June 4, 2012

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

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

Dear Ms. Dortch:

On May 31, 2012, Jerianne Timmerman, Erin Dozier and the undersigned of the National Association of Broadcasters ("NAB") met with Lyle Elder of the Office of Chairman Genachowski to discuss issues raised in the above-referenced proceeding.

Consistent with our filings throughout this proceeding, NAB again urged the Commission to retain the consumer-oriented focus that has defined its implementation of the statutory viewability requirement.

We stated that several NAB members have expressed concerns about the practical implementation issues of enforcing the statutory viewability standard if the viewability rule is allowed to sunset. Section 614(b)(7) was designed to ensure that consumers would have actual access to all must carry signals on the cable system, not just theoretical access. We discussed how an equipment-based approach raises multiple barriers for consumers, including the cost of boxes, education around the need for boxes, ordering boxes, and installation/setup. We also discussed the legal and policy bases for retaining the current viewability rule as outlined in the attached document.

We reiterated our previous statements that the losses in viewing households and revenues associated with eliminating the current rule would have severe economic consequences for must carry stations, and would be harmful to television viewers.

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

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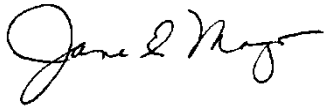
undersigned.

Respectfully submitted,



Jane E. Mago
Executive Vice President & General Counsel
National Association of Broadcasters

cc: Sherrese Smith, Lyle Elder

Attachment

Cable's Proposal That a Signal Be Deemed "Viewable" if it is Capable of Being Viewed Using "Readily Available Equipment" Would Contravene the Statute and Harm the Public Interest.

I. Proposals That the Viewability Requirement Be Met By Requiring Consumers to Purchase or Lease Additional Equipment Would Contravene Multiple Provisions of the Communications Act.

- The statute requires: (i) that "[s]ignals carried in fulfillment of the requirements of this section *shall be provided to every subscriber* of a cable system" and; (ii) that those signals "shall be viewable *via cable on all television receivers* of a subscriber which are connected to a cable system..." 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. As the FNPRM acknowledges, the Commission already has considered and rejected a similar proposal in the *Viewability Order*. FNPRM ¶ 14.

    - During the proceeding adopting the Viewability Rule, cable commenters disputed the Commission's longstanding interpretation of Section 614(b)(7) and urged the FCC to hold that "the viewability mandate is satisfied whenever cable operators transmit broadcast signals and '*offer* to sell or lease… a converter box' to their customers' that will allow those signals to be viewed on their receivers."[1]

    - Today, as in 2007, the cable industry's arguments are "are at odds with both the plain meaning of the statutory text as well as the structure of the provision."[2]

    - Contrary to the cable industry's views, the Commission held that "[t]o the extent that such subscribers do not have the necessary equipment, however, the broadcast signals in question are not 'viewable' on their receivers." The Commission held that those who sought to make equipment available for purchase or lease as a means of complying with the viewability standard were "confus[ing] the separate mandates set forth in the second and third sentences of Section 614(b)(7), a distinction we clarified as early as 1993."[3]

    - The Commission's longstanding interpretation of the statute is that the third sentence of Section 614(b)(7) was not intended to narrow the scope of the viewability requirement. Thus, for every receiver "connected to a cable system by a cable operator or for which a cable operator provides a connection," that

[1] *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 ¶22 (2007) ("*Viewability Order*").

[2] *Id*.

[3] *Id.* (citing *Implementation of the Cable Television Consumer Protection Act of 1992,* 8 FCC Rcd 2965 at n. 99 (1993)).

operator must ensure that the broadcast signals in question are actually viewable on their subscribers' receivers.[4]

- As in 2007, NCTA's current reading of the statute would make the second sentence Section 614(b)(7) surplusage, and remove any meaning from the word "additional" in the third sentence of Section 614(b)(7). Legislation should not be interpreted in a manner that renders statutory language irrelevant.[5]

- The statutory language remains the same and the cable industry has advanced no basis for somehow re-interpreting the statute. As the Commission has recognized, the "plain meaning" and "structure" of Section 614(b)(7) preclude the interpretation advanced by the cable industry.[6]

- 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, or to provide some local signals to analog subscribers, but not others.

