

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

In the Matter of
Carriage of Digital Television Broadcast
Signals: Amendment to Part 76 of the
Commission's Rules

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CS Docket No. 98-120

THIRD REPORT AND ORDER
AND THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

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By the Commission: Chairman Martin and Commissioners Copps, Tate and McDowell issuing separate
statements; Commissioner Adelstein approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. Pursuant to Section 614(b)(4)(B) of the Communications Act of 1934, as amended (the “Act”),¹ the Commission initiated this proceeding in 1998 to address the responsibilities of cable television operators with respect to carriage of digital broadcasters in light of the significant changes to the broadcasting and cable television industries resulting from the Nation’s transition to digital television.² Now that Congress has established February 17, 2009, as the date certain for the end of analog broadcasts by full-power television licensees, we must address the post-transition carriage responsibilities of cable operators under Sections 614 and 615 – particularly in light of the expectation that there will continue to be a large number of cable subscribers with legacy, analog-only television sets after the end of the DTV transition.³

2. In this *Third Report and Order* and *Third Further Notice of Proposed Rulemaking* (“*Third Report and Order*” and “*Third Further Notice*,” respectively), we adopt rules to ensure that cable subscribers will continue to be able to view broadcast stations after the transition, and that they will be able to view those broadcast signals at the same level of quality in which they are delivered to the cable system.⁴ We announce these rules now to ensure that cable operators and broadcasters have sufficient time to prepare to comply with them. We also seek comment on several issues related to implementation of these rules. We are mindful that the mandatory carriage rules serve their purpose only when such stations are viewable by all cable subscribers, including those who will only have analog sets after the transition. Furthermore, we act with the knowledge that Congress intended that the benefits of the digital transition should accrue to all consumers.

II. THIRD REPORT AND ORDER

3. As discussed below, the Act requires that cable systems carry broadcast signals without material degradation and ensure that all subscribers can receive and view mandatory-carriage signals.⁵ This *Third Report and Order* finalizes the material degradation requirements adopted by the Commission

¹ 47 U.S.C. § 534(b)(4)(B).

² See *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15093, paras. 1-2 (1998) (“*1998 NPRM*”).

³ This will be the case despite the steady rise in DTV display sales over the last several years. About 35 percent of all television homes, or approximately 40 million households, are analog-only cable subscribers. These 98 million television viewers depend on cable to provide all of the programming for their roughly 120 million television sets. Moreover, many digital cable subscribers have one or more television sets that currently only receive analog cable service. See Nielsen Media Services estimates for 2006/2007 season and Nielsen 2007 2nd Quarter Home Technology Report.

⁴ See Appendix C, *infra*.

⁵ 47 U.S.C. §§ 534(b)(4)(A), (b)(7).

in 2001, and establishes two alternative approaches that cable operators may use to meet their responsibility to ensure that cable subscribers with analog television sets can continue to view all must-carry stations after the end of the DTV transition. Cable operators may either carry such signals in analog, or, for all-digital systems, carry the signal in digital only.⁶

A. Material Degradation – Sections 614(b)(4)(A) and 615(g)(2)

4. In this section, we adopt rules requiring that cable operators not discriminate in their carriage between broadcast and non-broadcast signals, and that they not materially degrade broadcast signals. As explained below, we reaffirm the approach adopted by the Commission in 2001 to determining whether material degradation has occurred, as well as the requirement that HD signals be carried in HD.

5. The Act requires that cable operators carry local broadcast signals “without material degradation,” and instructs the Commission to “adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.”⁷ As noted above, Section 614(b)(4)(B) of the Act directs the Commission “to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed” as a result of the DTV transition.⁸

6. In the *Second Further Notice*, we sought comment on proposals for ensuring that broadcast signals would not be materially degraded after the digital transition. We proposed that the measurement by which we determine whether an operator is degrading the broadcast signal change from a subjective to an objective standard or, in the alternative, to maintain the comparative standard established in the First Report and Order. We asked whether we should require cable operators to pass through all primary video and program-related bits (“content bits”).⁹ In addition, we proposed a rule that would create a framework for negotiations between cable operators who wanted to carry fewer than all content bits and the broadcasters whose signals were at issue. Such a rule would require any operator that wished to carry fewer than all content bits to demonstrate to the broadcaster that it could meet the picture-quality-nondegradation standard without carriage of all content bits.¹⁰ Finally, in the *Second Further Notice*, we

⁶ See Appendix C, *infra*.

⁷ 47 U.S.C. § 534(b)(4)(A). See Section 615(g)(2) of the Act, 47 U.S.C. § 535(g)(2) (material degradation requirements applicable to noncommercial stations). See also H.R. Conf. Rep. No. 102-862, at 67 (1992) (“The FCC is directed to adopt any carriage standards which are needed to ensure that, so far as is technically feasible, cable systems afford off-the-air broadcast signals the same quality of signal processing and carriage that they employ for any other type of programming carried on the cable system.”); S. Rep. No. 102-92, at 85 (1991) (same).

⁸ 47 U.S.C. § 534(b)(4)(B).

⁹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Second Further Notice of Proposed Rulemaking, FCC 07-71 (Rel. May 4, 2007) (“*Second Further Notice*”) at ¶ 12; (explaining that verification that all content bits are passing through would serve as proof that an operator is meeting the material degradation standard).

¹⁰ *Second Further Notice* at paragraph 15. During any such discussions/negotiations, the operator would be required to continue to pass through all content bits. This “pass through” requirement would also apply, until the time of the Commission ruling, if a broadcaster filed a material degradation carriage complaint. If an operator decided to end negotiations under this framework, it would notify the broadcaster in writing. The broadcaster

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reminded commenters of the existing requirement to carry high definition signals in HD to those subscribers who have signed up for an HD package, and reiterated that this requirement will continue after the transition.¹¹

7. We retain the requirement that HD signals be carried in HD, as well as the comparative approach to determining whether material degradation has occurred. In 2001, the *First Report and Order* established two requirements to avoid material degradation. First, "a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any" other signal on the system.¹² Second, a cable operator must carry broadcast stations such that, when compared to the broadcast signal, "the difference is not really perceptible to the viewer."¹³ Thus, "a broadcast signal delivered in HDTV must be carried in HDTV."¹⁴ Because we decline to rely on measurement of bits to determine whether degradation has occurred, we do not require carriage of all content bits. Additionally, for the reasons described below, we decline to adopt the proposed negotiation framework.

8. The Act requires that broadcast signals not be "materially degraded." It also requires the Commission to "adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal."¹⁵ The Commission stated in 2001 that "[f]rom our perspective, the issue of material degradation is about the picture quality the consumer receives and is capable of perceiving."¹⁶ Cable commenters argued that this should remain the focus of the Commission's decision making, and we agree.¹⁷

9. We considered the "all content bits" proposal, the main benefit of which was a clear means of measurement and consequently ease of enforcement.¹⁸ Ultimately, we conclude, however, that the all content bits approach is likely to stifle innovation and the very efficiency that digital technology offers, and may be more exacting a standard than necessary to ensure that a given signal will be carried without *material* degradation. We also conclude that it is unnecessary at this time to impose such a requirement in light of the paucity of material degradation complaints over the 15 years since enactment of the Must

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would then have thirty days to file a material degradation carriage complaint, if it believed such degradation was occurring despite the absence of the required agreement. Failure to file such a complaint within thirty days would preclude the broadcaster from so filing during that carriage cycle.

¹¹ *Second Further Notice* at para. 3 (citing *First Report and Order*, 16 FCC Rcd at 2629, para. 73).

¹² *First Report and Order*, 16 FCC Rcd at 2629, para. 73.

¹³ *First Report and Order*, 16 FCC Rcd at 2628, para. 72.

¹⁴ *First Report and Order*, 16 FCC Rcd at 2629, para. 73.

¹⁵ 47 U.S.C. § 534(b)(4)(A).

¹⁶ *First Report and Order*, 16 FCC Rcd at 2628, para. 72.

¹⁷ Comments of NCTA at 27; Comments of AT&T at 2.

¹⁸ Broadcast Group Petition for Reconsideration at 20 (the "Broadcast Group" comprises Arizona State University, Benedek Broadcasting Corp., Midwest Television, Inc., and Raycom Media, Inc.).

Carry statute.¹⁹

10. A number of commenters support the existing standard, and most argue that a comparative approach remains the best method of measuring material degradation.²⁰ As these commenters point out, there is little evidence to indicate otherwise.²¹ We note Comcast's observations that there appear to have been no more than two material degradation complaints since the 1992 adoption of the prohibition, and that both of those were dismissed.²² Even if there has been limited opportunity to "test" these rules in a digital context,²³ there is every reason to believe that they will prove just as robust in an environment of greater attention to picture quality.

11. Furthermore, there are technological benefits to the current comparative standard. Time Warner argues that the content bits standard proposed in the *Second Further Notice* would require devoting additional bandwidth to carriage even when it would not improve the quality of the transmitted image, hurting consumers by limiting other uses of the bandwidth.²⁴ AT&T further argues that an "all content bits" standard could "dampen[] incentives to invest in video compression and other technologies...that would allow even greater transmission efficiencies and higher quality pictures."²⁵ We recognize these concerns, and do not intend to impede improvements in technology. Some cable operators may, currently or in the future, rely on advanced compression technologies such as MPEG 4 to provide service to subscribers with greater efficiency. We particularly recognize the value of compression technologies that take the broadcast signal back to uncompressed baseband and then re-encode it in a more efficient manner without materially degrading the picture. Such advanced compression utilizes a minimum bit rate that does not reduce the quality of the resolution. We agree with commenters that a comparative standard is currently the best way to encourage and reward technological innovations, like MPEG4 compression, that allow for more efficient use of bandwidth without diminishing viewer experience.

