Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

REPLY OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC. AND
THE NATIONAL ASSOCIATION OF BROADCASTERS

The Association for Maximum Service Television, Inc. ("MSTV")[1] and the National Association of Broadcasters ("NAB")[2] submit this reply to the comments on the *Third Further Notice of Proposed Rulemaking* in the Viewability and Material Degradation proceeding.[3] When it first implemented the Cable Act 15 years ago, the Commission expressly determined that the statutory prohibition on material degradation applies not only to must-carry signals but also to signals carried pursuant to retransmission consent. There is no basis for changing this longstanding determination. As set forth in our initial comments, we agree with commenters urging the Commission to permit broadcasters and viewers to control the format of downconverted programming. Finally, we urge the Commission to fully implement the statutory

[1] MSTV is a nonprofit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality of the local broadcast system.

[2] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

[3] *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 07-170 (rel. Nov. 30, 2007) ("*Third FNPRM*").

viewability and nondegradation requirements and to reject calls for categorical exemptions for certain cable operators.

I. THE STATUTORY PROHIBITION AGAINST MATERIAL DEGRADATION APPLIES TO RETRANSMISSION CONSENT STATIONS.

When the Commission implemented the 1992 Cable Act fifteen years ago, it fully analyzed the statutory language and determined that the prohibition on material degradation applies equally to must-carry and retransmission consent stations. While Congress limited Section 614's channel positioning and viewability requirements to must-carry stations,[4] the Commission found that Section 614's prohibition on material degradation applies to all "local commercial television stations" that a cable operator carries.[5] It is a basic canon of statutory interpretation that when Congress uses different terms, it is presumed to intend different meanings.[6] Section 614(b)(6) provides for the channel position of "[e]ach signal carried in fulfillment of the carriage obligations of a cable operator under this section" – *i.e.*, each must-carry signal – and Section 614(b)(7) applies the viewability requirement to signals "carried in fulfillment of the requirements of this section" – again, must-carry signals. By contrast, Section 614(b)(4)(A) applies to all "local commercial television stations" carried by operators. The Commission has determined that the "plain language" of Section 614(b)(4)(A) affirms Congress's intent to apply the material degradation prohibition "to more than just television

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[4] *See* 47 U.S.C. § 534(b)(6) and (7).

[5] *See* Section 614(b)(4)(A) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 534(b) (4)(A).

[6] "Different language in separate clauses in a statute indicates Congress intended distinct meanings." *Barmes v. United States*, 199 F.3d 386, 389 (7th Cir. 1999) (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). *See also Third FNPRM* at para. 3 (noting that "the Act requires that cable systems carry broadcast signals without material degradation and ensure that all subscribers can receive and view mandatory-carriage signals") (emphasis added).

signals carried pursuant to the must-carry rules."[7] The Commission subsequently reaffirmed its decision that the provisions of Section 614 that referenced "local commercial television stations" apply to all local television signals, regardless of whether they are must-carry or retransmission consent stations.[8] There is no statutory basis for departing from this long-standing interpretation now, as some commenters urge.[9]

II. BROADCASTERS AND VIEWERS SHOULD DETERMINE THE ASPECT RATIO OF DOWNCONVERTED PROGRAMMING.

Like MSTV and NAB, the Consumer Electronics Association ("CEA") believes that, for signals downconverted to an analog format at the headend, broadcasters should make the determination as to aspect ratio (*e.g.*, letterbox or center-cut), and for signals downconverted at a viewer's home with a converter box, the box should be capable of allowing the consumer to determine the format.[10] As the CEA has observed, "broadcasters are in the best position to

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[7] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, at para. 171 (1993).

[8] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, MM Docket No. 92-259, 9 FCC Rcd 6723, at para. 103 (1994). This interpretation conforms with the legislative history of Section 614. The Senate Report clarified that the Commission was to "establish regulations which will permit broadcasters to elect periodically between acceptance of signal carriage and channel positioning rights in which case their signals will be presumed carried and exercise of their right of retransmission consent. Section 325 makes clear that a station electing to exercise retransmission consent with respect to a particular cable system will thereby give up its rights to signal carriage and channel positioning established under section 614 and 615 for the duration of the 3-year period." *See* S. Rep. No. 92, 102d Cong., 1st Sess. 37 (1991) (emphasis added).

