

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**OPPOSITION OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
TO JOINT MOTION FOR STAY**

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The National Cable & Telecommunications Association (“NCTA”) hereby opposes the joint motion of Agape Church, Inc., London Broadcasting Company, the National Association of Broadcasters, and Una Vez Mas, LP (“Movants”) for a stay pending judicial review of the *Fifth Report & Order* in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

In the *Report & Order*, the Commission determined that the so-called “viewability rule,” which it adopted in 2007 in anticipation of broadcasters’ transition to all-digital broadcasting, should be allowed to sunset three years after the completion of that transition, on June 12, 2012. The viewability rule required cable operators (except those that provided *all* of their programming only in digital format) to provide all must-carry broadcast signals in analog *and* digital format. Even after sunset of the viewability rule, cable operators are *still* required to deliver must-carry broadcast signals in digital format.

While Movants seek to portray the decision to allow this dual-carriage requirement to sunset as some sort of unexplained and unanticipated change of course, expiration of the rule was

¹ See *In re Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report & Order, 27 FCC Rcd. 6529 (2012) (“*Report & Order*”).

expressly provided for and anticipated when the rule was adopted.² Indeed, it was precisely because it was widely understood and clear from the *2007 Report & Order* that the viewability rule was meant to be a three-year transitional requirement that NCTA agreed not to seek judicial review, despite the serious constraints that the dual carriage obligation imposed on cable operators' and cable program networks' First Amendment rights. And Movants neither sought reconsideration nor judicial review of the Order's sunset provision.

Astonishingly, Movants do not even mention the First Amendment in their motion – not in their discussion of their likelihood of prevailing on the merits, not in their discussion of the harm to cable operators and other affected parties, and not in their discussion of the public interest. Constitutional issues aside, Movants have failed to show that the Commission's decision to allow the rule to expire was anything other than a reasonable interpretation of its statutory authority and a wholly rational policy determination under the sunset provision of its 2007 rule. Adding the First Amendment considerations to the mix only confirms that staying the rule and continuing to impose the dual analog/digital carriage requirements on cable operators pending judicial review would be completely unwarranted. Movants have failed to demonstrate that a stay is warranted under the four-prong test applied by the Commission.³

² See *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Third Report & Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd. 21064, 21070 (2007) ("*2007 Report & Order*").

³ See *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F. 2d 841, 843 (D.C.Cir.1977); *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also *In re Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398)*, Order, DA 12-1122, MM Dkt. Nos. 00-168 & 00-44 (Media Bur. July 12, 2012) ("*NAB Stay Denial Order*") (denying broadcasters' request for stay pending appeal of online public inspection files rule).

I. MOVANTS ARE UNLIKELY TO PREVAIL ON THE MERITS OF THEIR APPEAL.

A. The Commission’s Interpretation of the Viewability Requirement Is Wholly Consistent With the Statutory Language.

Movants argue that the language of the statute unambiguously requires cable operators to carry digital broadcast signals in analog format as long as there are any viewers with analog television sets who are not equipped to watch digital signals on their sets. In their view, a cable operator is not providing a “viewable” signal, as required by Section 614(b)(7) of the Communications Act, if the customer is required to obtain additional equipment (even for free or at a nominal cost) to view the signal.

As the Commission recognized, this is hardly the only possible meaning of the term “viewable.”⁴ Indeed, it is not even the “ordinary” meaning of the word, which the dictionary defines as “capable of being seen or inspected.”⁵ A distant star may be viewable with a telescope, or it may be viewable with the naked eye. To say that the star is viewable is to say only that it is capable of being seen. *How* it can be seen – with or without a telescope – remains ambiguous. Similarly, to say that a signal carried by a cable system must be viewable leaves open the question of whether the signal must be viewable without any set-top equipment, whether it must be viewable using equipment that all customers must be forced to purchase and install, or whether it is viewable so long as equipment is readily available to customers who wish to view it.

The Commission’s choice of the latter as most appropriate for purposes of its implementation of Section 614 is clearly a permissible and reasonable interpretation, which is entitled to – and is likely to receive – deference from a reviewing court. Movants suggest,

⁴ *Report & Order* ¶ 8.

