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

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

THIRD REPORT AND ORDER AND THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: September 11, 2007 **Released: November 30, 2007**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission: Chairman Martin and Commissioners Copps, Tate and McDowell issuing separate statements; Commissioner Adelstein approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. Pursuant to Section 614(b)(4)(B) of the Communications Act of 1934, as amended (the "Act"),[1] the Commission initiated this proceeding in 1998 to address the responsibilities of cable television operators with respect to carriage of digital broadcasters in light of the significant changes to the broadcasting and cable television industries resulting from the Nation's transition to digital television.[2] Now that Congress has established February 17, 2009, as the date certain for the end of analog broadcasts by full-power television licensees, we must address the post-transition carriage responsibilities of cable operators under Sections 614 and 615 – particularly in light of the expectation that there will continue to be a large number of cable subscribers with legacy, analog-only television sets after the end of the DTV transition.[3]

2. In this *Third Report and Order and Third Further Notice of Proposed Rulemaking* ("*Third Report and Order"* and "*Third Further Notice*," respectively), we adopt rules to ensure that cable subscribers will continue to be able to view broadcast stations after the transition, and that they will be able to view those broadcast signals at the same level of quality in which they are delivered to the cable system.[4] We announce these rules now to ensure that cable operators and broadcasters have sufficient time to prepare to comply with them. We also seek comment on several issues related to implementation of these rules. We are mindful that the mandatory carriage rules serve their purpose only when such stations are viewable by all cable subscribers, including those who will only have analog sets after the transition. Furthermore, we act with the knowledge that Congress intended that the benefits of the digital transition should accrue to all consumers.

II. THIRD REPORT AND ORDER

3. As discussed below, the Act requires that cable systems carry broadcast signals without material degradation and ensure that all subscribers can receive and view mandatory-carriage signals.[5] This *Third Report and Order* finalizes the material degradation requirements adopted by the Commission

[1] 47 U.S.C. § 534(b)(4)(B).

[2] *See Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15093, paras. 1-2 (1998) ("*1998 NPRM*").

[3] This will be the case despite the steady rise in DTV display sales over the last several years. About 35 percent of all television homes, or approximately 40 million households, are analog-only cable subscribers. These 98 million television viewers depend on cable to provide all of the programming for their roughly 120 million television sets. Moreover, many digital cable subscribers have one or more television sets that currently only receive analog cable service. *See* Nielsen Media Services estimates for 2006/2007 season and Nielsen 2007 2nd Quarter Home Technology Report.

[4] *See* Appendix C, *infra*.

[5] 47 U.S.C. §§ 534(b)(4)(A), (b)(7).

in 2001, and establishes two alternative approaches that cable operators may use to meet their responsibility to ensure that cable subscribers with analog television sets can continue to view all must-carry stations after the end of the DTV transition. Cable operators may either carry such signals in analog, or, for all-digital systems, carry the signal in digital only.[6]

A. Material Degradation – Sections 614(b)(4)(A) and 615(g)(2)

4. In this section, we adopt rules requiring that cable operators not discriminate in their carriage between broadcast and non-broadcast signals, and that they not materially degrade broadcast signals. As explained below, we reaffirm the approach adopted by the Commission in 2001 to determining whether material degradation has occurred, as well as the requirement that HD signals be carried in HD.

5. The Act requires that cable operators carry local broadcast signals "without material degradation," and instructs the Commission to "adopt carriage standards to ensure that, to the extent technically feasible, 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."[7] As noted above, Section 614(b)(4)(B) of the Act 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" as a result of the DTV transition.[8]

6. In the *Second Further Notice*, we sought comment on proposals for ensuring that broadcast signals would not be materially degraded after the digital transition. We proposed that the measurement by which we determine whether an operator is degrading the broadcast signal change from a subjective to an objective standard or, in the alternative, to maintain the comparative standard established in the First Report and Order. We asked whether we should require cable operators to pass through all primary video and program-related bits ("content bits").[9] In addition, we proposed a rule that would create a framework for negotiations between cable operators who wanted to carry fewer than all content bits and the broadcasters whose signals were at issue. Such a rule would require any operator that wished to carry fewer than all content bits to demonstrate to the broadcaster that it could meet the picture-quality-nondegradation standard without carriage of all content bits.[10] Finally, in the *Second Further Notice*, we

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[6] *See* Appendix C, *infra*.