12. We decline to adopt the proposal of Agape Church Inc., that we require carriage of secondary channels.²⁶ Our rules here focus only on the broadcaster's primary video and program related

¹⁹ Comcast points out that only two carriage complaints have been filed alleging material degradation of an analog signal, and that there have been no carriage complaints filed alleging material degradation of a digital signal. Comments of Comcast at 12. We note, however, that we do not place much weight on the latter, as there are few, if any, stations carried pursuant to must-carry in a digital format.

²⁰ See, e.g., Comments of Time Warner at 24-26, Comments of Comcast at 8, Reply of Verizon at 2-3.

²¹ Comments of NCTA at 28.

²² Comments of Comcast at 12, note 29.

²³ Comments of NAB and MSTV at 21-22.

²⁴ Comments of Time Warner at 26-27.

²⁵ Comments of AT&T at 4. See also Reply of OPASTCO at 4 (agreeing and noting particularly that small MVPDs use broadband technologies to deliver video, and that increasing the bandwidth necessary to deliver video could slow the deployment of other broadband-based services, limiting the ability of small operators to "bundle" services and compete effectively).

²⁶ Comments of Agape Church, Inc. at 1.

content. The prohibition on material degradation adds no additional requirement to carry non-program-related content.

13. Commenters requested clarification that downconversion to analog does not constitute material degradation.²⁷ We accordingly clarify that it is not material degradation to downconvert that signal to comply with the “viewability” requirement discussed below.

14. As noted above, we do not adopt the negotiation framework proposed in the *Second Further Notice*, and direct parties to continue to follow the rules as established in Section 76.61.²⁸ Both broadcasters and cable operators, the parties who would be involved in these negotiations, raised serious objections to the proposal. The National Association of Broadcasters (“NAB”) and The Association for Maximum Service Television (“MSTV”) are highly critical of any required negotiations, particularly ones which would begin and end upon the request of operators. They state that the 30 day window for carriage complaints is too short, and that the proposal as a whole places the burden of ensuring compliance on the broadcasters, rather than on the operators who have the duty by statute. Finally, they argue that the requirements and penalties for noncompliance are insufficiently detailed or strict.²⁹ Cable commenters object to the requirement that operators make a showing of non material-degradation to the satisfaction of the broadcaster. They express concern about what they anticipate would be: (1) a major shift in power to must-carry broadcasters, who do not have an incentive to bargain; and (2) an addition of significant transaction costs for operators, who currently do not negotiate with must carry stations at all. They argue that this would add an unnecessary complication to mandatory carriage.³⁰ As NAB and MSTV note, the goal of these rules is to provide cable subscribers with the full benefits of the digital transition.³¹ Given the broad based objections to the proposal, we decline to establish a formal procedure by which broadcasters would waive the material degradation requirements.³²

B. Availability of Signals – Sections 614(b)(7) and 615(h)

15. In this section, we adopt rules requiring cable systems that are not “all-digital” to provide

²⁷ Comments of Block at 4. *See also* Testimony of Kyle E. McSlarrow, Chairman and CEO of NCTA at note 67, *infra*. *But see* Testimony of Glenn Britt, CEO of Time Warner, at note 44, *infra* (expressing confidence that downconversion is legally permissible).

²⁸ 47 C.F.R. § 76.61.

²⁹ Comments of NAB and MSTV at 28.

³⁰ The cable commenters also strongly dislike the requirement for full carriage during pending complaints, which Comcast describes as “sentence first, verdict afterwards.” Comments of Comcast at 15.

³¹ Comments of NAB and MSTV at 18.

³² We note that enforcement of the material degradation requirements is initiated by a broadcaster’s carriage complaint, and that the rules provide for the broadcaster to complain first to the cable operator before filing such a complaint. This gives the parties an opportunity to informally address material degradation disputes, and if the station is satisfied with the resultant carriage, no complaint will be filed. No additional formal process is necessary. 47 C.F.R. § 76.61.

must-carry signals in analog, while “all-digital” systems may provide them in digital form only.³³ We also require that the cost of any downconversion be borne by operators, but that downconverted signals may count toward the cap on commercial broadcast carriage.³⁴ Pursuant to Sections 614 and 615 of the Act, cable operators must ensure that all cable subscribers have the ability to view all local broadcast stations carried pursuant to mandatory carriage. Specifically, Section 614(b)(7) (for commercial stations) states that broadcast signals that are subject to mandatory carriage must 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.”³⁵ Similarly, Section 615(h) for noncommercial stations states that “[s]ignals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system’s lowest priced tier that includes the retransmission of local commercial television broadcast signals.”³⁶ These statutory requirements plainly apply to cable carriage of digital broadcast signals,³⁷ and, as a consequence, cable operators must ensure that all cable subscribers – including those with analog television sets – continue to be able to view all commercial and non-commercial must-carry broadcast stations after February 17, 2009.³⁸

16. These rules shall be in force for three years from the date of the digital transition, subject to review by the Commission during the last year of this period (i.e., between February 2011 and February 2012). In light of the numerous issues associated with the transition, it is important to retain flexibility as we deal with emerging concerns. A three-year sunset ensures that both analog and digital cable subscribers will continue to be able to view the signals of must-carry stations, and provides the Commission with the opportunity after the transition to review these rules in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace.³⁹

³³ We note that the some cable commenters appear to express concern that these rules will require carriage of, and provide “more marketplace power” to “major broadcast networks” who already use “retransmission consent leverage” to ensure carriage of affiliated cable networks. See Reply of The Africa Channel, et al., at 31. On the contrary, these rules apply exclusively to stations that elect must-carry, and therefore likely have very limited “leverage” and “marketplace power.”

³⁴ 47 U.S.C. § 534(b)(1)(B) (providing for one-third cap on mandatory carriage of commercial stations).

³⁵ 47 U.S.C. § 534(b)(7) (emphasis added).

³⁶ See 47 U.S.C. § 535(h). Although Sections 534(b)(7) and 535(h) use different language, the Commission consistently has treated them as imposing identical obligations. See, e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2974, para. 32 (1993) (“*Analog Must Carry Report and Order*”) (noting that all must-carry signals must be available to all subscribers); see also *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 18223, 18308, para. 162 (1996) (“Pursuant to Section 614(b)(7) and 615(h), the operator of a cable system is required to ensure that signals carried in fulfillment of the must-carry requirements are provided to every subscriber of the system”).

³⁷ See 47 U.S.C. § 534(b)(4)(B).

³⁸ Analog-only television sets plainly qualify as “television receivers” under Section 614(b)(7) at the present time, and will continue to fall within the scope of that term as it is used in Section 614(b)(7) after the transition. See also paragraph 23, *infra*.

³⁹ To assist the Commission in this review, we will include questions in our annual Cable Price Survey to assess, for example, digital cable penetration, cable deployment of digital set-top boxes with various levels of processing capabilities, and cable system capacity constraints.

17. In the *Second Further Notice*, we sought comment on proposals that would ensure the viewability, for all subscribers, of signals carried pursuant to mandatory carriage. To that end, we proposed that

cable operators must either: (1) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or (2) for all-digital systems, carry those signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast content.⁴⁰

We also proposed that the cost of any down conversion rendered necessary by these rules be borne by the cable operators.⁴¹

18. We adopt these proposals, and note that they apply to all operators, regardless of their rate-regulated status.⁴² In sum, cable operators must comply with the statutory mandate that must-carry broadcast signals “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,” and they have two options of doing so.⁴³ First, to the extent that such subscribers do not have the capability of viewing digital signals, cable systems must carry the signals of commercial and non-commercial must-carry stations in analog format to those subscribers, after downconverting the signals from their original digital format at the headend.⁴⁴ This proposal is in line with the approach already voluntarily planned by many cable operators, as described in testimony by Time Warner CEO Glenn Britt before the House Subcommittee on Telecommunications and the Internet.⁴⁵ In the alternative, operators may choose to

⁴⁰ *Second Further Notice* at para. 17.

⁴¹ *Second Further Notice* at para. 19.

⁴² See Appendix C, *infra*.

⁴³ Consistent with Section 614(b)(7) of the Act, the viewability requirement set forth here does not apply to situations where “a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections.” Under these circumstances, “the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers.” See 47 U.S.C. § 534(b)(7). Even in situations where a subscriber does not need to lease or purchase a box, the notice requirement of Section 614(b)(7) is still fully in effect.

⁴⁴ In accordance with the material degradation rules discussed in Section II(A), *supra*, an operator of a system providing analog service must also carry the signal in its original digital format.

⁴⁵ See Testimony of Glenn Britt, CEO of Time Warner, before the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives (March 27, 2007). See also Ted Hearn, *Britt Unsure About Local HDTV for Basic-Only Subs*, Multichannel News, March 28, 2007 (“In another exchange, [Rep.] Boucher referred to February 2005 House testimony by Insight Communications CEO Michael Willner that after an analog-TV cutoff, cable operators intended to send local TV signals from their headends to homes both in analog and digital.

