

**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 THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”)¹ hereby submits its comments on the Fourth Further Notice of Proposed Rulemaking (“Notice”)² in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

Almost five years ago, the Commission adopted rules governing the manner in which cable operators were to comply with their broadcast signal carriage obligations once the transition to digital over-the-air broadcasting was completed in 2009. Although the “must-carry” provisions of the Communications Act require cable operators to carry “the signals” of local broadcast stations, the Commission ruled that unless a cable system transmitted *all* its programming in digital format, the system would be required to carry must-carry stations in both digital *and* analog format for an interim period of three years.

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$185 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

² *In re Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, FCC 12-18; CS Docket 98-120* (released Feb. 10, 2012) (“Notice”).

First, the Commission found that, in order to carry signals “without material degradation,” as mandated by Section 614(b)(4), operators would have to carry a high definition (“HD”) digital version of any signal transmitted by the broadcaster in HD. Moreover, the Commission acknowledged that, depending upon the type of set-top boxes employed by cable operators and used by customers, operators might *also* have to transmit the broadcast signal in standard definition (“SD”) digital in order to make the signal viewable to customers who subscribe to (non-HD) digital tiers of programming but whose digital set-top boxes cannot make either analog or HD signals viewable on their analog television sets.

Second, in addition to carrying digital version(s) of local must-carry signals, the cable systems that had not yet transitioned to all-digital operation were required to carry “downconverted” *analog* versions of the signals to its customers. The Commission reasoned that there would “continue to be a large number of cable subscribers with legacy, analog-only television sets,” and that if the broadcast signals were provided digitally, they would not be “viewable” on those sets, as required by Section 614(b)(7) of the Act.

The Supreme Court has recognized that forcing cable operators to carry even a single version of local broadcast signals that they would otherwise choose not to carry raises serious First Amendment issues. In *Turner Broadcasting v. FCC*, the Court narrowly rejected a facial challenge to such a requirement. But the underpinnings of that decision have been substantially eroded – and, in any event, certainly do not support a requirement that signals be carried in analog instead of, much less *in addition to*, digital SD or HD. The Court found that when a cable system chose not to carry a station *at all*, there was no way for that system’s customers to view the station – and there were typically no multichannel alternatives to the cable system. Today, vibrant competition from Direct Broadcast Satellite (“DBS”) and telephone company

multichannel services has eliminated any such bottleneck control. And, in any event, unlike a signal that is not carried at all, a signal carried in digital format is fully viewable to those cable customers who subscribe to digital services. Meanwhile, other customers can view such signals simply by obtaining and attaching readily available equipment.

Despite these serious First Amendment concerns, the cable industry did not challenge the three-year analog carriage requirement. In fact, the industry had voluntarily committed that it would carry signals in analog during such a three-year period following the transition even in the absence of such a rule, in order to minimize any additional disruption to viewers and broadcasters in the immediate aftermath of the broadcasters' digital transition. But, as expected, now that the transition is completed, any continuing benefits of the rule to broadcasters and consumers have substantially diminished. As more and more cable customers purchase digital television sets and opt for digital tiers of cable service, and as cable operators gradually provide more basic tier services in digital format, only a shrinking minority of subscribers are not equipped to view digital services.

At the same time, the analog carriage requirement (especially in conjunction with the requirement to carry HD signals in HD) is increasingly burdensome for cable operators. Throughout cable's history, it has always been the case that, even as operators invest in increased capacity, demand for such capacity quickly exceeds supply. While cable's massive investment in recent years to upgrade their facilities was expected to provide plenty of capacity to deliver new digital programming services, the marketplace success of HD programming and HD sets, along with the rapidly growing use of broadband service to deliver bandwidth-intensive video programming and gaming services, has once again created an increasing demand for capacity that is approaching or exceeding supply.

To recapture capacity, operators are, to varying degrees, providing as many basic tier networks as possible in digital-only format, while providing a diminishing number of analog channels for the shrinking number of customers who remain reluctant or unwilling to install the readily available equipment needed to watch digital basic channels on analog sets.

Forcing systems to include must-carry broadcast stations on these scarce and costly analog channels severely interferes with this effort to manage a smooth transition to digital cable service in a manner that provides value to all customers. If such stations are added to the services that would otherwise be offered in analog, they use up valuable capacity that might otherwise be used for digital and broadband services. If they replace services on the limited number of channels that an operator can devote to analog services, they diminish the value of cable service to analog customers. As operators seek to appeal to various segments of their customers with various program packages and offerings, the importance of preserving their editorial discretion is greater than ever.

In light of these developments, the constitutionality of the analog carriage requirement is more dubious than ever, and, with its transitional purposes fulfilled, the Commission should no longer interpret the Act in a manner that raises such serious First Amendment problems. Even for that diminishing number of customers who do not subscribe to digital tiers and do not have digital television sets, digitally delivered basic tier services can be viewed simply by obtaining and installing readily available digital converters. This is, after all, the step that off-air viewers had to take in order to continue to receive broadcast television after analog service was discontinued in June 2009. It is not only reasonable and in the public interest but also

constitutionally imperative to interpret such services as “viewable” for purposes of the Section 614(b)(7).

Finally, as proposed in the *Notice*, the Commission should continue to exempt small systems from the “material degradation” requirement that HD must-carry signals be carried in HD. It remains the case that the costs and burdens of dual carriage of must-carry stations in analog and HD – and, in some cases, carriage of any HD services at all – are often prohibitive for systems with fewer than 2,500 customers or with 552 MHz or less capacity. These systems already face serious economic and capacity constraints in competing with their larger, all-digital competitors such as the two national DBS providers. Burdening these small systems with the technical and engineering costs associated with providing additional (or any) HD signals in order to carry programming already available in analog – or to use already severely constrained capacity to carry must-carry stations (which they might otherwise choose not to carry at all) in bandwidth-constraining analog *and* HD – makes no sense as a matter of public policy, much less as a First Amendment matter.

I. THE INTERIM “DUAL CARRIAGE” REQUIREMENT SHOULD NOT BE EXTENDED.

A. Mandatory Carriage of Must-Carry Stations in Analog Format Disrupts Cable Operators’ Ability to Manage Their Digital Transition in a Manner That Best Meets Consumers’ Needs.

