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

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

Comments

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I. INTRODUCTION.

The American Cable Association ("ACA") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above captioned docket.[1] In the NPRM, the Commission seeks comment on its proposal to extend its current material degradation rules, which are currently set to expire on June 12, 2012.[2]

ACA supports the Commission's tentative conclusion that it is in the public interest to retain its rule exempting small cable systems with less than 553 MHz of activated channel capacity, or fewer than 2,501 subscribers that are not owned by a very large multichannel video programming distributor ("MVPD"),[3] from the requirement that they deliver the signals of must-

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[1] *In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Doc. No. 98-120, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, FCC 08-193 (rel. Feb. 10, 2012) ("*NPRM*").

[2] *NPRM* at ¶ 23.

[3] *NPRM* at ¶ 20.

carry broadcast stations in digital high definition ("HD") ("HD carriage exemption").[4] By continuing the exemption that permits these small systems to carry broadcast signals in standard definition ("SD") digital or analog, even if the signals are provided by the broadcaster in HD,[5] the Commission will avoid placing additional regulatory burdens on systems that are least able to bear them.

The small cable systems that are encompassed within the existing HD carriage exemption are an important part of the overall market for MVPD services. These small systems provide an important competitive alternative to digital broadcast satellite ("DBS") services in the areas they provide service, which are typically rural areas of smaller markets. Although they often lack the robust channels offerings of DBS providers, these small operators can provide a low cost option for customers that prefer their service from a local provider, do not wish to obtain a set-top box to view programming, or are unable to qualify as DBS subscribers due to poor credit.

The burdens that transmitting must-carry signals in HD place on small systems operators are as great now, if not greater, than they were at the time the Commission first adopted the HD carriage exemption. Repealing the exemption would not only harm these vulnerable small systems, but would also harm consumers in direct and immediate ways. With regard to small systems with channel capacity of less than 553 MHz, the circumstances that originally justified the exemption, particularly with regard to the availability of unused channel capacity, known as "channel lock,"[6] have not improved significantly over the past three years.

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[4] *See NPRM* at ¶ 20 (Commission tentatively concludes that it is in the public interest to extend the small-system HD exemption); *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 23 FCC Rcd 13618, ¶ 7 (2008) (identifying exemption of certain small cable operators from the HD the requirement to carry must-carry signals in HD) ("*Fourth Report and Order*").

[5] *Id*.

[6] More specifically, channel lock is the situation where all of the analog capacity of a system is occupied and the channel line-up is "locked" such that no channel can be added without removing a channel.

In fact, the unused channel capacity available on these systems has actually decreased since the Commission adopted the HD carriage exemption. In some cases, requiring these small systems to add HD must-carry channels would force operators to move other channels -- more popular than the must-carry channels -- to less subscribed digital-only tiers that require customers to lease, purchase, or already own equipment capable of receiving digital signals. In other cases, not maintaining the exemption would compel dropping channels entirely. Either way, requiring carriage of must-carry signals in HD would directly harm subscribers by removing or making less accessible more desired programming.

Similarly, applying an HD must-carry mandate on systems serving fewer than 2,501 subscribers will harm consumers by leading to increased rates, the loss of access to cable services, and the loss of the benefits that flow from having a competitive market for MVPD services in many small markets. The primary burden on these systems arises from the increased costs required to upgrade systems to permit carriage of HD signals. For systems with fewer than 2,501 subscribers that currently rely on the exemption, the financial situation has only become worse over the past three years. Costs for these systems have risen precipitously, particularly costs associated with programming, causing these systems' net income related to video to decrease. A Commission rule requiring such small systems to transmit HD must-carry signals would require additional equipment purchases and, as the Commission has previously found, make these systems less economical to operate.[7] Such a rule would force already financially marginal small systems to either pass through costs that are very high on a per-subscriber basis and risk losing significant numbers of subscribers, or simply close systems where undertaking the necessary upgrades does not make economic sense.

