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

Reply Comments

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I. INTRODUCTION

The record in this proceeding[1] clearly demonstrates that the public interest is best served by continuing to exempt small cable systems[2] from the requirement that they provide must-carry broadcast signals in digital high definition ("HD") ("HD carriage exemption").[3]

The National Association of Broadcasters ("NAB"), nonetheless, argues that the Commission should narrow the HD carriage exemption so that systems that carrying even one

[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] The small cable systems that are subject to the HD carriage exemption are those with less than 553 MHz of capacity, or fewer than 2,501 subscribers that are not owned by a very large multichannel video programming distributor ("MVPD"). *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).

[3] *See NPRM* at ¶ 20 (Commission tentatively concludes that it is in the public interest to extend the small-system HD carriage 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*").

HD signals are required to carry all signals of broadcasters that elect must-carry in HD.[4] The Commission must reject this suggestion as NAB has presented no evidence that cable systems that offer some HD programming and rely upon the HD carriage exemption would not be significantly burdened by no longer qualifying for the exemption. In fact, based on ACA's survey of its members that rely on the HD carriage exemption, those who operate digital/analog hybrid systems that utilize the exemption say its elimination would impose a burden on them, and that the burden would be similar to that one imposed on analog-only systems. Moreover, lifting the HD exemption for these systems would cause the very same consumer harms that lifting it would cause to analog-only systems. Consequently, the Commission should refrain from narrowing the exemption as requested by NAB.

In addition, while the evidence entered into the record suggests that the number of systems that are utilizing the HD carriage exemption has decreased since 2008, the need for the exemption among the small cable systems that currently rely upon it, whether they are offering HD programming or not, has not only failed to diminish, but has increased. Extending the HD carriage exemption will not only avoid imposing a significant burden on these small cable systems that have less than 553 MHz of channel capacity or fewer than 2,501 subscribers, but will also serve the public interest by preventing the consumer harms that record evidence shows will flow from "creating a regime in which the required carriage is too expensive to operate."[5]

With regard to the Commission's request for information regarding the continued need for the HD carriage exemption, ACA, along with the National Cable Telecommunications Association ("NCTA"), provided ample evidence. Data that has been entered into the record by the NCTA suggests that the number of systems relying upon the HD carriage exemption has

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[4] NAB Comments at 7-8.

[5] *Fourth Report and Order* at ¶ 7 (citation omitted).

decreased over time - an outcome that the Commission anticipated would occur and hoped for in giving smaller systems time to come into compliance with the viewability rule. However, among small systems that continue to rely upon the HD carriage exemption, the financial and capacity constraints that necessitated the exemption years ago have not improved, and in some cases have grown worse. ACA and NCTA conclude that requiring small systems to comply with the HD must-carry mandate would result in these systems dropping existing channels or converting channels from analog to digital only, purchasing new equipment, or shutting down. For consumers, this would mean no longer being able to view desired channels, paying higher subscription fees, or losing a competitive and sometimes preferred choice of provider. The harms demonstrated by this evidence are the same as those that prompted the Commission to adopt the HD carriage exemption in 2008. Consequently, the record makes plain that, in order to avoid the harm to small cable systems and consumers, the Commission must extend the HD carriage exemption.

Further, the record also demonstrates that the Commission should permanently exempt analog-only systems from the HD must-carry mandate. Must-carry stations would not be disfavored by permitting analog systems to continue offering their signals in analog-only until they deem it appropriate to change based on local conditions. Indeed, broadcasters that elect retransmission consent and national cable networks that typically require their signals to be carried in HD often grant analog-only systems permission to offer their programming in analog-only. This is because these programmers recognize analog-only systems' financial and bandwidth constraints. In light of this market reality, the Commission should permanently exempt these systems from the HD must-carry mandate.

