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April 28, 2008

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

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

Dear Ms Dortch:

On April 25, 2008, Diane Burstein (Vice President and Deputy General Counsel, NCTA) and I met with Rudy Brioché, Legal Advisor to Commissioner Adelstein. At our meeting, consistent with our written comments in the above-captioned proceeding, we discussed the need for the FCC to act quickly to exempt small systems from the FCC's dual carriage obligation.

We discussed the interpretation of the phrase "to the extent technically feasible" in Sec. 614(b)(4)(A). The phrase acts in the statute as a limitation on the Commission's adoption of carriage standards to insure signals of local commercial must carry television stations be carried without material degradation. The discussion was in the context of our urgent plea that the FCC include cable systems with 5,000 or fewer subscribers in an exemption to the requirement to carry the HDTV or SDTV signals of must carry stations, so long as the digital signal of the broadcaster is converted to analog and is viewable to all subscribers.

We indicated that the FCC has interpreted "technical feasibility" to include the consideration of the costs of meeting any such mandatory carriage obligation and has not given the phrase only a narrow interpretation related to so-called technical considerations. The FCC made that clear when first implementing the commercial must carry requirements of the 1992 Act. It found that a requirement under a separate provision of Section 614 (addressed to carriage of program-related material) was "technically feasible" only "if it does *not require the cable operator to incur additional expenses* and to change or add equipment in order to carry such material." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 at ¶ 82 (1993) (emphasis supplied). In that same proceeding, the FCC determined that "signal carriage" of must carry stations is "technically feasible" if "*only nominal costs, addition or changes of equipment are necessary.*" *Id.* (emphasis supplied).

Operators already will be incurring additional costs simply to convert each digital must carry station to analog. Where a system has 5,000 or fewer subscribers, there may be too few customers to justify the *additional* costs necessary to carry the digital signals of must carry broadcasters in digital, too. These costs, as documented in NCTA's Comments in this proceeding, are significant.

We also note that phrases that seemingly refer only to nonfinancial factors have been explicated, as a practical matter, by the FCC to refer to cost factors. Indeed, as with the phrase "technically feasible," the FCC recognized in the cable home wiring rules that a seemingly noncost based standard like "physically inaccessible" should include a reference to relative costs. Thus, that term is defined as a location that "[w]ould add significantly to the physical difficulty *and/or cost* of accessing the subscriber's home wiring." 47 C.F.R. § 76.5(mm)(4) (emphasis added). In its recently filed brief in an appeal of what constitutes physical inaccessibility, the FCC itself argued that it had found that cost was a basis, separate from physical difficulty, for its finding that its rule that sheetrock was "physically inaccessible." Brief for Respondents, NCTA v. FCC, No. 07-1356 (D.C. Cir., Apr. 14, 2008), at 21.<sup>1</sup>

Accordingly, there is ample precedent to interpret the phrase, "to the extent technically feasible," with reference to the costs imposed by complying with the general rule. Moreover, such an approach is consistent with a logical reading of the statute.

In most cases, with enough money thrown at a problem, anything is "technically feasible." But, as the FCC has already recognized in this context, such a requirement must be read to include what is reasonably practicable. The same logic should apply here, where small systems face enormous financial burdens to provide both digital and analog signals to a very small number of subscribers.

The FCC has long understood the need for relieving small systems of regulatory burdens based on the undue costs when spread over a small customer base. In fact, the FCC in its Emergency Alerting System rules granted exemptions for systems of 5,000 or fewer subscribers because of costs, which were much less per system in that context. And under the earlier cable/telephone cross ownership rules, the FCC permitted telcos to provide cable service to populations less than 2,500 where there was no existing operator, nor any system under construction. 47 C.F.R. § 63.58 (deleted). The Commission should adopt a similar subscriber-sized approach here to avoid unnecessary waiver filings for small-sized systems.

Sincerely,

**/s/ Daniel L. Brenner**  
Daniel L. Brenner

cc: Rudy Brioché

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<sup>1</sup> The FCC stated: "Since these requirements are disjunctive, the Commission could have based its conclusion that wiring behind sheet rock was physically inaccessible on a finding *either* that accessing it would present significant 'physical difficulty' or cost. In this case, it made both findings."