[7] 47 U.S.C. § 534(b)(4)(A). *See* Section 615(g)(2) of the Act, 47 U.S.C. § 535(g)(2) (material degradation requirements applicable to noncommercial stations). *See also* H.R. Conf. Rep. No. 102-862, at 67 (1992) ("The FCC is directed to adopt any carriage standards which are needed to ensure that, so far as is technically feasible, cable systems afford off-the-air broadcast signals the same quality of signal processing and carriage that they employ for any other type of programming carried on the cable system."); S. Rep. No. 102-92, at 85 (1991) (same).

[8] 47 U.S.C. § 534(b)(4)(B).

[9] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Further Notice of Proposed Rulemaking, FCC 07-71 (Rel. May 4, 2007) ("*Second Further Notice*") at ¶ 12; (explaining that verification that all content bits are passing through would serve as proof that an operator is meeting the material degradation standard).

[10] *Second Further Notice* at paragraph 15. During any such discussions/negotiations, the operator would be required to continue to pass through all content bits. This "pass through" requirement would also apply, until the time of the Commission ruling, if a broadcaster filed a material degradation carriage complaint. If an operator decided to end negotiations under this framework, it would notify the broadcaster in writing. The broadcaster

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reminded commenters of the existing requirement to carry high definition signals in HD to those subscribers who have signed up for an HD package, and reiterated that this requirement will continue after the transition.[11]

7. We retain the requirement that HD signals be carried in HD, as well as the comparative approach to determining whether material degradation has occurred. In 2001, the *First Report and Order* established two requirements to avoid material degradation. First, "a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any" other signal on the system.[12] Second, a cable operator must carry broadcast stations such that, when compared to the broadcast signal, "the difference is not really perceptible to the viewer."[13] Thus, "a broadcast signal delivered in HDTV must be carried in HDTV."[14] Because we decline to rely on measurement of bits to determine whether degradation has occurred, we do not require carriage of all content bits. Additionally, for the reasons described below, we decline to adopt the proposed negotiation framework.

8. The Act requires that broadcast signals not be "materially degraded." It also requires the Commission to "adopt carriage standards to ensure that, to the extent technically feasible, 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."[15] The Commission stated in 2001 that "[f]rom our perspective, the issue of material degradation is about the picture quality the consumer receives and is capable of perceiving."[16] Cable commenters argued that this should remain the focus of the Commission's decision making, and we agree.[17]

9. We considered the "all content bits" proposal, the main benefit of which was a clear means of measurement and consequently ease of enforcement.[18] Ultimately, we conclude, however, that the all content bits approach is likely to stifle innovation and the very efficiency that digital technology offers, and may be more exacting a standard than necessary to ensure that a given signal will be carried without *material* degradation. We also conclude that it is unnecessary at this time to impose such a requirement in light of the paucity of material degradation complaints over the 15 years since enactment of the Must

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would then have thirty days to file a material degradation carriage complaint, if it believed such degradation was occurring despite the absence of the required agreement. Failure to file such a complaint within thirty days would preclude the broadcaster from so filing during that carriage cycle.

[11] *Second Further Notice* at para. 3 (citing *First Report and Order*, 16 FCC Rcd at 2629, para. 73).

[12] *First Report and Order,* 16 FCC Rcd at 2629, para. 73.

[13] *First Report and Order,* 16 FCC Rcd at 2628, para. 72.

[14] *First Report and Order,* 16 FCC Rcd at 2629, para. 73.

[15] 47 U.S.C. § 534(b)(4)(A).

[16] *First Report and Order*, 16 FCC Rcd at 2628, para. 72.

[17] Comments of NCTA at 27; Comments of AT&T at 2.

[18] Broadcast Group Petition for Reconsideration at 20 (the "Broadcast Group" comprises Arizona State University, Benedek Broadcasting Corp., Midwest Television, Inc., and Raycom Media, Inc.).

Carry statute.[19]

10. A number of commenters support the existing standard, and most argue that a comparative approach remains the best method of measuring material degradation.[20] As these commenters point out, there is little evidence to indicate otherwise.[21] We note Comcast's observations that there appear to have been no more than two material degradation complaints since the 1992 adoption of the prohibition, and that both of those were dismissed.[22] Even if there has been limited opportunity to "test" these rules in a digital context,[23] there is every reason to believe that they will prove just as robust in an environment of greater attention to picture quality.