Almost five years ago, the Commission adopted rules governing the manner in which cable operators were to comply with their statutory broadcast signal carriage obligations once the transition to digital over-the-air broadcasting was completed in 2009.³ At the same time, cable operators were in the process of transitioning their own systems to digital – a process that

³ *In re Carriage of Digital Television Broadcast Signals*, Third Report & Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 (2007) (“*Third Report & Order*”).

continues to this day. Cable operators have undertaken massive rebuilds and upgrades of their facilities in order to expand their capacity and to use digital technology for the transmission of their services. Using digital compression, cable operators have been able to provide many more channels of programming using their existing physical plant. Moreover, digital transmission reduced the adverse effects of signal loss and offered consumers vastly improved video and audio quality.⁴

While implementing digital service offered many benefits for operators and consumers alike, it also introduced new technological and marketing complications. By the time that digital service was introduced, most consumers' television sets were "cable ready" – *i.e.*, they were capable of receiving all the analog channels offered on basic and "expanded basic" tiers without a set-top converter box – although "addressable" boxes might still be necessary to watch premium channels and pay-per-view programming that was not available as part of the basic tiers.⁵ Switching all services to digital delivery would require all customers to use set-top boxes or a CableCARD-equipped device, even if only to receive the very same channels that they had been viewing without a box.

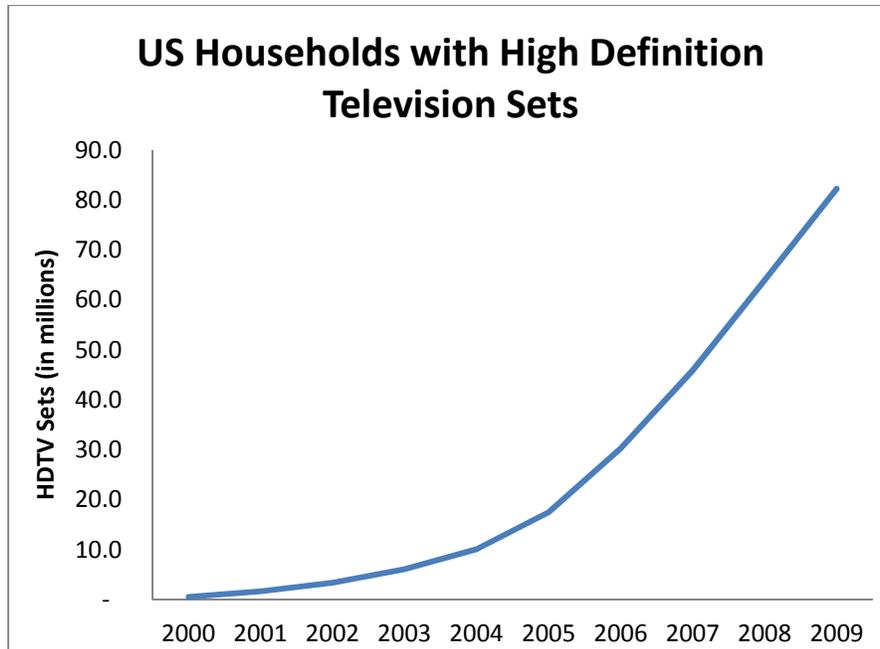
⁴ Initially, digital cable service generally consisted of an optional "digital tier" of program networks offered along with the analog tiers and premium channels available to cable customers. To receive such digital tiers, customers generally needed to lease a digital set-top box that was capable of converting the digital signals to analog format, so that they could be viewed on the analog television sets in customers' homes. But the use of digital boxes also enabled operators to provide, and customers to use, an array of additional new services, including interactive program guides, video on demand, and digital video recording. Moreover, digital technology also enabled cable operators to offer HD programming to consumers with HDTVs.

⁵ In the earliest days of cable television, cable operators simply retransmitted nearby and distant broadcast stations, which were delivered on the same VHF frequencies (2-13) that were used for over-the-air broadcasting. Cable customers could watch those stations simply by tuning their sets to the channel on which the stations were retransmitted. But when cable operators began providing more services, including satellite-delivered non-broadcast cable networks and distant "superstations," they delivered such program services on frequencies outside the VHF (and UHF) frequencies that could be tuned by the television sets of the day. To receive such channels, customers needed a set-top "converter box," which "converted" any channel the customer selected to VHF channel 3 or 4, for reception by the set on that channel. Eventually, television set manufacturers designed "cable ready" sets, which were capable of directly tuning the non-broadcast frequencies used to deliver cable channels, so that customers with such sets could watch those channels without a set-top box.

Instead, most cable operators initiated digital service by providing an array of *new* channels and digital offerings as *options*, while continuing to provide their existing basic tiers of analog programming. This enabled cable operators to compete effectively with their DBS competitors, which were offering a multitude of digital channels, while also continuing to meet the demands of those cable customers who preferred to continue receiving a smaller number of analog channels without a set-top box.

At the outset, most of the digital programming offered on digital tiers and video on demand was provided in SD format, each channel of which required only a fraction of the 6 MHz of capacity required to transmit an analog channel. As a result of their system rebuilds, operators anticipated ample capacity to add hundreds of new channels and services to their digital tiers and offerings. The amount of HD programming available was initially limited by a chicken-and-egg problem: Consumers were unlikely to purchase expensive HD television sets in the absence of a wide array of quality HD programming, but programmers were unlikely to invest in expensive HD programming until there were a sufficiently large number of consumers with HD sets on which to view such programming.

Once cable program networks and cable operators (and, subsequently, broadcasters) began testing the market for HD programming, however, they found that it had broad and strong consumer appeal, stoking demand for HD sets – which, in turn, resulted in steadily dropping prices for HD sets, rapid deployment of such sets in consumers' homes, and increasing demand for more HD programming.



Source: SNL Kagan.

The marketplace success of HD programming has had a transforming impact on the digital video services available on cable. Instead of simply supplementing the popular services that had been available in analog format with an additional array of new SD programming services on digital tiers, cable operators now also offer HD versions of a large number of the programming networks offered on their basic as well as optional digital tiers (along with HD video on demand programming). But because not all homes have an HD set, and even those that do may still have additional analog sets, cable operators have also had to find a way to make those networks and services available to those analog sets. And because the marketplace circumstances facing different operators of different size serving different communities vary widely, cable operators are adopting and experimenting with various strategies to meet this challenge.