‘Do you agree with that? Is that still the industry’s plan?’ Boucher asked. Affirming a commitment to voluntary dual mustcarry [sic], Britt replied: ‘Yes, I do.’

(continued....)

operate “all-digital systems.”⁴⁶ Under this option, operators will not be required to downconvert the signal to analog, and may provide these stations only in a digital format. In any event, any downconversion costs will be borne by the operator.

19. To fulfill its must-carry obligations in cases where a cable operator uses digital-to-analog converter boxes that do not have analog tuners, the operator can deliver a standard definition digital version of a must-carry broadcaster’s high definition digital signal, in addition to the analog and high definition signal, or use boxes that convert high definition signals for viewing on an analog television set, or use other technical solutions so long as cable subscribers have the ability to view the signals.

20. As NCTA notes, the congressionally mandated end of the Digital Television transition does not apply directly to cable operators.⁴⁷ We thus recognize that there may be two different kinds of cable systems for some period of time after the DTV transition is complete.⁴⁸ Some operators may choose to deliver programming in both digital and analog format. NAB and MSTV describe these systems as those in which they “keep an analog tier and continue to provide local television signals (and perhaps many cable channels as well) to analog receivers in a format that does not require additional equipment.”⁴⁹ Other operators may choose, as many already have, to operate or transition to “all-digital systems,” and as NAB and MSTV further note, “virtually *all* cable operators ultimately *will* do so.”⁵⁰ Game Show Network, LLC (“GSN”) questions why there should be any rules protecting owners of analog sets, since that is “a format the government itself has determined is no longer worthy of any spectrum.”⁵¹ Congress did decide to end analog broadcasting, but declined to turn its backs on the millions of Americans with analog sets. Thus, they established the NTIA converter box program to protect the continued availability of over-the-air signals to all Americans;⁵² they accepted the claims of the cable industry that subscribers

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Afterward, a reporter asked Britt if he believed his company had legal authority to convert digital-TV signals to analog at the headend. ‘We think we have flexibility to do what we need to do,’ Britt said.”)

⁴⁶ “All-digital” systems are systems that do not carry analog signals or provide analog service.

⁴⁷ Comments of NCTA at 7. *But see, Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209 (2007), *GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CSR-7130-Z, Memorandum Opinion and Order, DA 07-1020 (MB rel. May 4, 2007), and *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 11780 (MB Jun. 29, 2007), among others (receiving a waiver from the separable security requirements in exchange for an agreement to go all-digital by February 17, 2009).

⁴⁸ Because of the nondegradation requirements of the Act, all operators will be required to provide at least some digital service to subscribers. *See* paragraph 7, *supra*.

⁴⁹ Comments of NAB and MSTV at 10.

⁵⁰ Reply of NAB and MSTV at 5 (emphasis in original); *see also* note 73, *supra*.

⁵¹ Reply of Game Show Network, LLC at 2.

⁵² Rules to Implement and Administer a Coupon Program for Digital to Analog Converter Boxes, NTIA Docket No. 0612242667705101, Final Rule, 72 FR 12097 at paragraph 8 (“NTIA Coupon Program Final Rule”); 47 C.F.R. § 301.

with analog sets would continue to be served;⁵³ and we now establish these rules to ensure that those subscribers do continue to be served.⁵⁴

21. NAB proposes that cable operators carry all broadcasters on their systems in the same manner; i.e., if one must carry station is carried in analog, all broadcasters, whether carried pursuant to retransmission consent or must carry, would be carried in analog. Cable operators object to this proposal, and we decline to adopt it.⁵⁵ Although a system that is not “all-digital” will be required to carry analog versions of all must-carry signals to ensure their viewability, retransmission consent stations may be carried in any manner that comports with the private agreements of the parties.

22. The “viewability” requirement that we adopt today is based on a straightforward reading of the relevant statutory text.⁵⁶ While some cable commenters dispute our interpretation of Section 614(b)(7), their arguments are at odds with both the plain meaning of the statutory text as well as the structure of the provision. These commenters principally argue that the viewability mandate is satisfied whenever cable operators transmit broadcast signals and “‘offer to sell or lease... a converter box’ to their customers” that will allow those signals to be viewed on their receivers.⁵⁷ To the extent that such subscribers do not have the necessary equipment, however, the broadcast signals in question are not “viewable” on their receivers.⁵⁸ To be sure, “[i]f a cable operator authorizes subscribers to install *additional* receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator [is only required to] notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed without a converter box and . . . offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3).”⁵⁹ But these commenters confuse the separate mandates set forth in the second and third sentences of Section 614(b)(7), a distinction we clarified as early as 1993.⁶⁰ As NAB and MSTV

⁵³ See note 67, *infra*. See also Testimony of Glenn Britt at note 44, *supra*.

⁵⁴ See Appendix C, *infra*.

⁵⁵ Reply of NCTA at 8; Reply of Comcast at 11.

⁵⁶ See 47 U.S.C. §§ 534(b)(7), 535(h). Indeed, some cable operators were already planning to carry downconverted versions of broadcast signals, in addition to the broadcast version, in order to ensure that subscribers continue to be able to view them. See, e.g., Reply of Cequel at 3. See also Testimony of Glenn Britt at note 44, *supra*. Our discussion of material degradation clarifies that this is not a violation of Commission Rules. See Paragraph 13, *supra*.

⁵⁷ Reply of Comcast at 9-10, partially quoting 47 U.S.C. § 534(b)(7) (emphasis added by commenter).

⁵⁸ In addition, it is important to note that the relevant question under the statute is not whether subscribers can view over-the-air broadcast signals using their receivers. Rather, it is whether subscribers can view the signals of broadcast stations that are carried through their cable system. See 47 U.S.C. § 534(b)(7).

⁵⁹ See 47 U.S.C. § 534(b)(7) (emphasis added). By referring to “additional” receivers that are attached without operator involvement, the provision contemplates that at least one receiver is connected by the operator. We note further that a box (or television) purchased at retail by the subscriber is nevertheless covered by the viewability requirement if the cable operator provides the connection.

⁶⁰ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965 at FN 99 (1993) (“*Must Carry Order*”). See also Reply of NAB and MSTV at 8 (citing *Barnhart v. Sigmon*, 534 U.S. 438 (2002), for the premise that “[w]here Congress chooses to use different language in separate sentences of a statute, it is presumed to have intended different results”).

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observe, “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.”⁶¹ For every receiver “connected to a cable system by a cable operator or for which a cable operator provides a connection,” that operator must ensure that the broadcast signals in question are actually viewable on their subscribers’ receivers.⁶²

23. As we explained in the *Second Further Notice*, the operators of either all-digital or mixed digital-analog systems will be responsible under the statute for ensuring that mandatory carriage stations are actually viewable by all subscribers, “including those with analog television sets.”⁶³ Two commenters argued that our proposed rules were overbroad, because analog-only televisions will not “qualify as ‘television receivers’ after the transition for purposes of the viewability requirement.”⁶⁴ These arguments fail to recognize, however, that the hard deadline set by Congress does not apply to Low Power television stations, including translators and Class A stations. Thus, Low Power broadcasters, operating hundreds of channels, will still be lawfully transmitting analog signals on February 18, 2009, and for some period of time afterwards.⁶⁵ Those consumers who rely on Low Power stations and turn on their over-the-air analog sets that morning to watch a local newscast will be using a device “engaged or able to engage in ‘the process of...radio transmission.’”⁶⁶ More broadly, as NAB and MSTV point out, the Commission’s authority over these sets is not predicated merely on their ability to receive over the air signals.⁶⁷ Rather, we believe that a device that allows subscribers to view signals sent by their cable operator is a television receiver for purposes of Section 614(b)(7) of the Act.⁶⁸

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⁶¹ Reply of NAB and MSTV at 8.

⁶² 47 U.S.C. § 534(b)(7); *see also* Reply of NAB at 7-8. (“[W]here the cable operator *does* provide the connections for television receivers, including analog receivers, the operator does not satisfy the viewability requirement... by making the signal available in a format that cannot be viewed”).

⁶³ *Second Further Notice* at para. 16.

⁶⁴ Comments of Comcast at 23; *see also* Comments of NCTA at 12, note 14.

⁶⁵ *See In re Amendment of Parts 73 and 74 of the Commission’s Rules To Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and To Amend Rules for Digital Class A Television Stations, Report & Order*, 19 FCC Rcd 19331, 19338, ¶ 17 (2004).

⁶⁶ Comments of Comcast at 23.

⁶⁷ “The Commission is correct (*Notice* n. 33) that analog television sets will, after the transition, continue to be ‘television receivers’ for purposes of the viewability provision. If a cable operator provides any video service to an analog set or a connection to an analog receiver for video service, then that set falls squarely within Congress’ expectations that must-carry signals will be provided universally to all cable subscribers. Certainly, when Congress directed the Commission to modify its must-carry rules in Section 614(b)(4)(B), it did not expect the Commission to use that authority to eliminate Congress’ core goal of universal availability of local must-carry signals. Redefining ‘receiver’ to exclude analog sets that otherwise receive video from cable operators would thus be directly contrary to Congressional intent.” Comments of NAB and MSTV at 7, fn 7.

⁶⁸ Additionally, contrary to the suggestion made by Comcast, the ability to purchase a subsidized converter box for over-the-air digital signals does not alter the ongoing statutory responsibility of cable operators to make must-carry broadcast signals viewable by their subscribers. The converter box program was limited to over-the-air signals in

(continued....)