11. Furthermore, there are technological benefits to the current comparative standard. Time Warner argues that the content bits standard proposed in the *Second Further Notice* would require devoting additional bandwidth to carriage even when it would not improve the quality of the transmitted image, hurting consumers by limiting other uses of the bandwidth.[24] AT&T further argues that an "all content bits" standard could "dampen[] incentives to invest in video compression and other technologies…that would allow even greater transmission efficiencies and higher quality pictures."[25] We recognize these concerns, and do not intend to impede improvements in technology. Some cable operators may, currently or in the future, rely on advanced compression technologies such as MPEG 4 to provide service to subscribers with greater efficiency. We particularly recognize the value of compression technologies that take the broadcast signal back to uncompressed baseband and then re-encode it in a more efficient manner without materially degrading the picture. Such advanced compression utilizes a minimum bit rate that does not reduce the quality of the resolution. We agree with commenters that a comparative standard is currently the best way to encourage and reward technological innovations, like MPEG4 compression, that allow for more efficient use of bandwidth without diminishing viewer experience.

12. We decline to adopt the proposal of Agape Church Inc., that we require carriage of secondary channels.[26] Our rules here focus only on the broadcaster's primary video and program related

[19] Comcast points out that only two carriage complaints have been filed alleging material degradation of an analog signal, and that there have been no carriage complaints filed alleging material degradation of a digital signal. Comments of Comcast at 12. We note, however, that we do not place much weight on the latter, as there are few, if any, stations carried pursuant to must-carry in a digital format.

[20] *See, e.g.*, Comments of Time Warner at 24-26, Comments of Comcast at 8, Reply of Verizon at 2-3.

[21] Comments of NCTA at 28.

[22] Comments of Comcast at 12, note 29.

[23] Comments of NAB and MSTV at 21-22.

[24] Comments of Time Warner at 26-27.

[25] Comments of AT&T at 4. *See also* Reply of OPASTCO at 4 (agreeing and noting particularly that small MVPDs use broadband technologies to deliver video, and that increasing the bandwidth necessary to deliver video could slow the deployment of other broadband-based services, limiting the ability of small operators to "bundle" services and compete effectively).

[26] Comments of Agape Church, Inc. at 1.

content. The prohibition on material degradation adds no additional requirement to carry non-program-related content.

13. Commenters requested clarification that downconversion to analog does not constitute material degradation.[27] We accordingly clarify that it is not material degradation to downconvert that signal to comply with the "viewability" requirement discussed below.

14. As noted above, we do not adopt the negotiation framework proposed in the *Second Further Notice*, and direct parties to continue to follow the rules as established in Section 76.61.[28] Both broadcasters and cable operators, the parties who would be involved in these negotiations, raised serious objections to the proposal. The National Association of Broadcasters ("NAB") and The Association for Maximum Service Television ("MSTV") are highly critical of any required negotiations, particularly ones which would begin and end upon the request of operators. They state that the 30 day window for carriage complaints is too short, and that the proposal as a whole places the burden of ensuring compliance on the broadcasters, rather than on the operators who have the duty by statute. Finally, they argue that the requirements and penalties for noncompliance are insufficiently detailed or strict.[29] Cable commenters object to the requirement that operators make a showing of non material-degradation to the satisfaction of the broadcaster. They express concern about what they anticipate would be: (1) a major shift in power to must-carry broadcasters, who do not have an incentive to bargain; and (2) an addition of significant transaction costs for operators, who currently do not negotiate with must carry stations at all. They argue that this would add an unnecessary complication to mandatory carriage.[30] As NAB and MSTV note, the goal of these rules is to provide cable subscribers with the full benefits of the digital transition.[31] Given the broad based objections to the proposal, we decline to establish a formal procedure by which broadcasters would waive the material degradation requirements.[32]

B. Availability of Signals – Sections 614(b)(7) and 615(h)

15. In this section, we adopt rules requiring cable systems that are not "all-digital" to provide

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[27] Comments of Block at 4. *See also* Testimony of Kyle E. McSlarrow, Chairman and CEO of NCTA at note 67, *infra*. *But see* Testimony of Glenn Britt, CEO of Time Warner, at note 44, *infra* (expressing confidence that downconversion is legally permissible).