[9] *See* Comments of the American Cable Association ("ACA"), National Cable & Telecommunications Association ("NCTA"), and Verizon. NCTA suggests that Section 614(b)(4)(B), which directs the Commission to "establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with" the DTV standards, somehow undermines the statutory requirements of Section 614(b)(4)(A). There is nothing in Section 614(b)(4)(B), or elsewhere in the statute, that would support that result.

[10] *See* CEA Comments at 2.

determine the format for downconverting broadcast programming and subsequent distribution to cable subscribers. The broadcasters' preferences, therefore, should be maintained throughout the cable conversion process."[11] By permitting broadcasters and viewers to control the format of downconverted programming, the Commission would give full effect to Congress's goal of preventing cable operators from disadvantaging broadcasters in cable carriage.[12]

Without such a rule, cable operators would have an incentive to choose unfavorable aspect ratios that are not in viewers' best interests and that could materially degrade broadcast signals. Cable operators provide programming that competes with the broadcast programming retransmitted on their systems.[13] Thus, MSTV and NAB disagree with Verizon's claim that "there is no reason to assume that a video provider would select an approach that would diminish the quality of the services that it delivers to its customers"[14] and NCTA's claim that cable operators will have "every incentive" to optimize the viewer experience.[15] Nor is NCTA's argument that "[o]perators should be able to ensure a consistent look across all their

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[11] *Id.*

[12] *See* Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), P.L. 102-385 (1992) at § 2(a)(15). As MSTV and NAB noted in their comments, in the event that a broadcaster is voluntarily providing active format description ("AFD") and the cable operator has AFD-capable equipment, the cable operator's use of such equipment would comply with the aspect-ratio conversion element of the material degradation rule.

[13] *See* 1992 Cable Act at § 2(a)(14) (finding that "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues") and § 2(a)(15) (finding that "there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position."). *See also Third FNPRM* at para. 49 (noting that, "to the extent cable operators' arguments about market power are meant to suggest that they no longer represent the threat to free, over-the-air broadcasting that drove the *Turner* decisions, the evidence convinces us otherwise") and paras. 51-53 (describing incentives of cable systems to favor their own programming over that of broadcasters).

[14] *See* Verizon Comments at 3-4.

[15] *See* NCTA Comments at 7.

analog channels" credible. As NBCU points out, center-cutting might cause important video to be lost. On the other hand, letterboxing might make elements of some programming too hard to see, especially on smaller television screens.[16] Broadcasters and subscribers, rather than cable operators, are best-positioned to choose the appropriate trade-off with respect to these concerns, notwithstanding operators' desires to have a "consistent look."

III. THERE IS NO BASIS FOR ADOPTING CATEGORICAL EXEMPTIONS FOR CERTAIN CABLE OPERATORS.

MSTV and NAB urge the Commission to protect all cable subscribers and reject the requests from the cable industry for exemptions for systems with 5,000 or fewer subscribers and systems with less than 552 MHz capacity.[17] On February 17, 2009, all full-power broadcasters must cease analog broadcasts pursuant to a Congressional mandate.[18] Congress has directed the Commission to amend its rules to ensure cable carriage of broadcasters' digital signals. Carriage of these digital signals exclusively in a downconverted, analog format would be a blatant violation of the prohibition on material degradation, and the Commission has already found as such, observing that "[b]ecause of the nondegradation requirements of the Act, all operators will be required to provide at least some digital service to subscribers."[19]

Congress explicitly addressed the concerns of small operators and provided the appropriate relief. Congress mandated that a system with more than 12 usable activated channels

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[16] *See* NBC Universal, Inc. and NBC Telemundo License Co. ("NBCU") Comments at 4-5.

[17] *See* American Cable Association ("ACA") Comments, NCTA Comments, and Charter Communications ("Charter") Comments; *see also* Office of Advocacy, U.S. Small Business Administration Comments.