The proliferation of HD services has consumed far more capacity on cable operators' facilities than would have been the case had digital tiers continued to consist primarily of SD transmissions. While HD programming consumes less capacity than *analog* programming, it

nevertheless uses much more bandwidth than *SD* programming. Moreover, while some set-top boxes are capable of making HD signals viewable in analog format on analog television sets, those boxes are significantly more expensive than boxes that are designed simply to convert SD signals to analog format. So, to reduce the costs of providing digital services to customers for viewing on analog sets, some systems choose to transmit SD versions of the same programming that is also being transmitted in HD.

Many cable operators that are fully capable of offering all their services in digital format are seeking to alleviate the costs, inefficiencies and bandwidth constraints associated with this triple carriage of the same programming in analog, SD and HD formats by providing as much of their programming as possible in digital-only format and reducing the number of signals provided in analog format. As the Commission has noted, some systems are already all-digital; all of their customers must have digital set-top boxes or other digital equipment to receive *any* cable services. But while this may ultimately be the most efficient way to deliver cable services to consumers, marketplace circumstances have, for most systems, dictated a more gradual transition.

These systems are gradually switching many of the basic and enhanced basic signals on their basic and enhanced basic tiers from analog to SD digital signals. In many cases, operators are making available small, low-cost digital boxes that can be used to view these SD signals on analog sets, although they cannot be used to receive the full array of digital cable services (such as video on demand or HD) offered by the cable system. But these operators are, for now, retaining a diminishing number of analog channels on those basic tiers for customers who prefer not to obtain and install the additional equipment associated with digital service on all their

television sets. This convenience and cost saving can provide value to some customers, just as the availability of additional digital and HD programming on all sets provides value to others.

The challenge for these operators is to choose the right mix of analog channels to retain those customers who might otherwise cancel their service while, at the same time, maximizing available capacity by moving other programming (and customers) to digital channels.

Depending on the economic circumstances, operators may view these analog offerings as a temporary and short-term way station on the road to an all-digital offering. Or it may be more economical to keep a reduced-size analog tier in place for the foreseeable future, as long as it continues to help retain customers. In either case, the objective is to make optimal use of analog channels – to create a package that provides maximum value in retaining customers in return for the valuable 6 MHz of capacity that is occupied by each analog channel. This is the context in which the Commission’s temporary, transitional rule interpreting the “viewability” requirement of Section 614(b)(7) of the Act must be assessed.

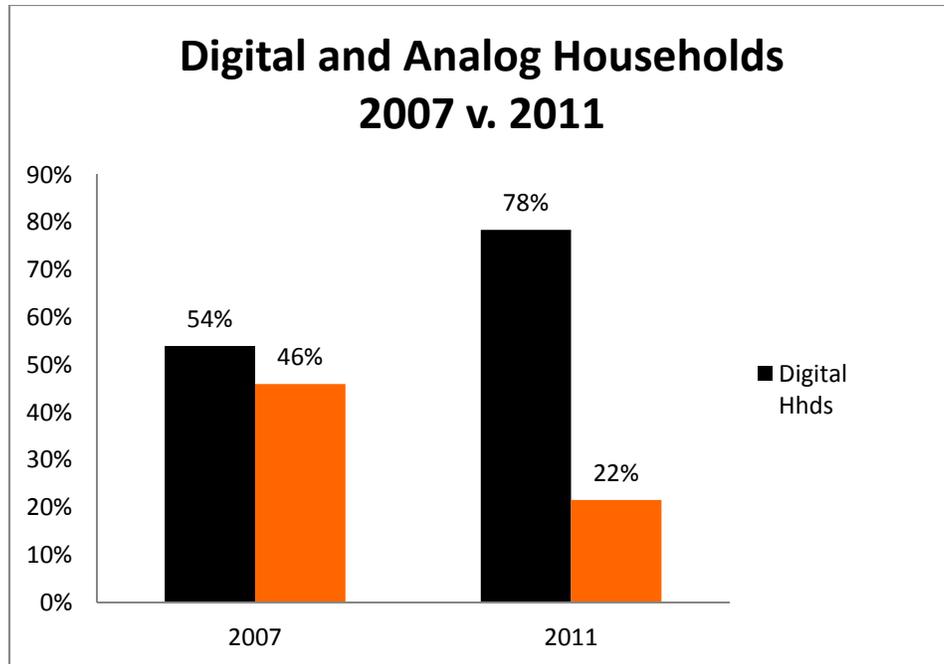
B. The Incremental Benefits to Broadcasters of Requiring Carriage of Analog and HD Versions of Each Must-Carry Station Cannot Justify the Burdens and Adverse Effects on Cable Operators and Consumers.

Section 614(b)(7) requires that must-carry broadcast signals “shall be provided to every subscriber of a cable system” and “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.” In the *Third Report & Order*, the Commission ruled that, for three years following the completion of the broadcasters’ digital transition, cable operators could comply with this requirement in one of two ways: They could comply by providing *all* their cable services in digital format, so that all customers would necessarily have the digital equipment to watch must-carry stations and any other programming. Alternatively, they could

comply by “downconverting” and carrying all digital must-carry signals in analog format, so that the signals could be viewed by customers with analog sets who did not have digital equipment on all their sets.

The Commission also adhered to its previous determination that, in order to comply with the requirement that must carry signals be carried “without material degradation,” HD signals must be carried in HD. In tandem, the Commission’s interpretations of these two provisions have imposed upon systems (other than those that are “all digital”) the most bandwidth-intensive dual carriage requirement: They must carry HD must carry signals in analog format *and* in HD.

The impact of this dual carriage requirement on cable operators’ efforts to transition to digital service in a manner that best meets the needs and demands of their consumers and reflects the economic circumstances of the markets they serve is severe. And as more and more cable households have opted for digital cable services and are equipped to view digital signals on some or all of their sets, the benefits to consumers and to broadcasters of requiring analog carriage of digital must-carry signals have, as the Commission expected, largely evaporated. In 2007, when the Commission adopted its transitional rule, 54% of cable households subscribed to cable’s digital offerings. This meant that if cable operators carried must-carry broadcast signals only in digital format, those signals would not be accessible to 46% of their customers unless those customers obtained a digital set-top box. Today, however, the percentage of households that purchase digital service has increased to 78.4%, substantially shrinking the number of homes that are not equipped to view digital must-carry signals.