II. THE COMMISSOIN MUST REJECT NAB'S SUGGESTION THAT THE HD MUST-CARRY MANDATE BE APPLIED TO SMALL SYSTEM OPERATORS THAT PROVIDE ANY SIGNALS IN HD

In its Comments, NAB asserts that "[i]f a small cable system has the capability of

transmitting one or more signals in HD, it should no longer be entitled to a waiver of the statutory mandate to transmit local broadcast signals without degradation . . . ."[6] The Commission should reject NAB's suggestion.

NAB rests the entirety of its argument in support of revoking the HD carriage exemption for small system operators that provide any signals in HD on the existence of the "material degradation rule" contained in Section 614(b)(4) of the Act.[7] NAB maintains that allowing a waiver of this statutory mandate when a small cable system carries one or more HD signals is contrary to Congress's intent to prevent cable systems from providing "technically advantageous carriage to 'favored signals'" and lower quality carriage to local television signals.[8]

NAB's focus on its interpretation of the Congressional intent behind the material degradation rule misses the point. The narrow issue of whether to extend the HD carriage exemption for smaller cable systems that provide some HD programming does not turn on a legal interpretation of what Congress intended with regard to the material degradation rule. The Commission has already ruled on this matter.[9] Here, instead, the Commission is appropriately evaluating whether extending the HD carriage exemption for small cable systems that have less than 553 MHZ capacity or fewer than 2,501 subscribers remains warranted in the public interest.[10] This is fully consistent with Congress' intent that all agencies take steps to minimize the economic impact on small entities while still complying with the statutory requirements, as

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[6] NAB Comments at 7.

[7] 47 U.S.C. § 534(b)(4)(A).

[8] NAB Comments 7-8.

[9] *See, e.g., Third Report and Order* at ¶ 7 ("We retain the requirement that HD signals be carried in HD, as well as the comparative approach to determining whether material degradation has occurred.").

[10] *NPRM* at ¶ 3, 20; *Fourth Report and Order* at ¶ 1, 7 ("we address the obligation of small cable systems, and grant them an exemption from the material degradation requirement to carry high definition ("HD") broadcast signals under the Commission's Rules . . . .").

prescribed by the Regulatory Flexibility Act,[11] as well as with the Commission's authority under the Communications Act and its own rules to grant waivers or exemptions from its rules under appropriate circumstances.[12] Indeed, when the Commission considered adoption of its "viewability" rules in 2007, a significant number of members of Congress filed letters advocating for the Commission to adopt a blanket exemption for small systems.[13] Thus, the only question regarding the HD carriage exemption presented for decision by the NPRM is whether this exemption is still needed, and to what extent.[14] Accordingly, NAB's focus on the Congressional intent of the material degradation is utterly misplaced.

To help the Commission answer key questions concerning extension or revocation of the HD carriage exemption, the NPRM requested data and information from commenters.[15] As discussed in their initial comments, both ACA and NCTA submitted specific facts and data detailing the burdens that lifting the HD carriage exemption would have on small system operators in terms of increased costs; disruption of channel line-ups; and the undermining of the business case for operating many small systems to the point where the only logical response for operators is to close the systems.[16] The record also includes significant documentation of consumer harms that lifting the HD carriage exemption would cause in the form of increased

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[11] Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§ 601-612), *amended by* Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996).

[12] *See The Communications Act of 1934*, Pub.L. No. 73-416, 48 Stat. 1064 § 10 (codified as amended at 47 U.S.C. § 160) (providing Commission with forbearance authority); 47 C.F.R. § 1.3 (suspension, amendment, or waiver of rules).

[13] *See* Ted Hearn, *Senators Back Dual Carriage Exemption*, Multichannel News, Nov. 19, 2007 (describing a letter dated Nov. 15, 2007, signed by Senators Jay Rockefeller (D-W.Va.), Byron Dorgan (D-N.D.), Trent Lott (R-Miss.), Olympia Snowe (R-Maine), Gordon Smith (R-Or.), Jim DeMint (R-S.C.), and John Thune (R-S.D.)).