- The Commission did not ask for comments on the correctness of its long-settled interpretation of the viewability requirements in Section 614(b)(7). NCTA, TWC and BHN had a full opportunity to seek reconsideration or appeal the *Viewability Order* and their comments must be rejected as an untimely petition for reconsideration.

II. Even if Lawful, Transitioning From a "Viewability" to an "Equipment Availability" Rule Would Be Bad Public Policy Because it Shifts the Burden of Compliance Entirely to Consumers.

- Continuing the existing Viewability Rule places no new burden on cable operators. Adopting cable's proposal would, however, take away many consumers' access to programming they currently receive.

- The cable industry's proposed 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

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[4] *Id.*

[5] *See, e.g., Hohn v. United States*, 524 U.S. 236, 249 (1998)(the courts are "reluctant to adopt a construction making another statutory provision superfluous")(citing *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)); *Gustafson v. Alloyd Co., Inc.,* 513 U.S. 561, 574 (1995) ("the Court will avoid a reading which renders some words altogether redundant").

[6] *Viewability Order* at ¶22 (noting consistent FCC reading since 1993).

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.[7] This 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.[8]

- The cable proposal is similar to the DISH network plan that required subscribers to obtain a second receive dish to view all must carry signals. Even though DISH provided the second receive dish for free (in strong contrast to the cable proposal), the FCC rejected it as contrary to the Act.[9] Congress later confirmed that reading.[10]

Even if the Commission Had Requested Comment on its Long-Established Interpretation of the Viewability Provision of the Statute, Cable Has Not Demonstrated that the Viewability Rule Raises First Amendment Issues.

I. <u>Because Cable Operators Have a Compliance Option that is Entirely Within Their Control and Completely Unrelated to Speech, the Viewability Rule Presents No First Amendment Burden.</u>

- Broadcasters, the FCC and even the cable industry agree that more and more cable systems are converting to all-digital operation. The impact of the Viewability Rule on cable systems, therefore, is steadily declining.

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[7] Notably, a representative of Bright House Networks ("BHN") states that BHN would be required to obtain a substantial number of converter boxes to go "all digital," and that this would represent a dramatic increase in its normal capital expenditures. *See* Letter dated April 17, 2012, to Marlene H. Dortch, FCC Secretary, from Steven Horvitz, counsel to BHN (filed in CS Docket No. 98-120). He expressed concern that "BHN's Cisco-supplied systems do not currently have a low-cost DTA [digital transport adapter] option available that some operators can rely upon to ease the transition to all digital operations." Presumably, the same expensive boxes that BHN cannot afford would need to be purchased or leased by BHN subscribers wishing to view must carry signals.

[8] 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). There is a significant disparity in the household incomes of those that select higher-end cable services and those that do not. For example, the average household income for digital cable subscribers is $70,940, while the average household income for analog cable subscribers is $49,450. *GfK-Knowledge Networks Home Technology Monitor Survey, Spring 2011-March 2011.*

[9] *NAB and ALTV Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, 17 FCC Rcd 6065 (Med. Bur. 2002).

[10] *See Satellite Home Viewer Extension and Reauthorization Act of 2004,* Pub. L. No. 108-447, §203, 118 Stat 2809 (2004) (amending 47 U.S.C. § 338 to require use of a single dish for local broadcast stations).

- The progress of that conversion is entirely within the control of cable systems, eliminating any burden that the Viewability Rule may impose.[11] The fact that some have delayed conversion does not create a First Amendment issue.

