

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

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

**COMMENTS OF TIME WARNER CABLE INC.**

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Time Warner Cable Inc. (“TWC”) hereby submits the following comments in response to the Fourth Further Notice of Proposed Rulemaking and Declaratory Order (“NPRM”) issued in the above-captioned docket.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

The NPRM proposes to extend the Commission’s viewability rule,<sup>2</sup> which would otherwise sunset on June 12, 2012.<sup>3</sup> The viewability rule requires cable operators to ensure that all must-carry stations are “actually viewable” by all cable subscribers (a) by carrying signals in analog format to enable analog cable subscribers to receive them without additional equipment, or (b) for all-digital systems, by providing navigation devices at no charge to subscribers with analog televisions.<sup>4</sup>

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<sup>1</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, CS Docket 98-120, FCC 12-18 (rel. Feb. 10, 2012).

<sup>2</sup> *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 (2007) (“*Viewability Order*”), *pet’ns for review denied*, *C-SPAN v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008).

<sup>3</sup> NPRM ¶ 1.

<sup>4</sup> 47 C.F.R. § 76.56(d)(3). *See also* NPRM ¶¶ 1, 8.

Contrary to the NPRM’s assertion, the Communications Act of 1934, as amended (the “Act”), does not compel the adoption of the viewability rule. Rather, the Act is at least ambiguous and can reasonably be read to require that cable operators ensure “viewability” of digital must-carry signals by offering to lease or sell appropriate navigation devices to subscribers with analog televisions. Indeed, before adopting the *Viewability Order* in 2007, the Commission had taken the position that “viewable” meant *capable* of being viewed via appropriate equipment.

The First Amendment and the well-established canon of constitutional avoidance compel adoption of this narrower construction of the Act. The First Amendment accordingly precludes the NPRM’s proposed extension of the viewability rule. An extension of the viewability rule would be subject to strict scrutiny because it is a content-based regulation of speech, and it cannot satisfy that standard. Even if the requirement were subject to intermediate scrutiny, it could not stand because it fails to advance an important governmental interest and is more restrictive of cable operators’ speech than necessary to achieve the asserted interests. In addition, the NPRM fails to recognize that the rule imposes significant unwarranted burdens on consumers who are forced to pay higher prices to receive programming that they have no interest in viewing. The viewability rule has never been subjected to judicial scrutiny and would fail to pass muster if extended in today’s marketplace.<sup>5</sup>

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<sup>5</sup> In *C-SPAN*, 545 F.3d 1051, cable programmers filed a petition for review of the *Viewability Order*, but the court dismissed the petition for lack of standing and thus did not address the merits of the rule.

## DISCUSSION

### I. THE COMMUNICATIONS ACT DOES NOT REQUIRE THAT ALL SIGNALS BE “ACTUALLY VIEWABLE” WITHOUT ADDITIONAL EQUIPMENT

The NPRM notes that this proceeding “provides an opportunity for [the Commission] to determine whether extending the current rule is *necessary* to fulfill [the] statutory mandate, given the current state of technology and the marketplace.”<sup>6</sup> Relying on the statutory analysis in the *Viewability Order*, the NPRM asserts that the Commission “remain[s] ‘*bound by statute*’ to ensure that commercial and non-commercial mandatory carriage stations are actually viewable by all cable subscribers.”<sup>7</sup> By “actually viewable,” the Commission meant viewable without payment for any additional equipment, such as a set-top box. In the *Viewability Order*, the Commission stated that this requirement “is based on a straightforward reading” of two provisions of the Act.<sup>8</sup> For commercial stations, the *Viewability Order* relied on Section 614(b)(7)’s requirement that must-carry 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.”<sup>9</sup> For non-commercial stations, it relied on Section 615(h)’s requirement that must-carry signals “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.”<sup>10</sup>

Contrary to the interpretation advanced in the *Viewability Order* and repeated in the NPRM, the relevant statutory provisions do not compel the conclusion that must-carry stations

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<sup>6</sup> NPRM ¶ 5 (emphasis added).

<sup>7</sup> *Id.* ¶ 6 (emphasis added); *see also id.* ¶ 5 (“bound by statute”).

<sup>8</sup> *Viewability Order* ¶ 22; *see also id.* at ¶ 31 (“bound by statute”).

<sup>9</sup> 47 U.S.C. § 534(b)(7).

<sup>10</sup> *Id.* § 535(h).

be viewable without reliance on additional equipment. The mere fact that the *Viewability Order* provided for the sunset of the viewability rule after three years<sup>11</sup>—and that the NPRM likewise proposes to extend the rule for only three years and then reconsider it<sup>12</sup>—belies the notion that the Commission is statutorily “bound” to adhere to that interpretation. In fact, the interpretation of Section 614 adopted by the *Viewability Order* is not the most readily apparent reading of the Act, as the Commission had previously recognized. *First*, the term “viewable” in Section 614(b)(7) is at least ambiguous and does not mandate that must-carry stations be “actually viewable” with no additional equipment. Rather, it means “*capable* of being seen or inspected.”<sup>13</sup> A station plainly is capable of being viewed if it can be seen with the purchase or lease of equipment (such as a set-top box or digital terminal adapter). Thus, a cable operator should be found to comply with Section 614(b)(7)’s requirement that must-carry stations be “viewable” if it offers to lease or sell equipment to subscribers with which they could view those stations. For example, if a cable operator provides must-carry stations in digital format and then leases a digital converter box to analog subscribers, it would satisfy Section 614(b)(7). The Commission previously adopted this very interpretation of “viewable,”<sup>14</sup> belying any suggestion that the statute forecloses it.

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<sup>11</sup> See *Viewability Order* ¶ 16.

<sup>12</sup> See NPRM ¶ 14.

<sup>13</sup> Webster’s Third New International Dictionary (1993) (emphasis added).

