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June 7, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 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:

Time Warner Cable Inc. (“TWC”) files this letter in response to recent *ex parte* presentations by the National Association of Broadcasters (“NAB”) and ION Media Networks and Liberman Broadcasting, Inc. (collectively, “ION”).¹ NAB and ION both broadly contend that Section 614(b) of the Communications Act requires extension of the Commission’s viewability rule, which is scheduled to sunset on June 12, 2012.² Their arguments are unpersuasive. As TWC explained in its comments and subsequent submissions, the statute does not compel dual carriage of digital and analog broadcast signals, and such a requirement in any event could not be imposed without violating the First Amendment. The Commission therefore should rule that the term “viewable” in Section 614(b)(7) means *capable* of being viewed using appropriate equipment. Pursuant to this correct interpretation of the statute, cable operators may

¹ NAB, Notice of Ex Parte Communications in CS Docket No. 98-120, Attachment at 1-2 (June 5, 2012) (“NAB Ex Parte”); ION, Continuation of Cable Viewability Requirements for Digital Must-Carry Television Stations, CS Docket No. 98-120, at 1-2 (June 1, 2012) (“ION Ex Parte”).

² *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, CS Docket 98-120, FCC 12-18, ¶ 1 (rel. Feb. 10, 2012) (“NPRM”).

comply by offering to lease or sell appropriate navigation devices to ensure that digital must-carry signals are “viewable” by subscribers with analog televisions.

TWC has previously explained why Section 614(b)(7) does not compel the dual carriage mandate sought by NAB and ION,³ but NAB’s recent letter advances the novel theory that Section 614(b)(4)(A), which addresses “Nondegradation” and “Technical Specifications,” should be read to bar cable operators from ceasing analog transmissions of must-carry stations.⁴ That argument is meritless. Contrary to NAB’s unsupported suggestion that carrying a must-carry signal only in digital format would somehow constitute “material degradation,” Section 614(b)(4)(A) does not remotely require transmission of broadcast signals in a particular format. Rather, the text of the provision is plainly focused on preventing cable operators from relying on “signal processing” or other carriage standards that result in the degradation of commercial television signals as compared to *non-broadcast* signals.⁵ Whether a cable subscriber accesses a must-carry signal through a direct connection to an analog television or via a converter box of some type has no bearing on signal quality. The legislative history of Section 614(b)(4) further confirms that the provision was intended to address only the “technical quality of the signal processing and carriage,”⁶ not NAB’s conception of viewability. Indeed, the House Report expressly recognized the permissibility of transmitting some signals in digital and some in analog.⁷ In any event, transmitting must-carry stations in digital format while carrying certain non-broadcast programming in analog format would result in *improved* signal quality on the broadcast side, not “degradation.”

ION likewise argues that Section 614(b)(7) was intended to prevent the carriage of must-carry signals solely in digital format as long as the signals of retransmission consent stations are carried in analog.⁸ But Section 614(b)(7) contains no such “nondiscrimination” requirement. Rather, it requires only “viewability,” and as TWC has explained, that requirement is satisfied as long as must-carry signals are capable of being viewed using appropriate equipment. That a cable operator may agree to dual carriage as part of a retransmission consent agreement has no bearing on the scope of its statutory obligations to must-carry stations; to the contrary, if stations seek to bargain for such provisions, they may do so by electing retransmission consent status.

In addition to distorting the statute, NAB and ION misapprehend the relevance of the First Amendment in this context. NAB argues that challenges to an extended viewability

³ See Comments of Time Warner Cable Inc., *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120 (March 12, 2012) (“TWC Comments”).

⁴ NAB Ex Parte, Attachment at 2.

⁵ 47 U.S.C. §534(b)(4)(A).

⁶ H. Rep. No. 102-628 at 94 (June 29, 1992).

⁷ *Id.*

⁸ ION Ex Parte at 4.

mandate would be foreclosed by the Supreme Court's *Turner* decisions, but that is not so. Even assuming that the basic must-carry requirements could pass muster in today's dramatically changed marketplace—which is doubtful, given the evaporation of the bottleneck concerns that animated the *Turner* cases—those rulings cannot be read to justify a *dual carriage* mandate. The Commission would have to demonstrate that the absence of dual carriage would imperil the future of over-the-air broadcasting to fit within the *Turner* rationale, and the record does not contain any evidence to support that proposition. NAB and ION also are wrong in asserting that dual carriage does not impose significant burdens on cable operators. As TWC has explained, devoting scarce network capacity to the duplicative carriage of must-carry signals in analog prevents cable operators from repurposing the relevant spectrum to improve broadband speeds and enhance programming diversity.⁹ Indeed, the broadcasters have the cost-benefit analysis entirely backwards: Not only would dual carriage impose far greater burdens on cable operators and subscribers than they acknowledge, but sunseting the viewability mandate would impose minimal burdens on broadcast stations and their audience because must-carry signals would remain accessible to analog-only cable subscribers through the availability of low-cost converter boxes.

Finally, the broadcasters' procedural objections to sunseting the viewability mandate are a make-weight. Whereas NAB oddly characterizes cable operators' support for the long-anticipated sunset as an untimely request for reconsideration,¹⁰ it was of course the Commission's issuance of a Notice of Proposed Rulemaking, rather than any request by cable operators, that led to this proceeding and the ensuing debate about the meaning of Section 614(b)(7) and the relevance of the First Amendment.¹¹ By the same token, ION's complaint that cable operators have advanced a new "Adaptor Proposal" that falls outside the scope of the NPRM is mere wordplay. What ION calls the "Adaptor Proposal" is simply cable operators' longstanding interpretation of the statute to require that must-carry signals be "viewable" using appropriate equipment. When the Commission sought comment on whether to extend or sunset the viewability mandate and on which approach would best fulfill congressional intent,¹² it plainly invited comments explaining how the availability of low-cost digital terminal adapters and other equipment will ensure that must-carry signals are "viewable." To the extent the broadcasters are suggesting that the Commission lacks authority to modify the interpretation of Section 614(b)(7) it adopted in 2007, that is plainly wrong. Even where an appellate court has upheld a prior interpretation of the statute on the merits (as has not occurred here), an agency's

⁹ See TWC Comments at 23-24.

¹⁰ NAB Ex Parte, Attachment at 2.

¹¹ See NPRM ¶ 3 (seeking comment on the possible extension of the viewability mandate beyond the planned June 2012 sunset); *id.* ¶ 9 (seeking comment on which approach will best fulfill the statute).

¹² *Id.*

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subsequent change in interpretation “is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute to the implementing agency.”¹³

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

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of LATHAM & WATKINS LLP
Counsel for Time Warner Cable Inc.

¹³ *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996); *see also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (upholding Commission’s classification of cable modem services notwithstanding conflict with prior appellate court classification); *New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (9th Cir. 2006) (upholding Commission’s change in its interpretation of Section 252(i) after the previous interpretation was upheld by the Supreme Court as the “most readily apparent”).