

**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)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ replies to the three commenters supporting another blanket waiver for small cable systems exempting them from the requirement to carry high definition (HD) broadcast signals in HD. As discussed below, no commenter in this proceeding² has explained how extending this categorical exemption yet again is consistent with the signal quality provisions of the Communications Act of 1934 (Act), or with Congress' and the Commission's "goal of transitioning all consumers – including cable consumers – to digital" so that they can "enjoy the benefits of the digital transition," including HD video.³

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of 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: Amendment to Part 76 of the Commission's Rules*, Fifth Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC No. 15-29 (Mar. 12, 2015) (Notice).

³ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 8803, 8810 ¶ 18 (2007) (Second FNPRM).

I. NO COMMENTER HAS SHOWN HOW A BLANKET HD EXEMPTION COMPLIES WITH THE ACT

As NAB discussed in its initial comments,⁴ the first sentence of Section 614(b)(4)(A) requires that the “signals of local commercial television stations” carried by a cable operator “shall be carried without material degradation.” In its second sentence, Section 614(b)(4)(A) adds an anti-discrimination provision, directing the FCC to ensure that, “to the extent technically feasible,” cable systems provide the “local commercial television stations” they carry the same “quality of signal processing and carriage” as provided for “any other type of signal.”⁵ No commenter has explained how a blanket exemption permitting small cable systems to downconvert HD signals of local commercial television stations to standard definition (SD) digital or analog – particularly if some of those cable systems carry one or more nonbroadcast signals in HD – is consistent with both provisions of Section 614(b)(4)(A).⁶

⁴ Comments of NAB, CS Docket No. 98-120, at 4-7 (Apr. 16, 2015) (NAB Comments).

⁵ 47 U.S.C. § 534(b)(4)(A). Since 2001, the FCC has interpreted these two provisions of Section 614(b)(4)(A) as (i) requiring cable operators to carry HD broadcast signals in HD, and (ii) prohibiting cable systems from discriminating in their carriage of broadcast and nonbroadcast signals by providing a digital broadcast signal in a lesser format or lower resolution than that afforded to any other signal. *Carriage of Digital Television Broadcast Signals*, First Report and Order, 16 FCC Rcd 2598, 2629 ¶ 73 (2001).

⁶ The American Cable Association (ACA) continues to mistakenly characterize Section 614(b)(4)(A) as applying only to the carriage of HD *must-carry* signals. See, e.g., Comments of ACA, CS Docket No. 98-120, at 1-3 (Apr. 16, 2015) (ACA Comments). NAB has already explained that the “plain language” of that section applies “to all local commercial television stations carried by a cable system, and not just to must-carry stations.” NAB Comments at 5, n.14, quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 3004 ¶ 171 (1993). The two other cable industry commenters correctly refer to the HD carriage requirement and do not try to limit that requirement to HD must-carry signals only. See Comments of the National Cable & Telecommunications Association, CS Docket No. 98-120, at 2 (Apr. 16, 2015) (NCTA Comments); Comments of WTA – Advocates for Rural Broadband, CS Docket No. 98-120, at 1 (Apr. 16, 2015) (WTA Comments) (both referring to the requirement to carry HD broadcast signals in HD).

While NCTA makes no attempt to analyze the statutory basis for the HD exemption,⁷ both WTA and ACA misread the two requirements of Section 614(b)(A)(4). For example, WTA calls for a continued exemption for small cable systems from the “material degradation” requirement to carry HD broadcast signals in HD, but then quotes only the second part of Section 614(b)(A)(4), the nondiscrimination provision (which, not so coincidentally, is the only provision containing the technical feasibility language).⁸ Nowhere in its comments does WTA set forth, let alone discuss, the mandatory language of Section 614(b)(4)(A)’s actual “material degradation” requirement. In its brief discussion of the statute, ACA similarly collapses Section 614(b)(4)(A)’s two requirements, and imports the “technically feasible” language from the nondiscrimination requirement into the material degradation requirement.⁹ Neither WTA nor ACA adequately explain how a categorical exemption allowing small cable systems to degrade broadcast signals from HD to SD or analog complies with Congress’ mandatory prohibition on material degradation.

Even more notably, ACA fails to explain how small cable systems carrying one or more nonbroadcast signals in HD may, consistent with the nondiscrimination requirement of Section 614(b)(4)(A), qualify for an exemption allowing them to carry broadcast signals in a lesser format or lower resolution than those other types of signals. Indeed, Section III of ACA’s comments, arguing that “the HD [broadcast] exemption should continue to be available to systems that carry some signals in HD,” makes no reference whatsoever to the statute.¹⁰

⁷ See NCTA Comments at 1-6 (making no reference to the statute).

⁸ See WTA Comments at 1, 7 and n.11.