The burdens associated with complying with the HD must-carry requirement would cause significant and immediate consumer harms in the form of increased rates, loss of

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[7] *Fourth Report and Order* at ¶ 7 (*citing* RICA comments at 4).

channels, loss of services, and the loss of facilities-based competition in many markets. The benefits of repealing the small system HD carriage exemption simply do not warrant these consumer harms. The primary benefit of the HD must-carry requirement is ensuring that all consumers are able to receive over their cable systems the HD signals transmitted by must-carry broadcast stations without material degradation. The elimination of the small system HD carriage exemption would be expected to benefit customers with HD televisions who are served by systems qualifying for the exemption in areas where HD signals are transmitted by the broadcaster. However, these benefits are greatly outweighed by the harms of increased rates, decreased channel selections, and loss of services and competitive choices that will be felt by all cable subscribers in these small and remote markets.

As a result, and consistent with the Commission's tentative conclusion in the NPRM, the HD carriage exemption remains critical for the continued viability of many small systems.[8] It remains contrary to the public interest to force a small cable operator to drop a channel or shut down a system for the sole purpose of carrying the HD signal of a must-carry broadcast station. Consequently, the Commission should continue to permit systems that either have less than 553 MHz capacity, or serve fewer than 2,501 subscribers that are not affiliated with a very large operator, to retransmit the digital broadcasts of must-carry signals to their customers in an analog format. Moreover, the Commission should permanently exempt all-analog systems from the requirement to transmit must-carry signals in HD.

II. A SIGNIFICANT NUMBER OF SMALL SYSTEMS CURRENTLY RELY ON THE COMMISSION'S HD CARRIAGE EXEMPTION.

In the NPRM, the Commission tentatively concludes that the number of small systems relying on the HD carriage exemption indicates that extending the exemption remains in the

[8] *NPRM* at ¶ 20 (noting that the FCC's Form 325 data indicates that a large percentage of small systems rely on the exemption).

public interest.[9] The Commission estimated the number of small systems using the exemption by reviewing its own Form 325 data, which according to the NPRM reveals that as of 2010, 37% of eligible small system operators were taking advantage of the HD carriage exemption.[10] In an effort to gain further insight into the number of systems relying on the HD carriage exemption and other related data and information, ACA recently conducted a survey[11] of its members on issues related to the HD carriage exemption.[12] The survey results show that, at a minimum, 52 ACA operator members[13] representing 385 systems across the country are still relying on the HD carriage exemption. A breakdown of the types of systems utilizing the HD carriage exemption from the survey is set forth in Table 1 below.

Table 1: ACA survey respondents relying on HD carriage exemption.

Types of Systems	System Totals
Less than 553 MHz and more than 2,500 Subs	45
Less than 553 MHz and fewer than 2,501 Subs	234
More than 552 MHz and fewer than 2,501 Subs	106
Less than 553 MHz or fewer than 2,501 Subs	385

With regard to systems with less than 553 MHz system capacity, 46 respondents answered the survey indicating that they rely on the HD carriage exemption. These respondents account for at least 279 systems, of which 84% (234 in total) also serve fewer than 2,501 subscribers. In addition, 57% (158 in total) of the systems with less than 553 MHz

[9] *NPRM* at ¶ 20.

[10] *Id*.

[11] ACA conducted an online survey of its members from March 1, 2012 through March 8, 2012.

[12] ACA represents nearly 850 independent MVPDs that serve about 7.4 million video subscribers, primarily in smaller markets and rural areas. ACA member systems are located in 49 states and many U.S. territories. ACA's members range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. 64% of ACA's members serve fewer than 2,000 subscribers. Most ACA members provide video, voice, and data services, as part of a triple play offering, delivering these critical services to smaller-market and rural subscribers across the nation.

[13] In some instances more than one representative of an ACA operator member responded to the survey. However, a review of the data indicates that these respondents were not providing duplicative data about the same systems but were instead responding with information referring to different ones.

capacity that rely on the HD carriage exemption reported being analog-only. A summary of the survey results for ACA members relying on the HD carriage exemption for systems with less than 553 MHz capacity is set forth in Table 2 below.

Table 2: ACA survey respondents with systems of less than 533 MHz capacity relying on HD carriage Exemption.

Type of Systems	System Totals	Analog-Only System Totals
Less than 553 MHz and more than 2,500 Subs	45	28
Less than 553 MHz and fewer than 2,501 Subs	234	130
Less than 553 MHz	279	158

ACA obtained similar survey results for systems serving fewer than 2,501 subscribers, with 52 respondents reporting that they rely on the HD carriage exemption. These operators account for 340 systems, of which 69% (234 in total) also have less than 553 MHz capacity. A total of 47% of systems serving fewer than 2,501 subscribers (159 systems) reported being analog-only. A summary of these survey results is set forth in Table 3 below.

