

**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 BRIGHT HOUSE NETWORKS, LLC**

**BRIGHT HOUSE NETWORKS, LLC**

Steven J. Horvitz  
**Davis Wright Tremaine LLP**  
1919 Pennsylvania Avenue, N.W.  
Suite 800  
Washington, DC 20006  
(202) 973-4200

Jeff Chen  
Senior Vice President  
Advanced Technology  
**BRIGHT HOUSE NETWORKS, LLC**

Arthur J. Steinhauer  
Thomas M. Wilson  
**SABIN BERMANT & GOULD LLP**  
Four Times Square  
New York, NY 10036  
(212) 381-7018

Its Attorneys

March 22, 2012

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY.....	1
I. CHANGED CIRCUMSTANCES ARGUE AGAINST EXTENDING THE DUAL CARRIAGE RULE.....	3
A. The DTV Transition Occurred Three Years Ago. ....	4
B. Spectrum Devoted to Dual Carriage Would Be Deployed For Broadband Services ...	5
C. Analog Delivery is Inefficient. ....	6
D. Analog Delivery is Unnecessary.....	7
II. THE MUST CARRY STATUTE DOES NOT REQUIRE DUAL CARRIAGE.....	9
CONCLUSION.....	12

**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 BRIGHT HOUSE NETWORKS, LLC**

Bright House Networks, LLC (“Bright House Networks”) hereby submits these Reply Comments in response to the Commission’s *Fourth Further Notice of Proposed Rulemaking and Declaratory Order* (“NPRM”) in the above-captioned docket and in response to the Comments already submitted therein.

**INTRODUCTION AND SUMMARY**

It has been almost three years since the nation’s broadcast industry converted from analog to digital transmission. As a result, television households now attempting to access broadcast programming through “off air” reception must first acquire and use digital equipment. With no apparent sense of irony, NAB argues in its Comments that the Commission should extend the “Dual Carriage” rule – requiring cable operators providing a mix of analog and digital channels to deliver all must carry signals in *both* digital and analog format – even though the must carry stations themselves broadcast only in digital. In so arguing, NAB turns the 1992 must carry law on its head.

When the Supreme Court first considered the 1992 must carry law, it concluded, “The must-carry provisions . . . are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the

viability of broadcast television.”<sup>1</sup> But the “gatekeeper” analysis that led the Supreme Court to narrowly uphold the must carry statute in the mid-1990s cannot possibly justify the continued imposition of a “Dual Carriage” requirement in 2012.

Competition has transformed the cable industry. As the DC Circuit recognized in 2009, “Cable operators ... no longer have the bottleneck power over programming that concerned the Congress in 1992.”<sup>2</sup> In NCTA’s words, “Two DBS companies are available nationwide, and they, along with Verizon and AT&T, now serve 41.5% of MVPD customers.”<sup>3</sup> This competing penetration figure is almost *three times* the 15% penetration figure that Congress decided in 1992 provides “effective competition” to incumbent cable operators. The reality of today’s robustly competitive marketplace is irreconcilable with any previous “gatekeeper” concerns.

Not only have dramatic changes in the competitive MVPD landscape undermined any possibility of cable operators exploiting a distribution “bottleneck,” but Dual Carriage goes far beyond simply ensuring the *availability* of broadcast signals on local cable systems. It instead requires cable operators to provide broadcasters with an additional *duplicative* mode of distribution, using an *inefficient* format that broadcasters themselves have not been burdened with since 2009.

Bright House Networks, along with the rest of the cable industry, voluntarily accepted a *temporary* Dual Carriage requirement so as to help avoid viewer disruption associated with the broadcast industry’s 2009 DTV transition. NAB errs in now exploiting the cable industry’s cooperation in an unwarranted attempt to transform a temporary carriage requirement into a permanent one.

---

<sup>1</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661 (1994) (“*Turner I*”).

<sup>2</sup> *Comcast Corp. v. FCC*, 579 F.3 1, 8 (D.C. Cir. 2009)

<sup>3</sup> NCTA Comments at 20.

As NCTA and Time Warner explain in their respective Comments, the Commission's Dual Carriage rule suffers serious constitutional infirmities that should not be ignored. Indeed, the Commission is obligated to implement the 1992 must carry law in a sensible manner that simultaneously promotes the statute's objective and minimizes its constitutional vulnerability. Bright House Networks applauds the Commission for initiating this proceeding and respectfully asks the Commission to promptly reconsider its expansive "viewability" interpretation and no longer require hybrid cable systems to carry a duplicative analog version of every must carry signal.

