

APPENDIX B

Initial Regulatory Flexibility Analysis For the *Third Further Notice*

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible economic impact on a substantial number of small entities by the policies and rules proposed in this *Third Further Notice of Proposed Rulemaking* (“*Third Further Notice*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Third Further Notice* as indicated on the first page of the Order. The Commission will send a copy of the *Third Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).² In addition, the *Third Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposals

2. This *Third Further Notice* seeks comment on several detailed issues related to the major questions about material degradation and viewability after the transition. Our goal in this proceeding is to determine how best to implement the requirements adopted in the *Third Report and Order* when digital broadcasters seek mandatory carriage for their digital signal after February 17, 2009, the date established by Congress as to when analog service must cease.⁴ We ask how the channel positioning rules should apply to operators carrying more than one version of a station’s signal, and seek comment on a proposal that on systems that provide analog service, the analog version be physically located on the appropriate channel as determined by the channel placement rules, and that the version as broadcast appear on that same channel for digital subscribers who can view it. We also seek comment on the practicality and wisdom of a proposal for multiple digital versions of a signal to appear on the same channel from a subscriber perspective. We generally seek comment on the issue of changing display formats during downconversion, and note two proposals offered by commenters. We seek comment on the applicability of the material degradation rules adopted by the associated Report and Order. We ask whether the current notice rules are sufficient to enforce the requirement that cable operators notify their subscribers if they decide to become an all-digital system, and if not what changes are necessary. We again ask for alternative rules that would “minimize the economic impact for small cable operators while still complying with the statutory requirements,”⁵ request comment on the appropriate small business size standard to use under these rules, and seek any further proposals to minimize the impact on small cable operators, whether they are alternative rules, ameliorated timetables, or any other approaches that would conform to the requirements of the statute. We offer for comment specific proposals raised by ACA and other commenters. Finally, we welcome comment on any other matters relating to material degradation and viewability, and particularly the proper and sufficient application of the rules in this Order.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ See Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2006). Among other things, Title III, entitled the Digital Television Transition and Public Safety Act of 2005, establishes a hard deadline of February 17, 2009, for the end of analog transmissions by full power television stations.

⁵ *Second Further Notice* at para. 12.

B. Legal Basis

3. The authority for the action proposed in this rulemaking is contained in Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 534, and 535.

C. Description and Estimate of the Number of Small Entities To Which the Proposals Will Apply

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.⁶ The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁹ The rules we may adopt as a result of the comments filed in response to this *Third Further Notice of Proposed Rulemaking* will primarily affect cable operators and television stations. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

5. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”¹⁰ The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having \$13.5 million or less in annual receipts.¹¹ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.¹² Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹³ Thus, under this size standard,

⁶ 5 U.S.C. § 603(b)(3).

⁷ 5 U.S.C. § 601(6).

⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register”.

⁹ 15 U.S.C. § 632.

¹⁰ U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

¹¹ 13 C.F.R. § 121.201, NAICS code 517510.

¹² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹³ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

the majority of firms can be considered small. We note, however, that the proposals at issue in this *Third FNPRM* only apply at this time to cable operators,¹⁴ and not other MVPD providers.¹⁵

6. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.¹⁶ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.¹⁷ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.¹⁸ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.¹⁹ Thus, under this second size standard, most cable systems are small.

7. *Cable System Operators.* The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²⁰ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²¹ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²² We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²³ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

¹⁴ The proposals would also apply to OVS operators.

¹⁵ On this point, we note that the proposals do not, for example, apply to DBS services.

¹⁶ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

¹⁷ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

¹⁸ 47 C.F.R. § 76.901(c).

¹⁹ Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

²⁰ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²¹ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

²² These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²³ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's Rules. See 47 C.F.R. § 76.909(b).

8. *Television Broadcasting.* The proposed rules and policies apply to digital television broadcast licensees, and potential licensees of digital television service. The SBA defines a television broadcast station as a small business if such station has no more than \$13 million in annual receipts.²⁴ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”²⁵ According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on October 18, 2005, about 873 of the 1,307 commercial television stations²⁶ (or about 67 percent) have revenues of \$12 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations²⁷ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

9. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

10. *Other Program Distribution.* The SBA-recognized definition of Cable and Other Program Distribution includes other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS and OVS. This definition provides that a small entity is one with \$13.5 million or less in annual receipts.²⁸ As previously noted, according to the Census Bureau data for 2002, there were a total of 1,191 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,087 firms had annual receipts of under \$10 million and an additional 43 firms had receipts of \$10 million or more, but less than \$25 million. The Commission estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

11. Concerning ITFS, we note that educational institutions are included in this analysis as

²⁴ See 13 C.F.R. § 121.201, NAICS Code 515120.