[14] *NPRM* at ¶ 3 ("We initiate this Fourth Further Notice of Proposed Rulemaking (Fourth NPRM) in the DTV cable carriage docket to determine whether it would be in the public interest to extend this rule and exemption.").

[15] *See id*. at ¶ 20.

[16] ACA Comments at 15-17; NCTA Comments at 25-29.

rates, loss of desired channels, loss of not only video service, but the potential for broadband Internet access, and the loss of the benefits that flow from competition.[17]

In contrast, NAB offers no evidence that small cable systems that currently utilize the HD carriage exemption but carry HD programming would not be significantly burdened by carrying the HD must-carry signals of broadcasters. NAB fails to even present evidence showing the additional burden of carrying the must carry stations in HD would be less for small cable systems presently utilizing the HD carriage exemption and offering at least one HD channel, than for cable systems utilizing the HD carriage exemption and carrying no HD channels. Nor does it advance any theories on either point.

There is nothing unique about systems that utilize the HD carriage exemption and offer some signals in HD that would lessen the financial burden and consumer harms resulting from revocation of the HD must-carry exemption for them. As discussed in its Comments, ACA recently conducted a survey of its members to gather facts regarding their reliance on the HD carriage exemption.[18] Of the 340 systems that utilize the HD carriage exemption and serve fewer than 2,501 subscribers represented in the ACA survey, 55% of these (187 in total) are digital/analog hybrid systems. 72% of the operators of these systems reported that it would be a burden to purchase additional equipment for their systems to carry must-carry signals in HD, and 65% of these said it would be a significant burden. Of the 279 systems with less than 553 MHz represented in the ACA member survey, 42% (117 in total) are hybrid digital/analog systems. 83% of the operators of these system reported that it would be a burden to make capacity available on their systems to carry must-carry signals in HD, and 83% of these said it would be a significant burden.

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[17] *See, e.g.,* NCTA Comments at 27-28; ACA Comments at 17.

[18] See *id* at 5.

Because small digital/analog hybrid systems suffer from the same channel capacity and financial constrains that all-analog small systems face, there is no logical reason for treating them differently than other small systems eligible for the HD exemption. Adoption of NAB's proposal would impose the very same significant burdens on small digital/analog hybrid system operators, and would cause the very same harms to consumers that the Commission previously found warranted extending the HD carriage exemption in the first place.[19] In fact, using the carriage of any HD signals as a threshold for applying the HD must-carry mandate to small system operators could create a disincentive for these systems to take any incremental steps toward adding HD programming to their systems. It is also possible that some of these systems would opt to stop carrying HD signals presently carried as part of their channel line-up to avoid the significant burden of an HD must-carry mandate. Neither of these results would be in the public interest. Consequently, NAB's proposal to narrow the HD carriage exemption must be rejected.

III. RECORD EVIDENCE ESTABLISHES THAT A SIGNIFICANT NUMBER OF SMALL SYSTEM OPERATORS CONTINUE TO RELY ON THE HD CARRIAGE EXEMPTION, BUT THE OVERALL NUMBER OF THESE SYSTEMS HAS LIKELY DIMINISHED

The NPRM tentatively concluded that it is in the public interest to extend the small-system HD carriage exemption because a large number of systems continue to rely on it and requested information related to this conclusion.[20] Both ACA and NCTA submitted comments agreeing with this tentative conclusion and providing evidence demonstrating the continued need for the HD carriage exemption. For its part, ACA provided the results of a survey it conducted of its members that are consistent with the Commission's findings and showed that within the small cable sector of the industry, at least 52 ACA members, operating more than 385

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

[20] *NPRM* at ¶ 20.

small systems, currently rely on the HD carriage exemption.[21] Of these 385 small systems, 45 rely on the exemption because they have less than 553 MHz of capacity; 106 systems rely on it because they have fewer than 2,501 subscribers; and 234 systems rely on the exemption because they have both less than 553 MHz of capacity *and* fewer than 2,501 subscribers.[22] These numbers only include the respondents to ACA's survey, and the total number of ACA members and the total number of their systems that are currently utilizing the HD carriage exemption is likely higher.