<sup>14</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723 ¶ 16 (1994) (“Where a cable operator chooses to provide subscribers with signals of must-carry stations through the use of converter boxes supplied by the cable operator, the converter boxes must be capable of passing through all of the signals entitled to carriage on the basic service tier of the cable system, not just some of them. In addition, any converter boxes provided for this purpose must be provided *at rates* in accordance with Section 623(b)(3). Therefore, in a situation where the subscriber’s converter is supplied by the cable operator, and is incapable of receiving all signals as required by Section

This common-sense interpretation of the word “viewable” is consistent with the structure of Section 614(b)(7) and does not “confuse the separate mandates” in that Section, as the *Viewability Order* claimed.<sup>15</sup> The first sentence of Section 614(b)(7) requires that cable operators “provid[e]” must-carry stations to subscribers.<sup>16</sup> The second sentence’s mandate that must-carry stations be “viewable” imposes the additional requirement that cable operators must offer for lease or sale the equipment necessary for a subscriber to view the stations.<sup>17</sup> The third sentence of Section 614(b)(7) requires that cable operators “shall notify” subscribers who install “additional receiver connections” “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 at rates in accordance with section 623(b)(3).”<sup>18</sup> This requirement goes beyond the viewability requirement in the second sentence: in addition to offering equipment necessary for the connections the operator installs, a cable operator must notify a subscriber and offer equipment for additional connections that the subscriber may install.

*Second*, the provision governing non-commercial stations—Section 615(h)—likewise is at least ambiguous as to whether a cable operator must make non-commercial must-carry stations “actually viewable” by all subscribers. In fact, Section 615(h) does not even use the term “viewable.” Instead, it requires that must-carry signals “shall be *available* to every subscriber as part of the cable system’s lowest priced service tier that includes the retransmission of local

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614(b)(7), the cable operator must make provision for a converter which is capable of providing these signals.” (emphasis added)).

<sup>15</sup> *Viewability Order* ¶ 22.

<sup>16</sup> 47 U.S.C. § 534(b)(7).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

commercial television broadcast signals.”<sup>19</sup> A station clearly is “available” to a subscriber even if she has to lease or purchase additional equipment in order to view the station. Section 615(h) thus does not support the conclusion in the *Viewability Order* and NPRM that the statute mandates the viewability rule.

*Third*, other provisions of the Act further demonstrate that it does not mandate the interpretation set forth in the *Viewability Order* and NPRM. The *Viewability Order* and NPRM give cable operators two options: (1) carry must-carry signals in analog format or (2) in all-digital systems, ensure that all subscribers with analog televisions can view the digital signal.<sup>20</sup> The first option effectively imposes a dual carriage requirement—hybrid systems (including all of TWC’s systems) have to carry must-carry stations in analog *and* digital format. This dual carriage requirement squarely conflicts with the policy underlying Section 614(b)(5)—titled “duplication not required”—which explicitly states that a cable operator “shall not be required” to carry a signal that “substantially duplicates” another must-carry signal.<sup>21</sup> By its terms, Section 614(b)(5) applies when two different must-carry *stations* are at issue, but the same policy indicates that cable operators should not be required to duplicate the same station.

The second option allows cable operators to carry must-carry stations only in digital format, but it compels them to furnish equipment at no charge for subscribers to view the digital signals.<sup>22</sup> This free-equipment mandate ignores that subscribers could lease such equipment at

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<sup>19</sup> *Id.* §535(h) (emphasis added).

<sup>20</sup> *See* NPRM ¶ 8.

<sup>21</sup> 47 U.S.C. § 543(b)(5).

<sup>22</sup> As commenters previously explained, this theoretical “second option” is illusory as a result of the significant costs that would be imposed by converting to all-digital systems *and* providing free set-top boxes to all subscribers. *See, e.g.*, Comments of Time Warner Inc., CS Docket No. 98-120, at 3 (filed July 16, 2007) (“Time Warner Inc. Comments”); Comments of the National Cable & Telecommunications Association, CS Docket No. 98-

reasonable rates or purchase CableCARD-equipped devices. Indeed, forcing cable operators with all-digital systems to distribute navigation devices at no charge undercuts the Commission's longstanding efforts to support a retail marketplace for such devices pursuant to Section 629 of the Act. The Commission has recognized "that requiring cable operators to make available set-top boxes capable of processing digital signals for display on analog sets might be inconsistent with section 629 of the Act."<sup>23</sup>

The Commission's interpretation of Sections 614(b)(7) and 635(h) as requiring that must-carry stations be "actually viewable" conflicts with these other provisions of the Act. But there would be no conflict if Sections 614(b)(7) and 635(h) were interpreted as requiring only that cable operators offer equipment for lease or sale for subscribers to view must-carry stations. Therefore, the Act is at least ambiguous with respect to—and arguably prohibits—the NPRM's "actually viewable" requirement.

## **II. PARTICULARLY IN LIGHT OF SIGNIFICANT FIRST AMENDMENT CONCERNS PRESENTED BY THE COMMISSION'S VIEWABILITY MANDATE, THE COMMISSION SHOULD ALLOW THAT MANDATE TO SUNSET AS PLANNED**

The NPRM requests "comment on any marketplace or other changes that have since occurred that may impact [the Commission's] analysis of the constitutional issues" related to the viewability rule.<sup>24</sup> While TWC appreciates the NPRM's acknowledgment of the significant First Amendment interests at stake, the NPRM appears to accept without question the validity of the constitutional analysis adopted in the *Viewability Order* because it provides no independent

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120, at 2, 23 (filed July 16, 2007) ("NCTA Comments"); Comments of Comcast Corporation, CS Docket No. 98-120, at 34 n.102 (filed July 16, 2007). The *Viewability Order*'s claim that the viewability rule was not a "mandatory dual carriage" requirement thus is unavailing. *Viewability Order* ¶ 41.