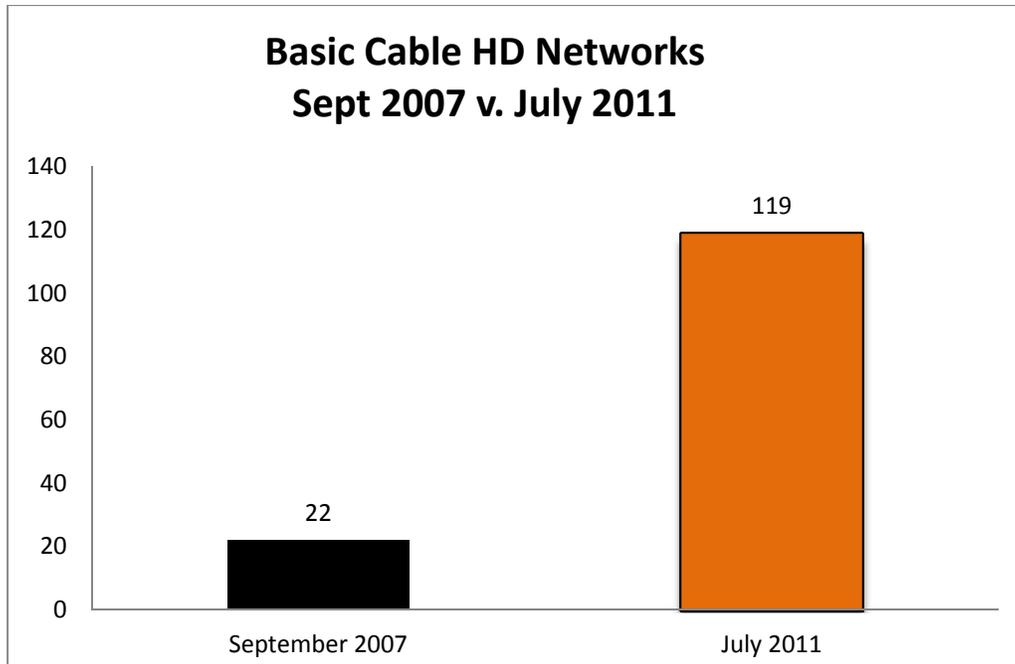
Source: SNL Kagan.

Moreover, even those customers who have *not* chosen to purchase the full array of digital services available over full-service digital set-top boxes, now have equipment that enables them to view digitally delivered must-carry signals. As discussed above, many cable systems have begun delivering some of the program networks in their basic and enhanced basic packages in digital format along with others that are delivered in analog format. To enable customers to watch those channels without having to acquire full-service digital set-top boxes (rear, in picture below), cable operators encouraged the development of small, low-cost “Digital Transport Adapters” (“DTAs”) (front, in picture below), which customers can acquire and attach to their television sets at minimal cost. According to SNL Kagan, 27.2 million DTAs were already deployed by year-end 2011, and those DTAs could be used to receive digital must-carry signals as well.



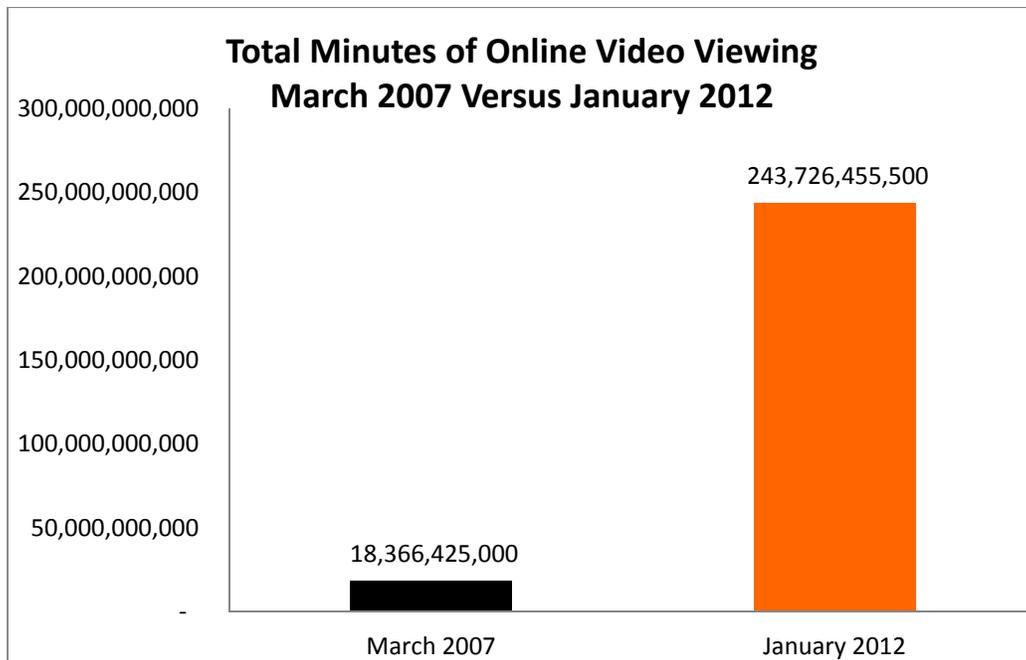
http://www.bocsc.com/comcast_dta.php

As a result, the incremental impact on broadcasters of allowing cable operators to make digital must-carry signals “viewable” by delivering them in a digital format that can be viewed using readily available equipment would be small. At the same time, the detrimental impact on cable operators and their customers of extending the interim rule and continuing to require analog and HD carriage has become substantially greater. Since the Commission adopted its interim rules in September 2007, the number of HD services available to cable operators and consumers has increased geometrically. As of September 2007, there were only 22 HD basic cable networks. By July 2011 that number had grown to 119. Today, there are over 183 HD cable networks (including basic, premium, and regional sports channels).



Source: NCTA Research.

Meanwhile, the capacity requirements of cable operators' high-speed Internet services are also increasing at a much greater rate than could have been anticipated five years ago. This is largely attributable to the increasing usage of the Internet to stream high quality – and even HD – video content. As shown below, such usage has increased more than *13-fold* in the last five years:



Source: NCTA analysis of comScore data.

The greatly increased demand for capacity to accommodate HD cable services and broadband video services has made it imperative for cable operators to use their capacity efficiently. Of all the formats for providing video programming – analog, SD digital, HD digital, and Internet Protocol – analog consumes by far the most capacity. This is why cable operators are providing more and more of their basic and enhanced basic tier services in digital format – and it is why the channels that are still being used to deliver analog channels must be reserved for programming services that provide value commensurate with the disproportionate amount of capacity that they consume. If a primary purpose of retaining analog channels is to continue to provide value to those customers who are not only unwilling to purchase digital tiers but also unwilling to obtain and use the equipment necessary to watch digital basic tier programming, it is a waste of valuable capacity to use those analog channels for services that do not, in the operator’s view, provide substantial value. Yet that is exactly what the transitional must-carry rule requires.