**I. CHANGED CIRCUMSTANCES ARGUE AGAINST EXTENDING THE DUAL CARRIAGE RULE.**

The Commission's original adoption of the *temporary* Dual Carriage rule was clearly tied to the unique exigencies of the 2009 DTV transition. The NPRM itself explains that the Commission is now seeking to reevaluate the rule in light of changed circumstances:

In order to retain flexibility to deal with concerns arising after the DTV transition, the Commission stated that the viewability rule would sunset three years after the transition, subject to review during the last year of this period to determine if it should be extended, revised, or allowed to sunset....

The proceeding we begin today provides an opportunity for us to consider whether extending this rule best fulfills the statutory mandate, by reviewing it "in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace."<sup>4</sup>

The fact that the Commission initiated this proceeding (and is now seeking information about the actual operation of the Dual Carriage rule) constitutes a critical legal concession. Indeed, there would be no purpose for this proceeding if the statute's language left no room for alternative interpretations – including interpretations less invasive of cable operators' First Amendment rights and more respectful of the viewing preferences of cable customers.

---

<sup>4</sup> NPRM at ¶ 9, (citing *Viewability Order* at ¶¶ 1, 16.)

**A. The DTV Transition Occurred Three Years Ago.**

When the Commission adopted the *Viewability Order*, it was confronting the broadcast industry's DTV transition and the fear that this historic event would trigger major viewer disruption. In that context, the Commission chose – *on a temporary basis* -- to broadly apply cable's must carry obligations so as to minimize the transitional impact on cable customers who were accustomed to receiving broadcast channels in analog. With that same transitional objective in mind, the cable industry acquiesced. But the broadcast industry's digital transition took place three years ago, and there is no longer a credible basis to maintain the Dual Carriage rule. Analog carriage of each and every must carry station imposes a heavy burden on capacity-strained cable systems that can no longer be justified.

The NPRM errs in speculating that the lack of Dual Carriage complaints and waiver requests “seems to indicate that the burden of compliance has been relatively minimal and actual costs of compliance have likely not been onerous.”<sup>5</sup> That burden is very real, and the cable industry's regulatory compliance has become more, rather than less, problematic. As the NCTA explains in its Comments, the explosion of video programming (particularly HD programming) and broadband usage over the last few years has placed substantial and escalating burdens on cable spectrum, which is precisely why the cable industry continues to convert non-must carry programming from analog delivery to more efficient digital delivery.

Notwithstanding the Commission's fears about viewer disruption prior to the DTV transition, digital television is now well-established. Of critical importance here, the vast majority of current cable customers regularly access digital programming. NCTA reports that

---

<sup>5</sup> *NPRM* at ¶ 15.

almost 80% of cable subscribers now purchase digital service.<sup>6</sup> Whereas 46% of cable customers subscribed solely to analog service in 2007 (when the Commission adopted its Dual Carriage rule), that figure was reduced to just 22% in 2011, and it continues to fall.<sup>7</sup> Not surprisingly, some of Bright House Networks' cable systems enjoy an even higher digital penetration. Moreover, any digital penetration figure reported for the cable industry exaggerates subscriber dependency on analog delivery, because many cable customers who have not yet subscribed to a digital service tier are able to directly access unencrypted digital signals included in their cable system's basic service through their television set. The Commission, after all, has required that every television receiver sold in the United States for the last five years include a digital tuner.<sup>8</sup> In short, accessing digital services is no longer an impediment to the vast majority of cable customers.

**B. Spectrum Devoted to Dual Carriage Would Be Deployed For Broadband Services.**

Since the Commission adopted its Dual Carriage rule in 2007, Bright House Networks and other cable operators have accommodated a dramatic increase in both the number of broadband customers and the data usage of these customers. This result is, of course, entirely consistent with the Commission's oft-stated objective of encouraging additional high speed, high quality broadband service. Unfortunately, the Dual Carriage rule significantly and unnecessarily impedes the Commission's broadband objective by inefficiently consuming precious cable capacity that could be better deployed for enhanced broadband service.

If the Commission allows the Dual Carriage rule to sunset as scheduled, Bright House Networks and other cable operators would redeploy much of the liberated spectrum for

---

<sup>6</sup> NCTA Comments at 11, 12 (citing SNL Kagan).

<sup>7</sup> *Id.*

<sup>8</sup> *See* 47 C.F.R. § 15.117.

broadband services. As it now stands, the Dual Carriage rule imposes excessive demands on cable capacity with little or no offsetting public benefit. Indeed, when it comes to reassessing the Dual Carriage requirement in today's digital world, applying the common sense rule of "less is more" would benefit cable operators and consumers alike.

Data-usage by the average Internet user has increased a thousand-fold in the last decade. Over the next three years, this trend will continue and even accelerate, and cable operators will need flexibility to meet fast-changing consumer demands. Future broadband use should not be artificially restrained by clinging to an outmoded carriage requirement that no longer serves its intended purpose. The cable industry's own digital transition otherwise continues at a pace that properly balances the needs of consumers with available spectrum. Allowing the Dual Carriage rule to sunset as scheduled would further aid this sensible transition.

