



June 8, 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:

Throughout this proceeding, the National Association of Broadcasters (“NAB”) has urged the Commission to retain the consumer-oriented focus that has defined its implementation of the statutory viewability requirement.¹ We have emphasized the legal and policy bases for retaining the current viewability rule for a three-year period, and contended that 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.

In an effort to identify potential areas of common ground with our cable industry partners, and in response to certain cable industry filings in this proceeding, NAB on May 23 filed a letter proposing a unique solution to the viewability issue.² There, NAB

¹ In its NPRM in this proceeding, the Commission did not waiver from that focus, observing that “[t]he sunset of the viewability rule would potentially impact millions of subscribers, and the broadcasters who would be unable to reach them,” that “hundreds of broadcast stations ... rely on the must carry rules to ensure carriage on cable systems” and that “[w]ithout the viewability rule, many cable subscribers would be required to pay more for access to must-carry broadcast stations, by replacing existing and still-functional analog equipment with digital equipment or leasing set top boxes to view the complete service they currently pay for and receive in analog.” *Carriage of Digital Television Broadcast Signals*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, 27 FCC Rcd 1713 ¶10 (2012) (“NPRM”). Nothing in the record controverts these Commission findings.

² Letter to Marlene H. Dortch, Secretary, from Jane E. Mago, NAB, filed in CS Docket No. 98-120 (May 23, 2012) (“NAB May 23 *Ex Parte*”). This *ex parte* referenced and responded to an *ex parte* notice by the National Cable & Telecommunications Association (“NCTA”) discussing a voluntary commitment by some cable operators to offer “low-cost” equipment. See Letter to Marlene H. Dortch, FCC Secretary, from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA, filed in CS Docket No. 98-120 (May 17, 2012). It also addressed a Time Warner Inc. (“TWC”) *ex parte* notice stating that: (1) in connection with its transition of its Augusta, Maine cable system to “all digital,” TWC was providing consumers with *free* digital transport adapters (“DTAs”) for a period of two years; (2) after the two-year

1771 N Street NW
Washington DC 20036 2800
Phone 202 429 5300

stated that while “we do not believe that the statements of the cable operators alone address the requirement of the statute,” NAB was not opposed to providing “some additional flexibility.”³ Accordingly, NAB suggested that the Commission might mandate that cable operators unwilling to transition to “all digital” or comply with the current viewability rule “provide *free* equipment that enables access to digital broadcast signals for a period of three years.”⁴

Since that time, it has become clear to NAB through communications with our membership and viewers of must carry stations that even a free equipment offer would present barriers to access that constitute serious practical problems for both groups and are, in our view, inconsistent with the statute.⁵ In any event, it does not appear

period it would lease DTAs to consumers for \$0.99 per month; and (3) TWC “anticipates extending comparable equipment offers to subscribers in other areas where TWC eliminates analog cable transmissions.” See Letter to Marlene H. Dortch, Secretary, from Matthew A. Brill, Counsel for Time Warner Cable, Inc., filed in CS Docket No. 98-120 (May 7, 2012).

³ NAB May 23 *Ex Parte* at 1.

⁴ *Id.* at 2-3 (emphasis in original).