The rule requires cable operators to retain *additional* analog channels that, in the operators' judgment, add little or no value to analog customers while preventing operators from using those channels for a more valuable array of digital services. Or, it requires operators to use capacity-intensive analog channels to carry such services *instead* of programming that would be helpful in retaining and providing greater value to analog customers. In either case, the rule not only interferes with the editorial discretion of operators in determining how best to meet the programming needs and demand of all their customers but also disrupts the systems' managed transition to digital service. Whatever the Commission thought was the case when it adopted its interim rule in 2007, this incremental burden on operators' bandwidth cannot reasonably be viewed as "negligible"⁶ or "modest"⁷ today.

To the contrary, mandatory analog carriage of must-carry signals is difficult to justify today even if it were the *only* must-carry burden on cable operators' valuable bandwidth and on their editorial discretion. But the burden is severely compounded by the Commission's rule requiring cable operators to carry digital must-carry signals *twice* – not only in analog format (the most bandwidth intensive format) but also in HD (the second most burdensome format).

C. Interpreting the Statute to Require Mandatory Carriage of Must-Carry Signals in Analog and HD Format Cannot Survive First Amendment Scrutiny.

In any event, it is hard to imagine how the dual carriage burden imposed by the interim rules could survive First Amendment scrutiny under the standards set forth by the Supreme Court in the *Turner Broadcasting* case.⁸ In that case, the Court narrowly rejected a facial challenge to the must-carry provisions of the Act. The Court recognized that the rules, by giving a mandatory

⁶ *Third Report & Order* ¶ 26.

⁷ *Id.* ¶ 68.

⁸ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

preferential carriage right to broadcast stations, directly constrained and infringed the protected speech of cable operators and non-broadcast cable program networks. The Court had previously made clear, in *Miami Herald Publishing Co. v. Tornillo*,⁹ that a law that forced a *newspaper* to carry content not of its choosing would be subject to the most stringent standard of First Amendment review and would almost certainly be impermissible. According to the Court, “[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply” – such a law would still be unconstitutional “because of its intrusion into the function of editors.”¹⁰ As the Court explained, “[c]ompelling editors or publishers to publish that which “‘reason’ tells them should not be published’ is what is at issue in this case,”¹¹ and “[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”¹²

In *Turner*, however, the Court held that because of “an important technological difference between newspapers and cable television,”¹³ forcing cable operators to carry content against their will should not receive the same strict scrutiny that would apply to similar interference with the editorial discretion of newspapers. As the Court explained, “[a]lthough a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers’ access to other competing publications – whether they be weekly local newspapers, or daily newspapers published in other

⁹ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

¹⁰ *Id.* at 258.

¹¹ *Id.* at 256.

¹² *Id.* at 258.

¹³ *Turner I*, 512 U.S. at 656.

cities.”¹⁴ But the power of a cable operator with monopoly status, according to the Court, was much greater because

[w]hen an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.¹⁵

This rationale for distinguishing cable from newspapers for rejecting strict scrutiny has been overcome by changes in the marketplace and in technology. First, the monopoly status that the Court attributed to cable systems has virtually everywhere disappeared, thanks to the ubiquitous availability of two national DBS services, as well as the availability in many markets of competitive cable services offered by local telephone companies.¹⁶ Second, the physical connection between the television set and the cable system no longer prevents cable subscribers from receiving programming services that the cable system chooses not to carry. Virtually all television sets and A/V receivers today are designed with multiple video inputs that enable households to receive content from two or more multichannel video programming providers (“MVPDs”), as well as from Internet-delivered video programming services and over-the-air broadcasters. Today, “with a mere flick of the switch” on their remote controls, viewers can – and do – readily switch from one video programming source to another (or to their video game console or DVD player).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report, 24 FCC Rcd 542 (2009).*

As a result, the basis for applying “intermediate scrutiny” rather than strict scrutiny to a requirement that cable operators carry broadcast signals *at all* – much less carry them *twice* – has disappeared. But even if the underlying economic and technological facts had not changed, the Court’s rationale for rejecting strict scrutiny would not apply to an extension of the Commission’s requirement that broadcast signals be carried in analog *and* digital HD format. That rationale was based on a scenario in which cable customers could not access a broadcast station no matter how much they wanted to view it because the station was not being carried by the cable operator. But there is a world of difference between that scenario and one in which the broadcast station is being carried on the system in digital format, is available to all digital tier subscribers, and can be accessed by all other customers simply by installing readily available digital equipment.

Moreover, a requirement to carry signals in analog and digital HD format would fail to survive even the intermediate scrutiny applied in *Turner*. Under that standard, a restriction on speech is permissible only “if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”¹⁷ In *Turner*, the Court confirmed that Congress’s purpose of “preserving the benefits of free, over-the-air local broadcast television” was an important governmental interest.¹⁸ And, after initially sending the case back to the three-judge district court to adduce and consider voluminous factual evidence, a bare 5-4 majority of the Court determined that it was reasonable for Congress to conclude that allowing cable operators to refuse to carry certain broadcast stations *at all* posed a real threat to that statutory objective.¹⁹ And it concluded that the

¹⁷ *Turner II*, 520 U.S. at 189 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

¹⁸ *Id.* at 189-90.

¹⁹ *See id.* at 208.

burdens of such a single-carriage requirement on cable operators, whose capacity at the time was growing and who were already carrying most broadcast signals, were “modest” and not an unnecessarily restrictive means of achieving the statutory purpose.

None of these findings would reasonably apply to an extension of the Commission’s interim dual carriage requirements. In 1992, a cable operator’s failure to carry a broadcast station at all meant that the broadcast station could not reach any of the cable system’s viewers over the cable system, whether or not they would have wanted to watch any of the station’s programming. And, because there were, in the Court’s view, no competing cable operators or other MVPDs, the station would effectively lose access to *all* MVPD customers in its local community.

But, as discussed above, requiring a cable operator to carry a signal in *analog* format has a much lesser impact on broadcasters and imposes a much greater burden on the protected speech of operators and programmers. A must-carry broadcaster would have access to all digital-tier customers – approximately 80% of customers nationwide – that are already equipped to view digital signals on some or all of their digital or analog television sets. And they would have access to all other customers who were willing to obtain and attach a readily available DTA or other converter device to some or all of their television sets to view broadcast signals and any other basic or enhanced basic services that their operator has chosen to provide in digital format. Only those customers who choose not to attach such a device would be unable to watch the broadcast station.