Although the number of systems, particularly those of ACA members, that rely on the exemption remain significant, data presented by NCTA shows that the total number of systems eligible for the exemption, as well as the total number of subscribers served by these eligible small systems is decreasing overall. Specifically, NCTA provides data demonstrating that the number of systems with fewer than 2,501 subscribers that are eligible for the HD carriage exemption decreased by 22% between 2008 and 2011, while those with less than 553 MHz capacity decreased by 38%.[23] The NCTA data also further shows that numbers of subscribers served by these small systems also decreased over the same period by 12% for systems with fewer than 2,501 subscribers, and by 30% for those with capacity less than 553 MHz.[24] Thus, while the number of systems eligible for the HD carriage exemption may remain significant, these numbers are steadily decreasing as, presumably, are the numbers of eligible systems that are actually relying on the HD carriage exemption. This trend also indicates that over time, the number of viewers who do not receive their must-carry signals in HD will also likely decline.

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[21] ACA Comments at 5.

[22] *Id.*

[23] *See* NCTA Comments at 23 (table showing 4,693 eligible systems with fewer than 2,501 subscribers in 2008, and 3,681 in 2011, and systems with a capacity of less than 553 MHz decreased from 1,852 in 2008 to 1,148 in 2011).

[24] *Id.* at 24 (table showing 2,666,149 subscribers for eligible systems with fewer than 2,501 subscribers in 2008, and 2,345,916 in 2011, and subscribers for systems with a capacity of less than 553 MHz decreased from 546,603 in 2008 to 383,175 in 2011).

The facts presented in the record suggest that the Commission was correct in anticipating that granting a three year HD carriage exemption "would give small systems an opportunity to come into compliance by making relatively large expenditures over a longer period of time."[25] However, the record evidence also clearly demonstrates that there remains a significant number of small cable systems that are still relying on the HD carriage exemption, and as discussed in detail below, need more time to come into compliance.

IV. THE RECORD SUPORTS MAINTAINING THE HD CARRIAGE EXEMPTION FOR SYSTEMS WITH CAPACITY OF LESS THAN 553 MHz OR FEWER THAN 2,501 SUSBSCRIBERS

Although the number of systems that are eligible and utilize the HD carriage exemption may have decreased over time, data gathered by ACA through its member survey reveals that the HD carriage exemption remains very important for those small systems that currently rely upon it, and in many cases is more important now than ever. NCTA reaches a similar conclusion and provides additional supporting data that demonstrates the continued importance to operators of the HD carriage exemption.[26] NAB itself stated that it would not object to the extension of the HD carriage exemption for all-analog systems – those that are unable to carry any HD signals – where evidence is presented confirming the need.[27] The record in this proceeding establishes that large number of systems remain unable to carry the additional must-carry HD signals that would be required without the exemption, thus confirming that there is a legitimate need for an extension of the HD carriage exemption.

A. The Record Supports Maintaining the HD Carriage Exemption for Systems with Channel Capacity of Less than 553 MHz.

In its Comments, ACA demonstrated that the channel capacity constraints that warranted the Commission's initial grant of the HD carriage exemption to systems with an

[25] *NPRM* ¶ 20.

[26] *See* NCTA Comments at 22-29.