⁵ See, e.g., Letter to Chairman Genachowki and Commissioners McDowell, Clyburn, Pai and Rosenworcel from Brian Brady, President and CEO of Northwest Broadcasting, Inc., filed in CS Docket No. 98-120 (Jun. 5, 2012) at 2 (“the vast majority of affected viewers will be unaware of the change and will abruptly lose access to programming they now enjoy if the viewability rule is allowed to sunset. The learning curve for affected customers would be akin to the digital transition, which took three years and hundreds of millions of dollars in education. Six months is simply not enough time.”); Letter to Marlene H. Dortch, FCC Secretary, from John Burgett, counsel to NRJ-TV LLC, filed in CS Docket No. 98-120 (Jun. 7, 2012) (stating that “an equipment-based approach raises multiple barriers for consumers” and that a six month transition period is a “woefully insufficient amount of time for consumers to prepare themselves for the loss of must-carry stations that they currently enjoy”); Letters to Chairman Genachowki and Commissioners McDowell, Clyburn, Pai and Rosenworcel from Todd Lawyer of OTA Broadcasting, filed in CS Docket No. 98-120 (Jun. 6, 2012) (“viewers may be unwilling or unable to take the steps necessary to obtain, pay for, and install new equipment”); Letter to Marlene H. Dortch from Brad Moran of Ramar Communications, Inc., filed in CS Docket No. 98-120 (Jun. 5, 2012)(cable industry proposals impose “additional time and resource burden on consumers” which are inconsistent with their statutory mandate; “Congress mandated that cable operators provide all their customers with must-carry signals, not the opportunity to purchase yet another piece of equipment to self-install.”). Even information on DTAs filed with the Commission by NCTA indicates that they are no simple solution. See Comments of NCTA at 13, providing a link to http://www.bocscsco.com/comcast_dta.php (last viewed on June 8, 2012). According to this information, DTAs have “[n]o direct output – only ‘VCR-like’ Channel 3 output (bad quality),” and are equipped with “a completely different – and incompatible – remote control.” *Id.* As a result, the site recommends that consumers accept the DTAs offered and connect them to sets “that do not get used very often,” but “for every TV you are ‘really’ going to use, get a ‘real’ cable box.” *Id.* Indeed, just yesterday, the FCC took action based on the apparent unavailability of DTAs in certain circumstances. See *Baja Broadband Operating Company*,

from the record in this proceeding that any segment of the cable industry currently intends to provide free equipment for the purpose of accessing must carry signals on hybrid cable systems.⁶

As NAB has consistently noted throughout this proceeding, the Commission correctly held in 2007 that the “plain meaning” and “structure” of Section 614(b)(7) preclude a reading that would allow the viewability mandate to be met by a cable operator’s “offer to sell or lease . . . a converter box.”⁷ The Commission also correctly determined that “[t]o the extent that such subscribers do not *have* the necessary equipment . . . the broadcast signals in question are not ‘viewable’ on their receivers.”⁸ Thus, the Commission’s own reasoning – which was based on a “straightforward reading of the

LLC, Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, CSR-8357-Z, DA No. 12-899 (rel. Jun. 7, 2012).

⁶ As explained above, NCTA’s proposal was for “low-cost” boxes. Since the date of NAB’s filing, NCTA has not filed any notices indicating an interest in a free equipment approach. And although TWC stated its intention to offer free equipment on May 7, its more recent filings have: (1) asserted that cable operators should only be required to make equipment “available,” (2) stated its “intention to offer such equipment *for lease*” rather than for free, and (3) indicated that the Commission cannot “regulate the rates of such equipment” other than pursuant to its rate-regulation authority. Letter to Marlene H. Dortch, Secretary, from Matthew A. Brill, Counsel for Time Warner Cable, Inc., filed in CS Docket No. 98-120 (June 1, 2012) (reporting on meeting with Dave Grimaldi) (emphasis added); Letter to Marlene H. Dortch, Secretary, from Matthew A. Brill, Counsel for Time Warner Cable, Inc., filed in CS Docket No. 98-120 (June 1, 2012) (reporting on meeting with Holly Saurer) (emphasis added).

⁷ *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*”) (emphasis in original); see, e.g., Letter to Marlene H. Dortch, Secretary, from Jane E. Mago, NAB, filed in CS Docket No. 98-120 (June 5, 2012) (“NAB June 5 *Ex Parte*”), Attachment at 2; Letter to Marlene H. Dortch, Secretary, from Jane E. Mago, NAB, filed in CS Docket No. 98-120 (June 4, 2012) (“NAB June 4 *Ex Parte*”), Attachment at 2; Letter to Marlene H. Dortch, Secretary, from Jane E. Mago, NAB, filed in CS Docket No. 98-120 (June 1, 2012), Attachment at 2 (reporting on meeting with Office of Commissioner Rosenworcel); Letter to Marlene H. Dortch, Secretary, from Jane E. Mago, NAB, filed in CS Docket No. 98-120 (June 1, 2012), Attachment at 2 (reporting on meeting with Office of Commissioner Pai); Letter to Marlene H. Dortch, Secretary, from Erin L. Dozier, NAB, filed in CS Docket No. 98-120 (May 4, 2012), Attachment at 2; Letter to Marlene H. Dortch, Secretary, from Erin L. Dozier, NAB, filed in CS Docket No. 98-120 (April 26, 2012), Attachment at 2.

