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March 22, 2012

STEFANIE A. BRAND
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VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

In the Matter of:

**Carriage of Digital Television Broadcast
Signals: Amendment to Part 76 of the
Commission's Rules**

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WC Docket 98-120

**To: Secretary Federal Communications Commission
Chief, Media Bureau**

Dear Secretary Dortch:

On behalf of The New Jersey Division of Rate Counsel, enclosed please find Reply Comments on the Fourth Further Notice of Proposed Rulemaking and Declaratory Order ('NPRM') issued in the above-captioned docket.

Respectfully submitted,

STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE
COUNSEL

By:

Christopher J. White
Deputy Rate Counsel

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

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

**REPLY COMMENTS OF
NEW JERSEY DIVISION OF RATE COUNSEL**

The New Jersey Division of Rate Counsel (“Rate Counsel”)¹ hereby submits reply comments on the Fourth Further Notice of Proposed Rulemaking and Declaratory Order (“*NPRM*”) issued in the above-captioned docket.²

SUMMARY

The *NPRM* notes that the current viewability rule(s) will remain in effect until June 12, 2012, absent further Commission action.³ The *NPRM* also established a comment cycle for interested parties to weigh in on “...whether to extend the viewability

^{1/} The New Jersey Division of Rate Counsel is statutorily authorized to represent the public interest of New Jersey ratepayers, including cable television subscribers, before state and federal regulatory agencies. See N.J.S.A. 52:27EE-48, 55.

^{2/} *I/M/O Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, CS Docket No. 98-120, FCC 12-18 (Rel. February 10, 2012) (“*NPRM*”). The “*Viewability rule*” referenced in this *NPRM* is the directive announced in the *Viewability Order* in *I/M/O Carriage of Digital television Broadcast Signals: amendment to Part 76 of the Commission's Rules*, Third Report and Third Further Notice of Proposed Rulemaking, CS Docket 98-120, 200722 FCC Rcd. 21064 (rel. November 30, 2007, (“*Viewability Order*”).

^{3/} *Id.*, ¶¶ 1, 23.

rule for three more years to ensure that all cable subscribers, including those with analog equipment, continue to have access to must carry television signals.”⁴

Not surprisingly, in initial comments, the National Cable & Telecommunications Association (“NCTA”) and Time Warner Cable Inc. (“TWC”) sided against extension of the viewability rule, although the NCTA favored extension of the HD exemption for small carriers. The American Cable Association (“ACA”) opined that the reasons for granting small carriers exemption from the HD requirements are magnified in today’s environment and thus, the Commission should extend its current HD carriage exemption so that systems with less than 553 MHz capacity or fewer than 2,501 subscribers can continue to retransmit digital broadcasts to their customers in analog-only. The National Association of Broadcasters (“NAB”) comments support the extension of the viewability rule for an additional three years and the continued exemption on small carrier HD carriage.

In these Reply comments, Rate Counsel concurs with the three-year extension of the viewability rule, and with the call for continued exemption of the HD carriage requirements on small carriers. Moreover, Rate Counsel submits that the Commission should clarify that for the duration of the viewability rule, the provision of digital equipment to subscribers in hybrid systems must be rendered at no additional cost to subscribers. In addition, Rate Counsel submits that for all-digital systems, the necessary equipment should also be provided at no additional cost due to the overarching benefit to the carriers from enhanced spectrum that arises from digital compression. Added available spectrum benefits all digital services provided by the carrier.

^{4/} *Id.*, ¶ 3.

I. INTRODUCTION

On March 12, 2012, several interested entities filed comments with the FCC in connection with the Commission's release of the *NPRM* on February 10, 2012. Pursuant to the *NPRM*'s comment cycle, Reply comments are due March 22, 2012. This *NPRM* was in direct response to Rate Counsel's letter dated June 15, 2011 requesting information on the status of the Commission's review of the digital transmission rules prior to their sunset. The *NPRM* addresses the latter by its Declaratory Order that subject to further action by the Commission, the viewability rule as well as the small carrier HD exemption remains in effect until June 12, 2012. The major thrust of the *NPRM* is to obtain input from interested parties on whether to extend the viewability rule for another three years to ensure that all cable subscribers, including those with analog equipment, have continued access to must carry television signals.⁵ As a corollary, the *NPRM* also requests comment concerning continuity of the HD carriage exemption for small carriers.

In their initial comments, the NCTA and TWC, representing the large cable carrier contingent, both opined that the current state of affairs requires lifting of the viewability rule requirements. The NCTA also favors Commission extension of the small carrier HD carriage exemption, while TWC is silent on that point.