²⁵ *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

²⁶ Although we are using BIA’s estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1,368. See *News Release*, “Broadcast Station Totals as of June 30, 2005” (dated Aug. 29, 2005); see <http://www.fcc.gov/mb/audio/totals/bt050630.html>.

²⁷ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

²⁸ 13 C.F.R. § 121.201, NAICS code 517510. This NAICS code applies to all services listed in this paragraph.

small entities.²⁹ There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

12. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “[t]his industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”³⁰ The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.³¹ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.³² Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.³³ Thus, under this size standard, the majority of firms can be considered small.

²⁹ In addition, the term “small entity” under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

³⁰ U.S. Census Bureau, 2002 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

³¹ 13 C.F.R. § 121.201, NAICS code 334220.

³² U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

³³ *Id.* An additional 18 establishments had employment of 1,000 or more.

D. Description of Projected Reporting, Record Keeping, and other Compliance Requirements for Small Entities

13. The *Third Further Notice* seeks comment on a number of proposals and issues that deal with implementation of the rules adopted in the *Third Report and Order*. Small cable operators currently have obligations with respect to carriage of local commercial and non-commercial broadcast stations which vary according to the size of the cable system. As with existing statutory and regulatory requirements, small cable operators will need engineering and legal services to comply with the proposed rules, but if the proposed rules are implemented we do not anticipate that this need will be any different for small operators than for large operators. The *Third Further Notice* solicits alternative approaches that would reduce the burden on small cable operators of compliance with the rules established in the *Third Report and Order* while still complying with statutory requirements. Small broadcast stations would also be affected by the proposed rules and other issues raised in the *Third Further Notice*, and their costs could increase under some of the commenter proposals discussed in the *Third Further Notice*. Also, initially, broadcasters may need additional legal services.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.³⁴ We seek comment on the applicability of any of these alternatives to affected small entities.

15. The requirements proposed in the *Third Further Notice* would in most cases create minimal economic impact on small entities, and in some cases could provide positive impact. Broadcast stations, including small entity stations, are afforded the flexibility to elect mandatory carriage of their digital signal or elect to negotiate carriage with cable systems. Station licensees and other parties are encouraged to submit comment on the proposals' impact on small television stations. Every effort will be made to minimize the impact of any adopted proposals on cable operators. In this IRFA, we seek comment on whether there is a specific legal basis for affording operators that qualify as small systems special consideration in this regard. Finally, we are mindful of the potential concerns of small entities and will, therefore, continue to carefully scrutinize our policy determinations going forward. We invite small entities to submit comment on how the Commission could further minimize potential burdens on small entities if the proposals provided in the *Third Further Notice*, or those submitted into the record, are ultimately adopted.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

16. None.

³⁴ 5 U.S.C. § 603(c)(1) – (c)(4).

APPENDIX C

Amended Rules¹

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 – Multichannel Video and Cable Television Service

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 336, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.56 is amended by adding new subsections (d)(3), (d)(4) and (d)(5) and revising subsection (e) to read as follows:**§ 76.56 Signal carriage obligations.**

* * * * *

(d) Availability of signals.

* * * * *

(3) The viewability and availability requirements of this section require that, after the broadcast television transition from analog to digital service for full power television stations cable operators must either:

(i) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or

(ii) for all-digital systems, carry those signals in digital format, provided that all subscribers, including those with analog television sets, that are connected to a cable system by a cable operator or for which the cable operator provides a connection have the necessary equipment to view the broadcast content.

(4) Any costs incurred by a cable operator in downconverting or carrying alternative-format versions of signals under §76.56(d)(3)(i) or (ii) shall be the responsibility of the cable operator.

(5) The requirements set forth in paragraph (d)(3) of this section shall cease to be effective three years from the date on which all full-power television stations cease broadcasting analog signals, unless the Commission extends the requirements in a proceeding to be conducted during the year preceding such date.

(e) Calculation of Broadcast Signals Carried

When calculating the portion of a cable system devoted to carriage of local commercial television stations under paragraph (b) of this section, a cable operator may count the primary video and program-related signals of all such stations, and any alternative-format versions of those signals,

¹ Changes are indicated in bold.

that they carry.