⁵ *Id.* (citing *Webster’s Third New International Dictionary* 2551 (1993)).

however, that this interpretation is precluded by the Act’s legislative history, which, in their view, “confirms that the Act was intended to prevent local stations from being ‘located on a channel . . . that subscribers . . . cannot view *without added equipment*.’”⁶ As an initial matter, broadcasters have repeatedly noted during the course of this proceeding that cable operators retain the ability to convert their systems to all-digital operation.⁷ While broadcasters noted that fact to argue that cable operators can eliminate the dual carriage obligation by going all-digital, such a transition would also have the effect of requiring subscribers to obtain some type of additional equipment to view the digital broadcast signals. Broadcasters’ argument that requiring subscribers to obtain additional equipment is prohibited by the Act cannot be squared with their suggestion that cable operators move to all-digital service. Moreover, the legislative history suggests no such thing, and, in fact, must-carry channels were, from the outset, carried on channels that some customers could not view without added equipment.

Specifically, when cable operators began providing more signals than could be accommodated on the 12 VHF channels (2-13) that could be received on the television sets that were still in use 30 years ago, they transmitted the additional signals on frequencies that could only be received using set-top converter boxes, which received the signals and converted them for viewing on channel 3 or channel 4 of the customer’s television set. By 1992, when Section 614 was enacted, the consumer electronics industry had introduced “cable ready” television sets, which were capable of tuning and displaying signals transmitted on the non-broadcast frequencies used by cable operators. But many cable customers still had sets that were not cable

⁶ *In re Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Dkt. No. 98-120, Joint Motion of Agape Church, Inc., et al. for Stay of Viewability Order (“Joint Motion”) at 6 (filed Aug. 1, 2012).

⁷ See NAB Comments at 5; NAB Reply Comments at 9.

ready, and these customers still needed to obtain set-top boxes to view channels other than the 12 channels that could be tuned on their sets.

Nevertheless, there is no indication that Congress intended to require cable operators to locate all must-carry channels on channels 2-13 so that these customers would not have to acquire additional set-top equipment in order to view them. Nor did the Commission ever impose such a requirement. Cable customers without cable ready sets typically had to obtain additional set-top equipment to view programming – including must-carry stations – on channels other than channels 2-13, and, pursuant to the rate regulation provisions of the Act and the Commission’s rules, they had to pay an additional fee for such set-top equipment that customers with cable-ready sets did not have to pay.

What Congress and the Commission *were* concerned with, however, was that the set-top equipment installed by cable operators on sets that were not cable ready be capable of receiving all the must-carry channels carried on the system. As illustrated by a case decided by the Commission shortly after enactment of the 1992 Cable Act, many cable set-top boxes still in use at that time were only capable of tuning 36 channels.⁸ But cable systems were increasingly delivering more than 36 channels on their systems, all of which could be tuned and viewed by customers with cable ready sets or more advanced set-top equipment, but only some of which could be tuned by customers with the 36-channel boxes. The Commission made clear that, in such circumstances, any boxes installed by cable operators must be capable of tuning all the must-carry stations:

[W]here a cable operator chooses to provide subscribers with signals entitled to mandatory carriage through converter boxes supplied by the cable system, those

⁸ See *Complaint of WLIG, Inc. Against Cablevision Systems Corp.*, 74 R.R. 2d 208 (1993).

converters must be capable of transmitting all the signals entitled to mandatory carriage on the basic tier of the cable system, not just some of them.⁹

This concern shows why the distinction between the second and third sentences of Section 614(b)(7) is not, as Movants contend, rendered “meaningless” by the Commission’s interpretation of the viewability requirement. The second sentence does more than simply require a cable operator to notify the customer that he or she needs additional equipment in order to view must-carry signals. It also ensures that if a cable operator installs service and provides a set-top box, the box does not *prevent* any must-carry signals from being viewable because it is not capable of tuning those signals. The third sentence applies to the situation where the cable operator does not visit the home at all but simply authorizes the customer to install additional connections. In that circumstance, all that is required of a cable operator is a notification of any must-carry signals that require a converter box and of the availability of converter boxes that are specifically capable of receiving such signals. The requirements are similar but not identical; they apply to two different scenarios, and therefore, as the Commission correctly concluded, neither is “superfluous” and neither is “surplusage.”