⁹ See ACA Comments at 12-13

¹⁰ ACA Comments at 10-12. Rather than addressing the controlling statutory language, ACA cites its member survey to argue that it would be “burdensome” for those small systems “offering some HD services” to carry broadcast signals in HD. *Id.* at 11. These assertions of “burden” do not claim that it would be technically infeasible for those small systems to carry HD broadcast signals. ACA does even

Perhaps recognizing the impossibility of legally justifying the lesser “quality of signal processing and carriage” that ACA insists small cable systems can afford to broadcast signals, neither WTA nor NCTA responds to the *Notice’s* request for comment on whether systems that carry other HD programming should continue to be able to qualify for the exemption.¹¹

ACA also asserts that the Commission should set *no* limits on the number of channels of other HD programming that a small cable system may provide without loss of the exemption from carrying broadcast signals in HD.¹² Remarkably, ACA tries to justify its argument by contending that *broadcasters* have not shown that small cable systems have “tak[en] advantage of the waiver by offering dozens of HD signals,” or filed formal complaints on this issue with the Commission.¹³

ACA’s contention is frivolous. It in no way addresses Section 614(b)(4)(A)’s prohibition on discriminatory carriage of broadcast and nonbroadcast signals; obviously, the statute does not say that cable systems may carry “dozens” of other signals in HD before it becomes discriminatory to afford lesser quality of signal processing to broadcast signals. Moreover, ACA has the burden of showing its requested waiver complies with statutory requirements and promotes the public interest, and cannot shift to other parties its “burden of convincing the agency” to “depart from rules presumptively in the public interest.”¹⁴ Finally, with regard to

not cite the “technically feasible” language of the statute in this portion of its comments, let alone attempt to show technical infeasibility for this group of systems, likely due to the difficulty of establishing actual infeasibility when these systems are carrying other types of signals in HD.

¹¹ *Notice* at ¶ 11.

¹² ACA Comments at 12.

¹³ *Id.*

¹⁴ *Sudbrink Broadcasting, Inc. v. FCC*, 509 F.2d 418, 422 (D.C. Cir. 1974). See also *Thomas Radio Co. v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983) (waiver applicant “bears the burden of convincing the agency that it should depart from the rules”); Memorandum Opinion and Order, 29 FCC Rcd 15924, 15941 n.125 (2014) (in waiver cases, “the burden of proof rests with the petitioner to plead specific

the number of other HD channels carried by ACA's member systems, neither commenters in this proceeding nor the Commission knows whether these numbers are in the "dozens" or not, given ACA's failure to provide even an estimate. ACA merely says that about 26 percent of its small cable members utilizing the broadcast HD exemption "report offering some HD services."¹⁵

Simply put, ACA and the other cable commenters have either not attempted to explain, or have failed to satisfactorily explain, the statutory basis for the requested waiver. The Commission therefore should not grant ACA's petition.

II. IF THE FCC RETAINS THE HD EXEMPTION IN SOME FORM, IT SHOULD REVISE ITS ELIGIBILITY STANDARDS AND WORK TO PROMOTE INCREASED COMPLIANCE WITH THE HD CARRIAGE REQUIREMENT

Cable industry commenters urge the Commission to extend the HD exemption without any change to the eligibility requirements, focusing on small cable systems' limited customer base over which to spread the costs of upgrading systems and/or increasing capacity.¹⁶ The current eligibility standard, however, permits cable systems serving 2,500 or fewer subscribers, but affiliated with a cable multiple system operator (MSO) serving as many as *ten million* subscribers, to take advantage of the "small" cable exemption.¹⁷ As NAB pointed out in its initial comments, under no circumstances should a cable system affiliated with an MSO

facts and circumstances that would make the rule inapplicable") (citing *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971)).

¹⁵ ACA Comments at 11 (emphasis added). ACA's petition similarly described the amount of other HD television services offered by its members as "some." ACA Petition for Rulemaking, CS Docket No. 98-120, at 5-6 (Jan. 27, 2015) (ACA Petition).

¹⁶ See NCTA Comments at 3-4; WTA Comments at 4-5, 8-9; ACA Comments at 4. Currently, cable systems qualify for the exemption if they either (i) serve 2,500 or fewer subscribers and are not affiliated with a cable operator serving more than ten percent of all MVPD subscribers, or (ii) have an activated channel capacity of 552 MHz or less.

¹⁷ See NAB Comments at 7-8 (explaining that ten percent of the total number of MVPD subscribers is just over ten million subscribers).

with ten million subscribers be regarded as too small to have the resources to upgrade their service.¹⁸ If the Commission ultimately determines to retain the HD exemption in some form, we urge that it be more appropriately limited to exclude those systems affiliated with any of the “one million plus” MVPDs.¹⁹

Moreover, given consumers’ clear interests in receiving high-quality HD signals,²⁰ NAB repeats its call for the Commission to work to facilitate small cable systems’ compliance with the HD carriage requirement, should it grant another HD exemption of any type.²¹ ACA’s request for a *permanent* exemption for those cable systems offering programming only in analog format²² is contrary to the FCC’s repeated statements that the “exemption is not intended to be permanent and that its purpose is to provide small systems with additional time to upgrade and, where necessary, expand their systems to come into compliance with the material degradation provisions of the carriage rules by carrying HD versions of all HD

¹⁸ We suggested that a small cable system affiliated with a cable operator serving more than one million total subscribers (or about one percent of the 101.6 million MVPD households in the country) should be ineligible for any HD exemption going forward. See NAB Comments at 7-8 and n. 21 (noting that the publicly traded cable MSOs in this “one million plus” category have revenues in the billions and cash flow margins between 30-40 percent).