Moreover, cable operators no longer have the “bottleneck” control over access to MVPD customers that the Court perceived in *Turner*. Two DBS companies are available nationwide, and they, along with Verizon and AT&T, now serve 41.5% of MVPD customers. Significantly,

those providers are “all-digital,” so that any must-carry broadcast signals carried by those MVPDs reach *all* of their customers. In these circumstances, there is no reason to believe that the loss of viewership from the small subset of customers that choose not to attach a digital converter device would have an effect on broadcasters that in any way resembles the projected effects of complete non-carriage that the Court relied on in *Turner*.

At the same time, the burden of requiring analog carriage and HD carriage of the same broadcast station far exceeds what the Court anticipated from the single analog carriage requirement in *Turner*. First of all, the obvious: Dual carriage in analog and HD consumes significantly more bandwidth than carriage in analog or HD alone. But also, for the reasons discussed above, the opportunity costs and the burdens on editorial discretion of using a full 6 MHz channel to carry the analog version of a must-carry broadcast signal – especially, a must-carry broadcast signal that is also being carried in HD format – are severe. The popularity and proliferation of HD programming, the steadily increasing capacity requirements for broadband services, and the need to manage a gradual transition to digital while maintaining a valuable but ever-shrinking array of analog services could not have been foreseen by the *Turner* Court when it characterized the mandatory carriage of what it perceived as a mere handful of analog signals as a “modest” burden.

In sum, in light of the dramatic changes in the video marketplace, it is doubtful that the must-carry statute could survive another facial challenge today, and it is especially unlikely that the Commission’s rules requiring carriage in analog and in HD format could pass muster even under the “intermediate scrutiny” test applied in *Turner*. At the very least, continuing to interpret the “viewability” provision of the statute to require such carriage raises very serious questions under the First Amendment. Having implemented, with the cable industry’s

acquiescence, such a requirement on a temporary, transitional basis, the Commission should now interpret the statute in a manner that avoids such serious constitutional issues by allowing the analog carriage requirement to expire as intended.

II. THE COMMISSION SHOULD EXTEND THE HD EXEMPTION FROM THE MATERIAL DEGRADATION RULE FOR SMALL AND CAPACITY-CONSTRAINED SYSTEMS.

The Commission has tentatively concluded that “it is in the public interest to extend the small-system HD exemption for another three years because the number of systems relying on the exemption indicates that three years did not provide sufficient time for some small systems to come into compliance in a cost-effective way.”²⁰ As the *Notice* explains,

[T]he exemption applies to operators of cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers, and to those with an activated channel capacity of 552 MHz or less. It permits such systems to carry broadcast signals in standard definition (SD) digital or analog, even if the signals are provided in HD.²¹

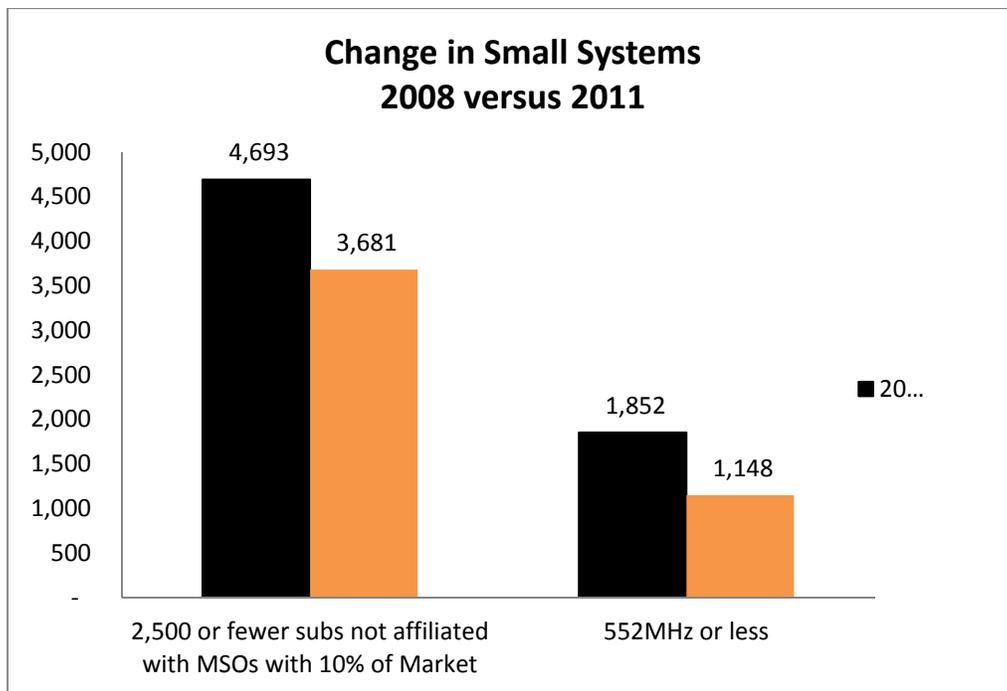
In adopting the exemption, the Commission recognized that “some small systems did not have the technical capability or system capacity to carry high definition digital signals, and in some cases had so few subscribers that per-subscriber costs to upgrade to that capacity would be so high as to make it not worthwhile to continue operating the system.”²² Furthermore, continuation of the exemption will not harm broadcasters since customers of small and low capacity systems receive an analog version of a digital must-carry broadcaster’s signal on their television sets. Thus, consistent with its tentative conclusion, the Commission should extend the exemption.

²⁰ *Notice* ¶ 20.

²¹ *Notice* ¶ 18; *In re Carriage of Digital Television Broadcast Signals*, Fourth Report & Order, 23 FCC Rcd 13618 ¶ 12 (2008) (“*Fourth Report & Order*”).