B. The Movants’ Interpretation – Which Would Leave the Dual Carriage Requirement in Place – Would Raise Serious First Amendment Problems.

Movants’ likelihood of success on the merits is further diminished by the fact that construing the statute in the way they propose would raise very serious constitutional problems – problems completely ignored in their motion for a stay. When the Supreme Court, in the *Turner Broadcasting* case,¹⁰ narrowly upheld the must-carry provisions of Section 614, even the majority recognized that compelling cable operators to occupy channels with programming not

⁹ *Id.* at 210.

¹⁰ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

of their choosing significantly impacted the protected speech and editorial discretion of operators and of cable program networks that might otherwise have occupied those channels. The Court found, however, that the obligation to carry local broadcast stations survived scrutiny – for reasons that would not apply to the dual carriage regime that the Commission allowed to sunset.

A requirement to carry signals in analog and digital format would fail to survive even the intermediate scrutiny applied in *Turner*. Under that standard, a restriction on speech is permissible only “if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”¹¹ In *Turner*, the Court confirmed that Congress’s purpose of “preserving the benefits of free, over-the-air local broadcast television” was an important governmental interest,¹² and that it was reasonable for Congress to conclude that allowing cable operators to refuse to carry certain broadcast stations *at all* posed a real threat to that statutory objective.¹³ And it concluded that the burdens of such a single-carriage requirement on cable operators, whose capacity at the time was growing and who were already carrying most broadcast signals, were “modest” and not an unnecessarily restrictive means of achieving the statutory purpose.¹⁴

None of these findings would reasonably apply to an extension of the Commission’s interim dual carriage requirements. Today, cable operators are already required to deliver must-carry signals in *digital* format; requiring cable operators to also carry a signal in *analog* format has a much lesser impact on broadcasters and imposes a much greater burden on the protected speech of operators and programmers. A must-carry broadcaster would have access to all

¹¹ *Turner II*, 520 U.S. at 189 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

¹² *Id.* at 189-90.

¹³ *See id.* at 208.

¹⁴ *Id.* at 214.

digital-tier customers – approximately 80% of customers nationwide – that are already equipped to view digital signals in their homes.¹⁵ And they would have access to all other customers who were willing to obtain and attach a readily available DTA or other converter device to some or all of their television sets to view broadcast signals and any other basic or enhanced basic services that their operator has chosen to provide in digital format.

Moreover, cable operators no longer have the “bottleneck” control over access to MVPD customers that the Court perceived in *Turner*.¹⁶ Two DBS companies are available nationwide, and they, along with Verizon and AT&T, now serve 41.9% of MVPD customers.¹⁷ Significantly, those providers are “all-digital,” so that any must-carry broadcast signals carried by those MVPDs reach *all* of their customers. In these circumstances, there is no reason to believe that the loss of viewership from the small subset of customers that choose not to attach a digital converter device would have an effect on broadcasters that in any way resembles the projected effects of complete non-carriage that the Court relied on in *Turner*.

At the same time, the burden of requiring both analog and digital carriage of the same broadcast station far exceeds what the Court anticipated from the single analog carriage requirement in *Turner*. First of all, the obvious: Dual carriage in analog and digital consumes significantly more bandwidth than carriage in analog or digital alone. And carriage of broadcast signals in high-definition (“HD”) format consumes even more. But also, for the reasons discussed above, the opportunity costs and the burdens on editorial discretion of using a full 6 MHz channel to carry the analog version of a must-carry broadcast signal – especially, a must-carry broadcast signal that is also being carried in HD format – are severe. The popularity and

¹⁵ See *Report & Order* ¶ 13.

¹⁶ See *Turner I*, 512 U.S. at 656.

¹⁷ See NCTA Comments filed in MB Dkt. No. 12-68 at 9 (June 22, 2012).

proliferation of HD programming, the steadily increasing capacity requirements for broadband services, and the need to manage a gradual transition to digital while maintaining a valuable but ever-shrinking array of analog services were not before the *Turner* Court when it characterized the mandatory carriage of what it perceived as a mere handful of analog signals as a “modest” burden.