3. Section 76.62 is amended by revising subsection (b) and adding subsection (e) to read as follows:

§ 76.62 Manner of carriage.

* * * * *

(b) Each **digital** television broadcast signal carried shall be carried without material degradation. **Each analog television broadcast signal carried shall be carried without material degradation and in compliance with technical standards set forth in subpart K of this part.**

(c) Each local commercial television station whose signal is carried shall, to the extent technically feasible and consistent with good engineering practice, be provided no less than the same quality of signal processing and carriage provided for carriage of any other type of standard television signal.

(d) Each qualified local noncommercial educational television station whose signal is carried shall be provided with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried.

(e) If a digital television broadcast signal is carried in accordance with § 76.62(b) and either (c) or (d), the carriage of that signal in additional formats does not constitute material degradation.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

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

I am pleased with the action that the Commission takes today. With the adoption of this Order, cable operators will be obligated to ensure that all of their customers will be able to watch all broadcast stations after the digital transition.

This item, at its core, is about the consumer. It is about ensuring that all Americans with cable – regardless of whether they are analog or digital subscribers – are able to watch the same broadcast stations the day after the digital transition that they were watching the day before the transition. If the cable companies had their way, you, your mother and father, or your next door neighbor could go to sleep one night after watching their favorite channel and wake up the next morning to a dark fuzzy screen. This is because the cable operators believe that it is appropriate for them to choose which stations analog cable customers should be able watch. It is not acceptable as a policy matter or as a legal matter. The 1992 Cable Act is very clear. Cable operators must ensure that all local broadcast stations carried pursuant to this Act are “viewable” by all cable subscribers. Thus, they may not simply cut off the signals of these must-carry broadcast stations after the digital transition. The Order we adopt today prevents the cable operators from doing just that.

To put this in perspective, according to Commission staff calculations, there are approximately 15 million households with more than 30 million television sets that rely on over-the-air signals - that is, do not subscribe to any cable or satellite service. But there are over 40 million homes with 120 million analog cable television sets. Thus, in the absence of the action we took today, some broadcast stations would have become unwatchable on these 120 million television sets. And, millions of consumers will be disenfranchised.

Importantly, in the item we adopt today, we do not dictate how cable operators must fulfill their statutory requirement to make all broadcast signals viewable to its subscribers. Rather, we give them a choice. Accordingly, the Commission is not forcing consumers to purchase or lease a set top box to continue watching their favorite channels. This decision lies in the hands of the cable company. They can avoid the need for new boxes by choosing to downconvert the digital signal into analog at their headend. This downconversion would permit analog cable subscribers to continue watching broadcast television just as they do today without disruption. Of course, to the extent that a cable system is all-digital, like DBS systems are, all consumers are given a box that allows them to watch all of the broadcast stations.

Significantly, the statute's viewability requirements do not contain an exception for small cable operators. And, there was not much in our record to justify carving out some subset of such operators from the rules we adopt today. Although I believe that the benefits of the digital transition should be shared by all Americans, I also have sympathy for the constraints of very small cable systems. For this reason, we will allow these providers to file waivers to the extent they can show that they do not have the capacity to carry another digital channel. And, we have sought comment in a FNPRM as to whether we should adopt some different rules for a small subset of cable operators. I look forward to completing this proceeding in the next six months - well in advance of the February 2009 transition - so that these operators have sufficient notice of their obligations.

Today's item guarantees that consumers will be able to watch all broadcast stations at least until February 2012. In advance of this date, the Commission will review whether these rules continue to be

necessary to protect consumers. Some of the factors that I believe are important for the Commission to consider in its review are the extent to which consumers still rely on analog cable service, the state of the cable systems' conversion to digital, how customers have fared under the digital transition (including any added costs or service disruption they may experience), and the extent to which additional resources have been allocated by Congress to help consumers manage the transition.

