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	)))	CS Docket No. 98-120

COMMENTS OF CHARTER COMMUNICATIONS, INC.

Introduction

The Commission's *Further Notice* in this docket solicits comment on regulatory approaches that will "minimize the economic impact" on cable systems that lack the resources or capacity to accommodate the dual carriage requirements recently adopted by the Commission.[1] Charter respectfully submits that there are logical exemptions the Commission can, and should, adopt to mitigate the harmful burdens associated with dual must carry. Significantly, the Commission can provide this relief in a manner that will have minimal impact on the digital transition, as the cable systems most in need of relief serve, in aggregate, a small percentage of the nation's television households.

I. HUNDREDS OF SMALL CABLE SYSTEMS DO NOT FIT THE COMMISSION'S PROFILE FOR DUAL MUST CARRY

Charter Communications, Inc. is well situated to comment on the need for regulatory relief, because of its extensive experience with small, rural systems and with the challenges inherent to expanding channel capacity and technical capability on systems of all sizes. Of the

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[1] *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Third Report and Order and Third Further Notice of Proposed Rule Making, FCC 07-170 (released Nov. 30, 2007)("*Further Notice*").

639 U.S. counties in which Charter provides service, more than half are "majority rural," according to U.S. Census standards. Although Charter has large, high-capacity, state-of-the-art cable systems in metropolitan areas, that is not necessarily the case in the small, rural communities Charter serves. In fact, many of Charter's cable systems today still operate with an activated bandwidth of 550MHz or less. 221 of Charter's 632 lineups operate with an activated bandwidth of 550MHz or less. On average, each of these lineups serves just 1,935 subscribers, and one such system serves just 18 subscribers. As a result, although more than one-third of Charter's lineups operate at 550 MHz or less, they represent approximately 8% of Charter's customers.

Charter not only operates numerous systems with limited bandwidth, it also operates systems currently lacking digital capability. Indeed, many of Charter's systems do not currently offer any digital programming. Of Charter's 632 lineups, 106 (*i.e.*, 17% of Charter's total lineups) offer only analog service. On average, each of these analog-only systems serves just 503 subscribers. Because of their very small subscribership, these analog-only lineups in aggregate represent only 1% of all Charter customers.

Charter is greatly troubled by its ability to maintain these small, struggling cable systems and simultaneously comply with the Commission's new must carry obligations. It is much more expensive to deliver services on a per subscriber basis to less densely populated rural areas, and it is completely impractical to recover major headend and plant upgrade costs from systems that serve so few customers. Carriage rules that might make sense in large, high capacity cable systems simply make no sense for these very small, lower capacity cable systems. Given the relatively few customers affected, it is essential that the Commission provide relief from the burdens otherwise associated with dual must carry.

For example, Charter operates an analog-only system in western Michigan, in which 48 analog channels have been squeezed into 330 MHz. This system is faced with 9 local broadcasters and no way to carry them digitally. Merely to maintain carriage in analog after next year's transition will require work on towers, antennas, receivers, digital to analog conversion, and format conversion. Even assuming that the system had distribution plant capacity available (which it obviously does not), adding carriage of 9 broadcasters in digital (with high definition broadcasters carried in high definition) would require a new digital headend, multiplexing equipment, QAM modulators, and most likely HD set-top boxes for the very few customers who may have HD televisions connected to the system. The combined equipment cost is simply prohibitive.

Although these limitations are most common in systems with very limited bandwidth, the same constraints arise in systems with more activated channels. Charter's system on Tangier Island, Virginia has 750 MHz, but it remains all analog, because it serves only 33 subscribers. The technical expenses associated with offering a digital (let alone an HD) product on Tangier Island is prohibitive. Surely the interest of local broadcast stations reaching these particular customers in digital does not justify the associated headend costs. The truth is those headend costs could never be recovered from Charter's 33 customers. It would make far more sense financially for Charter to terminate local cable service entirely. In any event, losing digital access to these 33 cable subscribers (who will maintain analog access) will have no meaningful impact on the broadcast stations in this television market. These 33 cable subscribers, after all, represent less than 0.005% of the more than 700,000 television households in the Norfolk television market.

Even in situations where Charter does offer a digital product, that product is often restricted by channel capacity and headend costs. As a result, Charter sometimes provides a limited standard definition digital offering, but includes no high definition component. Charter certainly is anxious to offer a high definition product in these systems, but a variety of cost and capacity factors preclude that offering. In many cases, for example, Charter currently complements its established analog offering with less than 10 digital "multiplexes," which enables it to offer several dozen highly compressed standard definition services. Because HDTV consumes so much more bandwidth than these standard definition services, accommodating even a handful of HDTV must carry stations under the new rules would require a dramatic reduction in the number of standard definition digital services offered to Charter customers. Not only would diverse programming be lost, but the technical costs associated with providing high definition broadcast services would likely never be recovered, particularly from cable systems with fewer than 5,000 customers.

