

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of)	
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Carriage of Digital Television Broadcast)	CS Docket No. 98-120
Signals: Amendment to Part 76 of the)	
Commission's Rules)	
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**Comments of the National Association of Broadcasters
on the Fourth Further Notice of Proposed Rulemaking
and Declaratory Order**

The National Association of Broadcasters (“NAB”)¹ submits these Comments on the above-referenced *Notice of Proposed Rulemaking (“Notice”).*² The *Notice* raises two issues: (1) whether to extend the requirement that all must-carry signals carried on cable systems be “viewable” on all receivers connected to the system or authorized to be connected by a cable operator (the “Viewability Rule”), and (2) whether to extend the waiver for small cable systems of the requirement that local broadcast signals transmitted in High Definition (“HD”) be carried in HD.

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Carriage of Digital Television Broadcast Signals, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, CS Docket No. 98-120, FCC No. 12-18 (rel. Feb. 10, 2012)(“Notice”).*

NAB supports the extension of the Viewability Rule for an additional three-year period, and agrees that the HD carriage rule should continue to be waived for smaller cable systems that are incapable of transmitting a signal in HD.

I. Background

The Commission concluded in 2001 that, after the transition to digital television, the signals of digital television stations would have to be delivered to subscribers by cable systems in their native digital format.³ In 2007, the Commission – recognizing that many cable subscribers would continue to use analog receivers following the digital transition – proposed rules for carriage of must carry signals following the transition.⁴ The Commission first pointed out that, “[p]ursuant to Sections 614 and 615 of the Act, cable operators must ensure that all cable subscribers have the ability to view all local broadcast stations carried pursuant to mandatory carriage.”⁵ Reviewing its prior decisions implementing the must-carry provisions of the Act, the Commission concluded, “[i]n other words, the signal must be ‘viewable’ on all television sets connected to the cable provider’s system.”⁶

To implement that statutory mandate, the Commission proposed that cable operators be given a choice – hybrid cable systems (ones that provide both analog and digital service) would have to carry a local broadcast signal in both digital and analog formats; all-digital cable systems would only need to carry a local broadcast signal in a

³ *Carriage of Digital Television Broadcast Signals*, First Report and Order and First Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2629 (2001).

⁴ *Carriage of Digital Television Broadcast Signals*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 8803 (2007) (“*Viewability NPRM*”).

⁵ *Id.* at 8808.

⁶ *Id.* at 8809.

digital format, so long as subscribers with analog receivers have the equipment needed to view the broadcast signals.⁷ After considering comments, the Commission adopted its proposed rules, with a commitment to reexamine them after three years.⁸ A group of cable networks sought review of the *Viewability Order*, but their case was dismissed after the court found that they had not demonstrated that they were harmed by the Commission's decision.⁹

II. The Commission Should Retain the Viewability Rule

The Commission now proposes to extend the Viewability Rule for another three-year period. NAB strongly supports the Commission's proposal. First, the rule has functioned exactly as the Commission anticipated – subscribers of cable systems and other multiple channel video programming distributors (“MVPDs”) have been able to view local broadcast television signals whether they view television on a new digital receiver or an older analog receiver. That fulfilled Congress' mandate in Section 614(b)(7) of the Act, 47 USC § 534(b)(7), 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.*” (emphasis added)

In the proceeding leading up to the adoption of the *Viewability Order*, no one suggested a different rule that would have ensured that all must carry signals could be seen on all connected television receivers. In the five years since the Viewability Rule

⁷ *Id.*

⁸ *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 (2007) (“*Viewability Order*”).

⁹ *C-SPAN v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008).

was adopted, there have been no complaints by local broadcast stations or requests for waivers by cable operators,¹⁰ and to NAB's knowledge, no one has suggested any better alternative that would achieve Congress' directive.

As the Commission recognizes, the requirement that all must carry signals be viewable is one imposed by statute, and that statutory command would remain in effect whether or not the Viewability Rule is extended.¹¹ Extending the Rule would benefit all parties by providing a safe harbor for cable systems and MVPDs. The Viewability Rule thus minimizes the number of potential disputes between must carry stations and distributors, achieves Congress' objective of ensuring that must carry stations are available to every television viewer in a market, and reduces the burdens on both regulatees and the Commission that a complaint-driven process would create.

As the *Notice* acknowledges, millions of cable subscribers continue to use analog television sets. Thirty-one percent of all TV households do not have even one digital television and rely exclusively on analog receivers.¹² Cable industry data show that over twenty percent of all cable subscribers receive only analog service.¹³ The Commission notes that the bulk of subscribers receiving digital cable are served by hybrid systems in which only some channels are delivered in digital, and that even cable households that have one or more digital receivers often still have analog receivers.¹⁴

¹⁰ *Notice* ¶ 15.

¹¹ *Notice* ¶¶ 6-7,10.

¹² *Notice* ¶ 9 n.34.

¹³ *Id.* ¶ 9 and n.32. The National Cable & Telecommunications Association reports that 21.6% of all cable basic video customers do not receive any digital service. See www.ncta.com/StatsGroup/Availability.aspx (last visited March 7, 2012).

¹⁴ *Id.* ¶ 9.

Thus, there can be no doubt that the need to ensure subscribers' access to local broadcast signals remains and affects millions of cable subscribers.