Continuation of the viewability rule's dual carriage requirements, NCTA argues, obligates carriage of must carry stations in both analog and digital format during the digital transition, which undermines the carriers' ability to manage their transition consistent with consumers' best interests. The requirements pose burdens that outweigh

⁵/ See *I/M/O Carriage of Digital television Broadcast Signals: amendment to Part 76 of the Commission's Rules*, Third Report and Third Further Notice of Proposed Rulemaking, CS Docket 98-120, 200722 FCC Rcd. 21064 (rel. November 30, 2007), ("*Viewability Order*").

the incremental benefit to broadcasters of providing dual carriage of must carry stations. NCTA posits that since today 78% of households purchase digital services the number of households unequipped to view digital must carry signals is substantially diminished. The NCTA recognized that the viewability requirements apply to all television receivers of a subscriber connected to a cable system. In addition, it acknowledged that the FCC required carriers to either provide all cable services in digital format in the first instance along with the requisite digital equipment, or comply with the digital transition directive by “downconverting” the digital signals to analog in order to provide viewing parity to customers with analog televisions.

TWC submits that the term “viewable” in the *Viewability Order* is ambiguous and belies the notion that provision of equipment by sale or lease to view the digital format must carry stations would not satisfy the viewability requirement in Section 614 of the Telecommunications Act.⁶ Hence, TWC argues, that as long as the cable carrier offers equipment for sale or lease to subscribers to view must carry stations, the objective of the Act is satisfied.

In addition, TWC argues that the proposed three-year extension of the viewability rule cannot withstand constitutional scrutiny under the *Turner cases*.⁷ Current market and technological advancements run counter to the justifications that existed in 1992 when the Cable Act was passed and hence warrant greater scrutiny than the intermediate scrutiny level applied by the Commission on the basis that the viewability rule was content-neutral regulation of speech.

^{6/} 47 U.S.C. § 534 (b)(7).

^{7/} *Turner Broadcast Systems Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner P*”); *Turner Broadcast Systems Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”) (“*Turner cases*”).

The ACA advocates for permanent exemption from HD requirements to small carriers as these carriers largely operate on an analog-only basis and provide service outside the mainstream with only a few hundred customers. As such, they do not compete directly with the large carriers. The basis upon which the FCC granted such exemption, says the ACA, has not changed and imposition of the same requirements applied to large and national carriers would force rate increases, channel drops, or system shut downs.

The NAB supports the proposed three-year extension of the viewability rule as well as further extension of the small carrier HD exemption. Until systems convert to all digital transmission, the rule should remain in place as the burden on cable carriers is dwarfed by the benefits carriers attain as a result – increased capacity for programming and other services, reduced costs, and reductions in set-top box models supported. When systems are fully converted to digital, as most systems currently operate in the hybrid form, then the need for the viewability rule may disappear. Furthermore, while the NAB supports extension of the small carrier exemption it asks the Commission to make clear that if a small carrier upgrades to carry some HD signals, then it must also carry local digital television signals in the same way.

II. DISCUSSION

A. RATE COUNSEL SUPPORTS THE EXTENSION OF THE VIEWABILITY RULE FOR HYBRID SYSTEMS INCLUDING THAT SUCH CONVERSION SHOULD BE AT NO COST TO CONSUMERS.

Rate Counsel applauds the Commission's proposal to extend the viewability rule until June 12, 2015 and supports the continuation of the exemption for small carriers. During the initial transition period, Rate Counsel raised concerns about charges assessed on consumers in hybrid systems based upon a Form 1205 filing made by Comcast

wherein Comcast was charging consumers for Digital Transmission Adapters (“DTAs”) in hybrid systems. Rate Counsel interpreted the *Viewability Order* as foreclosing charges to consumers to view must carry channel on every television set in a household in hybrid systems.⁸ Rate Counsel submits that under the *Viewability Order*, a cable carrier’s signal carriage obligations regarding the viewability and availability of must-carry stations are governed by Section 76.56 of the Commission rules. The pertinent parts of Section 76.56 of the Commission’s rules⁹ provides as follows:

§ 76.56 Signal carriage obligations.

* * * * *

(d) *Availability of signals.*

* * * * *

(3) The viewability and availability requirements of this section require that, after the broadcast television transition from analog to digital service for full power television stations cable operators must either:

(i) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or

(ii) for all digital systems, carry those signals in digital format, provided that all subscribers, including those with analog television sets, that are connected to a cable system by a cable operator or for which the cable operator provides a connection have the necessary equipment to view the broadcast content.