<sup>23</sup> *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598 ¶ 80 (2001) ("*First DTV Order*").

<sup>24</sup> NPRM ¶ 16.

analysis. As discussed below, that flawed analysis based on the Supreme Court’s decisions in the *Turner* cases cannot withstand First Amendment scrutiny.<sup>25</sup> Whatever justifications may have existed for the must-carry regime in 1992 when the Cable Act was passed, they certainly do not warrant the additional burdens imposed on cable operators by the Commission’s viewability rule, particularly in light of the significant technological and marketplace developments that have taken place since that time. At a minimum, the NPRM’s interpretation of the Act as authorizing the viewability rule raises serious constitutional issues, which a court would be bound to interpret the Act to avoid.<sup>26</sup> The Commission therefore should allow the rule to sunset on June 12, 2012 without any further extension.

**A. An Order Extending the Viewability Mandate Would Be Subject to Strict Scrutiny.**

The NPRM relies entirely on the *Viewability Order*’s discussion of the constitutionality of the viewability rule.<sup>27</sup> The *Viewability Order*, in turn, concluded that intermediate scrutiny applies because the viewability rule purportedly is a content-neutral regulation of speech under the *Turner* decisions.<sup>28</sup> The *Turner* decisions do not support that conclusion, however.

In *Turner I*, a bare majority of the Supreme Court rejected the argument that the 1992 Cable Act’s must-carry requirements were content-based restrictions on speech and thus found

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<sup>25</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

<sup>26</sup> See, e.g., *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (rejecting agency interpretation of statute to avoid constitutional doubt); *Nat’l Mining Ass’n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (The “canon of constitutional avoidance trumps *Chevron* deference, and we will not submit to an agency’s interpretation of a statute if it ‘presents serious constitutional difficulties.’”) (citations omitted).

<sup>27</sup> NPRM ¶ 16.

<sup>28</sup> *Viewability Order* ¶¶ 47-53.

that intermediate scrutiny applied.<sup>29</sup> However, based on the dramatically changed circumstances that undermine the constitutional validity of must-carry as a general matter, as well as intervening Supreme Court precedent that calls into question the characterization of must-carry as content-neutral,<sup>30</sup> the stark preference for broadcast content entailed by the viewability rule is properly subject to strict scrutiny.

The Court in *Turner I* explained that the “principal inquiry” for determining whether a regulation is content-based or content-neutral is “whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”<sup>31</sup> After finding that the must-carry rules were content-neutral on their face, the Court then examined the purpose behind the 1992 Cable Act because “even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.”<sup>32</sup> Notably, the Court grounded its characterization of must-carry as content-neutral in large part on its finding that Congress’s purpose was “not to promote speech of a particular content, but to prevent cable operators from exploiting their market power to the detriment of

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<sup>29</sup> See *Turner I*, 512 U.S. at 643, 662.

<sup>30</sup> For example, in *Turner I*, the Court rejected the appellant’s argument that strict scrutiny applied because the must-carry provisions favor one set of speakers over another. 512 U.S. at 657-58. The Court reasoned that “laws favoring some speakers over others demand strict scrutiny [only] when the legislature’s speaker preference reflects a content preference.” *Id.* at 658. Since that decision, however, the Court has explained that the First Amendment prohibits both content- and speaker-based regulations. See, e.g., *Citizens United v. FEC*, 130 S.Ct. 876, 899 (2010) (“Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.” (emphasis added)).

<sup>31</sup> *Turner I*, 512 U.S. at 642 (quotation marks omitted).

<sup>32</sup> *Id.* at 645.

broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming.”<sup>33</sup>

Those congressional findings are inapposite today. Cable operators’ purported market power has evaporated based on the emergence of the Internet and other distribution channels, including but not limited to other multichannel video programming distributors (“MVPDs”). The D.C. Circuit recently recognized that, due to the increased market penetration of satellite operators and telecommunications providers that now offer MVPD services, “[c]able operators ... no longer have the bottleneck power over programming that concerned the Congress in 1992.”<sup>34</sup> The bottleneck rationale for the must-carry requirements that the Supreme Court identified in *Turner I* thus cannot be the purpose behind the viewability rule. Without this purpose, *Turner I* does not control, and the content-based character of any regulation that confers carriage preferences on broadcast stations is readily apparent.<sup>35</sup>

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<sup>33</sup> *Id.* at 649. *See also id.* at 646 (“Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable.”); *id.* at 652 (The must-carry provisions “are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems.”); *id.* at 659 (“Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry.”).

<sup>34</sup> *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). *See also infra* pp. 14-16.

<sup>35</sup> In addition to undermining *Turner I*’s content-neutrality determination, the changed circumstances also undermine the Court’s reason for rejecting the appellants’ claim that strict scrutiny applies because the must-carry provisions “single out certain members of the press—here, cable operators—for disfavored treatment.” 512 U.S. at 659. The Court explained that “heightened scrutiny is unwarranted when the differential treatment is ‘justified by some special characteristic of’ the particular medium being regulated,” which in the context of the must-carry provisions at issue was “the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.” *Id.* at 660-61. That reasoning no longer applies.

The *Viewability Order*, upon which the NPRM relies, dismissed this argument without explanation. It found “mistaken” the “notion that the Supreme Court applied intermediate scrutiny to must-carry regulation due to the existence of cable market power,” and instead asserted that the level of scrutiny “was tied to the content-neutral character of must-carry regulation.”<sup>36</sup> This assertion ignores the Court’s determination that the *purpose* of the must-carry provisions was content-neutral precisely because Congress was motivated by market dynamics, not the subject matter of the speech at issue.

In addition, the NPRM explicitly states that the Commission adopted the *Viewability Order* to further the governmental interest in “promoting the widespread dissemination of information from a multiplicity of sources” and in maintaining “the widest possible dissemination of information from *diverse and antagonistic* sources.”<sup>37</sup> Those purposes plainly are content-based.<sup>38</sup> Indeed, it is hard to see how one could label two sources as “diverse” or “antagonistic” without reference to the content of their speech.