[27] NAB Comments at 7.

activated channel capacity of less than 553 MHz remain a problem today, and, in many cases, have only grown worse. Data gathered by the ACA through its member survey reveals that among systems with less than 553 MHz that utilize the HD carriage exemption, a number of them lacked unused channel capacity at the time that the Commission first adopted the HD carriage exemption still do not have unused channel capacity, while others that had some unused channel capacity saw what they had decrease.[28] ACA's survey illustrates the fact that these systems that have been "channel locked" since the exemption was made available, or have become channel locked in the time since, could not offer the signals of broadcasters who elect must carry in HD without changing existing channels or services.[29] NCTA's Comments independently support this conclusion.[30]

Of those who saw their channel capacity decrease, system operators reported to ACA that the decrease is due to broadcasters that elect retransmission consent conditioning carriage of their primary feed with carriage of their secondary multicast feeds, and non-broadcast programmers conditioning carriage of their desired networks with carriage of their less desired ones.[31] There is nothing in the record to refute any of these facts, and they all point to the continuing need for the HD carriage exemption based on capacity constraints.

Moreover, the record demonstrates that small systems with less than 553 MHz capacity that rely on the HD carriage exemption would be significantly burdened if they were to be required to carry HD must-carry signals.[32] Most of the respondents to ACA's survey indicated that, in order to make room for HD must-carry channels, they would either drop existing

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[28] ACA Comments at 8.

[29] *Id.*

[30] NCTA Comments at 27-28.

[31] ACA Comments at 8.

[32] *Id*.

channels or convert channels currently carried in analog to digital-only.[33] Others said that they would opt to shut down their systems rather undertake the steps necessary to comply with the HD must-carry requirement.[34]

The record also shows that consumers will be harmed if the HD carriage exemption is repealed. For systems with less than 553 MHz that currently rely on the HD carriage exemption, consumers would be harmed when existing channels are dropped to make way for HD must-carry stations, or channels are converted from analog to digital-only because they are rendered un-viewable unless the subscriber's television has a QAM-tuner or is connected to a digital set-top box.[35] Another harm faced by consumers is the loss of cable services altogether where a system operator shuts down their system rather than take the additional regulatory burden.[36] There is nothing in the record that calls into question these clear consumer harms.

B. The Record Supports Maintaining the HD Carriage Exemption for Systems with Fewer than 2,501 Subscribers.

In its Comments, ACA further demonstrated that the financial constraints that necessitated the original grant of an HD carriage exemption for systems with fewer than 2,501 are still present today, and in many cases are worse. Specifically, a significant number of operators of systems with fewer than 2,501 subscribers that utilize the HD carriage exemption reported in ACA's survey that their net income from video services declined over the past three

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[33] *Id*.

[34] *Id.* at 9-10.

[35] *See* ACA Comments at 9; *see also* NCTA Comments at 27-28 (explaining the options available to capacity constrained systems).

[36] ACA Comments at 9.

years.[37] The survey further demonstrated that increases in programming costs and loss of subscribers are among the chief reasons for this decrease in net income.[38]

Requiring operators of systems that serve fewer than 2,501 subscribers to carry HD must-carry signals would exacerbate a deteriorating economic picture for many of these systems. NCTA reached the same conclusion and also provided data indicating that the cost of equipment alone makes upgrading systems with fewer than 2,501 subscribers uneconomical, arguing that this would cause systems to be closed rather than upgraded.[39] ACA also provided data in its Comments demonstrating that many operators of systems with fewer than 2,501 subscribers that rely on the HD carriage exemption would not absorb the cost of new equipment required to comply absent the exemption, and others would shutter systems altogether.[40]

Consumers would be significantly harmed if the HD carriage exemption was not extended for systems with fewer than 2,501 subscribers. Many operators of these systems that utilize the exemption would be forced to pass along their new equipment costs to consumers. The result would be all customers paying higher fees for service for the sole purpose of being able to watch the HD must-carry signals of broadcasters. Furthermore, in instances where these small system operators are forced to shut down rather than upgrade, the loss of the small cable system would reduce customer choice in these markets and decreases the price discipline competition enforces.[41] ACA agrees with NCTA's observation that additional

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[37] *Id.* at 11-12, Table 6 (83 % or respondents with systems that serve fewer than 2,501 subscribers (43 total) report decreasing net income from video (video-related revenues minus video-related costs)).