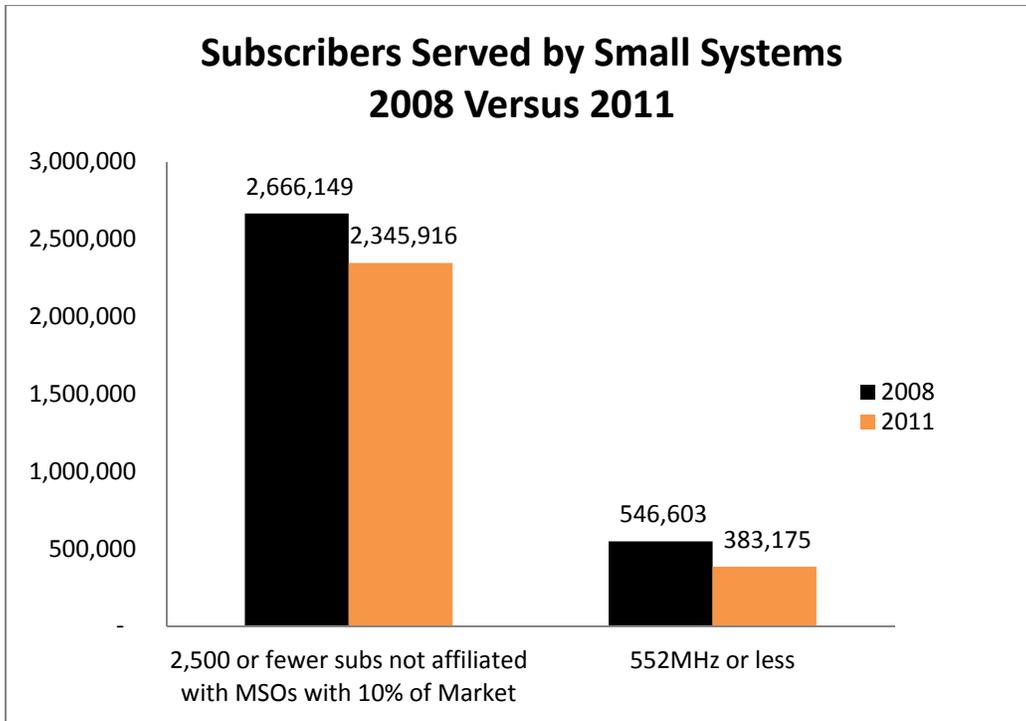
²² *Notice* ¶ 18.

Many small systems serve a small customer base, are located in rural communities characterized by relatively low populations, a low number of homes per mile, low activated bandwidth capacity, and in some cases, geographic isolation. According to NCTA estimates, only 4.1% of all basic cable subscribers subscribe to systems that qualify for (but do not necessarily employ) the exemption today.²³ As shown in the charts below, the universe of small systems that can qualify for the exemption (under one, or both qualifications) – and the number of subscribers those systems reach – continues to decline.



Source: NCTA analysis of Nielsen data.

²³ Based on NCTA's analysis of Nielsen information, approximately 2.4 million basic cable subscribers are served by systems that qualify for the small system exemptions. See Nielsen FOCUS database (data as of 2/15/12); see also NCTA, *Industry Data, Basic Video Customers 1975-2010* (reporting 59.8 basic cable customers as of 2010), at <http://www.ncta.com/Stats/BasicCableSubscribers.aspx> (last visited Mar. 5, 2012).



Source: NCTA analysis of Nielsen data.

Many cable systems are working toward a full transition to digital, including some that are owned by smaller companies.²⁴ However, unlike larger cable systems, which universally offer some digital video service, some smaller cable systems continue to be analog-only, providing no digital or HD services. Other small systems offer a mix of analog and digital programming – but, in many cases, these systems are only able to provide digital programming through adaptive technology such as “Headend in the Sky” (“HITS”), a solution that enables

²⁴ See, e.g., Press Release, BendBroadband, *BendBroadband Completes its Move to an All-Digital Platform – Now Boasts 71 HD Channels and More on the Way* (Jan. 13, 2009), available at http://www.bendbroadband.com/press/BendBroadband_Completes_its_Move_to_an_All_Digital_Platform.pdf; Mike Robuck, *Mediacom Ramps Up D3 in Northern Iowa, Albany, Georgia*, CED Magazine, Feb. 29, 2012 (“Early last year, Mediacom started its analog-to-digital project in Cedar Rapids and surrounding communities before expanding it to other systems in its footprint. The all-digital conversions freed up additional bandwidth for the DOCSIS 3.0 launches, as well as the addition of more HD channel offerings.”), available at <http://www.cedmagazine.com/news/2012/02/mediacom-ramps-up-d3-in-northern-iowa-albany-georgia>; see also Jeff Baumgartner, *Comcast Starts to Kiss Analog TV Goodbye*, Light Reading Cable, Jan. 6, 2012 (“All this reclaimed spectrum is going toward more digital services.”), available at http://www.lightreading.com/document.asp?doc_id=216104&site=lr_cable; Mike Robuck, *Time Warner Cable Wraps Up All-Digital Conversion Pilot in Maine*, CED Magazine, Jan. 18, 2012 (“As of January 2012, Time Warner Cable had transitioned 21 communities to an all-digital format and plans to convert the rest of its systems to all-digital over the next five years.”), available at <http://www.cedmagazine.com/news/2012/01/time-warner-cable-wraps-up-all-digital-conversion-pilot-in-maine>.

small systems to provide satellite-delivered digital programming on analog plant, but that may not offer the capability to insert digital programming locally.²⁵ Moreover, without deploying expensive HD-capable set-top boxes, small systems that implement HITS cannot offer HD.

Customers of these small systems may not be ready to upgrade to HD sets. But if they do, they can choose among other MVPDs available to them, including at least two DBS providers that *do* provide digital and HD services. The very survival of many small systems depends on their ability to compete effectively with DBS and other MVPDs and to do everything they can to induce customers to continue to take their service. These systems have evaluated the needs and demands of their subscribers, and the costs and benefits of transitioning to digital. As we previously explained,

If these systems are not upgrading to digital to compete, there is only one rational explanation: the economics simply do not yet make sense given their limited customer base and their inability to obtain a sufficient return on investment. Systems who cannot “go digital” are paying the price of that reality today; their costs are high and they have to fight tooth and nail to retain each and every customer.²⁶

Forcing such operators to incur uneconomic investments to upgrade to digital makes no sense, particularly in today’s tough economic times. It would only *undermine* their competitive viability and their ability to compete.

A. Dual Carriage Costs are Prohibitive in Systems with Fewer than 2,500 Customers.

It remains the case that operators of small systems would incur significant costs at each headend to provide digital broadcast signals. Indeed, costs for reliable equipment remain roughly the same today as they did in 2008 when NCTA explained that in addition to the

²⁵ See HITS, *QuickTake+*, at <http://www.comcastmediacenter.com/cmc-hits/hits-quicktakeplus.html> (last visited Mar. 5, 2012).