The NPRM further confirms the content-based motivations underlying the viewability rule when it attempts to justify that requirement on the ground that “not all analog cable subscribers are covered by signals from their local must-carry stations.”<sup>39</sup> Congress’s purpose in preserving over-the-air broadcasting was limited to ensuring the availability of broadcast content to non-cable households—“to preserve access to free television programming for the [then] 40

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<sup>36</sup> *Viewability Order* ¶ 48.

<sup>37</sup> NPRM ¶ 7 (quoting *Viewability Order* at ¶ 55) (emphasis added).

<sup>38</sup> See *Turner I*, 512 U.S. at 677 (O’Connor, J., dissenting) (“Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content.”).

<sup>39</sup> NPRM ¶ 6.

percent of Americans *without cable*.”<sup>40</sup> The viewability rule, however, attempts to *expand* the availability of broadcast content *beyond* the reach of a station’s over-the-air signal. By definition this expansion of broadcast television to additional households falls outside the purpose asserted by Congress and narrowly upheld by the Supreme Court. In fact, the NPRM turns the Supreme Court’s formulation of the relevant purpose on its head by seeking to ensure the delivery to *cable* households of programming that is *not* available over the air.

In short, the governmental purpose that the Court held was content-neutral in *Turner I* does not apply. Instead, the viewability rule is content-based and thus is subject to strict scrutiny. It is “presumptively invalid,”<sup>41</sup> and to overcome this presumption, the Commission must demonstrate that the rule “is justified by a compelling government interest and is narrowly drawn to serve that interest.”<sup>42</sup> As explained below, the Commission cannot demonstrate that the viewability rule satisfies intermediate scrutiny. *A fortiori*, the same analysis shows that the viewability rule cannot come close to satisfying the “much higher” burden entailed by strict scrutiny.<sup>43</sup>

**B. Even Assuming Intermediate Scrutiny Would Apply, the Viewability Requirements Cannot Pass Muster.**

Even if a court were to determine that intermediate scrutiny applies, the Commission would bear the burden of demonstrating that the rule (i) directly advances important

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<sup>40</sup> *Turner I*, 512 U.S. at 647 (emphasis added). *See also Turner II*, 520 U.S. at 222 (emphasizing that the important governmental interest justifying the must-carry regime was “not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to *noncable* households” (emphasis added)).

<sup>41</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>42</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S.Ct. 2729, 2738 (2011).

<sup>43</sup> *Id.*

governmental interests, and (ii) does not burden substantially more speech than is necessary to promote these interests.<sup>44</sup> The viewability rule fails under both prongs.

***1. The Commission Lacks a Sufficient Interest in Requiring Cable Operators To Deliver Must-Carry Stations in Analog Format or To Distribute Navigation Devices at No Charge.***

To establish a government interest sufficient to survive intermediate scrutiny, the Commission must, as a threshold matter, “demonstrate that the recited harms are real, not merely conjectural.”<sup>45</sup> The Supreme Court made clear in *Turner I* that the Commission “must do more than simply ‘posit the existence of the disease sought to be cured’” when the regulation of speech is at issue.<sup>46</sup> Rather, the Commission may draw reasonable inferences only when supported by substantial evidence.<sup>47</sup> Likewise, the D.C. Circuit has established that the Commission is required to justify its rules based on empirical evidence rather than conjecture.<sup>48</sup>

The Supreme Court’s decisions in *Turner I* and *II* upholding the must-carry regime were entirely dependent on evidence showing that cable operators possessed market power. The Court held in *Turner I* that “[t]he must-carry provisions ... are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.”<sup>49</sup> And in *Turner II*, the Court confirmed its

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<sup>44</sup> See *Turner I*, 512 U.S. at 662; *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

<sup>45</sup> *Turner I*, 512 U.S. at 664.

<sup>46</sup> *Id.* (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

<sup>47</sup> *Id.* at 666 (citing *Century Commc’ns Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987) for the rule that “[w]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures”).

<sup>48</sup> See *Time Warner Entm’t Co., L.P. v. FCC*, 240 F.3d 1126, 1133-34 (D.C. Cir. 2001) (finding that the Commission failed to demonstrate the existence of a non-conjectural harm because it “ignore[d] the true relevance of competition”).

<sup>49</sup> *Turner I*, 512 U.S. at 661.

view that “a real threat justified enactment of the must-carry provisions,” based principally on “evidence before Congress . . . that cable operators had considerable and growing market power over local video programming markets.”<sup>50</sup>

The Commission’s decision regarding the continued application of the viewability requirements similarly must be informed by current marketplace conditions; in particular, the Commission must identify substantial evidence of market power in order to justify speech-restricting regulations under the *Turner* cases. Nevertheless, the NPRM, like the *Viewability Order* before it,<sup>51</sup> does not undertake any inquiry into whether a bottleneck problem exists *today* that could justify the burdens entailed by the viewability rule.<sup>52</sup> It instead proceeds as if the marketplace has not changed at all in the two decades since Congress enacted the 1992 Cable Act, notwithstanding its stated intention “to determine whether extending the current rule is necessary . . . *given the current state of technology and the marketplace.*”<sup>53</sup>

Despite this head-in-the sand approach, the video distribution marketplace of course is dramatically different today, and the differences undermine any constitutional foundation for compelled carriage of broadcast signals, let alone the carriage of signals in digital *and* analog formats. The most profound change is the advent of the Internet and its emergence as a primary source of video distribution. The Internet presents a virtually unlimited distribution platform that enables any programming provider—including a broadcast station—to transmit its content directly to consumers without securing carriage on a cable system (or any other MVPD

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<sup>50</sup> *Turner II*, 520 U.S. at 197.