[38] *Id.* at 12-13 (providing ACA survey data, as well as an independent market analysis indicating that programming costs experienced an average annual increase of nearly 37% between 2008 and 2010).

[39] NCTA Comments at 26 (estimating that the cost of upgrading, per-headend, to be between $4,000 - $8,000 per digital broadcast channel where headend equipment can be upgraded, and up to $21,000 where new headend equipment is required).

[40] ACA Comments at 13-14.

[41] *Id.* at 16.

consumer harm could include the loss of broadcast signals altogether, where broadcasters use cable operators as "community antenna" to reach smaller and remote markets.[42]

In the *Fourth Report and Order*, the Commission acknowledged the concerns raised by small cable operators that the costs associated with the HD must-carry mandate would create a regime that makes small systems too expensive to operate, would lead to the loss of low-priced video offerings, and ultimately make it not worthwhile for operators to continue to operate small systems.[43] When the Commission adopted the HD carriage exemption in 2008, it found that the record presented "supports the cable commenters' suggestion that this exemption will best ensure the continued viability and competitiveness of small cable systems in markets throughout the country . . . ."[44] So too, the record presented in this proceeding overwhelmingly shows that 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.

V. THE COMMISSION SHOULD PERMANENTLY EXEMPT SMALL ANALOG SYSTEMS

Because many small analog-only systems will continue to be unable to carry HD signals for an extended period, the Commission should permanently exempt these systems from the HD must-carry mandate. Of note, both broadcasters that elect retransmission consent and national cable networks commonly grant analog-only systems permission to offer their programming in analog-only. Although these broadcasters and programmers often insist that the larger MVPDs carry their channels and networks in HD and have the market power to force the same carriage obligations on analog-only systems, they nonetheless refrain from doing so out of recognition that these analog-only systems' lack the financial resources and bandwidth to

[42] NCTA Comments at 26-27.

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

[44] *Id.* at ¶ 12.

bear the extra burden. In light of this market reality, and the fact that analog-only systems would not be disfavoring must carry broadcasters by not offering them in HD, the Commission should permanently exempt these systems from the HD must-carry mandate until such time that these systems offer some HD programming.[45]

NCTA similarly requests a permanent exemption for analog-only systems in its Comments noting that it makes no sense to repeatedly require small systems that cannot afford to provide any digital service at all "to pursue additional waivers when the economics make it impracticable for them to upgrade their systems."[46] As discussed above, there is ample record evidence demonstrating this need. In light of this, the Commission should make the HD carriage exemption permanent for analog-only cable systems.

VI. CONCLUSION

The record in this proceeding clearly demonstrates the need for the Commission to continue the HD carriage exemption for small cable systems. While the evidence entered into the record suggests that the number of systems utilizing the HD carriage exemption has decreased in the last four years, the need for the exemption among small cable systems that currently rely upon it, whether they are offering HD programming or not, has not only failed to diminish, but has increased. Extending the HD carriage exemption will avoid imposing a significant burden on small cable systems that rely on the exemption and have less than 553 MHz of channel capacity or fewer than 2,501 subscribers, but will also serve the public interest by preventing the consumer harms that record evidence shows will flow from "creating a regime in which the required carriage is too expensive to operate."[47]

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[45] An analog-only system that starts offering some HD programming may still qualify for the HD carriage exemption to the extent that a non-permanent HD carriage exemption for small systems still exists, and the system meets the criteria.

[46] *Fourth Report and Order* at ¶ 4 (*quoting* RICA Reply at 4)); NCTA Comments at 28-29.

[47] *Fourth Report and Order* at ¶ 7 (citation omitted).

For these reasons, the Commission should decline to narrow the HD carriage exemption, as proposed by NAB, to small systems that do not offer any HD programming. There is no record evidence indicating that small systems that are currently utilizing the HD carriage exemption and also offering some HD programming would not be substantially harmed by elimination of the exemption, or would suffer less than those systems offering no HD programming.

Respectfully submitted,

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