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EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

On April 3, 2012, Diane Burstein (Vice President & Deputy General Counsel), Stephanie Podey (Associate General Counsel), Lisa Schoenthaler (Vice President, Association Affairs and Office of Rural/Small Systems), and I met with Michelle Carey, Alison Neplokh, Mary Beth Murphy, Steve Broeckert, Evan Baranoff, and John Gabrysch of the Media Bureau to discuss NCTA's positions in the above-referenced proceeding, as set forth in our comments¹ and reply comments² on the Fourth Further Notice of Proposed Rulemaking.³

In particular, we urged that the interim "viewability" rule, which effectively requires cable systems that are not "all-digital" to provide high definition ("HD") must-carry signals in analog and digital HD format, should sunset as scheduled on June 12, 2012. In addition, we explained why the small system exemption to the requirement that cable systems carry HD must carry signals in HD format should be extended.

With respect to the viewability rule, we noted that all of the factors that the Commission had specifically identified as relevant to its review of the continuing need for the rule weigh heavily in favor of allowing the rule to sunset.⁴ Specifically, as discussed in our comments:⁵

¹ See NCTA Comments, CS Docket No. 98-120 (filed Mar. 12, 2012).

² See NCTA Reply Comments, CS Docket No. 98-120 (filed Mar. 22, 2012).

³ Fourth Further Notice of Proposed Rulemaking and Declaratory Order, FCC 12-18; CS Docket 98-120 (released Feb. 10, 2012) ("Notice").

⁴ See Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21070 n.39 (2007).

⁵ See NCTA Comments at 11-16.

- *Digital cable penetration* has increased from 54% when the rule was adopted in 2007 to 78% in 2011. In other words, only 22% of cable customers are not already equipped to view digital signals in their home;
- *Cable deployment of digital set-top boxes* now includes small, low-cost boxes that lack some of the advanced features that typically accompany optional digital tiers of service but fully enable viewing of digital signals on analog television sets; and
- *Cable system capacity constraints* have significantly increased in the last five years as the result of (1) the proliferation of HD programming provided by cable program networks and broadcast stations, and (2) the increased use of cable system capacity for broadband uses, including the viewing of video programming online. Mandatory carriage of must-carry signals in bandwidth-intensive analog *and* HD formats seriously exacerbates these constraints on capacity.

In addition, we explained that forcing operators to carry must-carry signals in analog format unduly hampers the efforts of cable operators to manage their own gradual transitions to all-digital service in a manner that attracts customers to digital services while retaining value for those customers who still choose and rely only on analog service.

We argued that, going forward, the viewability requirement in Section 614(b)(7) of the Communications Act can and should be construed by the Commission to be satisfied by the provision of signals in analog *or* digital format, so long as equipment is available to enable the viewing of such signals on analog sets.⁶ Not only is such an interpretation appropriate in light of the policy considerations described above, but also continuing to interpret the statute as requiring carriage of digital signals in analog format would raise serious First Amendment problems, which the Commission is obliged to avoid.

With respect to the small system exemption, we explained why we agree with the tentative conclusion in the *Notice* that it is in the public interest to extend the exemption.⁷ As the Commission previously recognized, some small systems do not have the technical capability or system capacity to carry HD signals, and in some cases such systems have so few subscribers that the per-subscriber costs to upgrade to provide HD would be so high that they would be forced to shutter rather than expend the revenue necessary to comply.⁸ Even for those small systems that are able to provide some HD signals, it may not be feasible to provide all must-carry signals in HD.⁹

⁶ See, e.g., Bright House Networks Reply Comments at 9-12.

⁷ See NCTA Comments at 22-29.

⁸ See *id.* at 22 (citing *Notice* ¶ 18).

⁹ See NCTA Reply Comments at 6-7.

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We emphasized that the number of systems that qualify for the exemption represent a small and diminishing number of subscribers, with the total universe of eligible cable systems representing approximately 2.4 million subscribers, or 4.1% of basic cable subscribers.¹⁰ We explained that if these systems are not upgrading, the only rational explanation is that the economics do not support an upgrade.¹¹ Over time, as more systems transition to digital, the situation will resolve itself. In the meantime, however, the small system exemption is critical for those systems that rely on it.

Respectfully submitted,

/s/ **Michael S. Schooler**

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cc: M. Carey
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E. Baranoff
J. Gabrysch

¹⁰ See NCTA Comments. at 23 & n.23.

¹¹ See *id.* at 25.