The American consumer is, and continues to be, our highest priority. Without the proper policies in place, some viewers may be left in the dark or be unable to realize the full opportunities offered by digital technology. This is just one of numerous policy proceedings that the Commission has undertaken to facilitate the nation's transition from analog to digital television. During the next 17 months, we plan to issue additional orders that will adjust our rules and policies in anticipation of the transition on February 17, 2009. We are committed to taking whatever actions are necessary to minimize the potential burden the digital transition could impose on consumers and maximize their ability to benefit from it.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

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

The Digital Television Transition, as Americans will come to understand—I hope sooner rather than later—brings new services to consumers, but new challenges, too. It can be a multi-faceted opportunity or a hydra-headed monster. We'll know which it is in 17 months and seven days. And which it is depends entirely on the efforts of industry and government between now and February 2009. Today's Order broaches an important part of the transition that has not received the nation's attention to the degree it merits. It is the role of cable and making sure that consumers (1) continue to receive signals when the transition occurs and (2) that these services include the best that digital technology has to offer. While this Order may seem crammed with legalisms—some might even allege technical mumbo-jumbo—it contains important news for consumers.

First, it ensures that no cable subscriber will lose access to a single broadcast station when the DTV transition occurs on February 17, 2009. That is, cable subscribers can rest easy that night knowing they will awaken in the morning to the same complement of broadcast stations on cable they received the night before. This Order provides much needed assurance for the large percentage of U.S. households that receive their programming via cable.

Second, although the obligation imposed today to make broadcast signals viewable on analog sets presumptively expires in 2012, the Commission pledges to conduct a formal review of the rule during its final year. That is, like the program access exclusivity ban we are considering today, the Commission will examine the viewability requirement to determine whether and how it should be extended. This review will need to focus on such relevant factors as: (1) minimizing potential cost and service disruption to consumers; (2) the state of cable systems' conversion to digital; (3) technological and other marketplace developments; and (4) the impact on other cable services. I am pleased that my colleagues have agreed to begin collecting, via industry reporting, some of the key underlying data that will inform the Commission's ongoing decision-making process.

Third, the Order ensures that cable subscribers have access to broadcasters' pristine digital signals on day one. So if a broadcaster has made the investment to transmit in HD, that's exactly what cable subscribers will get. That obligation never sunsets and should provide an additional incentive for cable subscribers to purchase digital equipment. While I would have preferred an accommodation for small cable systems in the present Order, I am pleased that we agree to complete the Further Notice within six months—well before the February 2009 effective date of the requirement.

We have 525 days until the end of analog broadcasting. In a transition this massive and with so many moving parts, that's precious little time. With such little time, so many people to inform and so much to do, it's time to get everyone's focus and everyone's efforts on making the DTV transition something we can look back on with pride rather than sour memories. Again, it can go either way.

I know the Bureau worked mightily on this item and I thank them for that, and I am grateful to my colleagues who worked so hard and clocked so many miles walking the Eighth floor to achieve workable agreement. (I notice the carpet is wearing out up there, which is another reason to modify the closed meeting rule so we can come together as a body and achieve consensus without all the inter-office commuting.)

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, DISSENTING IN PART**

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

Today, the Commission acts to ensure that, at the end of the national transition to digital television (DTV), cable operators will not disenfranchise their viewers. We take important steps to ensure that digital broadcast signals of must-carry stations will be carried on cable systems and consumers, including analog cable subscribers, will be able to view the signals. In short, we preserve the vitality of the free over the air broadcasting system, and ensure that the critical public interest value of broadcast television is enjoyed by cable consumers.

The useful attention we are providing to protecting the vitality of our over-the-air system stands in stark contrast to the outright dereliction of our duty in fulfilling the obligation to protect other interests of American viewers during this DTV transition. Since 1999, the Commission has failed to act on defining the public interest obligations of digital TV broadcasters. Today, I again implore my colleagues to act on this critical issue.

Since, as the *Order* makes clear, “must-carry requirements serve the important and interrelated governmental interests of (1) preserving the benefits of free, over-the-air local broadcast television; and (2) promoting the widespread dissemination of information from multiplicity of sources,” *Order* at ¶ 54, we should fulfill the congressional mandate to define the “benefits” broadcasters are required to provide the American viewer. The *Order* dwells on the point that “[b]roadcasters denied carriage on cable systems lose a substantial portion of their audience, which, in turn, translates into lost advertising revenues.” *Id.* There is no mention, however, about how broadcasters will serve the public in the digital era. This stark omission belies the integrity of this Commission’s commitment to advancing the DTV transition in the interests of American consumers. See Recommendations of the FCC Consumer Advisory Committee.