**C. Analog Delivery is Inefficient.**

In reevaluating the Dual Carriage rule, the Commission should recognize that the rule now operates in an extraordinarily wasteful manner. It requires cable operators to devote substantial capacity to retransmit a *duplicate* version of must carry programming in a spectrum-inefficient analog format to the small (and rapidly decreasing) minority of customers not already equipped to view digital transmissions. This perverse policy frustrates the Commission's interest in promoting program diversity for the large (and rapidly increasing) majority of cable customers. The Dual Carriage rule, after all, leaves less capacity available for other programming services, not to mention broadband deployment.

As cable customers increasingly rely on digital delivery, the Dual Carriage rule becomes increasingly objectionable, because the disparity in digital and analog subscribership magnifies the rule's inherent inefficiency. Requiring a cable operator to carry a single must carry channel in

analog consumes the same cable spectrum as a *dozen* standard digital services. This lopsided loss of programming (which will only grow more extreme as new compression advancements are implemented) is clearly contrary to the best interests of the vast majority of cable customers, who can already view must carry programming in digital. Extending the Dual Carriage rule (and the inefficient analog delivery of must carry signals that the rule compels) would necessarily impose a disproportionate burden on cable operators.

**D. Analog Delivery is Unnecessary.**

Neither NAB nor any other broadcast entity has provided the Commission with any evidence that the substantial burdens imposed on cable operators under the Dual Carriage rule are necessary to preserve over-the-air broadcasting. The most popular broadcast stations, after all, elect retransmission consent and enjoy no benefits under the Dual Carriage rule. The less popular stations that elect must carry status may or may not be viable in the years ahead, but there is no basis for the Commission to assume that providing a duplicate version of must carry programming to the small minority of cable subscribers currently lacking digital capability is critical to the viability of the entire broadcast industry.

Simple math explains the broadcast industry's conspicuous evidentiary failure.

Assuming that approximately: (1) 90% of television households subscribe to an MVPD service; (2) 60% of MVPD households subscribe to a traditional cable operator; and (3) 20% of cable households are analog-only customers, it would follow that the Dual Carriage rule consumes precious bandwidth, yet provides must carry stations with improved access to just 10% of all television households.<sup>9</sup> And that already modest figure is continually shrinking. NAB cannot credibly contend that the fate of the entire broadcast industry rests on the Commission insisting

---

<sup>9</sup> .90 x .60 x .20 = .10.

that must carry stations be delivered in a manner that simplifies reception to such a small portion of all television households.<sup>10</sup>

Significantly, the question in this proceeding is *not* whether cable systems make must carry programming *available* to their customers, but whether cable systems should be compelled to provide must carry programming in a duplicating and inefficient analog format. If analog-only cable customers are actually interested in watching must carry programming that is offered exclusively in digital, they can easily obtain the necessary digital equipment. Even if the Commission continues to compel operators to deliver must carry programming in analog, that programming may still fail to attract a significant number of analog-only cable customers.

The Commission should also recognize that “relegating” a programming service to digital is no longer (if it ever was) equivalent to a death sentence. Cable operators (like Bright House Networks) operating hybrid cable systems offer an increasing number of programming services exclusively in digital. On Bright House Network’s Tampa system, for example, there are literally dozens of programming services that are today offered only in standard digital format. These services include such prominent cable networks as: Bio, Ovation, Discovery Fit & Health, Game Show Network, Sundance, Style, FOX Soccer, BBC America, Nick Jr., MTV2, Bloomberg Television, CBS Sports Network, TV One, Fox Business Network, and ESPNU. The multitude of successful cable channels offered only in digital fatally undermines NAB’s unwarranted contempt for digital delivery.

---

<sup>10</sup> Congress’ recent authorization of incentive auctions to reclaim valuable broadcast spectrum acknowledges the importance of sensible spectrum management, and recognizes that the loss of some broadcast stations is *not* fatal to the future of the broadcast industry. The glaring inefficiencies of the Dual Carriage rule, and the burdens the rule necessarily imposes on cable operators, cannot be reconciled with Congress’ efforts to better manage the broadcast industry’s over-the-air spectrum consumption.

In short, NAB has failed to demonstrate that the benefits afforded by must carry are “congruent” to its burdens.<sup>11</sup> The realities of today’s video marketplace render obsolete any logical basis for burdening the First Amendment rights of cable operators and limiting the viewing options of cable customers by continuing to insist that hybrid cable systems not only carry must carry signals, but carry them in analog.