Table 3: ACA survey respondents with systems of fewer than 2,501 subscribers relying on HD carriage exemption.

Type of Systems	Number of Systems	Analog-Only
More than 552 MHz and fewer than 2,501 Subs	106	29
Less than 553 MHz and fewer than 2,501 Subs	234	130
Less than 2,501 Subs	340	159

This data demonstrates that significant numbers of cable operators continue to rely on the HD carriage exemption, supporting a conclusion by the Commission that ending the exemption and requiring these systems to carry the HD signals of must-carry stations would affect a significant number of system operators. As discussed in more detail below, removing the HD carriage exemption would cause substantial disruption for these operators and their customers and would be contrary to the public interest.

III. CABLE SYSTEMS WITH LESS THAN 553 MHz OF CHANNEL CAPACITY SHOULD NOT BE REQUIRED TO OFFER MUST-CARRY SIGNALS IN HD.

A significant number of cable systems that have less than 553 MHz of channel capacity are severely bandwidth constrained, and many are channel locked. As a result, it would be a significantly burden for these systems to provide must-carry broadcast signals in both analog and HD. In recognition of this fact, the Commission adopted the HD carriage exemption in 2008 to relieve systems with less than 553 MHz capacity of the requirement to carry both signals.[14] The circumstances that originally justified the HD carriage exemption have not improved since the Commission adopted the exemption. For systems with less than 553 MHz that still rely on this exemption, the unused channel capacity available has actually decreased over the past three years. As a result, the Commission should continue to permit systems with less than 553 MHz of capacity to retransmit the HD broadcasts of must-carry signals in analog-only.

The results of ACA's survey of its members described above demonstrate that capacity constraints, as well as the burdens required to overcome them in order to provide must-carry signals in HD, have not improved since the Commission first adopted the HD carriage exemption. In its survey, 46 respondents indicated that they operate a total of 279 systems with less than 553 MHz of activated channel capacity and transmit at least one must-carry signal in analog-only. Specifically, 87% (40 in total) of these 46 respondents reported that the amount of unused channel capacity available for new channels or services either decreased or remained the same in the past three years. Breaking down these numbers, 50% (23 in total) reported that their free capacity has "somewhat decreased" or "significantly decreased," and 37% (17 in total) reported that their capacity has remained the same. Of those who reported that their unused capacity has decreased, 78% (18 of 23) said their capacity "significantly decreased." A summary of these survey results is set forth in Table 4 below.

[14] *See Fourth Report and Order* at ¶¶ 7-8.

Table 4: System capacity changes over the past three years for ACA survey respondents with systems with less than 553 MHz capacity that rely on HD carriage exemption.

Response to Survey Question: In the last 3 years, have these systems' unused channel capacity for new channels or services increased or decreased?	Number of Operators	% of Respondents
“Significant decrease” in capacity	18	39
“Somewhat” decrease” in capacity	5	11
No change in capacity	17	37
“Somewhat increase” in capacity	2	4
“Significant increase” in capacity	3	7
No Response	1	2
TOTAL	46	

ACA’s survey asked these respondents why their system capacity has decreased. The most common response was because of increases in demands by over-the-air stations for carriage of multi-cast channel streams in their retransmission consent contracts. Another common response for why there was a decrease in capacity in the last three years related to demands made by non-broadcast programmers to carry additional channels in exchange for access to, or less drastic increases in rates for popular non-broadcast channels. The most common reasons given for channel capacity staying the same were that the system was channel locked three years ago and remains so today, and a lack of finances to increase the capacity of the system.

In addition, 39 of the 46 total respondents (84%) operating systems with less than 553 MHz capacity that carry at least one must-carry signal in analog reported that they currently do not have the unused channel capacity to deliver these signals without changing existing channels or services. Not surprisingly, 76% percent of all respondents (35 in total) reported that it would be a significant burden to make channel capacity available for HD must-carry signals. A summary of these survey results is set forth in Table5 below.

Table 5: Responses of systems with less than 553 MHz capacity regarding burden of carriage of HD must-carry signals.