24. NCTA also argues that the situation in the early 1990s that spurred the creation of these viewability requirements was different from the situation that will be faced by consumers post-transition.⁶⁹ Therefore, they posit, it is inappropriate to rely on Sections 614(b)(7) and 615(h) to address viewability on analog receivers. To begin with, it is our primary task to implement the text of the statutory provision. While the enactment of a statute may be principally aimed at a particular set of circumstances present at the time, it is often written in general language so that it applies to similar sets of circumstances in the future. As the United States Supreme Court has instructed, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”⁷⁰ In any event, the cable commenters’ own descriptions of the driving force behind the statutory provision demonstrate that the situation at hand is directly analogous. NCTA explains that “[a]t the time [of the provision’s enactment], certain television sets were not ‘cable-ready’ and could not receive [some] channels at all,” and observes that the Commission therefore required converter boxes provided by cable operators to contain “the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter.”⁷¹ Replace “cable-ready” with “digital cable-ready,” and “UHF” with “digital,” and NCTA has described the problem at hand, and one of the options the Commission has again offered to resolve it.⁷² The Commission’s charge is to implement the statutory language enacted by Congress, and this language reflects Congress’s unambiguous determination that broadcast signals must be viewable by all cable subscribers. Indeed, as NAB and MSTV note, “the authority that Congress gave the Commission under Section 614(b)(4)(B) to make rules regarding advanced television reflects Congress’ understanding that broadcast technology certainly would change over time, and that the Commission was expected to modify the carriage rules as needed.”⁷³ While the circumstances today differ from those present at the time of the provision’s enactment, the basic issue,

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part because of the Congress’ confidence that cable companies would continue to fully serve their subscribers. This confidence was based in part on assurances by the cable industry. *See, e.g.,* Testimony of Kyle E. McSlarrow, Chairman and CEO of NCTA, before the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives. (“And when we get to a transition, whenever that transition takes place, and we are faced with what do we do with the analog customers, *what we are proposing is to allow us to down-convert, in some circumstances, just for the limited number of must-carry stations.* In the meantime, you are exactly right. The converter boxes, or the more elaborate boxes that some people may want, particularly if they want high definition or DVRs, or those kinds of things, are increasingly going to penetrate the subscribership. So what you have a universe which, you know, we have gone through the numbers ad nauseam right now, but I think we all agree, the largest television universe is the cable customer universe, 66 million people, and *what we are offering is to incur the cost themselves.* It is not going to cost the government a dime. We will take care of the problem. No one on day one of the transition will see any difference from the day before. In the meantime, the digital transition is taking place. *And when it comes to must-carry, I guess our concern is this. We are saying we will step up, we will do this. We are not asking you to place an obligation on anybody else. And near as I can tell, everybody at this table would love to place obligations on cable or some other industry. We are not going to ask you to do that. We will take care of it.*”) (emphasis added).

⁶⁹ Comments of NCTA at 10-11.

⁷⁰ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

⁷¹ Comments of NCTA at 10-11.

⁷² *See also* Comments of Time Warner at 18-24.

⁷³ *See* 47 U.S.C. § 534(b)(4)(B) (requiring us to update carriage requirements for “advanced television services,” now known as Digital Television).

ensuring the viewability of broadcast signals, is the same.⁷⁴

25. Time Warner argues that we do not have the authority to read Section 614(b)(7) as a “manner of carriage” requirement, even to offer analog carriage as one option for complying with the statute.⁷⁵ They see the Commission’s early interpretation of the viewability provision as a statement that operators must provide converter boxes “in a specific and limited context,” and that the section cannot serve as the basis for a carriage requirement.⁷⁶ On the contrary, the Commission has frequently allowed cable operators to meet their 614(b)(7) obligations by placing must carry signals on a channel viewable to all subscribers instead of by providing boxes.⁷⁷ The rules we adopt today are firmly grounded in longstanding Commission practice, and echo previous solutions to similar problems.

26. Some cable programmer commenters, such as the Weather Channel, argue that the proposal “unquestionably would consume vast amounts of cable system bandwidth” with duplicative programming.⁷⁸ In actuality, as Time Warner admits, these rules will not have an impact on the carriage of most stations; the “vast majority of broadcasters opt for retransmission consent.”⁷⁹ Thus, as NAB notes in its reply, any incremental increase of bandwidth devoted to must-carry stations will be “negligible.”⁸⁰ Gospel Music Channel, LLC (Gospel) articulates a concern that flows from Weather Channel’s: that these rules could reduce their chances of carriage on any given system.⁸¹ While we recognize Gospel’s concerns, Congress already acknowledged them when it mandated that systems with more than 12 usable activated channels need carry local commercial television stations only “up to one-third of the aggregate number of usable activated channels of such system[s].”⁸² Furthermore, Gospel

⁷⁴ See, e.g., *Requirements for Digital Television Receiving Capability, Second Report & Order*, 20 FCC Rcd 18607 (2005) (“DTV Tuner Requirement Order”) (relying on the All Channel Receiver Act to require that all TV receivers include a digital tuner). The same problems that led Congress to pass the ACRA in 1962 arose again in the digital context, and their earlier solution proved just as effective. In viewability, just as with tuners, Congress’ concern and foresight remain relevant and controlling. See also Reply of NAB and MSTV at 9 and note 15.

⁷⁵ Comments of Time Warner at 19-20.

⁷⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Memorandum Opinion & Order, 9 FCC Rcd 6723 (1994).

⁷⁷ See, e.g., *In the Matter of Paxson Hawaii License, Inc.*, 14 FCC Rcd 9105 (1999); *In re: Complaint of Adell Broadcasting Corporation against Harron Communications*, 12 FCC Rcd 15169 (1997); *In re: Complaint of Fouce Amusement Enterprises, Inc., Licensee of Television Station KRCA, Riverside, California*, 10 FCC Rcd 668 (1995).

⁷⁸ Reply of The Weather Channel at 6.

⁷⁹ Comments of Time Warner at 16. See also Reply of The Africa Channel, et al., at 2 (recognizing that a significant amount, almost certainly a clear majority, of what is described as “duplicative programming” is in place due to market decisions by cable companies and voluntary agreements between cable operators and cable programmers. TAC particularly attacks cable carriage deals inked by retransmission consent stations and networks, which are unrelated to the rules we establish today, which are designed to ensure the viewability of stations that do not have the “leverage” that worries TAC and other independent cable programmers).

⁸⁰ Reply of NAB at 13.

⁸¹ Reply of Gospel at 1; see also Reply of Comcast at 6.

⁸² 47 U.S.C. § 534(b)(1)(B); see also paragraphs 30 and 36, *infra*.

fails to recognize that to the extent operators choose the second option and become “all-digital,” these rules could contribute to a very positive impact on independent programmers’ ability to make carriage deals due to the concomitant effective increase in channel capacity. The Africa Channel, et al. (“TAC”) also argue that the potential loss of independent cable programmers serving focused audiences “are digital transition issues as important as a consideration of what constitutes viewability or material degradation for broadcasters who are the least likely television market participants to be left behind with or without burdensome new must-carry rules.”⁸³ In essence, TAC argues that independent cable programmers deserve protections on par with must-carry broadcasters. Congress, however, disagrees, and the Supreme Court has upheld the must-carry regime to ensure the viewability and prevent the material degradation of the signals of those broadcasters.⁸⁴

27. Some commenters have incorrectly characterized our rule as “dual carriage.”⁸⁵ Comcast attempts to frame this requirement as “a requirement to carry broadcast signals in [analog]... in perpetuity.”⁸⁶ Not only is this not the Commission’s rule, Comcast’s proposal for avoiding “dual carriage” would read “viewability” itself out of the Act. Dual carriage, as considered and rejected by the Commission, would have required cable operators “to carry both the digital and analog signals of a station during the transition when television stations are still broadcasting analog signals”; that is, the mandatory simultaneous carriage of two different channels broadcast by the same station.⁸⁷ The Commission ultimately rejected this concept.⁸⁸ The rule we establish in this *Third Report and Order* is quite distinct. It requires carriage only of a single broadcast signal, and gives operators the freedom to choose how to ensure that signal is viewable by all subscribers. It does not require carriage of more than one broadcast signal from a given must-carry broadcaster, and it does not require carriage of an analog version of a signal unless an operator chooses not to operate an all-digital system.

28. NCTA notes that the Act allows a cable operator to decline to carry signals from stations whose programming substantially duplicates that of a station it already carries.⁸⁹ The commenter argues from this that the statute can not be read to require carriage of additional versions of a signal under any circumstances.⁹⁰ The connection, however, is tenuous at best. Section 614(b)(5) speaks specifically to the issue of the carriage of different stations providing substantially identical programming, and does not address a requirement to carry multiple versions of a single station’s signals. In the former case, subscribers would be receiving multiple channels all showing the same programs at virtually the same time. In this case, however, some subscribers will not be able to see any of a station’s programming unless a downconverted version is carried. From the perspective of these subscribers, the actual people Sections 614 and 615 were designed to reach, there need not be more than one viewable version of a

⁸³ Reply of The Africa Channel at 34.

⁸⁴ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

⁸⁵ Comments of Comcast at 15, et. seq., Comments of Time Warner at 3, and Comments of NCTA at 4.

⁸⁶ Comments of Comcast at 24.

⁸⁷ *Second Report and Order*, 20 FCC Rcd at 4516, para. 1.