Whatever may be the merit of imposing dual must carry on systems with hypothetically available bandwidth and a large number of customers, there are some practical realities to small systems with such constraints that need to be addressed generically and immediately. Given the ubiquity of powerful satellite, telephone, and Internet competitors, cable operators have every financial incentive to upgrade systems, expand spectrum capacity, and offer more things digital, high-definition, advanced and switched. Where there is a plausible financial basis to pursue that upgrade, cable operators (like Charter) do so. The fact that there are systems today that are still at 550MHz (and even 300MHz) and other systems that offer no standard or high definition digital product is a market-based indicator that these systems do NOT have the economic underpinnings to be upgraded. Across the cable industry, the specifics may vary from system to

system: small customer base from which to recover costs, no or small digital penetration, embedded traps, high headend or distribution costs, constrained capital, or financial distress. In some cases, the system's very survival is at stake, and dual must carry could be the *coup de grace*.[2] If marginal systems are required to devote limited resources to dual must carry, it will make it that much more difficult to offer other services customers might desire, such as VOIP telephone service. Of this we can be sure: with all available economic incentives, these systems have been financially unable to build themselves into the limitless design envisioned by the rules, which could add duplicate broadcast channels and down-conversion equipment without undue financial burden or customer disruption. Relief in all of these cases would be insignificant to broadcasters, but is essential to maintain viable cable service. and to treat cable customers fairly.

II. SMALL AND CHANNEL-LOCKED SYSTEMS DESERVE RELIEF REGARDLESS OF OWNERSHIP

The Commission asks whether there should be *a priori* definitional thresholds to qualify a cable system for waiver. The economic and technical limitations of small and channel-locked systems are real, even if owned by a larger company like Charter. Thus, whether or not a particular system or operator meets definitional thresholds for a "small cable company" (≤400,000 subs), a "small cable system operator" (<677,000 subs and <$250M gross annual revenue), or a "small" business in the eyes of the SBA (≤$13.5M in annual receipts), it should *not* be disqualified from relief. Granting such relief would not be discriminatory towards broadcast stations. Charter, after all, is not vertically integrated, and it has no interest in discriminating against broadcasters. Charter is simply confronting the reality that economic and

[2] "No Country for Old Systems," *Multichannel News*, February 25, 2008, http://www.multichannel.com/article/CA6534802.html.

capacity limitations make it prohibitive to offer both an analog and digital version of every broadcast station in every system across the Company's geographically scattered footprint. Waivers are supposed to provide a "safety valve" to rules that might make some general sense but would otherwise create bizarre results in particular cases. The concerns supporting dual must carry as a general proposition must yield to other concerns in specific cases. Small and channel-locked systems deserve regulatory relief, regardless of their ownership.

III. THE COMMISSION SHOULD CATEGORICALLY EXEMPT SMALL AND CHANNEL-LOCKED SYSTEMS FROM DUAL MUST CARRY

There is no sound reason for requiring every one of these systems to prove individually to the Commission what the market has already clearly demonstrated—that they cannot be upgraded to the "imagined" technical model by the time broadcasters make the digital transition in February 2009. In September 2007, the Commission promised to resolve the waiver issue within 6 months. The need for relief is now urgent and overdue. To "minimize the economic impact on such systems," and to avoid unnecessary administrative proceedings, the Commission should immediately establish automatic regulatory exemptions. Relief from the new must carry obligation to deliver each broadcast station in both analog and digital should be automatic in any system where one or more of the following apply:

- The system has an activated channel capacity of less than 552 MHz
- The system has 5,000 or fewer subscribers
- The system is all analog.

As is evident from Charter's experience, while there may be a sizeable number of eligible systems under this criteria, relatively few customers are at issue, and all of them would continue to receive the broadcast stations at issue, albeit only in a single delivery format.

It is imperative that the Commission consider the Comments submitted in this proceeding and rule on the requested relief as soon as possible. As already explained, compliance with the new regulations imposes substantial burdens on the cable industry. It also requires considerable planning in those systems not currently equipped to comply with dual must carry. Administrative delay on the Commission's part will further complicate an already challenging situation. With February 2009 fast approaching, the cable industry's orderly planning process necessitates a prompt grant of the requested relief.

IV. THE COMMISSION SHOULD PROMPTLY GRANT INDIVIDUAL WAIVERS IN OTHER SPECIFIC CASES

As important as it is for the Commission to adopt categorical exemptions from the new dual carriage obligations, these exemptions should not be the only grounds for waiver. In the past, the Commission has been sensitive to imposing a disproportionate cost burden on small systems.[3] This *Further Notice* seems to reverse that sensitivity. For example, in prior must carry regimes, the Commission has required broadcasters to bring to the system a signal suitable for carriage on the cable operator's distribution network. Broadcasters were required to cover signal