Response to Survey	Number of Operators	% of Respondents
Do not have the unused channel capacity "without changing any existing channels or services"	39	85
Making capacity available would be significant burden	35	76

Because of the capacity constraints faced by many systems with less than 553 MHz of capacity, consumers will be harmed if the HD carriage exemption is repealed. Where channel locked systems are required to transmit must-carry signals in HD, their perceived options for responding will be limited to dropping channels, moving channels from analog to digital-only, or shutting down systems. With regard to dropping channels, in ACA's survey, 17% of respondents with systems with less than 553 MHZ capacity that utilize the HD carriage exemption responded that they would respond to the increased carriage requirement by dropping existing channels. This would, no doubt, involve replacing stations popular with subscribers for less popular ones. This would result in consumers losing access to desired channels and, in turn, increasing the likelihood of these cable operators losing subscribers to their competitors. Another 26% of operators said they would convert channels currently delivered in analog to digital-only, which would necessitate consumers purchasing a digital set-top box or CableCARD in order to continue receiving the channel. Of greatest concern is the consumer harm that will result where small system operators opt to shut down systems rather than comply with an HD must-carry mandate. Of responding operators with systems with less than 553 MHz capacity that carry at least one must-carry channel in analog, 23% stated that that they would simply shut down their systems. Indeed, the fact that nearly a quarter of those system operators surveyed indicated that they would shut down systems rather than bear the costs of compliance makes clear that an HD must-carry mandate would reduce consumer access to MVPD services, particularly in small and remote markets, as well as areas underserved by broadcasters. As the Commission recognized when it adopted the HD carriage exemption, the loss of these small cable systems could result in the loss of access to local broadcast networks where customers cannot obtain strong signals over-the-air and where local signals are not available from other sources, such as through DBS providers.[15] Moreover, where small system operators decide that their best decision is to shut down their systems rather than carry HD signals, consumers could end up losing access to terrestrial MVPD services altogether, thus depriving them of the benefits of competition in these markets.

* * *

In 2008, the Commission found that the harms that would result from requiring systems with less than 553 MHz capacity to transmit must-carry signals in HD made applying that requirement on these systems inappropriate.[16] The data collected through the ACA survey demonstrates that for cable systems that have less than 553 MHz capacity, that the available unused capacity for carriage of must-carry signals in HD has gotten worse and requiring them to carry these HD signals would be a burden. Also, the harms to consumers associated with smaller systems being required to carry the HD signals of must-carry broadcast stations remain as significant as they were when the Commission adopted the HD carriage exemption in 2008.

Nothing has changed in the intervening four years to alter the conclusion reached by the Commission in the Fourth Report and Order that the HD carriage exemption is necessary to protect consumers. Accordingly, the Commission should retain the HD carriage exemption.

IV. CABLE SYSTEMS WITH FEWER THAN 2,501 SUBSCRIBERS SHOULD NOT BE REQUIRED TO OFFER MUST-CARRY SIGNALS IN HD.

The Commission must also retain the current HD carriage exemption that applies to cable systems serving fewer than 2,501 subscribers and that are not affiliated with an operator

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[15] *See Fourth Report and Order* at ¶ 7; *see also* HD Locals, DIRECTV, *available at* http://www.directv.com/DTVAPP/content/hd/hd_locals (last visited Mar. 8 2012) (indicating that DIRECTV does not currently offer local broadcast channels in 15 markets).

[16] *Fourth Report and Order* at ¶ 7.

serving more than 10 percent of all MVPD customers.[17] Operators of the systems that take advantage of this exemption generally do so because purchasing the equipment necessary to make must-carry channels available in HD would be a significant financial burden. For these operators, the cost of running these systems has increased more than the revenue they have generated over the last three years, and they are in no better position today to purchase the needed equipment. Therefore, these operators should be permitted to continue transmitting HD must-carry stations to their customers in analog-only. Ending the current exemption would have significant and deleterious effects on both these small systems and their subscribers.

In adopting the HD carriage exemption for systems with fewer than 2,501 subscribers, the Commission cited evidence in the record demonstrating that requiring HD carriage by small systems would "create a regime that is too expensive to operate."[18] As support for its decision to adopt the exemption, the Commission relied on evidence demonstrating that applying the HD must-carry rules to small systems could reduce consumer choice through the loss of lower priced service offerings,[19] and through the shuttering of small cable systems leading to the loss of access to broadcast signals by consumers in remote areas.[20] These circumstances originally justifying the HD carriage exemption, particularly concerning lack of available financial resources to purchase the necessary equipment, have not improved since the Commission last reviewed this issue. In fact, for systems with fewer than 2,501 subscribers currently relying on this exemption, the financial resources available have decreased over the past three years.

