15; Time Warner Comments at 24.

[33] NAB/MSTV Comments at 19-20.

should not be used. Instead, the industry urges a rule permitting the rich, high-quality sound and picture of a broadcaster's digital signal to be degraded simply because a cable operator chooses to degrade the quality of non-broadcast channels. This approach violates the statutory prohibition against material degradation and poorly serves the public interest.

A. The Record Includes No Evidence that Compression Techniques Do Not Harm Signal Quality.

The cable industry claims that the comparative approach to material degradation is necessary to allow it to compress broadcast signals, a process it suggests will not harm the signals cable customers receive. But, as the cable industry's own comments make clear, there is no consensus about what compression algorithms could reliably reproduce broadcast signals without material degradation.[34] Indeed, implicit in cable operators' assertions that they can squeeze large amounts of video content into a small pathway using one of a variety of experimental methods is the concession that some information included in the content is lost and that quality therefore suffers.

Remarkably, none of the cable commenters has provided any evidence supporting the industry's illogical suggestion that compression does not degrade a signal, and not one has offered any benchmark by which the Commission could measure whether or not a particular compression technique impermissibly degrades a broadcast signal. Cable's argument therefore amounts to a request that the Commission simply trust it not to violate the statutory prohibition on material degradation to the detriment of consumers.[35] Section 614 was enacted to protect the public's access to undegraded broadcast signals and counter cable operators' economic incentive

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[34] *See, e.g.*, AT&T Comments at 3-4 (promoting H.264 encoding); NCTA Comments at 29 (advocating MPEG-4 AVC and VC-1 standards).

[35] *See, e.g.*, Qwest Comments at 2.

to disadvantage broadcasters. Any rule that would allow a cable operator to unilaterally compress a broadcast signal − even if it similarly compresses other content − would directly undermine that goal.

B. MVPDs' Proposals Are Inconsistent with the Language and Purpose of Section 614.

The various degradation approaches promoted by certain MVPDs, far from effectuating Congress's consumer protection and digital transition goals, do serious violence to the statutory framework. AT&T, for instance, suggests that the Commission adopt a rule that goes *below* the statutory floor by requiring only that MVPDs carry broadcast signals received over-the-air at a quality that is no less than other programming received over-the-air.[36] In other words, broadcasters as a class could be disadvantaged as long as the MVPD did not treat one broadcaster better than another. That approach is plainly prohibited by Section 614.

Comcast and Qwest argue that the Commission's proposal would read "material" out of the statute.[37] That argument ignores the fact that the Commission does not propose to require carriage of null bits − *i.e.*, bits that include no information − because the failure to pass through such bits would not be material under the statute. *Notice* at ¶ 14. Likewise, NAB and MSTV have proposed that the material degradation standard include a one percent *de minimis* threshold to account for minor variations in measurement technology.[38] Under that proposal, a

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[36] AT&T Comments at 4-5.

[37] Comcast Comments at 10-13; Qwest Comments at 3.

[38] NAB/MSTV Comments at 20. The parties agree that there is no need for the Commission to endorse any specific product for bit measurement, *see, e.g.*, AT&T Comments at 5, but that any equipment used must "meet sound engineering practices and good equipment specifications." First Report and Order and Further Notice of Proposed Rulemaking, *Carriage of Digital Television Signals*, 16 FCC Rcd 2598 at ¶ 75 (2001) ("*First R&O*"). Any variation between measurements by different products should fall below the one percent threshold.

measurement that less than one percent of a broadcaster's content bits were not passed through would not be considered "material" under Section 614, while measurement indicating degradation of one percent or more of a signal's content bits would be sufficiently substantial to be considered "material."[39]

In its effort to persuade the Commission to permit substantial degradation of broadcast signals, ACA even implies that downconversion of a high-definition broadcast signal to analog for all subscribers, rather than only those with analog equipment, could be considered a mere "technical change" not amounting to material degradation.[40] This claim is simply illogical: it is hard to imagine what could "degrade" a television signal more substantially than replacing the high-quality digital picture and sound of an HD program with a standard-definition analog feed and delivering only that downconverted signal to consumers with HD equipment.[41] That basic conclusion is no less true today than it was when the Commission required cable operators to pass through broadcasters' HD signals in 2001.[42] Allowing cable systems to downgrade broadcasters' HD signals to lower quality analog signals would also provide a clear opportunity for discrimination in favor of cable programming.

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[39] As NAB and MSTV described in their comments, the one-percent *de minimis* threshold must be applied on a program-by-program basis. For purposes of determining whether there has been material degradation with respect to a broadcaster's high-definition program, for example, a cable operator would have to show that 99 percent of the content bits in the high-definition program stream were delivered.

[40] ACA Comments at 6-7.

[41] Downconversion would not constitute material degradation for subscribers with analog television sets provided that the protections described in our initial comments are met. *See* NAB/MSTV Comments at 22-25.

[42] *First R&O* at ¶ 73.