[28] 47 C.F.R. § 76.61.

[29] Comments of NAB and MSTV at 28.

[30] The cable commenters also strongly dislike the requirement for full carriage during pending complaints, which Comcast describes as "sentence first, verdict afterwards." Comments of Comcast at 15.

[31] Comments of NAB and MSTV at 18.

[32] We note that enforcement of the material degradation requirements is initiated by a broadcaster's carriage complaint, and that the rules provide for the broadcaster to complain first to the cable operator before filing such a complaint. This gives the parties an opportunity to informally address material degradation disputes, and if the station is satisfied with the resultant carriage, no complaint will be filed. No additional formal process is necessary. 47 C.F.R. § 76.61.

must-carry signals in analog, while "all-digital" systems may provide them in digital form only.[33] We also require that the cost of any downconversion be borne by operators, but that downconverted signals may count toward the cap on commercial broadcast carriage.[34] Pursuant 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. Specifically, Section 614(b)(7) (for commercial stations) states that broadcast signals that are subject to mandatory carriage must be "viewable via cable on *all* television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection."[35] Similarly, Section 615(h) for noncommercial stations states that "[s]ignals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced tier that includes the retransmission of local commercial television broadcast signals."[36] These statutory requirements plainly apply to cable carriage of digital broadcast signals,[37] and, as a consequence, cable operators must ensure that all cable subscribers – including those with analog television sets – continue to be able to view all commercial and non-commercial must-carry broadcast stations after February 17, 2009.[38]

16. These rules shall be in force for three years from the date of the digital transition, subject to review by the Commission during the last year of this period (i.e., between February 2011 and February 2012). In light of the numerous issues associated with the transition, it is important to retain flexibility as we deal with emerging concerns. A three-year sunset ensures that both analog and digital cable subscribers will continue to be able to view the signals of must-carry stations, and provides the Commission with the opportunity after the transition to review these rules in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace.[39]

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[33] We note that the some cable commenters appear to express concern that these rules will require carriage of, and provide "more marketplace power" to "major broadcast networks" who already use "retransmission consent leverage" to ensure carriage of affiliated cable networks. *See* Reply of The Africa Channel, et al., at 31. On the contrary, these rules apply exclusively to stations that elect must-carry, and therefore likely have very limited "leverage" and "marketplace power."

[34] 47 U.S.C. § 534(b)(1)(B) (providing for one-third cap on mandatory carriage of commercial stations).

[35] 47 U.S.C. § 534(b)(7) (emphasis added).

[36] *See* 47 U.S.C. § 535(h). Although Sections 534(b)(7) and 535(h) use different language, the Commission consistently has treated them as imposing identical obligations. *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2974, para. 32 (1993) ("*Analog Must Carry Report and Order*") (noting that all must-carry signals must be available to all subscribers); *see also Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 18223, 18308, para. 162 (1996) ("Pursuant to Section 614(b)(7) and 615(h), the operator of a cable system is required to ensure that signals carried in fulfillment of the must-carry requirements are provided to every subscriber of the system").

[37] *See* 47 U.S.C. § 534(b)(4)(B).

[38] Analog-only television sets plainly qualify as "television receivers" under Section 614(b)(7) at the present time, and will continue to fall within the scope of that term as it is used in Section 614(b)(7) after the transition. *See also* paragraph 23, *infra*.

[39] 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.

17. In the *Second Further Notice*, we sought comment on proposals that would ensure the viewability, for all subscribers, of signals carried pursuant to mandatory carriage. To that end, we proposed that

> cable operators must either: (1) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or (2) for all-digital systems, carry those signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast content.[40]

We also proposed that the cost of any down conversion rendered necessary by these rules be borne by the cable operators.[41]

18. We adopt these proposals, and note that they apply to all operators, regardless of their rate-regulated status.[42] In sum, cable operators must comply with the statutory mandate that must-carry broadcast signals "shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection," and they have two options of doing so.[43] First, to the extent that such subscribers do not have the capability of viewing digital signals, cable systems must carry the signals of commercial and non-commercial must-carry stations in analog format to those subscribers, after downconverting the signals from their original digital format at the headend.[44] This proposal is in line with the approach already voluntarily planned by many cable operators, as described in testimony by Time Warner CEO Glenn Britt before the House Subcommittee on Telecommunications and the Internet.[45] In the alternative, operators may choose to

[40] *Second Further Notice* at para. 17.