<sup>51</sup> See *Viewability Order* ¶ 49 (acknowledging that cable operators “face[] competition by DBS operators and others”).

<sup>52</sup> Indeed, despite the significant influence of Congress’s findings regarding the state of the marketplace in 1992 on the constitutional analysis in the *Turner* decisions, the terms “market power,” “bottleneck,” and “monopoly” do not appear in the NPRM.

<sup>53</sup> NPRM ¶ 5 (emphasis added).

system).<sup>54</sup> Indeed, broadcast networks and stations today do just that, using services like Hulu and iTunes and their own websites to distribute their content.<sup>55</sup> In addition, Internet-connected television sets and a range of other IP-enabled consumer electronics equipment and navigation devices now enable viewers to toggle seamlessly among programming delivered over the air, through a cable system, and over the Internet, further facilitating access to broadcast content.<sup>56</sup>

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<sup>54</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶ 153 (2009) (“*Thirteenth Video Competition Report*”) (recognizing that “established models for the distribution of video programming are being challenged by ... technological advancements and consumers’ ability to receive video programming via alternative means, not just from traditional linear networks”).

<sup>55</sup> See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, 24 FCC Rcd 4401 ¶ 42 (2009) (“*Fourteenth Report NOI*”) (noting the increasing trend of “commercial broadcast networks [to] offer[] streaming, advertising-supported episodes of their programming on their primary web sites [and] through third-party online video sites”); *Thirteenth Video Competition Report* ¶ 150 (“As we have reported in the past, many traditional broadcast and nonbroadcast programmers, as well as many independent content producers, currently provide streaming and downloadable video content on their Internet web pages.”). See also Press Release, NBC Sports, *Super Bowl XLVI Live Stream Sets Traffic Records*, Feb. 7, 2012, <http://www.nbcumv.com/mediavillage/sports/nbc sports/pressreleases?pr=contents/press-releases/2012/02/07/superbowlxlvi1328655424503.xml> (stating that “[t]he first-ever live stream of a Super Bowl in the United States attracted 2,105,441 users, making it the most-watched, single-game sports event ever online”); Andrea Morabito, *TCA: Hulu to Premier First Original Scripted Series*, BROADCASTING & CABLE (Jan. 15, 2012, 5:00 PM), [http://www.broadcastingcable.com/article/479118-TCA\\_Hulu\\_to\\_Premiere\\_First\\_Original\\_Scripted\\_Series.php](http://www.broadcastingcable.com/article/479118-TCA_Hulu_to_Premiere_First_Original_Scripted_Series.php).

<sup>56</sup> See, e.g., *Fourteenth Report NOI* ¶ 43 (providing examples of new consumer electronics equipment “that incorporate streaming technology to enable viewers to watch IP-delivered video”); George Winslow, *Sony’s Crackle Goes Live on Xbox*, BROADCASTING & CABLE (Feb. 1, 2012, 1:09 PM), [http://www.broadcastingcable.com/article/479978-Sony\\_s\\_Crackle\\_Goes\\_Live\\_on\\_Xbox.php](http://www.broadcastingcable.com/article/479978-Sony_s_Crackle_Goes_Live_on_Xbox.php) (noting that “ESPN, Fox, HBO, EPIX and a number of others” have signed deals to deliver streaming content to Microsoft’s Xbox); Kevin Sintumuang, *Cutting the Cord on Cable*, THE WALL STREET JOURNAL (Jan. 7, 2012); Parks Associates, *Growing sales of video receivers such as Apple TV and Roku in 2011 holiday season show strong consumer appetite for OTT video* (Feb. 14, 2012), <http://www.parksassociates.com/blog/article/growing-sales-of-video-receivers-such-as-apple-tv-and-roku-in-2011-holiday-season-show-strong-consumer-appetite-for-ott-video>.

Moreover, competition among MVPDs is now robust. The two national DBS providers, DIRECTV and DISH Network, are the second and third largest MVPDs,<sup>57</sup> and telecommunications behemoths Verizon and AT&T have become major players in video distribution.<sup>58</sup> Cable operators have steadily lost market share even in an artificially narrow product market defined to include only MVPDs (and not Internet-based distribution).<sup>59</sup> For these reasons, as noted above, the D.C. Circuit concluded nearly three years ago that “[c]able operators ... no longer have the bottleneck power over programming that concerned Congress in 1992.”<sup>60</sup>

The Commission cannot simply ignore these changes (and the D.C. Circuit’s contrary conclusion) and presume that cable operators possess bottleneck control.<sup>61</sup> Absent proof of

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<sup>57</sup> See *Thirteenth Video Competition Report* ¶ 76 (reporting that “DIRECTV is the largest DBS provider and second largest MVPD,” and that “EchoStar was the second largest DBS provider and third largest MVPD”); see also National Cable & Telecommunications Association, *Top 25 Multichannel Video Programming Distributors as of Sept. 2011*, <http://www.ncta.com/Stats/TopMSOs.aspx> (“*NCTA MVPD Rankings*”) (showing that DIRECTV and DISH Network remain the second and third largest MVPDs, respectively).

<sup>58</sup> See *Thirteenth Video Competition Report* ¶¶ 132-33; *Fourteenth Report NOI* ¶ 33 (noting that Verizon FiOS and AT&T U-verse had more than doubled their subscribers in 2008 and were “continu[ing] to expand their service areas”); *NCTA MVPD Rankings* (listing Verizon and AT&T as the nation’s seventh and eighth largest MVPDs, respectively).