ACA's recent survey of its members regarding the HD carriage exemption demonstrates this fact. In its survey, 52 respondents stated that they operate a total of 340 systems with fewer than 2,501 subscribers that transmit must-carry signals in analog. An overwhelming

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[17] *Id*.

[18] *Fourth Report and Order* at ¶ 7 (*quoting* RICA Reply Comments).

[19] *Id*. (*citing* OPASTCO Reply Comments).

[20] *Id*.

number of survey respondents, 43 in total and representing 83% of these respondents report that their net income from video services[21] has declined over the past three years. Of these 43 respondents, 63% (27 in total) report that their video net income "decreased significantly."

Table 6: Responses of systems with fewer than 2,501 subscribers reporting their net video income decreased significantly over the past three years.

Response to Survey Question: In the last 3 years, have these systems' net income from video (video-related revenues minus video-related costs) increased or decreased?	Number of Operators	% of Respondents
Respondents reporting systems' net income from video has "significantly decreased"	27	52%
Respondents reporting systems' net income from video has "somewhat decreased"	16	31%
TOTAL	43	83%

These operators identified a number of reasons for their reported decrease in income. The primary reason, identified by a majority of these respondents, is the significant increase in programming costs, particularly retransmission consent fees.

This data is supported by independent research from SNL Kagan, which in a report dated January 30, 2012, stated that:

> [v]ideo margins trended down steadily over the last several years as video cost increases outpaced video revenue growth. Programming costs, the largest expense for MSOs, were the main culprit. Video costs rose almost 1.5x faster than video revenues in 2010, and in the first three quarters of 2011, they increased 2.4x faster.
>
> Programming costs as a percentage of video revenues rose at a steady rate. In 2008, it averaged in the 34% range, jumping into the 37% range by 2009 and nearly 39% in 2010. In 2011, programming costs grew further to an average 40% of video revenues. Retransmission fees and sports programming costs are among the major drivers of these increases. Of the $30.03 cost to program a video subscriber each month, as of third quarter 2011, ESPN alone accounted for more than 16% of the total with an estimated $4.69 per month fee.[22]

[21] Video net income is defined as video-related revenues minus video-related costs.

[22] Michelle Ow, *Cable Margin Analysis, Part 1: Historical Benchmarks 2008-Q3'11*, SNL Kagan (Jan. 30, 2012) (analyzing video margin trends for the top three publicly traded multiple system operators: Charger Communications, Comcast, and Time Warner Cable).

These programming cost increases hit small system operators harder than large operators. Small providers typically pay higher rates for video programming, both in real terms and in terms of the percentage of their video revenues. This is because their small size leaves them with little bargaining leverage, particularly against large programmers.

In addition to surging programming costs, a significant number of ACA members with fewer than 2,501 subscribers report that loss of subscribers is decreasing their net video income. These respondents attribute these losses to an inability to stay competitively priced because of programming costs, and due to their limited ability to effectively compete with the robust HD offerings of the satellite TV companies. Finally, a number of other respondents indicated that increases in other operational costs also decreased net income. These costs include such things as utility pole rental fees, fuel costs and similar expenses.

Requiring operators of systems that serve fewer than 2,501 subscribers to carry HD must-carry signals would further exacerbate a deteriorating economic picture for many of these systems. The vast majority of ACA members with fewer than 2,501 subscribers responding to the survey, 90% (47 respondents) stated that they would need to purchase additional equipment in order to offer the must-carry stations signals in digital. Moreover, 71% of the operators of these systems (37 respondents) reported that purchasing the necessary equipment would be a significant burden. Some respondents expressed concern that requiring them to transmit must-carry stations in HD will prompt retransmission consent broadcast stations that permit their signals to be transmitted in analog-only to now require that their signals also be carried in HD. This would compound the burdens associated with an HD must-carry requirement by an order of magnitude for those systems where this occurs.