In sum, in light of the dramatic changes in the video marketplace, it is doubtful that the continuation of the Commission’s interim rules requiring carriage in analog and digital/HD format could have passed muster even under the “intermediate scrutiny” test applied in *Turner*. At the very least, continuing to interpret the “viewability” provision of the statute to require such carriage would have raised very serious questions under the First Amendment. The Commission properly interpreted the statute in a manner that avoided such serious constitutional issues by allowing the analog carriage requirement to expire as intended, noting that “the doctrine of constitutional avoidance counsels us to interpret the Act as not imposing a rigid analog-carriage requirement on cable operators, where the record establishes a reasonable, less burdensome alternative that meets the statutory objectives.”¹⁸ This only makes it even more likely that a reviewing court would defer to the Commission’s reasonable interpretation of the statutory language.

C. Permitting Cable Operators To Carry Must-Carry Stations in Digital Format Does Not Violate the “Signal Quality” Requirements of Section 614(b)(4)(A).

Movants contend that allowing cable operators to carry a must-carry station in digital format while some other programming services are still being carried in analog format violates the terms of Section 614(b)(4)(A) – specifically, the requirement that “the quality of signal

¹⁸ *Report & Order* ¶ 11.

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.”¹⁹ But digital carriage in no way diminishes “the quality of signal processing and carriage.” To the contrary, as the Commission found, “from a technical standpoint, a must-carry signal carried in standard definition (SD) arguably has the same ‘quality of signal processing and carriage’ as a signal carried in analog format because both versions received at the headend should have the same resolution – 480i – and thus there should be no perceivable difference between them.”²⁰

Movants suggest, however, that the requirement extends beyond issues of signal quality to issues involving the extent to which particular equipment must be used to view a signal.²¹ The captions of the relevant sections make clear that this is not what Congress intended. Section 614(b)(4) is captioned “Signal Quality,” and Section 614(b)(4)(A) is captioned “Nondegradation; *Technical Specifications*.” The provision at issue is all about the comparative signal quality of must-carry signals and other signals carried on a cable system. It is hard to imagine that a reviewing court would find Movants’ interpretation persuasive, and even less likely that it would not defer to the Commission’s interpretation.

D. The Order Is Wholly Consistent with the Basic Tier Requirements for Rate Regulated Systems.

Movants contend that carriage of must-carry signals in digital format will violate the requirement, in Section 623, that all must-carry stations be provided on “a separately available basic service tier to which subscription is required for access to any other tier of service.”²² They

¹⁹ Joint Motion at 10.

²⁰ *Report & Order* ¶ 10.

²¹ Joint Motion at 10.

²² *See id.* at 10-11.

argue that the fact that some subscribers must obtain additional set-top equipment to view digital signals somehow means that those signals are no longer included in the “must-buy” basic tier.²³

This argument has no merit. The fact that some customers might have to acquire additional equipment to view some but not all signals (including some must-carry signals) in the mandatory basic tier has never been viewed as violative of the basic tier requirement. As discussed above, customers without cable ready television sets used to have to obtain converter boxes (for which they were required by the rate regulation rules to pay an additional fee) to view any basic tier services provided on channels other than the 12 channels that could be tuned directly by their sets. Yet cable operators were never required to place all must-carry signals on channels 2-13 in order to comply with the basic tier requirement. In fact, the statute gives must-carry broadcasters the option of channel placement on their over-the-air channel number – which, in many cases, is a UHF channel number that cannot be tuned without a cable ready set or an additional set-top converter box.²⁴

So long as all cable customers are required to purchase all must-carry signals and the only additional fee for viewing such signals is the separate fee that customers might have to pay for equipment needed to view such signals, the basic tier requirement of Section 623 is met. In such a case, the tier is “separately available,” and it must be purchased in order to obtain any other optional cable service offerings.

²³ *See id.*

²⁴ *See* 47 U.S.C. § 534(b)(6).

E. The Order Does Not Violate the Administrative Procedure Act.

Movants briefly set forth a handful of reasons why the Commission's decision to allow the viewability rule to expire supposedly violates the Administrative Procedure Act.²⁵ These arguments are little more than makeweights.

