



April 13, 2012

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

Re: Notice of *Ex Parte* Communication
CS Docket No. 98-120

Dear Ms. Dortch:

On April 11, 2012, Jane Mago and the undersigned of the National Association of Broadcasters met with William Lake, Michelle Carey, Mary Beth Murphy, Steven Broeckaert, Alison Neplokh, John Gabrysch and Evan Baranoff of the FCC's Media Bureau and Susan Aaron of the FCC's Office of General Counsel to discuss the Commission's proposed extension of its rules implementing the statutory viewability requirement.

NAB stated that the Commission's consumer-oriented focus in adopting the viewability rule should continue to guide its analysis today. The Commission should extend the current viewability rule as proposed, and should not reverse course by replacing it with a regime sought by cable, in which the viewability standard is met even if consumers must purchase equipment to make signals viewable. As NAB explained in its reply comments, replacing the current viewability rule with an "equipment availability" rule will be harmful to the public interest and contrary to the statute.

Proposals that the viewability requirement be met by requiring consumers to purchase additional equipment would contravene multiple provisions of the Communications Act.¹ The statute requires that "[s]ignals carried in fulfillment of the requirements of this section *shall be provided to every subscriber of a cable system*" and that those signals "shall be viewable *via cable on all television receivers of a subscriber.*" 47 U.S.C. § 534(b)(7) (emphases added). A rule that makes signals viewable only if consumers purchase additional equipment is flatly inconsistent with this requirement.²

¹ NAB Reply Comments in CS Docket No. 98-120 at 4-6.

² The cable parties argue that cable systems can meet their must carry obligations by offering to rent subscribers the equipment necessary to receive the must carry signals carried only on a digital tier. Section 614(b)(7) of the Act, however, would authorize such an approach only for "additional"

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The proposal also would violate prohibitions on discrimination contained in the Act, which provide that “the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.” 47 U.S.C. § 534(b)(4)(A). The cable industry’s proposal would allow cable operators to discriminate by, for example, offering non-broadcast programming in a viewable format but not local broadcast signals.

Even if such a proposal were lawful, it should not be adopted because it would result in public interest harms. Most significantly, the rule would impose a substantial burden upon consumers. Consumers that subscribe to hybrid systems would have to determine why they can no longer view must carry stations, identify what equipment is needed to view them, order and pay for equipment to view those signals, and install or arrange for installation. Cable commenters have not explained what costs would be involved in purchasing the necessary equipment, but such data would clearly be critical to the Commission’s consideration of the shift in burdens from cable operators to their subscribers that would result from elimination of the current viewability rule. This is particularly relevant where the burden will fall on subscribers whose financial resources may be fueling decisions not to subscribe to digital cable products and services.³

NAB noted that if the Commission adopts the cable industry’s proposal to make viewability a subscriber obligation rather than a cable operator obligation, there is a significant potential for must carry stations to lose audience share. As the Commission observed in adopting the viewability requirement, “[b]roadcasters denied carriage on cable systems lose a substantial portion of their audience, which, in turn, translates into lost advertising revenues. As a result, the stations have less money to invest in equipment and programming, leading to further reductions in audience size. This cycle of audience loss followed by revenue loss repeats to the point that the stations ‘deteriorate to a substantial degree or fail altogether.’”⁴

receivers that cable systems do not connect or for which they do not provide connections. As the Commission has recognized, this provision was not “intended to narrow the scope of the viewability requirement for sets connected by cable operators.” *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21073-74 (2007) (“*Viewability Order*”); see *id.* at 21071 n. 43 (recognizing that this provision applies only to additional receivers).

³ Consumers that the cable industry characterizes as “unwilling” to purchase digital tiers or equipment necessary to watch digital basic tier programming may in fact consider such upgraded services to be cost-prohibitive. NCTA Comments in CS Docket No. 98-120 at 15 (Mar. 12, 2012).

⁴ *Viewability Order*, 22 FCC Rcd 21064, 21090-91 (citations omitted).