In addition, under Section 76.56(d)(4) of the Commission Rules, carriers are responsible for any costs incurred in down-converting or carrying alternative-format versions of

⁸ / Rate Counsel appealed an Order of the New Jersey Board of Public Utilities approving charges on consumers in hybrid systems. See *New Jersey Division of Rate Counsel v. State of New Jersey Board of Public Utilities, Appeal of Local Rate Order*, CSB-A-0748 (filed March 11, 2011) (“*Rate Counsel Appeal*”). Decision pending.

⁹ / 47 C.F.R. § 76.56.

signals under §76.56(d)(3)(i) or (ii).¹⁰ Rate Counsel asks that the Commission reaffirm that in hybrid systems, consumers must be able to view all must carry channel on all television sets and all cost shall be borne by the cable operator.

Rate Counsel concurs with the analysis submitted by the NAB and ACA that acknowledges the market and technological realities confronting consumers, in support of extending the *Viewability Order* requirements upon cable carriers for another three years before consideration of sunset. To date, not all consumers have acquired digital televisions and not all cable television carriers have completed their all-digital transitions. The need to remain vigilant of consumer needs to view must carry signals undisturbed has not yet passed. Until that occurs, the *Viewability Order* requirements should remain intact. A three-year extension will provide the necessary safeguards to consumers that ensure their ability to view must carry signals on analog television sets.

Although the Commission did not rule out equipment charges in all-digital systems, Rate Counsel asks that the Commission revise the viewability rule to extend the no cost rule to all digital systems as well. The benefits derived by the cable operator from going all-digital justify extending the no cost rule to all-digital systems in the public interest.

If the no cost rule is not extended to all-digital systems, Rate Counsel asks that the Commission clarify that equipment charges in all-digital systems are subject to review as part of the Form 1205 filing requirements. In that regard, Rate Counsel submits that charges permitted on consumers should be subject to review by the Local Franchise

^{10/} The requirements set forth in paragraph (d)(3) of this section shall cease to be effective three years from the date on which all full-power television stations cease broadcasting analog signals, unless the Commission extends the requirements in a proceeding to be conducted during the year preceding such date. 47 C.F.R. § 76.56 (d)(5).

Authority (“LFA”) in the FCC Form 1205 review process under Section 623 (b)(3)(A)¹¹ or reviewed by the FCC where the LFA no longer has authority to review rates.¹² In either case, the costs must be allocated among all services benefiting from the availability of additional bandwidth in accordance with Sections 76.923¹³ and 76.924¹⁴ of the Commission’s rules.

B. Rate Counsel Supports The Extension Of The Small Carrier Exemption.

Rate Counsel also concurs with the reasoning posited by the NAB, the NCTA and ACA in support of extending exemptions to small carriers. Equitable factors favor continued relief to qualifying small carriers from the dual carriage requirements for must carry signals. Systems operating at less than 533 MHz capacity and serving less than 2,501 subscribers do not share the economies of scale that large and national carriers enjoy. To the contrary, imposition of the dual carriage requirements leads to raising rates to the limited subscriber base or shutting down altogether. Neither logical consequence provides benefit to the viewing public. The burdens on small carriers have not changed since first permitted. Therefore, the Commission should retain the small carrier HD carriage exemption.

III. CONCLUSION

The Commission should, therefore, extend the viewability rules, including the small carrier exemption, as well as reaffirm and clarify that subscribers are held harmless for the costs attendant to downconverted digital signals in hybrid systems, and that in all-

^{11/} 47 U.S.C. § 543 (b)(3)(A).

^{12/} 47 U.S.C. § 543 (a)(6).

^{13/} 47 C.F.R. § 76.923.

^{14/} 47 C.F.R. § 76.924.

digital systems the benefits to carriers generated by freed spectrum warrants extending the no-cost rule to all-digital systems.¹⁵ In the event that the Commission declines to extend the no-cost rule to all-digital systems, the rates charged must be reviewed and approved in a FCC Form 1205 filing to the Commission for systems no longer subject to rate regulation, or to the LFA in systems still subject to rate regulation.

Respectfully submitted,

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By:



Christopher J. White, Esq.
Deputy Rate Counsel

Date: March 22, 2012

^{15/} This is consistent with Rate Counsel's position in *I/M/O Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Proposed Rulemaking, MB Docket NO. 11-169, PP Docket No. 00-67 (rel. October 14, 2011) ("*Basic Service Tier Encryption*").