First, they claim that the Commission “did not adequately explain why facts that it previously said would support a three-year extension . . . instead support[] repeal.”²⁶ But, of course, the Commission found that the relevant facts had changed. When the Commission adopted its interim viewability rule in 2007 and provided that the rule would sunset in three years, subject to a review proceeding in the third year, it identified three key factors that would be relevant in that review:

To assist the Commission in this review, we will include questions in our annual Cable Price Survey to assess, for example, digital cable penetration, cable deployment of digital set-top boxes with various levels of processing capabilities, and cable system capacity constraints.²⁷

The Commission found that trends and changes related to each of these factors strongly supported allowing the rule to sunset. Digital cable penetration had dramatically increased from 54% to 80%, significantly diminishing the number of analog viewers potentially affected by the viewership rule.²⁸ Moreover, “[m]ore importantly, unlike in 2007, low functionality/low cost digital equipment is now readily available as an option to cable consumers,”²⁹ substantially diminishing any deterrent to obtaining the equipment necessary to view digital signals carried on the basic tier. Finally, the Commission acknowledged that cable systems faced increasing

²⁵ See Joint Motion at 11-13.

²⁶ *Id.* at 11.

²⁷ 2007 *Report & Order*, 22 FCC Rcd. at 21070 n.39.

²⁸ *Report & Order* ¶¶ 12-13.

²⁹ *Id.* ¶ 14.

constraints on capacity from the “increasing proliferation of HD programming services as well as from broadband video services,” and it concluded that “elimination of the viewability rule will provide operators the needed flexibility to meet fast-changing consumer demands for HD cable services and high-speed broadband services.”³⁰

The *Report & Order* is full of reasons why the viewability rule should be allowed to sunset, as was intended and expected when the rule was adopted five years ago. There is no likelihood that a court will find that the Commission has not adequately explained its decision.

Second, Movants contend that the Commission’s “conclusion that [digital terminal adapters (‘DTAs’)] are readily available in an ‘affordable’ range of ‘no more than \$2’ . . . is contrary to record evidence.”³¹ According to Movants, “[g]reater evidence of availability was required, particularly because “the availability of set-top boxes” was [*c*]ritical to [the FCC’s] decision to allow the viewability rule to sunset.”³²

This argument shamelessly distorts what the Commission said. The Commission did find, to be sure, that several cable operators were already making digital converter boxes available at prices below two dollars per month. And it noted the commitment of the eight largest incumbent cable operators to make low-cost boxes available to basic tier households if they provided must-carry signals in digital format. But what the Commission said, in the sentences from which the partial quotes above were taken, was that *only if* a system made boxes available not materially higher than two dollars per month would the system be exempt from the requirement to provide must-carry signals in analog format:

We find that this range of charges for DTAs and set-top boxes – *i.e.*, free or a monthly fee of no more than \$2 – would satisfy the requirement for affordable

³⁰ *Id.* ¶ 16.

³¹ Joint Motion at 12.

³² *Id.*

equipment. . . . Materially higher leasing fees, however, could deter subscriber willingness to order the equipment needed to ensure viewability on a hybrid cable system. Accordingly, such fees would not meet the statutory viewability requirement as we interpret it.³³

Third, Movants suggest that because the Notice of Proposed Rulemaking in this proceeding pointed out that the Commission had previously rejected an interpretation of “viewable” that was based on the ready availability of affordable digital converter equipment, it was precluded – on grounds of inadequate notice – from changing its mind.³⁴ That argument will surely carry no weight with a reviewing court. The Notice made clear that what was on the table was whether to allow the scheduled sunset to occur. And the Notice invited comment “on any other proposals that would achieve the results necessary to assure the viewability of must-carry signals through an approach different than that of our existing rule.”³⁵ If, as Movants contend, the Commission’s previous determinations and interpretations regarding the meaning of the “viewability” provisions of the statute were subject to *stare decisis* and could not have been revisited in this proceeding, the proceeding would have been pointless.