⁸⁸ *Id.* at para. 27

⁸⁹ See 47 U.S.C. § 534(b)(5).

⁹⁰ Reply of NCTA at 5-6.

broadcaster's signal – but there must be at least one.

29. Comcast argues that enforcement of the viewability provisions of the Act will force the Commission into conflict with other sections of the Act, particularly the effective competition provisions of Section 623(b).⁹¹ Comcast misstates the case, however, when it says that a deregulated system may provide must carry stations “in any format that it wishes.”⁹² Indeed, as the Commission made clear in the 2001 Order, signals broadcast in HD must be carried by cable operators in HD, regardless of whether or not the system is rate-regulated.⁹³ While some requirements are lifted when an operator is deregulated, deregulation is not an exemption from the carriage requirements of the statute.⁹⁴ Stations electing mandatory carriage must be carried, they must not be materially degraded, and they must be made viewable.

30. If an operator chooses not to operate an “all-digital system” and therefore ensures viewability by providing a digital broadcast signal and a downconverted version of the signal for analog subscribers, it will in some cases use more than the 6 MHz of bandwidth occupied by an analog must-carry signal alone. Comcast argues that this improperly forecloses the use of the bandwidth for other purposes.⁹⁵ Congress recognized the importance of preserving cable bandwidth for non-broadcast programmers when it mandated that systems with more than 12 usable activated channels need carry local commercial television stations only “up to one-third of the aggregate number of usable activated channels of such system[s].”⁹⁶ This limit has been upheld by the courts and will continue to ensure that operators have sufficient bandwidth for carriage of non-broadcast programming and other services.⁹⁷ Moreover, to the extent that a cable operator wishes to free bandwidth for other purposes, it may choose to operate an “all-digital” system.

31. We are bound by statute to ensure that commercial and non-commercial mandatory carriage stations are actually viewable by all cable subscribers. The Commission also believes, however, that it is important to provide cable operators flexibility in meeting the requirements of Sections 614(b)(7) and 615(h). Therefore, we have declined to require a specific approach, instead allowing operators to choose whether or not to operate “all-digital systems,” and therefore whether or not to provide mandatory carriage stations in an analog format.⁹⁸ This is in accord with the Commission's decision, in the *First*

⁹¹ Comments of Comcast at 24.

⁹² *Id.*

⁹³ *First Report and Order*, 16 FCC Rcd at 2629, para. 73.

⁹⁴ Nothing in Sections 614 or 615 suggest that must-carry requirements apply only to rate-regulated systems. Section 615(h) specifically requires provision on the “lowest priced tier,” a requirement distinct from the “basic tier” created in Section 623 and an indication that Congress intended that all cable subscribers be able to see must-carry signals, regardless of whether their cable operator faced effective competition.

⁹⁵ Comments of Comcast at 34; *See also* Reply of NCTA at 3-4.

⁹⁶ 47 U.S.C. § 534(b)(1)(B).

⁹⁷ *See generally, Turner II*, 520 U.S. 180.

⁹⁸ *See* Appendix C, *infra*.

Report and Order, not to require operators to provide set-top boxes.⁹⁹

32. Time Warner argues that the requirement of Section 629, that navigation devices be available at retail, supersedes the requirements of Section 614(b)(7), which was enacted four years earlier.¹⁰⁰ We disagree. Section 629(f) provides that “[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under [the] law” prior to the 1996 Telecommunications Act. This includes the viewability provisions of Section 614(b)(7). Furthermore, Time Warner’s argument is premised on an interpretation of Section 614(b)(7) that we decline to adopt, namely that it requires cable operators to provide set top boxes. Indeed, the retail availability of set-top boxes should facilitate subscriber purchase of digital equipment and lessen the burden on all-digital cable operators to provide such boxes.¹⁰¹ However, we adopt the analog downconversion option to address these very concerns, and provide an option which does not even potentially implicate set-top boxes. An operator may choose not to go “all-digital,” and instead satisfy its Section 614(b)(7) obligations by downconverting must carry stations to analog, until the operator concludes that the local market is ready for an all-digital cable system.

33. We note that Americans for Tax Reform, Ovation, LLC, and other commenters appear to misapprehend the functionality of the “converter boxes” that will be available through the NTIA coupon program.¹⁰² These boxes will, by design, be limited to use in converting over-the-air digital signals into analog signals that can be interpreted by an analog television.¹⁰³ Because of differences in the modulation used by digital broadcasters and digital cable systems, these boxes will not be usable by digital cable subscribers to connect their analog receivers. Such converters will be available, but it is important to ensure that the public understands that there are different functionalities provided by different boxes.¹⁰⁴

34. Discovery observes that, during the transition period, a digital-only broadcaster has had the

⁹⁹ *First Report and Order*, 16 FCC Rcd at 2632-3, paras. 79-80. We neither require nor reject boxes in this Order, and our rule is totally agnostic as to their use. Allowing operators the discretion to pursue either viewability option will give them the flexibility they need to respond to their local market while ensuring the continued availability, to all consumers, of must-carry stations.

¹⁰⁰ Comments of Time Warner at 22.

¹⁰¹ Comcast observes that the ongoing and accelerating move by consumers to digital cable will continue for the remainder of the transition. Therefore, there will be fewer than 32 million analog subscribers remaining as the nation approaches February 17, 2009, and the cost of transitioning to an all-digital system at that time will be concomitantly lower. Comments of Comcast at 29, note 88. We note also that many operators are promoting the subscriber-level switch to digital. *See, e.g.*, Reply of Cequel at 2.

¹⁰² Reply of Americans for Tax Reform at 1; Reply of Ovation LLC at 4 (citing to Comments of NAB and MSTV at 11 that clearly deal with over-the-air converter boxes when discussing the easy availability of converter boxes to cable subscribers).

¹⁰³ Rules to Implement and Administer a Coupon Program for Digital to Analog Converter Boxes, NTIA Docket No. 0612242667705101, Final Rule, 72 FR 12097 at paragraph 8 (“NTIA Coupon Program Final Rule”); 47 C.F.R. § 301.

¹⁰⁴ We note also that use of over-the-air converter boxes and antennas, contrary to the suggestion of TAC, cannot fulfill the statutory mandate that must-carry signals be “viewable via cable.” *See* Reply of The Africa Channel, et al. at 34-35.

right to request carriage in digital only, rendering it non-viewable to analog subscribers.¹⁰⁵ As the Commission explained in the *First Report and Order*, however, this is an interim policy, assisting both broadcasters and cable operators to adjust to digital broadcasting over a limited period of time.¹⁰⁶ Discovery argues that the post-transition period will “similarly be limited,” and indeed, eventually analog-only sets will be as rare as VHF tuner-only sets are today.¹⁰⁷ There are still important differences, however. In the post-transition period, every channel subject to mandatory carriage will be broadcast solely in digital, while the use of analog receivers will continue for an indefinite time. Furthermore, making stations actually viewable to cable subscribers is the most fundamental interest expressed in the must carry rules that have been upheld by the Supreme Court. If we declined to enforce the viewability requirement it would render the regime almost meaningless, contrary to the clearly expressed will of the Congress as upheld by the Supreme Court.¹⁰⁸

35. Because the interim policy governing downconversion makes it an option exercised by broadcasters, they are responsible for any associated costs.¹⁰⁹ Cequel argues that post-transition analog downconversion would only be necessary because the broadcaster itself is no longer providing an analog signal, and that any costs should therefore be borne by the broadcaster.¹¹⁰ Agape Church Inc. and other broadcast commenters agree with our proposal that, because the decision will shift to cable operators after the transition, so should the costs.¹¹¹ NAB and MSTV further argue that these downconversion costs would be modest.¹¹² ACA says that one of its members paid as much as \$4,390.25 per channel to downconvert from HD to analog, and argues in an ex parte that these costs could approach \$16,500 per channel. We find this estimate surprisingly high and note that \$12,000 of this total appears to be dedicated to format conversion, rather than digital to analog conversion. It is also unclear whether or not the prices or equipment quoted are industry standards, or whether some of the equipment costs presented cumulatively are actually redundant or usable for more than just analog downconversion of one broadcast signal. Nevertheless, we are taking up the issue of flexibility for small cable operators in the *Third Further Notice, infra*. Entravision Holdings, LLC (Entravision) notes that, while it supports our proposal, it would not object to a requirement that broadcasters pay the cost of downconversion if it became necessary in order to ensure the continued viewability of must-carry stations for analog subscribers.¹¹³ However, since the post-transition downconversion will be undertaken by operators at their discretion, in order to comply with the Act, we adopt the proposal that any expense necessary for an operator’s compliance with the requirements of Sections 614(b)(7) and 615(h) shall be borne by the

¹⁰⁵ Comments of Discovery at 4-5.

¹⁰⁶ *First Report and Order*, 16 FCC Rcd at 2606, para. 15. This is also exactly the kind of flexibility Congress gave the Commission in Section 614(b)(4)(B) to ensure that the nation would make a smooth transition from analog to digital.

¹⁰⁷ Comments of Discovery at note 16.

¹⁰⁸ *Turner II*, 520 U.S. 180.

¹⁰⁹ *First Report and Order*, 16 FCC Rcd at 2602, para. 7.

¹¹⁰ Reply of Cequel at 12-13.

¹¹¹ Comments of NAB and MSTV at 11, Comments of Entravision at 5, Reply of Agape at 1.

¹¹² Comments of NAB and MSTV at 11, note 11.