If required to transmit must-carry signals in HD, many small providers will be forced to incur costs that will either be difficult or impossible for them to absorb and remain profitable. It is therefore not surprising that approximately one third of operators of systems with fewer than 2,501 subscribers reported in ACA's survey that they would pass the costs associated with compliance along to their customers. However, this option is untenable for operators of small systems that have adapted to the competitive pressures they face, particularly from DBS providers that offer HD services, by targeting lower income households by offering low-priced packages to customers who are either satisfied with basic cable services, or unable to meet DBS providers' credit requirements. Rate increases associated with mandatory HD carriage would fall directly on these systems' customers who are least able to absorb them. Small operators in these circumstances face a vicious cycle, where increasing rates lead to lost subscribers, and lost subscribers in turn lead to lost revenues and higher costs per subscriber that can only be made up through still more rate increases.

Given this situation, it is not surprising that many small operators surveyed do not believe that passing the cost of system upgrades along to customers is a viable business alternative. In fact, 19% of operators of systems with fewer than 2,501 subscribers report that that they would shut down their systems rather than invest in the equipment necessary to bring them into compliance. Where small system operators determine that an HD carriage mandate renders the economic model for serving these markets unsustainable, consumers could face loss of access to local MVPD services altogether, thus depriving them of the benefits of competition.

* * *

The burdens associated with complying with the HD must-carry requirement would cause significant and immediate consumer harms in the form of increased rates, and the loss of cable services in many markets. Increasing programming costs and the loss of subscribers by systems with fewer than 2,501 subscribers makes these systems more vulnerable to any costly new regulatory mandate, such as the HD must-carry requirement. As a result, and consistent with the Commission's tentative conclusion in the NPRM, the HD carriage exemption remains critical for the continued viability of many small systems.[23] Consequently, the Commission should extend the HD carriage exemption and continue to allow systems that serve fewer than 2,501 subscribers and are not affiliated with a very large operator, to retransmit the digital broadcasts of must-carry signals to their customers in an SD analog.

V. THE BENEFIT TO SUBSCRIBERS OF REQUIRING SMALL CABLE SYTEMS TO CARRY MUST-CARRY CHANNELS IN BOTH HD AND ANALOG IS OUTWEIGHTED BY THE HARM.

The purpose of the material degradation rule is to ensure that consumers have the ability to receive the broadcasters' signals without degradation.[24] The elimination of the HD carriage exemption will benefit some customers served by systems with less than 553 MHz capacity and fewer than 2,501 subscribers ensuring that these customers receive HD must-carry signals as part of their basic cable service package. This will allow customers with HD television equipment to view these HD signals.

However, it must be noted that not all must-carry broadcasters offer HD programming. Moreover, where they do, consumers within the signal contour of these stations will not be denied access to the signals where they do not receive them from their cable provider. They may receive them using an antenna. It is also worth noting that the HD carriage exemption is limited to a small class of operators – namely those with systems that have less than 553 MHz of capacity or serve fewer than 2,501 subscribers. The number of operators within this limited class that take advantage of the HD carriage exemption is even smaller, as some of these small systems have upgraded their systems and already carry HD signals of must-carry stations where their finances can afford and market conditions require it. Thus, the HD exemption as it

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[23] *NPRM* at ¶ 20 (noting that the FCC's Form 325 data indicates that a large percentage of small systems rely on the exemption).

[24] *See In the matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Doc. No. 98-120, Third Report and Order and Third Further Notice of Proposed Rulemaking, FCC 07-170 ¶ 3 (rel. Nov. 30, 2007) ("*Third Report and Order).*

is currently crafted is limited to only the smallest and most at-risk systems, thus impacting a small percentage of total U.S. Households.

As discussed, there are significant consumer harms that will result from a repeal of the HD carriage exemption. Specifically, as ACA's survey results make clear, in many markets the HD carriage mandate will force systems with a capacity of less than 553 MHz to drop existing channels, or shut down their systems altogether. In addition, the cost burden associated with complying with an HD must-carry mandate will cause a significant proportion of operators with systems with fewer than 2,501 subscribers, to either increase the rates they charge for their services, or shut down their systems entirely.

As demonstrated above, in those instances where placing these costly regulatory burdens on smaller operators does not force them from the market entirely, it will either raise subscriber rates, or reduce these systems' financial resources available for reinvestment in their systems. Both of these options place small system operators at a significant competitive disadvantage and reduce the consumer benefits from competition. In the instances where these small system operators decide instead to shut down their systems, it restricts customer choice by removing services from the market, as well removing the price discipline competition enforces. This harms consumers, even those not currently subscribing to the small systems affected by the HD carriage exemption, by allowing the remaining service provider to raise rates without any corresponding increase in services quality or other consumer benefits. It also harms consumers in those markets where DBS providers do not offer local-into-local services by potentially eliminating their access to local broadcast television offerings.