²⁶ NCTA Comments, CS Docket No. 98-120, at 13 (filed Mar. 3, 2008) (“2008 NCTA Comments”).

significant lost opportunity costs of having to carry duplicative programming from must-carry broadcasters,

[small system operators] would be forced to install headend equipment that would cost anywhere from \$4,000 at the low end to a more typical \$8,000 per digital broadcast channel. In cases where a system cannot simply upgrade its existing equipment but rather must purchase new equipment, the cost would rise substantially, by as much as \$21,000 more even to deliver one must-carry broadcaster in digital.²⁷

In addition, if analog-only small systems were forced to upgrade to digital in order to transmit digital must-carry signals, the cost for such systems would skyrocket by tens of thousands of dollars per headend, given the cost of the digital headend equipment needed to address the consumers' box and by the cost of the HD-capable converter boxes required to be held as inventory.²⁸ Small systems would also incur the costs of testing equipment, spares needed in the case of equipment failure, staff training, and of ongoing licensing fees associated with the equipment. Given the small customer base over which to spread these costs, these upgrades may be uneconomic at this time.

The exemption frees systems with fewer than 2,500 subscribers from an onerous and costly HD carriage requirement that could result in shuttering some of these small systems.²⁹ As we explained to the Commission previously, shutting down a cable system is bad not only for the system owner, but also for the broadcaster who loses a "community antenna" for its voice in the smaller market, and the consumer who loses access to a competitive alternative.³⁰ In sum, there

²⁷ The equipment needed to deliver digital broadcast signals includes (1) an 8 VSB receiver/decoder, (2) a groomer/multiplexer to ensure that bandwidth is used efficiently, and (3) a QAM modulator. *See 2008 NCTA Comments* at 14.

²⁸ The costs remain largely comparable to estimates previously provided by NCTA. *See 2008 NCTA Comments* at 15.

²⁹ As the Commission has recognized, an HD carriage requirement could cause some systems to shut down altogether, "because per-subscriber costs to upgrade to that capacity would be so high as to make it not worthwhile to continue operating the system." *Notice* ¶ 18 (citing *Fourth Report & Order* ¶¶ 6-7).

³⁰ *2008 NCTA Comments* at 15.

continues to be a pressing need to exempt cable systems that provide service to fewer than 2,500 customers from a requirement to carry HD signals in addition to an analog down-converted version.

B. Systems with Limited Bandwidth Should Not Be Forced to Dual Carry.

We also agree that the Commission should continue to exempt cable systems with 552 MHz or less capacity from the dual carriage requirement. A requirement to use additional capacity to provide HD would impose significant burdens on these limited bandwidth systems.

Small capacity systems are typically channel-locked, using a sizable amount of their capacity simply to provide analog service to their customers. Operators of these systems must maximize the use of the capacity available in order to remain competitive with the much higher-capacity DBS providers, who typically can offer subscribers over 300 channels of programming.

Devoting additional bandwidth – on top of the 6 MHz that small systems already will be providing to *each* must-carry station – cannot be justified as a matter of policy. The opportunity costs are simply too high. As NCTA previously explained,

Elimination of the HD exemption will force operators to take off valuable services simply to provide duplicative programming from must-carry stations whose digital signal can be received over-the-air in any event. And even if an operator could find a spare 3-6 MHz slot on their small capacity systems to dedicate to each must-carry station's duplicative HD signal, it would compromise its ability to offer new services like video-on-demand, deploy broadband, or introduce enhanced new speed tiers of broadband to more rural, smaller market customers.³¹

In particular, such a requirement would undermine one of the cable industry's true success stories – deploying, in many cases for the first time, broadband access to rural America. It would also undermine a key goal of the Commission's recent Universal Service order and the *National*

³¹ *Id.* at 16-17.

Broadband Plan, which recommend a number of actions to increase broadband service in rural areas.³²

Capacity-constrained system operators already have a strong marketplace incentive to upgrade where they can. Upgrades would allow them to offer a wide variety of video and non-video services in an intensely competitive MVPD marketplace. But, financial realities are such that these cable operators cannot cost-justify upgrading their systems to 750 MHz or otherwise moving to an all-digital system at this time. Thus, without the exemption, systems that remain at 552 MHz or less would likely be forced to remove existing programming and other services to free the capacity needed to carry must-carry programming in HD that is already available in analog. The costs of such an approach to small cable systems and to rural and smaller market consumers cannot be justified in this economic environment.

* * *

Over time, as cable plant is upgraded to provide digital services, the HD carriage issue will resolve itself for systems serving the vast majority of subscribers. In the interim, the Commission should continue to provide small systems necessary flexibility and extend the HD carriage exemption for another three years. Such an approach is consistent with its approach to low power broadcasters – who have been given until September 1, 2015 to transition to digital, including rules providing for “last minute” extensions.³³ For the limited subset of small systems

³² See generally *In re Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report & Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011); see also Federal Communications Commission, *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, Mar. 16, 2010, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf.

³³ See *In re Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Report & Order, 26 FCC Rcd 10732 ¶¶ 2, 8, 44 (2011) (recognizing that the 2015 deadline is “further removed from the prolonged economic downturn that began in late 2007, and will provide

that cannot afford to provide any digital service, the Commission should grant a permanent exemption from the HD carriage requirement. Indeed, it makes no sense to repeatedly require such systems -- which serve less than one percent of basic cable subscribers -- to pursue additional waivers when the economics make it impracticable for them to upgrade to digital.

CONCLUSION

For the foregoing reasons, the viewability and availability requirements adopted in 2007 to facilitate the transition to digital broadcasting should sunset as provided in the rules and should not be extended. The costs and burdens of an analog carriage requirement (in addition to an HD carriage requirement) – including the substantial infringement on protected speech – have significantly increased since 2007. And, as more and more cable customers are equipped to receive digital signals, the benefits to broadcasters of have substantially diminished. Moreover, the heavy burdens of requiring small systems to carry HD must carry signals in HD warrants a continued exemption from that requirement.

Respectfully submitted,

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more time for operators to secure the necessary funding,” that “stations are the most familiar with their own local markets,” and that “allowing stations to transition as they see fit makes sense from an economic perspective because it will allow them to avoid ‘incur(ring) the cost of broadcasting on an analog channel if individuals are not watching the station’”).