<sup>59</sup> See *Thirteenth Video Competition Report* ¶ 8 & App. B, Table B-1 (noting that, although “[t]he number of TV households and the number of MVPD subscribers increased in the past year,” that “cable’s share of the MVPD marketplace continues to decline,” serving 68.2 percent of MVPD subscribers as of June 2006 as compared to 69.4 percent as of June 2005). See also Nielsen Company, *The Cross-Platform Report, Q3 2011*, at 10 (Feb. 2012), <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012%20Reports/Nielsen-Cross-Platform-Report-Q3-2011.pdf> (“*Nielsen Q3 2011 Report*”) (showing that the cable industry lost more than 2.6 million subscribers over a 12-month period in 2010 and 2011, while satellite and telecommunications providers experienced steep gains during the same timeframe).

<sup>60</sup> *Comcast*, 579 F.3d at 8.

<sup>61</sup> See *Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2512, 2513 (2009) (explaining that constitutional burdens “must be justified by current needs,” and that where “there is considerable evidence” that a decades-old statute “fails to account for

market power, the Commission cannot justify the viewability rule as necessary to preserve free over-the-air broadcasting, as there is no basis for concluding that cable operators pose any threat to broadcasting today.<sup>62</sup> To the contrary, in the competitive MVPD marketplace, cable operators have every incentive to ensure the delivery of broadcast programming that subscribers find appealing, and broadcasters in any event enjoy various other distribution options. Thus, because the relevant evidence *disproves* the existence of a bottleneck, the historical market-power rationale accepted in the *Turner* cases no longer justifies compelling cable operators to carry broadcast stations.

The substantial decline in the audience for over-the-air broadcasting since the 1992 Cable Act further weakens any governmental interest in propping up the broadcast model. Even at a time when over-the-air broadcasting occupied a central role in the lives of most Americans, the Supreme Court narrowly upheld the government’s asserted interest in preserving that distribution model as sufficient to justify must-carry. Now that more than 90 percent of the population relies on subscription services for video programming,<sup>63</sup> and consumer interest in broadcast

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current . . . conditions,” a court must “not shrink from [its] duty ‘as the bulwar[k] of a limited constitution against legislative encroachments’” (quoting *The Federalist* No. 78, p. 526 (J. Cooke ed. 1961 (A. Hamilton))); *Comcast*, 579 F.3d at 9-10 (vacating the FCC’s cable ownership cap because retaining it “would continue to burden speech protected by the First Amendment” even though “[i]n light of the changed marketplace, the Government’s justification for the 30% cap is even weaker now than in 2001 when we held the 30% cap unconstitutional”).

<sup>62</sup> See *Radio-Television News Directors Ass’n v. FCC*, 184 F.3d 872, 882 (D.C. Cir. 1999) (rejecting the FCC’s retention of the personal attack and political editorial rules “to the extent that it relies on a thirty-year-old conclusion that the challenged rules survive First Amendment scrutiny”); *Time Warner Entm’t Co.* 240 F.3d at 1134 (admonishing the Commission for “seem[ing] to ignore the true relevance of competition” and the fact that “normally a company’s ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition” (emphasis in original)).

<sup>63</sup> See *Nielsen Q3 2011 Report* at 3 (noting that the “vast majority (90.4%) of U.S. TV households pay for a TV subscription (cable, telephone company or satellite”).

programming has waned,<sup>64</sup> the asserted governmental interest in preserving over-the-air broadcasting cannot easily be described as “important” or substantial,” particularly given the more valuable uses to which broadcast spectrum could be put.<sup>65</sup>

In any event, there is no reason to believe that requiring both digital *and* analog carriage of the same broadcast station is necessary to protect the viability of over-the-air broadcasting. To the contrary, as the NPRM acknowledges, the number of analog-only cable subscribers has decreased significantly.<sup>66</sup> Nor is there any evidence showing that allowing the dual carriage requirement to sunset will in any way diminish the availability or quality of broadcast programming. In light of the varied distribution options available to consumers today, any such assertion would be irrational. Whatever remnant of the government’s interest in promoting broadcast programming may remain, if any, it certainly cannot justify the significant costs that the viewability rule imposes on cable operators and consumers by forcing basic-tier carriage of, and payment of compulsory copyright fees for, analog *and* digital broadcast signals that most cable subscribers have no interest in viewing.<sup>67</sup>

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<sup>64</sup> See *Viewability Order* ¶ 49 (noting that “the total day share of ABC, CBS, and NBC affiliates shrunk precipitously from 44 percent to 23.5 percent” between 1995 and 2006). Of course, the popularity of stations affiliated with the major broadcast programming networks—which almost invariably elect retransmission consent—undoubtedly is considerably higher than that of the vast majority of must-carry stations.

<sup>65</sup> See Thomas W. Hazlett, *If a TV Station Broadcasts in the Forest ...: An Essay on 21st Century Video Distribution*, at 3 (2011) (explaining that “traditional TV broadcasting is the most expensive and the least valuable” video distribution platform because “the radio spectrum walled off for terrestrial TV broadcasts is extremely valuable in alternative uses, like mobile voice and data applications, and because newer systems – cable, telco and satellite – efficiently substitute for over-the-air video delivery”).

<sup>66</sup> See NPRM ¶ 9 (noting that analog-only cable subscribers has declined from “approximately 40 million” in 2007 to, “as of the third quarter of 2011, more than twelve million”).

<sup>67</sup> These costs include not only license payments required for dual programming streams under the compulsory copyright regime, 17 U.S.C. § 111, but additional costs associated

Dual carriage also fails to directly advance the asserted interest in promoting “the widespread dissemination of information from a multiplicity of sources.”<sup>68</sup> As the Commission has recognized in the context of multicasting, carrying multiple signals from the same broadcaster “would not enhance source diversity,” even where the signals provided different programming.<sup>69</sup> The viewability rule does even less to promote diversity in video programming, as it requires duplicative carriage of the exact same programming. In fact, mandating dual carriage under the viewability requirements actually undercuts diversity. As the Commission has acknowledged, compelled carriage of multiple signals from the same source “arguably diminish[es] the ability of other, independent voices to be carried on the cable system.”<sup>70</sup>

Even apart from these deficiencies, the Commission cannot justify singling out cable operators for unique carriage mandates with respect to broadcast programming, and the NPRM does not even try. Nor does the NPRM seek to explain why, despite acknowledging that the MVPD marketplace is now competitive, the *Viewability Order* took the position that any perceived threat to broadcast should be attributed entirely to the cable industry.<sup>71</sup> The failure to propose comparable viewability mandates for other MVPDs or online video distributors thus renders the proposed rule irrational and unsustainable under the First Amendment,<sup>72</sup> as well as

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with compliance with the dual carriage requirement, all of which lead to higher subscription prices for cable service. Section II.B.2 below discusses these burdens in greater detail.