- No one denies that cable systems will ultimately convert to all-digital operation, eliminating the need for the Viewability Rule altogether. Since all cable systems have an alternative that would permit them to carry must carry signals only in digital, their choice not to do so presents no constitutional concerns.[12]

II. Cable's First Amendment Contentions Must Be Analyzed – and Rejected – in Light of *Turner II.*

- There is no principled distinction between the arguments the cable industry makes against the viewability requirement and their arguments against must carry generally. Cable's opposition to viewability is, at bottom, an opposition to the broader must carry regime and must be analyzed against the backdrop of *Turner II*, which upheld the constitutionality of must carry.[13]

  - Cable has not shown how the burden of making local broadcast signals viewable results in a constitutionally different burden on cable systems than does the requirement that they carry local broadcast signals at all.

  - To the extent that the Commission could consider arguments that extending the Viewability Rule would create a First Amendment issue, it would do so in the framework established by the Supreme Court in the *Turner* cases. Contrary to cable's wishes, must carry rules are subject only to intermediate scrutiny and the reasonableness of Congress' findings supporting must carry was confirmed and cannot be reconsidered by the Commission now.

  - The facial challenge to the Viewability Rule that cable seeks to mount is precluded by *Turner II*, which assumed that must carry would occupy as much as a third of all cable channels.

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[11] The Commission has provided regulatory assistance to cable systems wishing to move to all-digital operation, among other things by waiving the prohibition on integrated set-top boxes for such systems to allow them to offer low-cost converters to subscribers.

[12] *See also Satellite Broadcasting and Communications Association v. FCC*, 275 F.3d 337, 365 (4th Cir. 2001) (upholding the "carry one, carry all" requirement in the Satellite Home Viewer Improvement Act of 1999, which requires direct broadcast satellite operators to carry all local broadcast stations in a market that request to be carried if they carry any local stations, and rejecting satellite carriers' burden argument because the requirement left "them with the *choice* of when and where they will become subject to the carry one, carry all rule") (emphasis added).

[13] The Commission cannot consider arguments that its governing statute is unconstitutional. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)(noting that "the constitutionality of a statutory requirement [is] a matter which is beyond [the] jurisdiction [of an agency] to determine").

- Although the Supreme Court left open the possibility of an "as-applied" challenge, such a challenge must be based on the impact of the must carry rules on a specific set of cable systems. But the cable comments are woefully devoid of specific data about the impact of the Viewability Rule generally or on any particular cable system.

- While cable complains of the burden the Viewability Rule supposedly causes, none of the cable comments reveal the number of must carry channels at issue, the number and identity of the other channels provided on the analog tier of any system,[14] and what programming would remain on the analog tier or be substituted for must carry channels.

- To mount a First Amendment challenge, cable must satisfy the burden of demonstrating that the effect of extending the Viewability Rule would substantially burden cable systems in a way that is different than Congress and the Supreme Court contemplated. Since only a fraction of local broadcast stations are carried under must carry,[15] and the capacity of cable systems continues to expand, there is no reason to believe that the Viewability Rule imposes a cognizable First Amendment burden on any cable system.[16]

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[14] Although BHN in an *ex parte* meeting claims to have provided data concerning one of its cable systems, that data was not provided in its report on that meeting. *See* Letter dated April 17, 2012, to Marlene H. Dortch, FCC Secretary, from Steven Horvitz, counsel to BHN (filed in CS Docket No. 98-120). Data provided *in camera* about one cable system does not meet cable's burden in a notice and comment rulemaking proceeding to establish the *bona fides* of their First Amendment claims.

[15] Although all non-commercial stations are carried under must carry, stations that are members of APTS have an agreement with NCTA concerning carriage of their stations. To the extent that the APTS-NCTA agreement requires carriage in both analog and digital on hybrid cable systems, that carriage – like carriage of retransmission consent stations – cannot be viewed as a burden of the must carry rules.

[16] *See Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734, 743 n.22 (D.D.C. 1995) ("if the burden to the cable industry [from must-carry] were much smaller, then the First Amendment would not even be implicated."); *aff'd*, 520 U.S. 180 (1997).