⁸ *Viewability Order*, ¶ 22; see *id.* (“For every receiver ‘connected to a cable system by a cable operator or for which a cable operator provides a connection,’ that operator must ensure that the broadcast signals in question are *actually viewable* on their subscribers’ receivers.”) (emphasis added, quoting Section 614(b)(7)); *id.* ¶ 24 (noting “Congress’s unambiguous determination that broadcast signals must be viewable by all cable subscribers”); *id.* ¶ 31 (“We are bound by the statute to ensure that commercial and non-commercial mandatory carriage stations are actually viewable by all cable subscribers.”).

relevant statutory text” – precludes an equipment-based means of complying with Section 614(b)(7).⁹

The use of equipment, even if provided at little or no cost to consumers, imposes substantial practical limitations on the viewer’s ability to directly access must carry signals, and thus on the concomitant right of must carry stations to unimpeded access to those viewers. In light of the substantial burdens that an equipment-based approach to viewability would impose on consumers and must carry stations,¹⁰ such an approach would contravene Section 614(b)(7) and cannot be justified, as a matter of law or policy.¹¹ Indeed, the Senate Report concerning the Cable Consumer Protection and Competition Act of 1992 explained that the Act was intended to prevent local stations from being “located on a channel . . . that subscribers . . . *cannot view without added equipment.*”¹² For example, as the NPRM, consistent with the FCC’s historically consumer-oriented approach to the statute, explained, “cable subscribers’ use of an ‘A/B’ switch to access over-the-air signals is not a legitimate replacement for access to those signals *on the cable system itself.*”¹³

The proposal contained in NAB’s May 23 filing was offered in the spirit of compromise, and never intended to prejudice NAB’s legal rights with respect to the proper interpretation of the statute. For these reasons, NAB respectfully withdraws the suggestion in its May 23 *Ex Parte* that the Commission might allow cable operators to ensure viewability of digital broadcast signals through the use of DTAs. It is NAB’s view that any rule that requires consumers to rely on additional equipment – whether provided for free or otherwise – in order to access the digital signals of must carry stations would be inconsistent with both the statute and the Commission’s prior interpretations thereof. The “millions of subscribers” and “hundreds of broadcast

⁹ As NAB has explained, disparate treatment of must carry signals also would violate prohibitions on discrimination contained in the Act. Section 614(b)(4)(A) provides 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.” *Id.* (citing 47 U.S.C. § 534(b)(4)(A)).

¹⁰ NAB June 5 *Ex Parte*, Attachment at 2-3; NAB June 4 *Ex Parte*, Attachment at 2-3.

¹¹ In any event, TWC’s proposal would conflict with other provisions of the Act. For example, there is a serious question whether allowing cable operators subject to rate-regulation to require consumers to install additional equipment in order to view must-carry stations would be consistent the requirement that such systems include *all* broadcast signals in their “basic tier” under Section 623(b)(7).

¹² S. REP. NO. 92, 102d Cong., 1st Sess. 44, 45 (1991) (emphasis added).

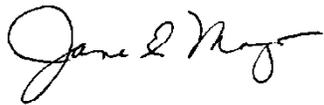
¹³ 27 FCC Rcd at 1715 & n.19 (emphasis added).

Marlene H. Dortch
June 8, 2012
Page 5

stations,"¹⁴ who would be harmed by the premature sunseting of the rule deserve better.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jane E. Mago". The signature is fluid and cursive, with the first name "Jane" being the most prominent.

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

cc: Chairman Genachowski, Commissioners McDowell, Clyburn, Rosenworcel, and Pai; Susan Aaron, Evan Baranoff, Matthew Berry, Steven Broeckaert, Michelle Carey, Lyle Elder, Dave Grimaldi, Sean Lev, Erin McGrath, Holly Saurer, Austin Schlick, Sherrese Smith

¹⁴ *Id.* at 1713.