¹¹³ Comments of Entravision at 5.

operator, and not the broadcaster.¹¹⁴ Specifically, operators of systems that provide analog service are responsible for the cost of downconverting a digital must-carry signal to analog at the headend.¹¹⁵

36. Such downconverted signals will, however, count toward the one-third carriage cap. Section 614(b)(1)(B) of the Act requires that cable systems with more than “12 usable activated channels” devote “up to one-third of the aggregate number of usable activated channels of such system[s]” to the carriage of local commercial television stations.¹¹⁶ Beyond this requirement, the carriage of additional commercial television stations is at the discretion of the cable operator.¹¹⁷ The Commission determined in the *First Report and Order* that with respect to carriage of digital broadcast signals, the channel capacity calculation will be made by taking the total usable activated channel capacity of the system in megahertz and dividing it by three to find the limit on the amount of system spectrum that a cable operator must make available for commercial broadcast signal carriage purposes.¹¹⁸ After the transition, when calculating whether an operator has reached or exceeded the one-third cap, we will count the system spectrum occupied by all versions of a commercial broadcast signal (both digital and analog).

37. We also find that operators of systems with an activated channel capacity of 552 MHz or less that do not have the capacity to carry the additional digital must-carry stations may seek a waiver from the Commission.¹¹⁹

38. We observe that a number of cable comments imply or state that it is not possible to transition from a system that provides analog service to an all-digital system without the agreement of all current subscribers.¹²⁰ While each operator will choose to transition or not based on local market conditions and other business considerations, it is clear that this choice is fully within their discretion. Both of these options are available to all operators at any time, a fact unaffected by this rule. We do note, that as with any change in programming service, particularly one which will have an impact on the compatibility of subscriber equipment, cable operators must comply with certain notice requirements. We remind operators who transition their systems to all-digital that they must provide written notice to subscribers about the switch, containing any information they need or actions they will have to take to continue receiving service.¹²¹

39. Entravision, licensee of a number of commercial broadcast stations, argues that analog

¹¹⁴ See Appendix C, *infra*.

¹¹⁵ To the extent that a standard definition digital subscriber is unable to view a high definition signal via their equipment, operators have a similar responsibility to ensure that the signal is viewable.

¹¹⁶ 47 U.S.C. § 534(b)(1)(B).

¹¹⁷ 47 U.S.C. § 534(b)(2). Section 615 also requires carriage of noncommercial stations. See 47 U.S.C. § 535(a).

¹¹⁸ *First Report and Order*, 16 FCC Rcd at 2614-5, paras. 39-40.

¹¹⁹ Such systems must, however, commit to continue carrying an analog version such that their subscribers are assured of being able to view all must-carry stations carried on the system.

¹²⁰ Comments of Comcast at 34, n. 102, Comments of Time Warner at 23-4, and Comments of NCTA at 1-2; *but see* Reply of Americans for Prosperity, et al., at 2 (recognizing that the decision to become an all-digital system rests with the operator).

¹²¹ 47 C.F.R. §§ 76.1603, 76.1622.

downconversion is the best way to ensure continued viewability, but does not object to the use of other methods by cable operators so long as the result is the same.¹²² As an alternative to the option we proposed for systems that continue to carry analog programming, Entravision proposes that must-carry stations be provided in analog, but only until such time as 85% of subscribers in each zip code served by a given operator have the means to view those signals if provided in digital.¹²³ As Entravision acknowledges, however, the statute requires that must carry broadcast stations be made available to all cable subscribers with analog television sets.¹²⁴ As we have noted before, we do not believe we have the authority to exempt any class of subscribers from this requirement, no matter how few the analog subscribers.¹²⁵ Therefore, we decline to adopt the proposal offered by Entravision.

40. The Consumer Electronics Association (CEA) asks that the Commission rely on technical solutions shaped by earlier rules and developed by the market to resolve concerns about viewability.¹²⁶ CEA suggests that the agency can rely on the retail availability of sets with digital tuners to ensure continued viewability of high quality programming.¹²⁷ It argues that this can be assured by requiring the carriage of must carry signals to conform to three requirements: (1) unencrypted, unscrambled, and in QAM (i.e., “in the clear”); (2) modulated using MPEG-2, a widely used and accepted codec; and (3) not in switched digital.¹²⁸ CEA expresses concern that the requirement to carry must-carry stations “in the clear” is not sufficiently articulated outside the context of rate-regulated systems.¹²⁹ Although we decline to reach the question of requiring MPEG-2 and prohibiting switched digital, as they are beyond the scope of this proceeding, we do address CEA’s essential concern, which is at the heart of our viewability proceeding.¹³⁰ Like CEA’s proposals, our rules are designed to ensure that all subscribers to a cable system have “in the clear” access to all must carry stations.¹³¹

¹²² Comments of Entravision at 3-4.

¹²³ *Id.* at 4-5.

¹²⁴ *Id.* at 2.

¹²⁵ *Second Further Notice* at para. 17.

¹²⁶ Comments of CEA at 1; *see also* Reply of Chris Llana.

¹²⁷ Comments of CEA at 4-5.

¹²⁸ *Id.* at 6-10.

¹²⁹ *Id.* at 7-8.

¹³⁰ As discussed in note 93, *supra*, the “viewability” language in 615(h) expressly refers to carriage on the “lowest priced tier.” 47 U.S.C. § 535(h).

¹³¹ We note in passing that CEA appears to misunderstand the statistic that roughly half of current cable subscribers are analog subscribers, cited by the Commission in paragraph 4 of the *Second Further Notice*. CEA believes this number stands for the proposition that “50 percent of all cable subscribers do *not* take a proprietary set-top box” and that “[t]his means that half of all subscribers... look to the competitive retail market for their devices.” Comments of CEA at 3 (emphasis in original). This number does not actually speak to the number of subscribers who rely on set top boxes, proprietary or not. Many analog subscribers do use a set-top box, and the growing use of Cablecards means that more and more digital subscribers do not use a box. The statistic CEA cites actually means that “half of all subscribers” choose to look neither to their cable operator nor to the “competitive retail market” for their “devices.” Instead, they choose to rely on the equipment they have already purchased. It is the

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C. Constitutional Issues

1. The Viewability Requirements Are Consistent with the First Amendment

41. A number of commenters assert that the rules we adopt herein constitute “mandatory dual carriage” and are unconstitutional.¹³² We disagree. The statutory must-carry provisions upheld by the Supreme Court in *Turner II*¹³³ include the requirement that must-carry signals “shall be viewable” 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.¹³⁴ The rules we adopt in this order do nothing more than ensure the continued fulfillment of this statutory mandate at the conclusion of the digital television (“DTV”) transition in February 2009. The must-carry obligation is meaningful only if all cable subscribers are able to view local broadcasters’ signals, even if they have analog televisions. If we fail to act, however, analog cable subscribers will be unable to view must-carry stations after the DTV transition. Rather than mandating downconversion to prevent this loss of signals after the transition, however, we offer cable operators a choice: those operators that choose not to operate an “all-digital system” must down-convert the broadcasters’ digital signal for their analog subscribers. Cable operators that elect to operate “all-digital” systems, on the other hand, do not have to down-convert these signals and may provide them solely in a digital format. The choice rests with the individual cable operator. In this way, cable operators decide for themselves, taking into account their particular circumstances, how best to operate following the digital transition.¹³⁵

42. We reject the argument of cable commenters that the “second option is effectively no option at all,”¹³⁶ or that we have presented cable operators with a “Hobson’s Choice.”¹³⁷ Rather, we believe that the second option represents a viable choice for complying with the viewability mandate. Cable operators complain about the burden of transitioning to “all-digital systems.” In particular, they object to requiring subscribers with analog television sets who do not yet have digital-set top boxes to use such boxes because, they argue, it is not “feasible” to require those customers to install set-top boxes, because customers do not want set-top boxes, or because of the expense associated with providing the boxes.¹³⁸

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interests of these consumers, and their full access to programming, that drives the Commission’s decisions on viewability.

¹³² See, e.g., Comments of NCTA at 7, 13-14; Comments of Comcast at 6, 15.

¹³³ *Turner II*, 520 U.S. 180.

¹³⁴ 47 U.S.C. § 534(b)(7) (“Signals carried in fulfillment of the requirements of this section [must-carry signals] shall be provided to every subscriber of a cable system. Such signals 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”).

¹³⁵ See Comments of NAB and MSTV at 5-10.

¹³⁶ Comments of NCTA at 2; see also Comments of Time Warner at 3 (“to most cable operators and subscribers, the NPRM single carriage proposal will be unavailable”); Comments of Comcast at 34, note 102.

¹³⁷ Comments of NCTA at 23 (contending that forcing cable subscribers to install digital boxes on their television sets to receive must-carry broadcasts is “no choice at all”).

¹³⁸ See Comments of Time Warner at 3; Comments of NCTA at 2-3, 23; Reply of Cequel Communications at 4 (expressing concern over the “uncertainty” caused by new rules).