Finally, Qwest attempts to interject into this proceeding Section 614's separate "good quality signal" requirement,[43] proposing that a must-carry broadcaster be required to modify its signal if the cable operator determines that the broadcaster's signal quality is "lower than that of a digital cable programming service."[44] The Commission resolved the good quality signal issue in 2001,[45] and it is entirely outside of the scope of this proceeding.[46]

C. The Commission's Experience with Material Degradation Reflects a Need for Quantitative Standards.

The cable industry suggests that the historical lack of numerous material degradation complaints supports retaining the existing subjective standard.[47] In fact, it reflects the insufficiency of that standard to protect broadcasters and viewers. With a purely subjective standard, broadcasters may be deterred from preparing and litigating a degradation complaint because it is impossible to know in advance how the subjective standard will be applied. Worse, even when a signal is substantially degraded, under a comparative approach a broadcaster cannot be assured of success if the relevant cable operator also degrades its other video programming.

The lack of consumer complaints is, moreover, evidence of the problem. With the degradation of television broadcast signals, cable subscribers will not know the difference between a top quality broadcast HDTV picture and a cable picture that has been compressed, and

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43 *See* 47 U.S.C. § 534(h)(1)(B)(iii).

44 Qwest Comments at 2-3.

45 *First R&O* at ¶ 46.

46 In addition, Comcast is wrong to suggest that the proposed bit loss standard would put must-carry stations at an advantage as compared to retransmission consent stations. Comcast Comments at 10, 13. As NAB and MSTV have explained and as the Commission has determined, Section 614 prohibits cable operators from materially degrading the signal of *any* broadcast station, regardless of whether that station is carried pursuant to retransmission consent or must-carry. NAB/MSTV Comments at 17-19.

47 ACA Comments at 8; Comcast Comments at 12; NCTA Comments at 28.

is of lesser quality. Having never seen a full broadcast HDTV picture, cable subscribers will not know what they are missing. Of course, from the cable perspective, this is precisely the point. By degrading television broadcast signals, cable operators will discourage viewers of cable network programming from migrating to broadcast programming, thereby increasing viewers and advertising revenue on cable-owned programming channels. Indeed, cable and satellite services are locked in a high stakes competitive battle over which system offers the best quality HDTV picture. At the same time, however, cable appears willing to ignore the competitive consequences of degrading the HDTV programs of its primary competitor for local advertising—local television broadcasters. Ironically, local broadcast stations offer better quality HDTV programs than either cable or satellite. All consumers, including cable subscribers, deserve access to the best quality digital programs without degradation.

An objective bit loss standard, in contrast, would allow broadcasters and cable operators to know in advance what is and is not permitted. Such a standard is even more important in the digital environment because analog signals are more forgiving of degradation than digital signals. For digital television signals, bit loss can result in substantial content distortions and gaps and, if the signal's rejection threshold is crossed, can result in the loss of the content in its entirety.[48] Moreover, given the clarity of the proposed standard, parties could resolve most disputes without the need for Commission action, and the few complaints that were filed could be resolved by the Commission quickly. The technology now exists to adopt a predictable and reliable material degradation standard based on bit loss. As the record reflects, that standard is sorely needed.

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[48] *See, e.g.*, Comments of MSTV and NAB, ET Docket No. 04-186, at 6-7 (filed Apr. 30, 2007).

D. Dispute Resolution Procedures Proposed by MVPDs Do Not Protect the Public's Access to High Quality Digital Broadcast Content.

In the *Notice* (at ¶ 15), the Commission sought comment about certain dispute resolution procedures it considered adopting in connection with the material degradation standard. As to pre-carriage material degradation disputes, the commenters were unanimous: broadcasters and cable operators should not be required to negotiate with each other to permit degradation of a broadcast signal.[49] Such an approach would undermine the viability of the material degradation standard, threaten to deprive the public of access to high-quality broadcast signals, and compromise the ability of must-carry stations to assert their carriage rights. The Commission should adopt a quantifiable and predictable standard that will allow cable operators and broadcasters to measure and identify material degradation, not place the burden on individual parties to negotiate it on a case-by-case basis.

A predictable and quantifiable standard would avoid many disagreements over material degradation and assure that consumers will routinely have access to high-quality digital television signals. For this reason, it is also appropriate that, in the event of any disagreement, cable operators be required to deliver a broadcast signal to subscribers without a loss of bits. NAB and MSTV oppose the suggestion of certain cable commenters that, in the event of a dispute, MVPDs should be allowed to continue degrading a signal until the Commission orders them to stop.[50] Under circumstances in which a cable operator carries a digital television signal using a method that causes bit loss, the public should be assured undegraded carriage pursuant to an established transmission technique.

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[49] *See, e.g.*, NAB/MSTV Comments at 27-29; Comcast Comments at 14; Time Warner Comments at 28-29; NCTA Comments at 30.

[50] *See* NCTA Comments at 30; Comcast Comments at 14.

III. CONTRARY TO THE CABLE INDUSTRY'S SUGGESTION, THERE IS AMPLE JUSTIFICATION FOR THE COMMISSION'S PRO-CONSUMER PROPOSAL.