<sup>68</sup> NPRM ¶ 7.

<sup>69</sup> *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516 ¶ 39 (2005) (“*Second DTV Order*”).

<sup>70</sup> *Id.*

<sup>71</sup> See *Viewability Order* ¶ 49.

<sup>72</sup> *Cf. Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 193 (1999) (holding that “to the extent that the purpose and operation of federal law distinguishes

arbitrary and capricious.<sup>73</sup> Likewise, the viewability rule’s application only to “cable operators,”<sup>74</sup> and not to competing MVPDs, risks violating the Fourteenth Amendment’s guarantee of equal protection.<sup>75</sup>

## **2. *The Viewability Mandate Burdens Substantially More Speech Than Necessary To Promote the Governmental Interests at Stake.***

Contrary to the suggestion in the NPRM that the burdens associated with the viewability rule are slight, they are substantial. Most significantly, the requirement to carry broadcast stations in digital and analog format for hybrid systems (including every TWC system nationwide) consumes considerable capacity and eliminates cable operators’ editorial discretion to carry programming they believe their subscribers would prefer.<sup>76</sup> The Commission has

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among information about tribal, governmental, and private casinos based on the identity of their owners or operators, the Government presents no sound reason why such lines bear any meaningful relationship to the particular interest asserted: minimizing casino gambling and its social costs by way of a (partial) broadcast ban”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (finding a regulation permitting brewers “to disclose alcohol content in advertisements, but not on labels,” could not “directly and materially advance its asserted interest because of the overall irrationality of the Government’s regulatory scheme”).

<sup>73</sup> See *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir 1996) (“A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently.” (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1983))).

<sup>74</sup> 47 C.F.R. § 76.56(d)(3).

<sup>75</sup> See *City of Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 446 (1985) (To withstand equal protection review, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *U.S. Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973))).

<sup>76</sup> *Turner I*, 512 U.S. at 636-37 (“By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech ... [by] reduc[ing] the number of channels over which cable operators exercise unfettered control[.]”).

recognized the capacity constraints confronting cable operators,<sup>77</sup> and such constraints necessarily make program carriage a zero-sum equation: The obligation to carry a broadcast station in digital and analog formats necessarily displaces other programming.<sup>78</sup>

Accordingly, the viewability rule imposes a greater burden on cable operators' speech than the must-carry rules upheld in *Turner II*. Whereas the basic must-carry mandate required cable operators to set aside capacity for each broadcast station that elected carriage under the statute, the dual carriage prong of the viewability rule compels operators to carry each broadcast signal *twice* (not to mention compelled carriage of must-carry stations' HD feeds, if made available<sup>79</sup>), thereby displacing even more programming that cable operators would prefer to carry. As noted above, the viewability rule also imposes significant burdens on cable subscribers in the form of higher prices.

As the Commission acknowledged in rejecting mandatory dual carriage on two prior occasions, these and other constraints associated with mandatory dual carriage impose burdens on “substantially more [speech] than is necessary” to promote valid governmental interests.<sup>80</sup>

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<sup>77</sup> See *Viewability Order* ¶ 60 (2007) (recognizing that cable operators operate using a finite amount of capacity). Notably, the NPRM acknowledges the availability of data “to assess ... cable system capacity constraints,” NPRM ¶ 9 n.33 (internal quotation marks and citations omitted), but cites none in support of the continued assertion that the “additional bandwidth consumed by compliance with th[e] [viewability] requirement would be ‘negligible.’” *Id.* ¶ 11 (quoting *Viewability Order* ¶ 26). The Commission is required to provide public access to data relied upon in rulemaking proceedings. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (citing *Chamber of Commerce v. SEC (Chamber of Commerce II)*, 443 F.3d 890, 899 (D.C. Cir. 2006)).

<sup>78</sup> See *Turner I*, 512 U.S. at 637 (noting that the must-carry rules “render it more difficult for cable programmers to compete for carriage on the limited channels remaining”).

<sup>79</sup> *Viewability Order* ¶ 7 (requiring that “a broadcast signal delivered in HDTV must be carried in HDTV”) (internal quotation marks and citations omitted).

<sup>80</sup> *First DTV Order* ¶ 3; see also *Second DTV Order* ¶ 15 (affirming the conclusion that “[m]andatory dual carriage would essentially double the carriage rights [of broadcasters]

The *Viewability Order*'s conclusion that "cable operators' arguments about the burdens of downconversion are undercut by their admission that they might down-convert on a purely voluntary basis" thus misses the mark.<sup>81</sup> The fact that a cable operator may exercise its editorial discretion to carry a particular must-carry station in analog format does not diminish the burdens of carrying *all* must-carry stations in analog, including many that the operator would prefer not to carry at all.

Relatedly, the Commission should reject the suggestion that, because it "ha[s] not received any complaints under [the viewability] rule, [or] ... any requests to waive it, ... the burden of compliance has been relatively minimal and that the actual costs of compliance have likely not been onerous."<sup>82</sup> That cable operators chose not to seek judicial review of the *Viewability Order* because they were willing to accommodate the Commission's interest in facilitating the DTV transition for a limited three-year period or other reasons is irrelevant.<sup>83</sup> Any decision to comply with the Commission's rules for three years can hardly be cited as evidence of an absence of burden or viewed as a waiver of any rights to object to reenactment of those rules. To the contrary, as explained above, the impact on cable operators' editorial discretion is substantial and no waiver has been granted.