Fourth, Movants complain that the Commission’s decision to extend the sunset for an additional six-month “transition period” was arbitrary and capricious because six months is not enough time to ensure a smooth transition.³⁶ The three-year viewability rule was itself adopted to help ensure a smooth digital transition for broadcasters and their viewers. Broadcasters have had five years since its adoption to prepare for the possibility that their dual carriage rights would end and that their stations might be carried only in digital format. They will, in any event, have 90 days advance notice of any such digital carriage decision. Finally, Movants suggest that the

³³ *Report & Order* ¶ 14.

³⁴ *See* Joint Motion at 3-4.

³⁵ *In re Carriage of Transmission of Digital Television Broadcast Stations: Amendment to Part 76 of the Commission’s Rules*, Fourth Further Notice of Proposed Rulemaking, 27 FCC Rcd. 1713, 1721 (2012).

³⁶ *See* Joint Motion at 13.

Order undermines the goal of the viewability rule by somehow failing to push operators to complete their transition to all-digital systems.³⁷ But Movants provide no evidence that the viewability provision of the Act was meant to serve any such purpose, and this halfhearted argument provides no reason to stay implementation of the rule.

II. MOVANTS FAIL TO DEMONSTRATE THAT A STAY IS NECESSARY TO PREVENT IRREPARABLE HARM.

Movants have failed to demonstrate that they will suffer irreparable injury absent a stay. The Commission was “not persuaded by the broadcasters’ analysis that allowing the current viewability rule to expire on schedule will threaten the viability of must-carry stations.”³⁸ Movants’ speculative claims here of possible economic injury while judicial review is pending are no more persuasive.³⁹

Movants fail to show that irreparable harm “is certain to occur in the near future” absent a stay.⁴⁰ Instead, their motion rests on a highly uncertain parade of horrors in which speculation builds on speculation. Broadcasters first assert that their stations will likely lose viewership and audience share because many viewers “will not be aware of the impending change” or will fail to acquire needed equipment.⁴¹ But this ignores that broadcasters have a six month transition period during which they can raise that awareness by educating their viewers about how to access their station if they are moved to digital-only carriage – a transition period five months *longer* than the notice period Congress thought necessary for operators to provide to broadcasters

³⁷ *See id.*

³⁸ *Report & Order* ¶ 15.

³⁹ *See Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 674 (D.C. Cir. 1985) (“[E]conomic loss does not, in and of itself, constitute irreparable harm.”); *see also* *Virginia Petroleum Jobbers*, 259 F.2d at 925 (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.”).

⁴⁰ *NAB Stay Denial Order* ¶ 9 & n.40 (*citing Wisconsin Gas*, 758 F. 2d at 674).

⁴¹ Joint Motion at 13-14.

prior to deleting or repositioning them.⁴² And stations will have at least 90 days notice that a change is actually in the offing. Finally, operators, too, will provide notice to customers. Under these circumstances, Movants' assumption that viewers will be unaware of station's digital-only carriage is unfounded. Nor do they show that once they are made so aware, viewers otherwise interested in the station's programming will not respond to the low-cost equipment offer. Instead, they simply assume that many viewers will choose not to obtain the additional necessary equipment.

Movants build on this purported lack of awareness and interest to claim that they will lose audience and hence advertising revenues.⁴³ But this claim, too, is entirely speculative. Broadcasters have not identified a single system – from among the dozens on which they are currently carried⁴⁴ – in which they will no longer be carried in analog while judicial review is pending. But even if one or more cable systems were to cease carrying must-carry stations in analog format, and even if a significant number of viewers failed to get low-cost converter boxes to continue to watch such stations, the Movants' exaggerated claims of lost advertising revenue (attributable to a loss of potential viewers who may or may not have ever watched the must-carry stations) are based on nothing other than pure conjecture.

Movants also assert that they will suffer “irreparable competitive injury.” But must-carry provides an *artificial* competitive boost to certain broadcasters at the expense of cable operators, cable programmers and others seeking access to scarce cable capacity. And, as noted below, any

⁴² 47 U.S.C. § 614(b)(9) (requiring cable operators to provide written notice to a local television station “at least 30 days prior to either deleting or repositioning that station”).