[41] *Second Further Notice* at para. 19.

[42] *See* Appendix C, *infra*.

[43] Consistent with Section 614(b)(7) of the Act, the viewability requirement set forth here does not apply to situations where "a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections." Under these circumstances, "the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers." *See* 47 U.S.C. § 534(b)(7). Even in situations where a subscriber does not need to lease or purchase a box, the notice requirement of Section 614(b)(7) is still fully in effect.

[44] In accordance with the material degradation rules discussed in Section II(A), *supra*, an operator of a system providing analog service must also carry the signal in its original digital format.

[45] *See* Testimony of Glenn Britt, CEO of Time Warner, before the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives (March 27, 2007). *See also* Ted Hearn, *Britt Unsure About Local HDTV for Basic-Only Subs*, Multichannel News, March 28, 2007 ("In another exchange, [Rep.] Boucher referred to February 2005 House testimony by Insight Communications CEO Michael Willner that after an analog-TV cutoff, cable operators intended to send local TV signals from their headends to homes both in analog and digital.

'Do you agree with that? Is that still the industry's plan?' Boucher asked. Affirming a commitment to voluntary dual mustcarry [sic], Britt replied: 'Yes, I do.'

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operate "all-digital systems."[46] Under this option, operators will not be required to downconvert the signal to analog, and may provide these stations only in a digital format. In any event, any downconversion costs will be borne by the operator.

19. To fulfill its must-carry obligations in cases where a cable operator uses digital-to-analog converter boxes that do not have analog tuners, the operator can deliver a standard definition digital version of a must-carry broadcaster's high definition digital signal, in addition to the analog and high definition signal, or use boxes that convert high definition signals for viewing on an analog television set, or use other technical solutions so long as cable subscribers have the ability to view the signals.

20. As NCTA notes, the congressionally mandated end of the Digital Television transition does not apply directly to cable operators.[47] We thus recognize that there may be two different kinds of cable systems for some period of time after the DTV transition is complete.[48] Some operators may choose to deliver programming in both digital and analog format. NAB and MSTV describe these systems as those in which they "keep an analog tier and continue to provide local television signals (and perhaps many cable channels as well) to analog receivers in a format that does not require additional equipment."[49] Other operators may choose, as many already have, to operate or transition to "all-digital systems," and as NAB and MSTV further note, "virtually *all* cable operators ultimately *will* do so."[50] Game Show Network, LLC ("GSN") questions why there should be any rules protecting owners of analog sets, since that is "a format the government itself has determined is no longer worthy of any spectrum."[51] Congress did decide to end analog broadcasting, but declined to turn its backs on the millions of Americans with analog sets. Thus, they established the NTIA converter box program to protect the continued availability of over-the-air signals to all Americans;[52] they accepted the claims of the cable industry that subscribers

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Afterward, a reporter asked Britt if he believed his company had legal authority to convert digital-TV signals to analog at the headend. 'We think we have flexibility to do what we need to do,' Britt said.")

[46] "All-digital" systems are systems that do not carry analog signals or provide analog service.

[47] Comments of NCTA at 7. *But see*, *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 209 (2007), *GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7130-Z, Memorandum Opinion and Order, DA 07-1020 (MB rel. May 4, 2007), and *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, 22 FCC Rcd 11780 (MB Jun. 29, 2007), among others (receiving a waiver from the separable security requirements in exchange for an agreement to go all-digital by February 17, 2009).

[48] Because of the nondegradation requirements of the Act, all operators will be required to provide at least some digital service to subscribers. *See* paragraph 7, *supra*.

[49] Comments of NAB and MSTV at 10.

[50] Reply of NAB and MSTV at 5 (emphasis in original); *see also* note 73, *supra*.

[51] Reply of Game Show Network, LLC at 2.