These harms vastly outweigh the benefits that the Commission seeks to create through its mandatory HD must-carry requirement. The pool of consumers that will be harmed from repealing the HD carriage exemption is larger and includes all consumers in markets where the presence of small system operators helps keep rates in check and spurs innovation. The consumers benefiting from repealing the HD carriage exemption are limited to those that are served by the systems and have or want HD televisions. Furthermore, the level of harm is also greater than the level of benefit, with harmed consumers experiencing rate increases or the loss of access to their services entirely. In contrast, the benefits are only that some consumers that have HD televisions will be able to watch a limited number of additional television programs in HD.

All consumers in these markets are better off where they have access to viable terrestrial alternatives to DBS providers and the harm that all consumers face from the loss of this competition outweighs the benefits they and broadcasters realize by receiving must-carry stations in HD. Avoiding these potential harms – increased consumer rates, decreases in service offerings, the complete loss of cable service, and the reduction in competition, warrants an extension of the HD carriage exemption in this proceeding.

VI. THE COMMISSION SHOULD PERMANENTLY EXEMPT ALL-ANALOG SYSTEMS FROM THE REQUIREMENT TO TRANSMIT MUST-CARRY SIGNALS IN HD.

Many cable operators across the country are increasingly migrating channels from analog to digital tiers as a means of better utilizing their systems' capacity and allowing them to provide more video channels, as well as additional services such as voice, broadband and video-on-demand.[25] These developments are due in no small part to competitive pressures arising from consumer demand for digital services, including access to HD video services. Small cable system operators, particularly those all-analog systems with less than 553 MHz capacity or serving fewer than 2,501 subscribers must deal with these competitive realities as well. Like all companies participating in competitive markets, these small system operators address these competitive pressures by making strategic decisions regarding service mix, system upgrades and innovation, and pricing that they feel best meet customer demands in their local markets.

[25] Ian Olgeirson, *All-digital Footprints Make Gains Amid Uneven Commitment by Operators*, SNL Kagan (Dec. 13, 2010).

To this day, there remain a small and decreasing number of cable systems that continue to be analog-only. For a variety of reasons, these systems continue to remain in operation with each having from a few dozen to a few hundred of customers willing to pay for their services. These operators provide vastly fewer channels than their competitors, none of which are in high definition, and do not offer any advanced services, such as pay-per-view or video-on-demand. Instead, these operators often provide a lower cost service that is locally operated that allows their customers to receive basic cable channels without needing costly set top boxes. For their customers, many of whom have lower incomes, these systems can provide an affordable alternative to more expensive satellite TV providers, some of whom inquire into their customers' creditworthiness before establishing an account.

Operators of these systems have been able to negotiate retransmission consent agreements with broadcasters and programming contracts with national cable networks that permit them to offer their programming in analog-only. Although most of these broadcasters and programmers offer their programming in high definition, these content providers have not required that their signals be offered on these systems in high definition as a condition to offering their signals at all. The Commission should take this market-based consideration into account when considering whether or not to continue to permit smaller cable operators to offer must-carry signals in analog-only. For this reason, ACA urges the Commission to grant a permanent exemption from the HD Carriage obligation to any cable system that offers all of its programming in analog-only.

VII. CONCLUSION.

Nothing has improved in the market since the adoption of the HD carriage exemption in 2008 that would warrant its elimination. If anything, the circumstances that necessitated the need for the exemption three years ago has grown. As the Commission has recognized, the HD carriage exemption remains critical for the continued viability of many small systems. It is still not in the public interest to force a cable operator to raise its rates, drop a channel, or shut down a system in order to carry the broadcaster's HD signal in digital format. Consequentially, the Commission should extend its current HD carriage exemption so that systems that either have less than 553 MHz capacity, or serve fewer than 2,501 subscribers that are not affiliated with large nation operators can continue to retransmit the digital broadcasts of must-carry signals to their customers in analog- only. Failure to extend the HD carriage exemption will cause significant, direct consumer harm.

Respectfully submitted,

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