The Commission’s hitherto lackluster participation in educating over-the-air viewers about the DTV transition is also troubling. While the firm DTV transition cut-off date was signed into law since February 8, 2006, the Commission has yet to develop a comprehensive, coordinated plan to educate over-the-viewers, which include some of the most vulnerable members of society. In fact, it was only last month – more than a year after the hard date was set – and only after prodding from Members of Congress -- that the Commission contemplated issuing a Notice of Proposed Rulemaking on proposals relating to DTV consumer education.

While the Commission’s effort to date – in terms of protecting consumers – has been disappointing, the broadcast, cable and consumer electronics industries have picked up the slack, and they have economic incentives to do so. The DTV Transition Coalition has done an admirable job in attempting to coordinate the efforts of industry and consumer advocacy groups. With only 525 days left, the Commission has no more time to waste.

In today’s *Order*, we endeavor to not only protect must-carry stations, but also ensure that we minimize the potential cost and service disruption to consumers. Accordingly, the Commission’s action today has much to do with allocating the burden and costs associated with the national DTV transition. But, to be sure, our guiding principle is that no over-the-air viewer or analog cable subscriber is left behind.

In this regard, the Commission has permitted a limited number of over-the-air broadcasters to turn off their analog signals and to transmit in digital only. Moreover, in the Third Periodic proceeding, the Commission is also considering whether to permit broadcasters to reduce the power of their analog signals during the transition, in order to minimize the costs associated with transmitting in both analog and digital. The net effect of these actions is that many over-the-air viewers are today required to either purchase digital TV sets or pay for a digital-to-analog converter box. If an over-the-air viewer does neither, he may be left behind before February 17, 2009.

In the cable context, the Congress, the courts, and the Commission have recognized that the relationship between a cable operator and a subscriber is different than that of the broadcaster and over-the-air viewer. Nevertheless, the Commission is required to ensure that cable subscribers are not left behind after the DTV transition. We must ensure that cable subscribers will receive a signal that is “viewable,” pursuant to Section 617(b)(7). The instant *Order* accomplishes this important goal.

Because the Commission has twice rejected mandatory dual carriage and multicast must-carry, it is important to recognize that the *Order* is not intended to be mandatory dual or multicast carriage disguised as “viewability”. The requirement that cable operators must deliver a “viewable” signal to cable subscribers is not a mandate for the Commission to specify the ways in which an operator can deliver a “viewable” signal. Nevertheless, if a cable operator fails to deliver a “viewable” signal to any cable subscriber, the Commission is obligated to protect the consumer. Cable operators must ensure that all customers can obtain the necessary equipment to view the signal. This is analogous to the need for over-the-air viewers to purchase digital TV sets or invest in a digital-to-analog converter box in order to view over-the-air signals.

Within this context of “viewability”, the *Order* provides cable operators with hybrid analog/digital systems the flexibility to carry the signals of must-carry stations in different ways, as long as all customers receive a “viewable” signal. The practical effect of this flexibility is that some cable operators could carry the analog, SD and HD signals to viewers. Other operators could carry the analog and the HD signal to viewers, when the must-carry stations broadcasts in HD only. The operator could also decide to go “all digital” and invest in set-top boxes for all of their subscribers. This solution protects consumers’ right to a “viewable” signal, and it ensures that must carry stations will be “viewable” by all cable subscribers.

We encourage cable operators to upgrade their systems and deploy solutions, such as switched digital, QAM or IPTV, to increase system capacity for more channels, enhanced services and faster broadband speeds. Such technological innovations promote efficient network management and the greater diversity of programming. But even as cable operators deploy these and other approaches, they must protect cable subscribers’ ability to view signals. Nothing in this *Order* precludes a cable operator from making available equipment – preferably for free -- that would enable subscribers to take advantage of these innovations.

In 1992, Congress determined that the preservation of free over the air television, for the benefit of cable and non-cable households, required mandating cable systems to carry all local television broadcast stations up to no more than one-third of a cable system’s capacity. The *Order* achieves this goal.

Beyond achieving the statutory goal of “viewability,” the *Order* should have better advanced the interrelated goal of promoting broadband, pursuant to section 706 of the Communications Act. The telecommunications and cable industries are the principal providers of broadband services to most Americans. And, as the Commission has stated repeatedly, encouraging the deployment of broadband is one of our primary goals

I must dissent in part because the *Order* does not provide small, often rural, cable operators a much-needed exemption from the carriage obligations in this *Order*. Unlike the major MSOs and LECs, small system operators face serious financial and technological resource constraints, and the Commission should consider these limitations moving forward. We cannot achieve our goal of promoting rural broadband if the Commission forces small rural cable operators to use their limited capacity for uses other than what the market and their customers demand, including broadband. While I am pleased that the *Order* provides for waivers, it is not fair to ask these tiny rural systems to engage lawyers in Washington when a simple exemption would have sufficed.