## **II. THE MUST CARRY STATUTE DOES NOT REQUIRE DUAL CARRIAGE.**

If Congress had unequivocally mandated dual carriage, the Commission would have little choice in this proceeding but to extend its Dual Carriage rule and wait for the inevitable First Amendment challenge. But Congress did no such thing. Assuming *arguendo* the statute is sufficiently ambiguous to accommodate the *Viewability Order*’s expansive reading, the statute certainly does not require that reading. *Bona fide* First Amendment concerns -- coupled with a realistic assessment of the benefits and burdens associated with mandating duplicative analog delivery -- compel the Commission to adopt a more balanced statutory interpretation. In this proceeding, the Commission should not be asking whether it is possible to construe the must carry statute broadly enough to extend the Dual Carriage rule; it instead should be asking whether the must carry statute is flexible enough to permit the Dual Carriage rule to sunset as scheduled.

The Commission originally premised its Dual Carriage rule on Section 614(b)(7) of the Act. The statutory provision is entitled “Signal Availability” and simply requires that must carry signals “be provided to every subscriber of a system.”<sup>12</sup>

---

<sup>11</sup> See NAB Comments at 6 (*quoting Turner I* at 215).

<sup>12</sup> See 47 U.S.C. § 534(b)(7). Section 614 is only applicable to commercial broadcast stations. Section 615 (rather than Section 614) establishes must carry obligations related to non-commercial stations. Section 615 simply requires that must carry channels “be available to every subscriber as part of the cable system’s lowest priced tier.” 47 U.S.C. § 535(h). Bright House

This controlling statutory provision does *not* expressly reference either analog or digital delivery. Indeed, the provision is technologically neutral. The Commission has already agreed that digital delivery satisfies Section 614(b)(7), provided that the cable system at issue relies exclusively on digital delivery. The Commission’s transitional Dual Carriage rule was based not on an antipathy towards digital delivery *per se*, but rather a concern that basic customers accessing some programming in analog might be disinclined to obtain and use digital equipment for the purpose of watching must carry programming. But even if a basic customer declines digital equipment, it does not mean that the operator has failed to make must carry programming “available” to the customer. Congress adopted “must carry,” not “must watch.”

Bright House Networks respectfully submits that Section 614(b)(7) mandates nothing more than requiring cable operators to deploy equipment capable of receiving all must carry signals and to advise customers of the need for such equipment. This interpretation of Section 614(b)(7) is precisely the one espoused by the Commission in *WLIG-TV, Inc. v. Cablevision Systems Corporation*,<sup>13</sup> shortly after the must carry statute was adopted. In that case, the Commission sensibly concluded:

We ... explained in the Report and Order that cable operators are not required to provide converter boxes to their subscribers, or to provide all cable connections for their subscribers, but they must notify all their subscribers of the broadcast stations they cannot receive without a converter box. (Citations omitted.) However in a situation such as that now before us, where a cable operator chooses to provide subscribers with signals entitled to mandatory carriage through converter boxes supplied by the cable system, those converters must be capable of transmitting all the signals entitled to mandatory carriage on the basic tier of the cable system, not just some of them.<sup>14</sup>

---

Networks submits the Commission erred in adopting an expansive reading of Section 614(b)(7) and then exacerbated its error by assuming that this expansive reading should be applied to non-commercial stations actually governed by Section 615(h).

<sup>13</sup> 78 R.R2d 208 (1993)

<sup>14</sup> *Id.* at ¶ 5.

The Commission’s sensible reasoning in 1993 requires that any equipment actually provided by a cable operator should be capable of receiving all commercial must carry signals (including must carry signals delivered solely in digital), but it does not require that every customer must deploy operator-provided digital equipment. Mandating operator-provided digital equipment at every cable connection would be at direct odds with the final sentence of Section 614(b)(7), which simply requires cable operators transmitting must carry signals in a manner requiring a converter box to “offer to sell or lease such a converter box to such subscribers.”<sup>15</sup> That result would also conflict with Section 623 of the 1992 Act, which mandates the “unbundling” of equipment and service rates and affirmatively requires cable operators to offer equipment and service separately from each other.<sup>16</sup> It would also conflict with Section 629 of the Communications Act, which Congress adopted in 1996 to ensure the “Competitive Availability of Navigational Devices.”<sup>17</sup> Under Section 629, cable operators are prohibited from mandating customer use of operator-provided equipment.<sup>18</sup>

---

<sup>15</sup> 47 U.S.C. § 534(b)(7).

<sup>16</sup> 47 U.S.C. § 543.

<sup>17</sup> 47 U.S.C. § 549.

<sup>18</sup> Significantly, Section 614(b)(7) requires that commercial must carry signals be delivered to “television receivers.” As noted above, Part 15 of the Commission’s rules have required that all television receivers sold in the United States for the last five years be equipped with digital tuners. *See* 47 C.F.R. § 15.117. Under the circumstances, the Commission could reasonably conclude that, for purposes of prospective application of Section 614(b)(7), “television receivers” should be limited to those sets equipped with digital tuners. This definitional interpretation would avoid any need to extend the Dual Carriage rule and its concomitant burden on cable operators.