Retaining the Viewability Rule also will not burden cable operators or programmers. In dismissing cable programmers' appeal of the *Viewability Order*, the Court of Appeals recognized that "cable operators have publically stated through their association that they will, in any event, voluntarily do what the *Viewability Order* requires."¹⁵ There is no reason to believe that this commitment by cable operators to ensure that subscribers with analog receivers continue to have access to local broadcast signals will not continue. Further, as the Commission notes, the expense required of cable operators to obtain equipment needed to convert digital broadcast signals to analog has "already been incurred by now and would not impose an additional cost."¹⁶

Moreover, the option for cable operators of upgrading their systems to all-digital operations and thereby eliminating the obligation to carry local broadcast signals in analog format would remain in place. NAB believes that the incentives for cable systems to move to all-digital – increased capacity for programming and other services, reduced costs for service visits for changes that could be implemented remotely in an all-digital environment, and reductions in the number of set-top box models that have to be supported – will continue to mean that hybrid and analog cable systems will be rebuilt for all-digital transmission. As cable systems convert, whatever burden the Viewability Rule might have imposed will disappear. Until that occurs, the Rule should

¹⁵ *C-SPAN*, 545 F.3d at 1055; see *Viewability Order*, 22 FCC Rcd at 21071-72 & n.45.

¹⁶ *Notice* ¶ 12.

remain in place. Its burden, like must carry itself, is “congruent to the benefits it affords.”¹⁷

NAB, therefore, supports extension of the Viewability Rule. Without it, many cable subscribers may not be able to actually view the signals of must carry television stations, contrary to Congress’ express intent. At some point, when cable systems have all converted to digital operation, the need for the Viewability Rule may disappear. It would be appropriate for the Commission to reexamine that question periodically, and NAB accordingly supports a three-year extension.

III. HD Carriage Exemption

As discussed above, the Commission made clear – long before the digital transition – the post-transition digital television signals would be entitled to carriage in their native digital formats and, if broadcast in HD, carried without degradation.¹⁸ As the digital transition approached, systems with limited capacity or fewer subscribers complained that the requirement to carry local broadcast signals in HD would create a substantial financial burden. To avoid imposing costs that could result in a complete loss of cable service, the Commission granted a three-year waiver of the HD carriage requirement for systems with under 552 MHz capacity or with 2,500 or fewer subscribers that are not affiliated with a large cable multiple system owner (“MSO”).¹⁹

¹⁷ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 215 (1997).

¹⁸ *Carriage of Digital Television Broadcast Signals*, First Report and Order and First Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2629 (2001).

¹⁹ *Carriage of Digital Television Broadcast Signals*, Fourth Report and Order, 23 FCC Rcd 13618 (2008). NAB sought reconsideration of this order for the narrow purpose of ensuring transparency, accountability and consumer access to relevant information. See Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. (filed Nov. 17, 2008 in CS Docket No. 98-120) (cable systems seeking to benefit from the HD

As the Commission explains, the intent of this waiver was to give small cable systems time in which to upgrade.²⁰ Data cited by the Commission, however, indicates that a substantial number of smaller cable systems continue to lack HD-transmission capability.²¹

The Commission concluded in 2008 that, balancing the benefits to the public of receiving television signals in HD – one of the key benefits of the digital transition – against the risk that an HD carriage requirement would result in many small cable operators having to reduce service or shut down, the public interest supported granting a limited waiver. The *Notice* asks for more detailed information concerning the burdens that elimination of the waiver would create.²² If the information submitted to the Commission confirms that a large number of small cable systems continue to be unable to carry any HD signals, NAB would not object to another three-year waiver of the HD carriage requirement for such systems.

The Commission also asks whether the exemption should be revised so that cable systems “would be required to carry all local broadcast signals in HD if they provide any HD service.”²³ NAB supports this proposed revision to the waiver policy. If a small cable system has the capability of transmitting one or more signals in HD, it should no longer be entitled to a waiver of the statutory mandate to transmit local

exemption should be required to notify consumers, affected stations, and the Commission of the system’s intent to utilize the exemption and the factual basis supporting its qualification for the exemption.)

²⁰ *Notice* ¶ 19.

²¹ *Id.* ¶ 20.

²² *Id.* ¶ 22.

²³ *Id.* ¶ 21.

broadcast signals without degradation, particularly where the requirement that digital signals would be carried in their native format was established 11 years ago. Moreover, Section 614(b)(4)(A) of the Act, 47 USC § 534(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 the carriage of any other type of signal.” Congress intended by this provision to make sure that cable systems did not provide technically advantageous carriage to favored signals, and provide lower quality carriage to others, particularly local television signals. This provision directly applies to HD carriage, and the Commission should make clear that, even for a small cable system, if it upgrades to carry some signals in HD, it must then also carry local digital television signals in the same way.

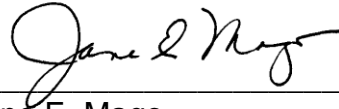
IV. Conclusion

The Viewability Rule has worked well to minimize the disruption of the digital transition to cable subscribers with analog receivers. Since there remain millions of analog receivers served by cable systems, the Commission should extend the Viewability Rule to ensure compliance with the Communications Act’s command that must carry signals be provided to and viewable by all subscribers to a cable system. NAB also agrees that the Commission should extend the waiver of the HD carriage requirement for small systems, but should clarify that the waiver will not apply if a

system carries any signal in HD.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

A handwritten signature in black ink, appearing to read "Jane E. Mago". The signature is written in a cursive style with a large initial "J".

Jane E. Mago
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