In terms of broadband, other than the failure to provide for small rural systems, this *Order* has come a long way to balance the needs of these systems to have the capacity to deliver the higher speeds consumers are demanding, along with the diversity of channels that they also enjoy. Some of the proposals considered, such as shoving "all the bits" down operators' throats, even though the human eye cannot tell the difference, would have been an enormous waste of capacity that can be better deployed for broadband and programming diversity. I am pleased that reason prevailed in terms of the standard we employ to ensure there is no material degradation of the signals. Consumers are the big winners when such gratuitous regulation does not distort the marketplace incentives operators have to deliver what their customers want. Moreover, there have never been actionable complaints upheld to date complaining of material degradation.

In short, I thank all my colleagues for working together to craft a reasonable proposal that has dramatically improved from what was presented to us. Together, we achieved the paramount goal of ensuring that all cable subscribers can continue to view broadcast signals after the digital transition is complete. Now, we must attend to the overdue work of rolling up our sleeves to ensure that over-the-air viewers are better informed about the ongoing DTV transition.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

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

The 2009 digital transition presents this Commission with a number of technical legal and policy issues. At the heart of the Commission's responsibility is ensuring that American consumers continue to receive uninterrupted television signals. This goal requires us to work together- and not just as Commissioners, but as an entire industry. From cable operators to programmers to broadcasters to members of Congress, we must focus on how we can best effect a smooth and efficient transition. This item responds to concerns regarding the continued viewability of must-carry broadcast signals carried by cable operators. The Commission has made clear that such signals must be viewable on all television sets of all cable subscribers both now and after the dtv transition.

This item appropriately reinforces the requirement that must-carry broadcast signals be carried at as good a quality of signal carriage as all other signals. There can be no discrimination by cable operators between signals from a must-carry broadcaster and a cable-affiliated programmer. All have the right to the same level of viewability.

In addition, it is critical that those cable subscribers with analog-only television sets continue to receive digital signals after the transition. Requiring carriage of must-carry digital signals in both analog and digital formats for three years following the transition will give the Commission an opportunity to review the status of changes within the cable industry, as well as allow consumers to adjust to the upgraded technology. The world of digital technology is experiencing evolutionary changes. Developments in new compression technology, such as switched digital, allow cable operators to conserve valuable spectrum while providing quality video service. Other technological changes we likely cannot even anticipate at this point. For this reason we must remain flexible as we approach our rulemaking procedures. Most importantly, we must continue to approach this transition with a consumer mindset, understanding that viewers depend on television for vital news and information.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

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

We at the Commission have worked hard to establish rules and policies to ensure a smooth digital transition for broadcast television. We now turn towards a separate but related issue: addressing carriage of broadcasters' digital signals by cable operators. The Communications Act directs the Commission to ensure both that cable operators carry broadcasters' signals without "material degradation" and all cable subscribers have the ability to view their local must-carry station broadcast signals.

Regarding material degradation, the Order retains the nondiscrimination standard adopted by the Commission in 2001 with respect to digital signals and the requirement that HD signals be carried in HD. We do not adopt the "all content bits" proposal upon which we sought comment. In my opinion, our decision strikes the appropriate balance between ensuring that broadcast signals are not materially degraded and permitting cable operators to use their technology efficiently to produce both high quality video and high-speed broadband offerings for consumers. The standard we reaffirm today will permit cable operators to take advantage of technological innovations, such as switched digital and advanced compression technologies, to continue providing service to consumers with greater efficiency.

With respect to viewability, my colleagues and I endeavored to ensure that analog cable subscribers – I am one, by the way – do not lose their local must-carry stations from their channel line-ups after the digital transition. The order requires cable systems that are not "all-digital" to provide must-carry signals in analog format to their analog subscribers. This requirement will sunset three years after the broadcast digital transition hard date, with review by the Commission of the rule within the final year. However, I am concerned about the effect this Order may have on smaller cable operators, particularly those with systems of 552 MHz or less. I will urge the Commission to consider waiver requests expeditiously and grant waivers for such providers, where relief is warranted.

I thank my colleagues and the Bureau for their hard work on this item.