⁴³ The declarations admit as much, repeating the same language: “actual losses that will be caused by the sunset of the current viewability rules are unquantifiable.” *See, e.g.*, Joint Motion, Attachment, Angulo Decl. ¶ 10; Hurley Decl. ¶ 10; Manzi Decl. ¶ 10; Ulloa Decl. ¶ 11.

⁴⁴ Each station is carried on multiple cable systems throughout its market, and there is no reason to believe that each of those systems will change the method of carrying the station in the near term. Two of the stations referred to in the declarations – KJLA and KDOC – are carried on more than 80 cable systems. Nielsen FOCUS database (data as of 7/15/12).

“irreparable competitive injury” that must-carry broadcasters may suffer from no longer being carried in *both* analog and digital format is at least balanced and may be exceeded by the injury that a stay will impose on such other programmers, none of which have a guarantee of carriage at all, much less in two formats.

Movants thus fail to show the type of injury that justifies a stay pending appeal.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR ALLOWING THE RULE TO SUNSET AS INTENDED.

Movants contend that “a stay pending further review will not harm third parties because it would simply maintain the status quo.”⁴⁵ This contention ignores the real and serious intrusions caused by any must-carry requirement – and this dual carriage requirement in particular – on protected First Amendment speech. Mandatory carriage interferes with the rights of cable operators to choose what programming to provide to customers, and with the rights of cable programmers to fairly compete for carriage.⁴⁶ This injury to First Amendment interests weighs heavily in the balance of hardships and, indeed, outweighs the speculative financial injury alleged by the Movants.⁴⁷

Moreover, First Amendment interests aside, Movants fail to acknowledge the harm that keeping the viewability rule in effect pending judicial review will continue to impose on third parties. As the Commission recognized, the rule not only requires cable operators to carry broadcast stations in analog format. It also prevents operators from using the capacity required for such carriage for *other* purposes. If such capacity would be used to carry other non-broadcast program networks on the analog tier or in HD format, then continuing the rule in effect will

⁴⁵ Joint Motion at 16.

⁴⁶ See *Turner I*, 512 U.S. at 636 (“Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”).

⁴⁷ See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

obviously impose a corresponding financial hardship on *those* networks – which, unlike broadcast stations, have no government guarantee of carriage *at all* – much less a guarantee of analog or dual carriage.

Such capacity might also be recaptured by cable operators to accommodate the rapidly expanding amount of data, including video content, being delivered to their high-speed Internet customers. Consumers, content providers and cable operators would all be harmed to the extent that the viewability rule continued to impair or delay the ability of operators to continue to ensure the robust delivery of such Internet content.

Moreover, as discussed at length in NCTA’s comments in this proceeding, the viewability rule has interfered with cable operators’ ability to implement a smooth transition from analog to digital delivery of video programming.⁴⁸ To recapture capacity, operators are, to varying degrees, providing as many basic tier networks as possible in digital-only format, while providing a diminishing number of analog channels for the shrinking number of customers who remain reluctant or unwilling to install the readily available equipment needed to watch digital basic channels on analog sets. Forcing systems to include must-carry broadcast stations on these scarce and costly analog channels severely interferes with this effort to manage a smooth transition to digital cable service in a manner that provides value to all customers.

Movants misleadingly claim that a stay would be in the public interest because “millions of analog subscribers ... will lose access to must-carry signals as a result of repeal.”⁴⁹ No must-carry station will lose cable carriage if the rule sunsets as intended. These stations will continue to be carried in digital format, just as they are transmitted over-the-air, and will be accessible with equipment that the operator will offer. On the other side of the balance, allowing the rule to

⁴⁸ See NCTA Comments filed in MB Dkt No. 98-120 at 4-10 (Mar. 12, 2012).

⁴⁹ Joint Motion at 17.

sunset will serve the public interest. As the Commission found, “eliminating the rule will result in significant benefits to cable operators in meeting the increasing demands of the large majority of their customers, *i.e.*, those subscribing to digital services.”⁵⁰ The balance of harms and considerations of the public interest both weigh decidedly in favor of denying the stay.

CONCLUSION

For the foregoing reasons, the Commission should deny the stay request.

Respectfully submitted,

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⁵⁰ *Report & Order* ¶ 16.