NAB agrees with the Commission's analysis. We emphasized that by harming stations' financial viability and ability to invest in programming, the cable industry's proposal would harm not only the cable subscribers that can no longer view must carry stations, but potentially all of those stations' viewers. NAB pointed to cable industry data presented in this proceeding which states that 22% of cable customers are not equipped to view digital signals in their homes.⁵ This translates to approximately 11% of all U.S. television households.⁶ If this loss in audience were spread equally across all must carry stations in all markets, each station would lose 11% of its existing audience share. NAB stated that increases and decreases in audience share can correspond to even larger increases and decreases in revenue. For example, we noted that in an unrelated proceeding, NAB commissioned an economic analysis that included data on audience share and station revenues. That analysis showed that where a number of television stations increased their local audience shares by an average of 11%, their average share of revenues increased by 15.4%.⁷ NAB noted that must carry stations frequently serve niche audiences with unique offerings including foreign language programming and religious programming. As the smaller stations in their respective markets, they are the least equipped to absorb such declines. NAB stated that it continues to analyze the potential public interest harms that would result from elimination of the current viewability rule, and will update the record as information becomes available.

NAB also refuted cable industry contentions that extending the viewability requirement raises First Amendment issues. As NAB explained in its Reply Comments, cable

⁵ Letter dated April 5, 2012 from Michael S. Schooler of the National Cable & Telecommunications Association to Marlene H. Dortch, Secretary, FCC (filed in CS Docket No. 98-120) at 2 ("NCTA April 5, 2012 Ex Parte").

⁶ The actual audience loss may be far greater than 11 percent since, even in households that subscribe to the digital tiers of hybrid systems, some television sets may only receive the analog service tier because the subscriber has either leased only an analog set-top box or does not use a set-top box at all with that television. Must carry stations that are not viewable on analog tiers would not be available on these other receivers.

⁷ NAB Comments in MB Docket No. 06-121, Attachment H, Economic Viability of Local Television Stations in Duopolies at 6 (filed Oct. 23, 2006). This study is consistent with other studies showing links between audience share and television stations' revenue shares. See, e.g., Comments of the Coalition Broadcasters in MB Docket No. 02-279 at Attachment A (filed Jan. 2, 2003); Jeffrey A. Eisenach & Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (2011), Attachment A to Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves (June 27, 2011) in NAB Reply Comments to *Notice of Proposed Rulemaking* in MB Docket No. 10-71, at Appendix A (filed June 27, 2011).

operators offer no evidence that the impact of the viewability rule on their First Amendment rights has materially changed since 2007; indeed, as more cable systems increase capacity or convert to digital, the actual impact of the rule will steadily decrease.⁸ The cable industry makes vague references to “capacity constraints”⁹ but has failed to provide relevant data or evidence of such constraints. Cable commenters have not shown how many hybrid cable systems exist, the percent of capacity those systems use for analog service, or the number of those channels that cable systems devote to carriage of cable programming networks or broadcast channels carried under retransmission consent agreements. NAB noted that this information is uniquely available only to cable operators. Thus, the cable industry is again asking the Commission act on supposition, not data.¹⁰ The repetitive First Amendment arguments raised by the cable industry with regard to viewability run counter to Congress’ specific statutory findings supporting must carry, the Commission’s implementation of must carry, and the Supreme Court’s confirmation of the constitutionality of must carry in *Turner II*.¹¹

Finally, NAB observed that compliance with the viewability rule remains voluntary. Operators today have the option to convert their systems to all-digital operation, obtain expanded capacity for all services, and carry local must carry broadcast signals in only

⁸ NAB Reply Comments in CS Docket No. 98-120 at 7-9.

⁹ NCTA April 5, 2012 Ex Parte at 2.

¹⁰ NAB Reply Comments in CS Docket 98-120 at 8-9 (noting that when the FCC did require cable operators to present actual data concerning cable capacity, it showed that – as of 2003 – carriage of both analog and digital signals of *all* local television stations would occupy less than 8.5 percent of an average cable system; as cable capacity has continued to increase in the past nine years, the impact today would be very significantly smaller). It is extremely unlikely that, given the capacity of today’s cable systems, a viewability requirement applicable only to must carry stations could constrain the capacity of cable operators in any significant way.

¹¹ *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997)(*Turner II*). While both TWC and NCTA continue to argue that strict constitutional scrutiny should apply to an extension of the Viewability Rule, the Supreme Court rejected cable’s position when it held that must carry is subject only to intermediate scrutiny. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994). That conclusion remains binding upon the Commission.

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one format, obviating a need to comply with the rule.

Should you have any questions concerning this submission, please contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'ERL Dozier', written in a cursive style.

Erin L. Dozier
Senior Vice President & Deputy General Counsel
National Association of Broadcasters

cc: William Lake, Michelle Carey, Mary Beth Murphy, Steven Broeckaert, Alison Neplokh, John Gabrysch, Evan Baranoff, Susan Aaron