Certain cable commenters inquire about the Commission's basis for proposing an objective bit loss standard for material degradation in the digital environment in light of the discussion of material degradation in its *First Report & Order*.[51] In this regard, the Supreme Court established long ago that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis."[52] The Commission is therefore free to revise its policies when it determines that an alternative approach would serve the public interest. All it must do is "supply a reasoned analysis for the change."[53] In that regard, there are several compelling reasons to adopt an objective bit loss definition now that were not present when the Commission first considered the issue in its 1998 Notice of Proposed Rulemaking.[54]

First, technology has improved dramatically over the past nine years. When the Commission issued the *First Report and Order* in January 2001, no widely available technology existed to compare bits between two signals and to exclude so-called "null bits" from the comparison. The *First Report and Order* determined not to require carriage of the full 19.4

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[51] *See* Comcast Comments at 9; AT&T Comments at 2-3; NCTA Comments at 27; Time Warner Comments at 26.

[52] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984). *See also Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996) ("change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

[53] *Rust v. Sullivan*, 500 U.S. 173, 186 (1991).

[54] *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 (1998).

mbps of a broadcaster's digital signal in part because the subtraction of bits not subject to a carriage requirement − for instance, "null bits" − would "by necessity [require] fewer than 19.4 mbps to be carried on the cable system."[55] Technological improvements now make it possible to measure bit loss while taking into account "null bits" that need not be carried because they include no information, and that measurement is plainly preferable to a subjective and unquantifiable standard.

Second, it is rapidly becoming clear that cable's transition to digital is happening too slowly for many consumers. According to the American Cable Association's comments, only 46 percent of its members presently deliver digital broadcast signals to even some of their subscribers,[56] and nearly 90 percent anticipate substantial difficulty in providing a digital converter box to consumers.[57] Digital rollout is even lagging for Comcast, the nation's largest multiple-system cable operator.[58] Cable customers therefore have little incentive to purchase DTV equipment, thereby compounding the challenges associated with completing the digital transition in a timely manner, and further reducing cable operators' motivation to provide full-quality digital programming to consumers.

Third, cable systems have experienced an unprecedented expansion in capacity. While 18 basic cable channels represented nearly a third of a typical "high capacity" cable system's capacity when Section 614 was enacted, it now accounts for only about 4.2 percent of the total

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55 *First R&O* at ¶ 72. For this reason, NCTA's observation that one broadcast programming service does not necessarily occupy all 19.4 mbps allotted to each television station fails to support its argument. *See* NCTA Comments at 28. If a broadcaster does not use all 19.4 mbps allotted to it and some of those bits are therefore unused, the Commission's proposal would not require a cable operator to carry them.

56 ACA Comments at 1.

57 *Id.* at 6.

58 Comcast Comments at 5.

number of channels and about 6.8 percent of the total "downstream" spectrum of the typical cable system.[59] With this dramatic increase in capacity, the cable industry cannot credibly claim that capacity constraints prevent cable operators from carrying broadcast signals without degradation.[60] Any concern regarding capacity limits today is not only belied by the facts, but is dramatically outweighed by the serious threat to the digital transition caused by cable operators' lagging investment in digital. Ensuring consumers' access to the full signal quality of digital broadcast programming, including HD programming, will give consumers an incentive to complete the transition by purchasing digital receivers.

The Commission has clear discretion to adopt the bit loss proposal in the *Notice*, as well as the standards set forth in our initial comments for assuring that signals downconverted to analog for *analog* subscribers are not materially degraded.[61] Indeed, given the ability to reliably measure bit loss and the absence of any evidence in the record refuting the obvious fact that bit loss degrades digital signals, a bit loss standard is the only policy that would promote predictability in cable's carriage of broadcast signals and facilitate efficient resolution of disputes, in many cases without the need for Commission action. Most importantly, the adoption of such a standard is both appropriate and necessary to protect the public's continued access to

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[59] NAB/MSTV Comments at 13-14.

[60] In comments, certain cable commenters attempt to protect operators' practice of dedicating system capacity to revenue-generating services by claiming that full carriage of broadcast signals threatens "innovation." *See, e.g.*, NCTA Comments at 27; Discovery Comments at 8. But cable operators cannot claim that the capacity needed to carry a small number of local broadcast signals on an undegraded basis even approaches the capacity caps envisioned by Congress when it passed the 1992 Cable Act, *see* 47 U.S.C. § 534(b)(1), or that the incremental capacity obligation impairs in any meaningful way the quality or quantity of services available to the public.

[61] *See* NAB/MSTV Comments at 22-25.

high-quality digital programming, as intended by Congress. *See Notice* at ¶ 18 ("the ultimate goal of Congress is that every customer should enjoy the benefits of the digital transition").

IV. CONCLUSION

NAB and MSTV applaud the Commission's efforts in this proceeding to put consumers first. The comments of the cable industry have shown no legal, constitutional or policy reason why the Commission should not adopt its pro-consumer "viewability" and material degradation proposals. To the contrary, the record demonstrates that adoption of the Commission's proposals will minimize the burden imposed on consumers by the end of analog broadcasting, and will ensure that all consumers, including cable customers, enjoy the full benefits of the DTV transition, as Congress intended.

Respectfully submitted,

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August 16, 2007