[52] Rules to Implement and Administer a Coupon Program for Digital to Analog Converter Boxes, NTIA Docket No. 0612242667705101, Final Rule, 72 FR 12097 at paragraph 8 ("NTIA Coupon Program Final Rule"); 47 C.F.R. § 301.

with analog sets would continue to be served;[53] and we now establish these rules to ensure that those subscribers do continue to be served.[54]

21. NAB proposes that cable operators carry all broadcasters on their systems in the same manner; i.e., if one must carry station is carried in analog, all broadcasters, whether carried pursuant to retransmission consent or must carry, would be carried in analog. Cable operators object to this proposal, and we decline to adopt it.[55] Although a system that is not "all-digital" will be required to carry analog versions of all must-carry signals to ensure their viewability, retransmission consent stations may be carried in any manner that comports with the private agreements of the parties.

22. The "viewability" requirement that we adopt today is based on a straightforward reading of the relevant statutory text.[56] While some cable commenters dispute our interpretation of Section 614(b)(7), their arguments are at odds with both the plain meaning of the statutory text as well as the structure of the provision. These commenters principally argue that the viewability mandate is satisfied whenever cable operators transmit broadcast signals and "'*offer* to sell or lease… a converter box' to their customers" that will allow those signals to be viewed on their receivers.[57] To the extent that such subscribers do not have the necessary equipment, however, the broadcast signals in question are not "viewable" on their receivers.[58] To be sure, "[i]f a cable operator authorizes subscribers to install *additional* receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator [is only required to] notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed without a converter box and . . . offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3)."[59] But these commenters confuse the separate mandates set forth in the second and third sentences of Section 614(b)(7), a distinction we clarified as early as 1993.[60] As NAB and MSTV

[53] *See* note 67, *infra*. *See also* Testimony of Glenn Britt at note 44, *supra*.

[54] *See* Appendix C, *infra*.

[55] Reply of NCTA at 8; Reply of Comcast at 11.

[56] *See* 47 U.S.C. §§ 534(b)(7), 535(h). Indeed, some cable operators were already planning to carry downconverted versions of broadcast signals, in addition to the broadcast version, in order to ensure that subscribers continue to be able to view them. *See, e.g.*, Reply of Cequel at 3. *See also* Testimony of Glenn Britt at note 44, *supra*. Our discussion of material degradation clarifies that this is not a violation of Commission Rules. *See* Paragraph 13, *supra*.

[57] Reply of Comcast at 9-10, partially quoting 47 U.S.C. § 534(b)(7) (emphasis added by commenter).

[58] In addition, it is important to note that the relevant question under the statute is not whether subscribers can view over-the-air broadcast signals using their receivers. Rather, it is whether subscribers can view the signals of broadcast stations that are carried through their cable system. *See* 47 U.S.C. § 534(b)(7).

[59] *See* 47 U.S.C. § 534(b)(7) (emphasis added). By referring to "additional" receivers that are attached without operator involvement, the provision contemplates that at least one receiver is connected by the operator. We note further that a box (or television) purchased at retail by the subscriber is nevertheless covered by the viewability requirement if the cable operator provides the connection.

[60] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965 at FN 99 (1993) (*"Must Carry Order"*). *See also* Reply of NAB and MSTV at 8 (citing *Barnhart v. Sigmon,* 534 U.S. 438 (2002), for the premise that "[w]here Congress chooses to use different language in separate sentences of a statute, it is presumed to have intended different results").

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observe, "there is no evidence that the third sentence of Section 614(b)(7) was intended to narrow the scope of the viewability requirement for sets connected by cable operators."[61] 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.[62]

23. As we explained in the *Second Further Notice*, the operators of either all-digital or mixed digital-analog systems will be responsible under the statute for ensuring that mandatory carriage stations are actually viewable by all subscribers, "including those with analog television sets."[63] Two commenters argued that our proposed rules were overbroad, because analog-only televisions will not "qualify as 'television receivers' after the transition for purposes of the viewability requirement."[64] These arguments fail to recognize, however, that the hard deadline set by Congress does not apply to Low Power television stations, including translators and Class A stations. Thus, Low Power broadcasters, operating hundreds of channels, will still be lawfully transmitting analog signals on February 18, 2009, and for some period of time afterwards.[65] Those consumers who rely on Low Power stations and turn on their over-the-air analog sets that morning to watch a local newscast will be using a device "engaged or able to engage in 'the process of…radio transmission.'"[66] More broadly, as NAB and MSTV point out, the Commission's authority over these sets is not predicated merely on their ability to receive over the air signals.[67] Rather, we believe that a device that allows subscribers to view signals sent by their cable operator is a television receiver for purposes of Section 614(b)(7) of the Act.[68]

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[61] Reply of NAB and MSTV at 8.