[18] *See* Digital Television and Public Safety Act of 2005 at § 3002(a), Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

[19] *See Third FNPRM* at n.48. *See also id.* at para. 83 (noting that "[t]hese proposals appear to seek reconsideration of the Commission's long-standing requirement of HD carriage").

need carry local commercial television stations only "up to one-third of the aggregate number of usable activated channels of such system."[20] As the Commission has stated, "[t]his limit has been upheld by the courts and will continue to ensure that operators have sufficient bandwidth for carriage of non-broadcast programming and other services."[21]

Moreover, the cable industry's estimates of the cost of compliance are vastly inflated. Both NCTA and ACA's estimates include equipment that is not technically necessary in order to comply with the FCC's rules.[22] Indeed, the only cost for operators choosing to downconvert digital signals to analog would be the cost of purchasing an inexpensive Coupon Eligible Converter Box ("CECB").[23] Cable's cost concerns are particularly "ironic in light of the cable industry's recent practice of raising its prices at a rate significantly in excess of inflation."[24] Broadcasters have spent billions of dollars to build out their stations and infrastructure to bring DTV service to the public, and consumer spending on new digital equipment will also total in the

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[20] *See* Section 614(b)(1)(B), 47 U.S.C. § 534(b)(1)(B).

[21] *See Third FNPRM* at para. 30.

[22] For example, they include $20,000 for a groomer, which addresses capacity concerns. Congress already provided a statutory capacity cap, and the Commission has determined that carriage of both an analog and a digital signal pursuant to the viewability rule counts towards the capacity cap. Cable operators' investment in optional equipment to further reduce the impact on capacity may make sense as a business matter, but it is not required by the Commission's rules. It is appropriate for operators to absorb such costs.

[23] ACA claims incorrectly that use of a set-top box would compel the operator to display closed captioning on all or none of its subscribers' televisions. CECBs are required to pass through all CEA-608 closed caption bytes that are embedded in the CEA-708 stream. *See* 47 C.F.R. § 15.22(a)(2) and NTIA's "Manufacturer's Frequently Asked Questions" at question 42, available at http://www.ntia.doc.gov/dtvcoupon/manufacturerFAQ.html. Each viewer can decide whether or not to display the captions (and the content advisory bytes) that are passed through in line 21.

[24] *See id.* at para. 42.

billions.[25] The Commission should ensure that cable steps up to meet its obligations, as "Congress intended that the benefits of the digital transition should accrue to all consumers."[26]

We disagree with the NCTA's argument that customers who want digital programming can simply switch to one of the two national DBS services.[27] This proposal is anti-consumer and impractical. Indeed, in many markets, this option is totally theoretical, as the DBS providers have failed to extend local-into-local service (let alone digital local-into-local service) to all markets. Moreover, the Commission has yet to implement digital DBS rules. NCTA asserts that carriage of a broadcaster's digital signal will force some cable operators to provide "duplicative" programming.[28] The option to carry a signal in both analog and digital formats is a part of the flexibility provided to cable operators in order to comply with the viewability requirement. Cable operators are not required to choose this option, however. They have the option of carrying only digital signals, provided they ensure that all of their subscribers can view those digital signals. If a cable system chooses to provide a downconverted analog signal to subscribers in order to the meet the viewability requirement, carriage of the digital signal would not be duplicative. By definition, those analog subscribers that will receive the downconverted broadcast signal are unable to receive the digital version of local broadcast programming. And for digital subscribers, broadcasters' programming in digital format is far superior to that in an

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[25] *See* Joint Reply Comments of MSTV and NAB, ET Dkt Nos. 04-186 and 02-380, at Exhibit A (filed March 2, 2007).

[26] *See id.* at para. 2. *See also Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Further Notice of Proposed Rulemaking, CS Docket No. 98-120, 22 FCC Rcd 8803, at para. 18 (rel. May 4, 2007) (stating that "the ultimate goal of Congress is that every customer should enjoy the benefits of the digital transition").

[27] *See* NCTA Comments at 13.

[28] *See id.* at 16.

analog format, both in terms of the video and audio quality as well as the additional consumer-friendly data (*e.g.*, PSIP) that the signal can carry.

Finally, MSTV and NAB disagree with the U.S. Small Business Administration's Office of Advocacy ("Advocacy") that the Commission did not comply with the requirements of the Regulatory Flexibility Act ("RFA").[29] The Commission is compelled by statute to promulgate these regulations. While it can and should consider the impact on small entities – including small cable operators as well as small broadcasters – the Commission ultimately must enforce the viewability and nondegradation requirements mandated by Congress. "Congress emphasized that the RFA should not be construed to undermine other legislatively mandated goals."[30] The initial regulatory flexibility analysis "does not require agencies to establish differing compliance on reporting requirements, to issue exemptions, to clarify, to consolidate or simplify requirements, or to issue performance standards, differing timetables for compliance or any other alternative to the proposed rule."[31] Rather, it simply requires agencies, "where appropriate, to notify the public that alternative proposals are being sought by the agency, and to identify and briefly describe alternatives consistent with the stated objectives of applicable statutes which may minimize any significant impact of the rule on small entities."[32]

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[29] *See* Advocacy Comments.