The theoretical option to avoid dual carriage by going "all digital" and ensuring that all subscribers have set-top boxes or other navigation devices does not alleviate the burdens on cable operators. As commenters explained before the Commission adopted the *Viewability*

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and substantially increase the burdens on free speech *beyond those upheld in Turner*" (emphasis added)).

<sup>81</sup> *Viewability Order* ¶ 61.

<sup>82</sup> NPRM ¶ 15.

<sup>83</sup> See *Viewability Order* ¶ 18 (acknowledging that the dual carriage requirement "is in line with the approach already voluntarily planned by many cable operators" for the period immediately following the digital transition).

*Order*, it is usually impracticable for a cable operator to absorb the cost of providing such equipment for all of their subscribers' televisions.<sup>84</sup> Even apart from the prohibitive expenses, a cable operator that seeks to go all digital prematurely would risk alienating its subscribers,<sup>85</sup> who may choose to forego MVPD service altogether and, in so doing, also lose access to broadcast programming that is not receivable over the air. Accordingly, compelling cable operators to bear the full cost of furnishing all subscribers with equipment for all of their TV sets represents an "unconstitutional condition" and fails to cure the First Amendment defects discussed above.<sup>86</sup>

Moreover, just as singling out cable operators for a viewability requirement (while declining to impose such a mandate on all other video distributors) undermines the legitimacy of the asserted governmental interests, it also exacerbates the burdens on cable operators. Cable operators face stiff competition from other MVPDs and online video distributors to provide access to the widest and most appealing range of digital services possible, including new linear channels of programming, HD programming, and libraries of video-on-demand content. The dual carriage requirement places traditional cable operators at a competitive disadvantage by forcing them alone to reserve capacity for digital and analog broadcast carriage (and thereby to forego more valued use of system capacity).

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<sup>84</sup> See, e.g., Time Warner Inc. Comments at 3 n.4 (explaining that "[t]urning cable systems into 'all-digital' systems would require an enormous investment: every subscriber would have to either buy a digital TV set or lease a digital set-top box"); NCTA Comments at 2-3 (explaining that "[t]he second option is effectively no option at all," because it would impose costs estimated at \$6.3 billion).

<sup>85</sup> See Time Warner Inc. Comments at 21; NCTA Comments at 23-24.

<sup>86</sup> See Charles J. Cooper, Brian Koukoutchos and Jonathan Massey, *The Commission's Proposed Digital Carriage Requirement Would Violate the Constitution*, at 35-39 (July 16, 2007), filed as Appendix A to NCTA Comments (citing precedent explaining that "the significant costs of the [all-digital option] represent a substantial penalty on the First Amendment right of cable operators to refuse the dual carriage alternative," thus rendering the second option an unconstitutional condition).

Indeed, as consumer preferences for time-shifted viewing options continue to grow, the viewability rule works at cross-purposes with cable operators' efforts to meet those demands. In recent years, cable operators have taken steps on their own (in the exercise of their editorial judgment) to increase the availability of broadcast programming to subscribers by entering into agreements to make such programming available on demand. The viewability rule reduces the amount of capacity available to devote to such endeavors and, as a result, actually *limits* cable operators' flexibility to deliver broadcast and other programming to subscribers.

Finally, the lack of appropriate "fit" between the asserted governmental interests and the viewability rule is reflected in the rule's conflict with important Commission priorities unrelated to broadcast carriage. Most significantly, the viewability rule runs headlong into the paramount national interest in promoting expanded broadband deployment and availability.<sup>87</sup> Bandwidth freed up by the sunset of the dual carriage requirement will facilitate cable operators' ability to increase broadband capacity. Indeed, it is deeply ironic for the Commission to have spent the last few years aggressively pursuing the voluntary *return* of broadcast spectrum through incentive auctions—based on the recognition that such spectrum can be put to better use if reallocated for mobile broadband services<sup>88</sup>—only to turn around and suggest in the NPRM that

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<sup>87</sup> See, e.g., Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6001 *et seq.* (2012) (Public Safety Communications and Electromagnetic Spectrum Auctions); Statement by the President, The White House (Feb. 16, 2012) (applauding congressional agreement to pass "a critical element in the plan I outlined in the State of the Union to out-innovate the rest of the world by unleashing mobile broadband, investing in innovation, and building a nationwide public safety network"); Press Release, Federal Communications Commission, *Statement from FCC Chairman Julius Genachowski on Incentive Auction Legislation* (Feb. 16, 2012) ("I'm pleased that Congress has recognized the vital importance of freeing up more spectrum" for the deployment of broadband networks.).

<sup>88</sup> See Omnibus Broadband Initiative, *CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN*, at 89 (2010) (explaining that "the market value for spectrum used for over-the-air broadcast TV and the market value for spectrum used for mobile broadband currently

cable operators should continue to devote a considerable portion of *their* network capacity to enable dual carriage of must-carry stations. If the Commission were to prop up such stations artificially by extending the viewability rule another three years—as opposed to forcing such stations to earn carriage on the merits, like other programming providers—it would only diminish the likelihood that such broadcasters will participate in incentive auctions, and thereby undermine a core component of its own National Broadband Plan.<sup>89</sup>

### CONCLUSION

The viewability rule is deeply flawed as a matter of statutory construction and impermissibly infringes on cable operators’ First Amendment rights. The Commission therefore should allow the rule to sunset as planned.

Respectfully submitted,

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reveal a substantial gap” that militates in favor of repurposing broadcast spectrum for broadband).

<sup>89</sup> *See id.* at 88 (“The FCC should initiate a rulemaking proceeding to reallocate 120 megahertz from the broadcast television (TV) bands.”).