[3] The Commission has repeatedly exempted, waived, or otherwise relieved regulatory requirements due to the disproportionate cost burden on small systems. *See, e.g., Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Second Report and Order, 12 FCC Rcd 15503, 15504 (1997) (EAS*); Charter Communications, Inc., Petition for Declaratory Relief and/or Waiver of the Commission's Emergency Alert System Requirements for Cable Television Systems*, 19 FCC Rcd 13178 (2004)(EAS); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Device and Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 20885 at ¶27 (2003) (reduced headend requirements on digital cable systems with less than 750 MHz capacity); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995)(rate regulation).

delivery costs of improved antennas, microwave relay equipment, and amplification equipment.[4] By contrast, the present order requires cable operators to bear the costs of creating an analog signal that the broadcaster does not deliver; and suggests that any unfair burden on the system would be counter-balanced by an unfair burden on a "small" broadcaster.[5] In prior must carry regimes, the Commission limited requirements to convert a broadcaster's over-the-air vertical blanking interval (VBI) or subcarrier transmission "to the extent technically feasible," defined to include situations where "only nominal costs, additions or changes of equipment are necessary."[6] In the present *Order*, where even the disputed costs of conversion equipment are in the thousands of dollars per channel, the Commission simply labels them as "modest," without elaboration or factual basis.[7] In prior signal carriage regimes, the Commission has waived carriage requirements entirely when the impact on the broadcaster was *de minimus,* given the small number of viewers potentially affected compared to the broadcaster's entire audience.[8] Here, the *Notice* reveals no apparent recognition of the disparity between heavy system burden and trivial broadcaster benefit. Technical costs of $100,000 for a system with 100,000 subscribers is $1 per subscriber, which the Commission might consider to be "modest." But those same costs spread over 500 customers soars to $200 per customer—for a duplicate channel whose carriage will also cost those system subscribers a precious choice of alternative programming.

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[4] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 at ¶28 (1993).

[5] *Further Notice* at ¶84.

[6] *Id.* at ¶82.

[7] *Further Notice* at ¶68. Compare ¶35, which acknowledges that cable operators who must actually implement dual must carry have submitted contrary evidence.

[8] *Community Tele-Communications Inc., D/B/A Scotts Bluff Cable TV*, 95 FCC 2d 239 (1983) (less than 3.24% audience loss); *Arlington Telecommunications Corporation* (Arlington County, Virginia), 65 FCC 2d 469 (1977)(loss of 12,000 homes).

Many other circumstances might also justify waiver, whether or not a system meets the automatic exemptions Charter recommends above. The customer base and operator may not be able to sustain the cost, the limits of digital tiers or tier traps might preclude dual carriage, there may be no high definition content carried on the tier, the cost burden might need to be shifted, or the impact of carrying a broadcaster on one, rather than two, channels might have *de minimus* adverse impact. The Commission should not suggest in any way that certain waivers are off limits.

V. THE COMMISSION HAS THE AUTHORITY AND RESPONSIBILITY TO WAIVE DUAL MUST CARRY

The Commission also seeks comment on the question of whether the FCC's dual carriage order is waivable. The dual carriage order is an FCC construction from a statute (Section 614) which at most requires signals to be "viewable," sometimes with the assistance of a converter box. Even without dual must carry, these signals will all be "viewable" without "material degradation" under the statute. Not only *may* the Commission-created regulatory construct for dual carriage be waived like any other rule, the Courts require it to be waivable.[9]

Waiver is not merely required under administrative procedure, but is compelled by the Constitutional forces in play. Dual carriage, after all, is a requirement that implicates *Turner Broadcasting*.[10] When the question is whether a broadcaster will be carried twice, rather than

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[9] *KCST-TV, Inc. v. FCC*, 699 F2d 1185, 1191-1192 (D.C. Cir. 1983) (vacating FCC denial of waiver request, holding that once the premise of the rule had been shown not to apply, the "logic of applying [the rule] collapses," and it was arbitrary to apply the rule. *Id.* at 1192, 1195. *See also WAIT Radio*, 418 F.2d at 1157-59 (D.C. Cir. 1969) ("[A] general rule, deemed valid because the overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.").

[10] As an initial matter, "cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System v. FCC*, 512 U.S. 622, 636 (1994).

once, none of the *Turner* justifications apply. The simple truth is that Charter is not engaged in any "favoritism" of integrated programmers; it is not seeking to disadvantage broadcast stations or preclude them from reaching audiences with advertising; there is no evidence of serious financial difficulty by the broadcast industry; no fit between the asserted interests and the means chosen to advance them; and no findings by Congress, let alone substantial evidence to support them.[11] In such a context, the Commission is required to be far more, rather than less, hospitable to waivers.

Conclusion

To treat cable customers fairly and to meet its statutory and Constitutional responsibilities, the Commission should immediately adopt an exemption from dual must carry for systems with an activated channel capacity of less than 552 MHz; 5,000 or fewer subscribers; or all-analog carriage; and it should promptly grant other waivers in individual circumstances.

Respectfully Submitted,

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[11] *Turner Broadcasting System, Inc., et al. v. FCC*, 520 U.S. 180 (1997).