[62] 47 U.S.C. § 534(b)(7); *see also* Reply of NAB at 7-8. ("[W]here the cable operator *does* provide the connections for television receivers, including analog receivers, the operator does not satisfy the viewability requirement… by making the signal available in a format that cannot be viewed").

[63] *Second Further Notice* at para. 16.

[64] Comments of Comcast at 23; *see also* Comments of NCTA at 12, note 14.

[65] *See In re Amendment of Parts 73 and 74 of the Commission's Rules To Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and To Amend Rules for Digital Class A Television Stations, Report & Order*, 19 FCC Rcd 19331, 19338, ¶ 17 (2004).

[66] Comments of Comcast at 23.

[67] "The Commission is correct (*Notice* n. 33) that analog television sets will, after the transition, continue to be 'television receivers' for purposes of the viewability provision. If a cable operator provides any video service to an analog set or a connection to an analog receiver for video service, then that set falls squarely within Congress' expectations that must-carry signals will be provided universally to all cable subscribers. Certainly, when Congress directed the Commission to modify its must-carry rules in Section 614(b)(4)(B), it did not expect the Commission to use that authority to eliminate Congress' core goal of universal availability of local must-carry signals. Redefining 'receiver' to exclude analog sets that otherwise receive video from cable operators would thus be directly contrary to Congressional intent." Comments of NAB and MSTV at 7, fn 7.

[68] Additionally, contrary to the suggestion made by Comcast, the ability to purchase a subsidized converter box for over-the-air digital signals does not alter the ongoing statutory responsibility of cable operators to make must-carry broadcast signals viewable by their subscribers. The converter box program was limited to over-the-air signals in

(continued….)

24. NCTA also argues that the situation in the early 1990s that spurred the creation of these viewability requirements was different from the situation that will be faced by consumers post-transition.[69] Therefore, they posit, it is inappropriate to rely on Sections 614(b)(7) and 615(h) to address viewability on analog receivers. To begin with, it is our primary task to implement the text of the statutory provision. While the enactment of a statute may be principally aimed at a particular set of circumstances present at the time, it is often written in general language so that it applies to similar sets of circumstances in the future. As the United States Supreme Court has instructed, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[70] In any event, the cable commenters' own descriptions of the driving force behind the statutory provision demonstrate that the situation at hand is directly analogous. NCTA explains that "[a]t the time [of the provision's enactment], certain television sets were not 'cable-ready' and could not receive [some] channels at all," and observes that the Commission therefore required converter boxes provided by cable operators to contain "the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter."[71] Replace "cable-ready" with "digital cable-ready," and "UHF" with "digital," and NCTA has described the problem at hand, and one of the options the Commission has again offered to resolve it.[72] The Commission's charge is to implement the statutory language enacted by Congress, and this language reflects Congress's unambiguous determination that broadcast signals must be viewable by all cable subscribers. Indeed, as NAB and MSTV note, "the authority that Congress gave the Commission under Section 614(b)(4)(B) to make rules regarding advanced television reflects Congress' understanding that broadcast technology certainly would change over time, and that the Commission was expected to modify the carriage rules as needed."[73] While the circumstances today differ from those present at the time of the provision's enactment, the basic issue,

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part because of the Congress' confidence that cable companies would continue to fully serve their subscribers. This confidence was based in part on assurances by the cable industry. *See, e.g.*, Testimony of Kyle E. McSlarrow, Chairman and CEO of NCTA, before the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives.("And when we get to a transition, whenever that transition takes place, and we are faced with what do we do with the analog customers, *what we are proposing is to allow us to down-convert, in some circumstances, just for the limited number of must-carry stations*. In the meantime, you are exactly right. The converter boxes, or the more elaborate boxes that some people may want, particularly if they want high definition or DVRs, or those kinds of things, are increasingly going to penetrate the subscribership. So what you have a universe which, you know, we have gone through the numbers ad nauseam right now, but I think we all agree, the largest television universe is the cable customer universe, 66 million people, and *what we are offering is to incur the cost themselves*. It is not going to cost the government a dime. We will take care of the problem. No one on day one of the transition will see any difference from the day before. In the meantime, the digital transition is taking place. *And when it comes to must-carry, I guess our concern is this. We are saying we will step up, we will do this. We are not asking you to place an obligation on anybody else. And near as I can tell, everybody at this table would love to place obligations on cable or some other industry. We are not going to ask you to do that. We will take care of it*.") (emphasis added).