After the DTV transition, however, some sort of set-top or converter box will be the rule rather than the exception for those Americans with analog television sets. Whether consumers currently obtain video programming through over-the-air broadcasts, cable, or DBS, they generally will need either set-top boxes or digital televisions to receive programming once the transition is complete.¹³⁹ Thus, cable operators' fear that they will lose customers to other providers of video programming if they pursue this option seems misplaced.¹⁴⁰ As to cable operators' concerns about the expense of providing set-top boxes, nothing in this order precludes them from recovering the costs of those boxes from subscribers, and cable operators offer no evidence to support their claim that they will lose a meaningful number of customers because of such charges.¹⁴¹ Indeed, such claims are rather ironic in light of the cable industry's recent practice of raising its prices at a rate significantly in excess of inflation.¹⁴²

43. Cable operators' complaints about the second option are also belied by these same parties' assurances that they have both the incentive and the means to "mak[e] the digital transition as seamless as possible for their customers."¹⁴³ NCTA asserts, for example, that cable operators have committed to "ensure that cable viewers do not experience disruption after February 17, 2009," and that they "already have the means to ensure continuing service to analog television sets with no government intervention or subsidy required."¹⁴⁴ Cequel Communications notes that it has every incentive to continue providing must-carry stations to all subscribers after the transition, if only because it welcomes free programming.¹⁴⁵ Comcast similarly assures us that "cable operators have powerful incentives to meet their customers' demands"¹⁴⁶ and that "no cable operator will allow its subscribers to become 'disfranchised' since to do so would be economically irrational."¹⁴⁷ If cable operators, in fact, "have every incentive to move customers to digital"¹⁴⁸ and "equipment will be available to enable cable

¹³⁹ Only those consumers of cable systems that continue to offer analog programming after the transition can avoid the need for a set-top box (or a digital television). In addition, while analog television sets will continue to receive signals from Low Power broadcasters, who will still be lawfully transmitting analog signals on February 18, 2009, and for some time afterwards, we doubt very much that cable subscribers, because they object to using a set-top box, will choose instead to rely solely on over-the-air signals from Low Power broadcasters.

¹⁴⁰ See, e.g., Comments of NCTA, Appendix A, 35-36.

¹⁴¹ For this reason, we also reject any notion that the all-digital option results in an unconstitutional taking of property without just compensation. See Comments of Comcast at 35-36; Comments of NCTA at 25-26. We address the cable operators' Fifth Amendment arguments in greater detail below. See *infra* paras. 64-71.

¹⁴² See *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15087-88, para. 2 ("2006 Cable Price Report").

¹⁴³ Comments of NCTA at 8.

¹⁴⁴ Comments of NCTA at 2; see also note 67, *supra*.

¹⁴⁵ Reply of Cequel at 2.

¹⁴⁶ Comments of Comcast at 16-17.

¹⁴⁷ *Id.* at 16, 17 ("consumers will go elsewhere" if cable operators do not provide them the channels they want or make available to them the equipment needed to view those channels).

¹⁴⁸ Comments of NCTA at 5.

customers to view digital broadcast signals,”¹⁴⁹ then we do not understand the cable companies’ complaint that the all-digital option is so burdensome that it is merely a “fantasy.”¹⁵⁰ Indeed, numerous cable operators have indicated to the Commission their intent to convert to all-digital operations prior to February 2009.¹⁵¹ The record in this proceeding also demonstrates that cable operators are already reducing analog programming and moving it to digital tiers.¹⁵² For all of these reasons, we conclude that the second option set forth in this item offers cable operators a meaningful choice about how to fulfill their must-carry obligations.

44. Turning to the First Amendment challenge, we do not believe that the “all-digital” option for complying with the statute’s viewability mandate implicates any First Amendment interest beyond that inherent in the must-carry mandate for digital signals already adopted by the Commission.¹⁵³ We note, moreover, that this mandate is significantly less burdensome than the analog must-carry mandate upheld by the Supreme Court in *Turner II* because digital signals occupy much less bandwidth on a cable system than do analog signals. The “all-digital” option does not require cable operators to carry *any* additional signals over its system or to displace *any* additional programming beyond that required by the Commission’s previously adopted digital must-carry mandate. Rather, it simply requires cable operators to take steps to ensure that all subscribers are able to view signals that will already be carried on their systems, and we do not believe that such a mandate can reasonably be described as an independent “infringement” of cable operators’ free speech rights.

45. While cable commenters argue that the second option triggers additional First Amendment scrutiny, we do not find their claims to be persuasive. We do not agree that the second option coerces operators into downconverting broadcaster’s digital signals or impermissibly penalizes them for failing to downconvert. The purpose and effect of the second option are neither to coerce operators into downconverting nor to penalize them for failing to do so. Rather, they are to provide cable operators with an alternative means of fulfilling the statutory requirement that the signals of must-carry stations

¹⁴⁹ Comments of NCTA at 24; *id.* at 32 (“Every signal will be carried, the signal will be viewable from day one with the right receiving equipment (as half of U.S. cable households already have)”).

¹⁵⁰ Comments of NCTA at 5.

¹⁵¹ See, e.g., *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97080, Memorandum Opinion and Order, 22 FCC Rcd 11780 (MB Jun. 29, 2007) (“*All-Digital Waiver Order*”) (granting limited waiver of ban on integrated set-top boxes to over 100 cable MVPDs that operate all-digital systems or will transition to all-digital systems by February 17, 2009). The Media Bureau previously granted similar waivers to three other MVPDs that had committed to all-digital operations. *Id.* at para. 4.

¹⁵² See Comments of NCTA at 19 & n.35 (noting Comcast plans to eliminate 38 channels on its expanded basic analog tier to reclaim the bandwidth for digital signals).

¹⁵³ *First Report and Order*, 16 FCC Rcd at 2602, para. 7 (citing *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, *et al.*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 20845, 20871, para. 65 (2000) (clarifying that cable systems ultimately are obligated to accord “must-carry” rights to local broadcasters’ digital signals)).

must be viewable by all subscribers.¹⁵⁴

46. However, even if we were to find that the second option implicates a First Amendment interest beyond that inherent in the must-carry mandate for digital signals already adopted by the Commission or, for that matter, that the second option did not represent a realistic choice for cable operators, we would still conclude that our approach here is constitutional because we believe that *both* options for complying with the viewability mandate are fully and independently consistent with the First Amendment.

47. *Content-Neutral Regulation.* As articulated by the Supreme Court in *Turner II*, “[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”¹⁵⁵ There can be little argument that must-carry obligations are content-neutral regulations. The Supreme Court held in *Turner I* that must-carry does not “distinguish favored speech from disfavored speech on the basis of the ideas or views expressed” but is instead a content-neutral regulation subject to intermediate-level scrutiny under the First Amendment.¹⁵⁶ Similarly, with respect to the first option provided to cable operators today, requiring downconversion of digital signals does not distinguish speech on the basis of content; it merely requires cable operators to carry whatever message the must-carry stations choose to transmit. We thus reject the notion that ensuring that cable subscribers with analog television sets are able to view must-carry stations reflects an “effort to exercise content control” that triggers strict scrutiny.¹⁵⁷ With respect to the “all-digital” option, we do not think that permitting cable operators to fulfill their must-carry obligations by providing digital must-carry signals that are viewable by all of their subscribers changes the analysis. This option does not distinguish speech on the basis of content; instead, it simply requires that subscribers can view broadcasters’ digital signals – regardless of the content those signals contain.

48. We also reject the argument that, in light of “enormous technological and market changes,” a First Amendment challenge to must-carry regulations today would be subject to strict scrutiny.¹⁵⁸ This argument is premised on the mistaken notion that the Supreme Court applied intermediate scrutiny to

¹⁵⁴ NCTA’s contention that the second option represents an impermissible “time, place and manner restriction” is also inapposite. Comments of NCTA, Appendix A at 32-33. To the extent that cable operators wish to continue transmitting analog signals to their customers, they are free to do so under the first option set forth above. If, however, cable operators choose to comply with the viewability mandate by ensuring that all customers are able to view digital signals rather than downconverting, then there is no legitimate reason why such operators would continue to transmit any analog signals. Indeed, NCTA itself admits that the purpose of such analog transmissions would be to provide service to “those television households who rely on analog TVs and who do not want converter boxes cluttering up their homes... .” *Id.* at 33. Continuing analog service to subscribers who do not have digital equipment, purporting to satisfy the second option, would constitute a clear circumvention of the statute’s viewability mandate.

¹⁵⁵ *Turner II*, 520 U.S. at 189 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

¹⁵⁶ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994) (“*Turner I*”). See also *Satellite Broadcasting and Communications Ass’n v. FCC*, 275 F.3d 337, 353-55 (concluding that “carry one, carry all” rule is a content-neutral measure and thus subject to intermediate scrutiny).

¹⁵⁷ See Comments of Time Warner at 11 (quoting *Turner I*, 512 U.S. at 652).

¹⁵⁸ Comments of NCTA at 15-16, Appendix A, 6-13.

must-carry regulation due to the existence of cable market power. The Court made clear, however, that the applicable level of scrutiny was tied to the content-neutral character of must-carry regulation.¹⁵⁹ Like the regulations upheld in the *Turner* decisions, requiring cable operators to down-convert digital must-carry signals or make such signals viewable by all subscribers is a content-neutral regulation that guarantees the carriage of broadcast programming regardless of content and is not designed to promote speech of a particular content.