¹⁹ The record also suggests that the 2,500 subscriber level for defining eligibility is “overly broad.” Notice at ¶ 10 (ACA members utilizing the exemption have, on average, only 348 subscribers per system). WTA supports retention of the 2,500 level, but cites specifics about cable systems with only 250, 200 and 450 subscribers. See WTA Comments at 4-5. NCTA does not discuss the actual size of the systems currently utilizing the small system exemption. Even ACA’s member systems that have more than 552 MHz capacity (and therefore must meet the 2,500 subscriber limit to qualify for the exemption) serve, on average, only 540 subscribers, although it states that “at least six” of these systems have subscriber levels ranging from 800 to 2,000. See ACA Comments at 9. Given the thinness of the record supporting the current 2,500 subscriber level, the Commission should carefully consider whether this standard for defining eligibility should be tightened for any HD exemption going forward. See NAB Comments at 7-8 (proposing a subscriber level of 1,000, as that corresponds to other regulatory exemptions granted to small cable systems).

²⁰ See NAB Comments at 10 (showing significant and rapid increases in the number of U.S. households purchasing HDTV sets).

²¹ See NAB Comments at 9-11; Notice at ¶ 14 (seeking comment on how FCC could promote small cable systems’ carriage of HD signals).

²² ACA Comments at 12-19; ACA Petition at 16-17.

broadcast signals.”²³ A permanent exemption also is contrary to Congress’ goal of every consumer enjoying the benefits of the digital television transition, and particularly disservices members of the public who have invested in high definition televisions.²⁴ The cable industry commenters supporting a continued (let alone permanent) exemption for certain types of cable systems fail to take these public interests into account.²⁵

Finally, ACA’s argument that the upcoming broadcast spectrum incentive auction makes another HD exemption “particularly appropriate” misunderstands the auction.²⁶ ACA’s apparent belief that the incentive auction will result in the eventual disappearance of large numbers of broadcast television stations in rural America is mistaken, for at least three reasons. First, repacking scenarios released by the Commission suggest that between 200-400 stations may go off the air, out of the 1675 auction eligible stations.²⁷ Thus, based on the FCC’s own data, at least three quarters of auction eligible stations will remain on the air following the auction. Second, these repacking simulations demonstrate that in many rural markets, including those where ACA’s members operate small cable systems, no stations at all will go off the air. Third, even if one or two stations in a given rural market go off the air, the FCC’s repacking simulations do not show a single market where no broadcast television stations will remain following the auction. Because, even after the incentive auction, ACA’s

²³ *Carriage of Digital Television Broadcast Signals*, Fifth Report and Order, 27 FCC Rcd 6529, 6548, ¶ 22 (2012). *Accord* Notice at ¶ 14.

²⁴ See Second FNPRM, 22 FCC Rcd at 8804 ¶¶ 5, 18.

²⁵ Cf. Comments of Meg Sterchi, CS Docket No. 98-120 at 2 (Apr. 16, 2015) (the public, including subscribers of small cable systems, should have a right to receive HD signals).

²⁶ ACA Comments at 7-8 (contending that the upcoming auction casts uncertainty on the number of broadcast stations that will remain and, thus, requiring small cable systems to now bear the costs and burdens of carrying the HD signals of stations that might go off the air would be “inequitable” and “inefficient”).

²⁷ See Letter from Gary Epstein, FCC, to Rick Kaplan, NAB, GN Docket No. 12-268, ET Docket No. 13-26 (June 30, 2014).

members will inevitably continue to have local television stations in their markets broadcasting HD signals, there is no reason for that auction to impact the FCC's decision here.

III. CONCLUSION

For the reasons stated above, ACA has failed to meet its burden of justifying its requested blanket waiver, and the two other cable industry commenters have not supplied the legal and factual bases missing from ACA's petition and comments. If, despite its highly dubious legal foundation, the Commission nonetheless extends the HD exemption in some form, we urge the FCC to more appropriately define the systems eligible for the exemption and require systems to establish their eligibility for it. Because permanently exempting any small cable systems would be contrary to FCC and congressional goals, the Commission should work to promote all cable systems' compliance with the requirement to carry HD broadcast signals in HD.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Rick Kaplan
Jerianne Timmerman
Erin L. Dozier
Patrick McFadden

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