[30] *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997). *See also Greater Dallas Home Care Alliance v. HHS*, 36 F. Supp. 2d 765, 769 (N.D. Tex. 1999), *quoting* 142 Cong. Rec. S3242, S3245 (daily ed. March 29, 1996) ("[n]othing in the bill directs an agency to choose to [sic] regulatory alternative that is not authorized by the statute granting regulatory authority").

[31] S. Rep. No. 96-878, at 13 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 2788, 2800.

[32] *Id. See also Center for Science in the Public Interest v. Department of Treasury*, 537 F. Supp. 1168, 1174 (D. D.C. 1983) (ruling that "[w]hatever the consideration given to costs and benefits, however, an agency may not substitute its policy judgment for the judgment that has already been articulated by Congress…. Congress has previously set the legislative agenda").

IV. CHANNEL POSITIONING

Congress has already determined that must-carry stations are to be carried on the channel number corresponding to the station's over-the-air channel, on the channel on which it was carried as of July 19, 1985 or January 1, 1992, or "on such other channel number as is mutually agreed upon by the station and the cable operator."[33] Thus, the Commission should reject NCTA and Verizon's claims that operators should be able to decide unilaterally where to position must-carry broadcasters' digital signals.

The cable industry's claims regarding technical problems with this approach are unfounded. In the digital world, the assignment of virtual channels will resolve most issues. The cable operator can place the signal on any RF channel and on any QAM multiplex. From the consumer's perspective, however, the issue is only which signal appears when they tune to a given channel.

The cable industry asserts that it is not technically feasible to channel map HD and SD versions to the same channel number where the analog signal is carried. This appears to be incorrect. It is technically possible to map two channels to the same major channel number by using the PSIP standard or the SCTE standard.[34] In this respect the first number (*i.e.*, "channel 11") would be considered the channel number and the second number (*i.e.*, the number after the decimal in "channel 11.1") would designate the service. Indeed, DirecTV does exactly what NCTA says cannot be done. For instance, the guide has, in contiguous positions, channel 4 (WNBC), 4.1 (WNBC-DT), 4.2 (WNBC-DT2), and 4.4 (WNBC-DT4). And the DirecTV MPEG-4 system maps the SD and HD versions of KTLA's signal next to each other. This is

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[33] *See* Section 614(b)(7) of the Act.

[34] *See* ANSI/SCTE 105 2005, "Uni-directional Receiving Device Standard for Digital Cable."

done via mapping in the channel guide.[35] As noted above, an examination of the SCTE indicates that cable should be able to do this as well.[36]

Under the cable industry's proposal, a cable system that is 80% digital and 20% analog could position a must-carry broadcaster's digital signal wherever it wanted to – including, it would appear, on a premium tier; meanwhile, the downconverted analog signal, of interest to a minority of the cable system's viewers, would be entitled to favorable positioning. Placing broadcasters' digital signals in disparate channel locations is likely to confuse viewers and it would ignore the statutory requirement that, if one of the enumerated channel positions is unavailable, broadcasters are entitled to work with operators to reach an agreed-upon position.

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MSTV and NAB urge the Commission to protect consumers and to ensure that they reap the full benefits of the digital transition by fully implementing the statutory viewability and material degradation requirements.

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[35] The cable industry also indicated that HD and SD signals must be physically separate. Again, this does not appear to be the case. For example, a 256 QAM RF channel can contain both HD and SD signals and "virtually" separate the two.

[36] *See id.* at "11 OOB FDC CHANNEL SUPPORT Requirement 11" (providing that the "Uni-Directional Receiving Device shall be able to navigate (tune) using the System Information when it is carried in OOB-FDC, as described in reference ANSI/SCTE 65 2002: Service Information Delivered Out-of-Band for Digital Cable Television [4])" and *id.* at "22 VIRTUAL CHANNEL NUMBER PROCESSING Requirement 60b (requiring that "[w]hen an out-of-band channel is available and profiles 4 or 5 are in use, the Uni-Directional Receiving Device shall use the two-part channel number in the two_part_channel_number_ descriptor(), if such descriptor is present for a given channel, for identification and navigation of that channel").

Respectfully submitted,

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