49. Moreover, to the extent cable operators' arguments about market power are meant to suggest that they no longer represent the threat to free, over-the-air broadcasting that drove the *Turner* decisions, the evidence convinces us otherwise. Although it faces competition by DBS operators and others, the cable industry by far remains the dominant player in the MVPD market, commanding approximately 69 percent of all MVPD households.¹⁶⁰ By contrast, the percentage of households that rely on over-the-air broadcast signals has declined significantly since the *Turner* decisions. In 1992, 40 percent of American households continued to rely on over-the-air signals for television programming.¹⁶¹ Today, however, that figure has shrunk to 14 percent.¹⁶² The shift in the competitive balance between broadcast and cable can also be seen in viewership trends. Between 1995 and 2006, ad-supported cable channels' total day share of the market increased from 28 to 49.5 percent, whereas the total day share of ABC, CBS, and NBC affiliates shrunk precipitously from 44 percent to 23.5 percent.¹⁶³ As cable capacity and the number of cable programming networks have grown, the fragmentation of the market for video programming has accelerated, further weakening broadcast stations.¹⁶⁴

¹⁵⁹ See *Turner I*, 512 U.S. at 647 (rejecting argument that the must-carry regulations are content-based because Congress's overriding objective of preserving access to free television programming "is unrelated to the content of expression disseminated by cable and broadcast speakers"); *id.* ("The design and operation of the challenged provisions confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech."); *Turner II*, 520 U.S. at 225-26 (Breyer, J., concurring in part) (joining the majority opinion (and providing the fifth vote) "except insofar as [it] . . . relies on an anticompetitive rationale").

¹⁶⁰ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2503, 2506, para. 8 (2006) ("*Twelfth Annual Video Competition Report*") (69.4 percent of MVPD subscribers received video programming from a cable operator). While the number of DBS subscribers has increased since the Supreme Court's *Turner* decisions, there is no evidence in the record that DBS places meaningful pressure on cable operators to carry all broadcast stations.

¹⁶¹ *Turner II*, 520 U.S. at 190.

¹⁶² *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2552, para. 96, 2617, Appendix B, Table B-1.

¹⁶³ NCTA 2007 Industry Overview at 9 (available at http://i.ncta.com/ncta_com/PDFs/NCTA_Annual_Report_04.24.07.pdf) (visited August 15, 2007). The total day share of all other TV sources declined slightly between 1995 and 2006 from 28 to 27 percent. *Id.* See *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2579, para. 165 (for two years, the combined audience share of all cable programmers has been higher than the combined share of all broadcast TV stations for daytime and prime time viewing).

¹⁶⁴ See Letter from Helgi C. Walker, Wiley, Rein & Fielding, LLP, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 98-120 (filed June 2, 2006), attaching study titled *Promoting the Public Interest Benefits of Broadcasting in the New Millennium: The FCC Can and Should Update Its Existing Carriage Regulation to Meet the Demands of the Digital Age* ("*Promoting the Public Interest*"), at 12 ("The increase in the number of available sources of video programming -- which remains ongoing due to innovation -- has fundamentally altered the environment that broadcasters face by placing them in the midst of an increasingly fragmented market.").

50. In addition, cable operators continue to “exercise ‘control over most (if not all) of the television programming that is channeled into the subscriber’s home [and] can thus silence the voice of competing speakers with a mere flick of the switch.’”¹⁶⁵ As in 1992, few consumers have the choice of more than one cable operator.¹⁶⁶ Cable systems also are more clustered than they were in 1992.¹⁶⁷ While clustering may have beneficial effects, the Supreme Court has recognized that it also may increase cable’s threat to local broadcasters and the risk of anticompetitive carriage denials.¹⁶⁸ Furthermore, the share of subscribers served by the 10 largest multiple system operators (“MSOs”) has continued to accelerate since Congress recognized a trend toward horizontal concentration of the cable industry, “giving MSOs increasing market power.”¹⁶⁹ The figure was nearly 54 percent in 1989 and over 60 percent in 1994.¹⁷⁰ The figure remains over 60 percent in 2005.¹⁷¹ And there remains a significant amount of vertical integration in the cable industry. In 2005, approximately 22 percent of the 531 nonbroadcast video programming networks were vertically integrated with at least one cable operator.¹⁷² “Congress concluded that vertical integration gives cable operators the incentive and ability to favor their

¹⁶⁵ *Turner II*, 520 U.S. at 197 (internal quotes and citations omitted).

¹⁶⁶ *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2570, para. 144 (“Relatively few consumers ... have a second wireline alternative, such as an overbuild cable system, as indicated by the small number of subscribers to BSPs [broadband service providers] and the limited entry by LEC[s] thus far. Several other MVPD technologies, such as private cable systems and wireless cable systems, offer consumers alternatives to incumbent cable services, but only in limited areas, and their overall share of the MVPD market has declined from 3.29 percent to 2.88 percent over the last year” (internal citations omitted)). See *Turner II*, 520 U.S. at 197.

¹⁶⁷ *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Petition for Reconsideration of ABC Television Affiliates Association, CBS Television Network Affiliates Association, NBC Television Affiliates, ABC Owned Television Stations, NBC and Telemundo Stations (April 21, 2005) (“*Network Affiliates Petition*”) at 18; *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2509, para. 20 (at the end of 2004, there were 118 clusters with approximately 51.5 million subscribers). See *Turner II*, 520 U.S. at 206 (noting evidence on remand of trend toward clustering).

¹⁶⁸ See *Turner II*, 520 U.S. at 207 (“The FTC study the dissent cites ... concedes the risk of anticompetitive carriage denials is ‘most plausible’ when ‘the cable system’s franchise area is large relative to the local area served by the affected broadcast station,’ and when ‘a system’s penetration rate is both high and relatively unresponsive to the system’s carriage decisions.’ That describes ‘precisely what is happening’ as large cable operators expand their control over individual markets through clustering. As they do so, they are better able to sell their own reach to potential advertisers, and to limit the access of broadcast competitors by denying them access to all or substantially all the cable homes in the market area”) (citations omitted); *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2574, para. 154 (noting that, in the license transfer proceeding relating to the sale of Adelphia’s systems to Comcast and Time Warner, in which the transfer of systems will enlarge or consolidate various clusters owned by Comcast and Time Warner, BellSouth “argues that consolidation and clustering in the cable industry increases the ability of cable operators to gain exclusive contracts with unaffiliated cable networks” (citation omitted)).

¹⁶⁹ *Turner II*, 520 U.S. at 197.

¹⁷⁰ *Id.* at 197, 206.

¹⁷¹ See *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2620, Appendix B, Table B-3. This figure includes cable MSOs only. Including DBS operators DirecTV and Echostar, the top 10 MSOs serve 88 percent of subscribers. *Id.*

¹⁷² *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2575, para. 157.

affiliated programming services.”¹⁷³

51. The incentives that the *Turner II* Court recognized for cable operators to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advertisers also have steadily increased. The Court explained that:

Independent local broadcasters tend to be the closest substitutes for cable programs, because their programming tends to be similar, and because both primarily target the same type of advertiser: those interested in cheaper (and more frequent) ad spots than are typically available on network affiliates. The ability of broadcast stations to compete for advertising is greatly increased by cable carriage, which increases viewership substantially. With expanded viewership, broadcast presents a more competitive medium for television advertising. Empirical studies indicate that cable-carried broadcasters so enhance competition for advertising that even modest increases in the numbers of broadcast stations carried on cable are correlated with significant decreases in advertising revenue for cable systems. Empirical evidence also indicates that demand for premium cable services (such as pay-per-view) is reduced when a cable system carries more independent broadcasters. Thus, operators stand to benefit by dropping broadcast stations.¹⁷⁴

In addition, the Court observed that “[t]he incentive to subscribe to cable is lower in markets with many over-the-air viewing options.”¹⁷⁵

52. Consistent with the *Turner II* Court’s analysis, the evidence confirms that local advertising revenue has become an increasingly important source of revenue for the cable industry, “providing a steady, increasing incentive to deny carriage to local broadcasters in an effort to capture their advertising revenue.”¹⁷⁶ For example, between 1992 and 2003, cable revenue from local advertising rose

¹⁷³ *Turner II*, 520 U.S. at 198 (internal quotes and citations omitted); *id.* at 200 (noting evidence on remand of “cable industry favoritism for integrated programmers”).

¹⁷⁴ *Turner II*, 520 U.S. at 200-01 (citations omitted). *See id.* at 203-04 (finding substantial evidence that advertising revenue would be of increasing importance to cable operators as cable systems mature and penetration levels off). Cable subscribership has been declining slightly. *See Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2617, Appendix B, Table B-1.

¹⁷⁵ *Turner II*, 520 U.S. at 201.

¹⁷⁶ *Id.* at 203. *See Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2521, Table 4 (showing 12% increases in cable industry local advertising revenues from 2003 to 2004 and from 2004 to 2005), 2551, para. 94 (cable programming networks experienced a 17.7% increase, to \$16.4 billion, in advertising revenue in 2004, compared to \$14 billion in 2002); *Network Affiliates Petition* at 18 n.67 (“The industry’s revenue from local advertising increased an estimated 13.5% from 2003 to 2004”) (citations omitted); *Carriage of Digital Broadcast Signals*, CS Docket No. 98-120, Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Ass’n (filed Jan. 8, 2004) (“NBC Factual Submission”), at 11-12, 15 n.39 (cable operators are encroaching on broadcasters’ advertising base); *Carriage of Digital Broadcast Signals*, CS Docket No. 98-120, Special Factual Submission by the CBS Television Network Affiliates Association in Support of Multicast Carriage Requirement (filed Jan. 13, 2004) (“CBS Factual Submission”) at 14-15 (“cable operators have experienced a dramatic rise in advertising revenue to the detriment of local broadcasters”).