[69] Comments of NCTA at 10-11.

[70] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

[71] Comments of NCTA at 10-11.

[72] *See also* Comments of Time Warner at 18-24.

[73] *See* 47 U.S.C. § 534(b)(4)(B) (requiring us to update carriage requirements for "advanced television services," now known as Digital Television).

ensuring the viewability of broadcast signals, is the same.[74]

25. Time Warner argues that we do not have the authority to read Section 614(b)(7) as a "manner of carriage" requirement, even to offer analog carriage as one option for complying with the statute.[75] They see the Commission's early interpretation of the viewability provision as a statement that operators must provide converter boxes "in a specific and limited context," and that the section cannot serve as the basis for a carriage requirement.[76] On the contrary, the Commission has frequently allowed cable operators to meet their 614(b)(7) obligations by placing must carry signals on a channel viewable to all subscribers instead of by providing boxes.[77] The rules we adopt today are firmly grounded in longstanding Commission practice, and echo previous solutions to similar problems.

26. Some cable programmer commenters, such as the Weather Channel, argue that the proposal "unquestionably would consume vast amounts of cable system bandwidth" with duplicative programming.[78] In actuality, as Time Warner admits, these rules will not have an impact on the carriage of most stations; the "vast majority of broadcasters opt for retransmission consent."[79] Thus, as NAB notes in its reply, any incremental increase of bandwidth devoted to must-carry stations will be "negligible."[80] Gospel Music Channel, LLC (Gospel) articulates a concern that flows from Weather Channel's: that these rules could reduce their chances of carriage on any given system.[81] While we recognize Gospel's concerns, Congress already acknowledged them when it mandated that systems with more than 12 usable activated channels need carry local commercial television stations only "up to one-third of the aggregate number of usable activated channels of such system[s]."[82] Furthermore, Gospel

[74] *See*, *e.g.*, *Requirements for Digital Television Receiving Capability, Second Report & Order*, 20 FCC Rcd 18607 (2005) ("*DTV Tuner Requirement Order*") (relying on the All Channel Receiver Act to require that all TV receivers include a digital tuner). The same problems that led Congress to pass the ACRA in 1962 arose again in the digital context, and their earlier solution proved just as effective. In viewability, just as with tuners, Congress' concern and foresight remain relevant and controlling. *See also* Reply of NAB and MSTV at 9 and note 15.

[75] Comments of Time Warner at 19-20.

[76] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Memorandum Opinion & Order, 9 FCC Rcd 6723 (1994).

[77] *See, e.g.*, *In the Matter of Paxson Hawaii License, Inc*, 14 FCC Rcd 9105 (1999); *In re: Complaint of Adell Broadcasting Corporation against Harron Communications*, 12 FCC Rcd 15169 (1997); *In re: Complaint of Fouce Amusement Enterprises, Inc., Licensee of Television Station KRCA, Riverside, California*, 10 FCC Rcd 668 (1995).

[78] Reply of The Weather Channel at 6.

[79] Comments of Time Warner at 16. *See also* Reply of The Africa Channel, et al., at 2 (recognizing that a significant amount, almost certainly a clear majority, of what is described as "duplicative programming" is in place due to market decisions by cable companies and voluntary agreements between cable operators and cable programmers. TAC particularly attacks cable carriage deals inked by retransmission consent stations and networks, which are unrelated to the rules we establish today, which are designed to ensure the viewability of stations that do not have the "leverage" that worries TAC and other independent cable programmers).

[80] Reply of NAB at 13.

[81] Reply of Gospel at 1; *see also* Reply of Comcast at 6.

[82] 47 U.S.C. § 534(b)(1)(B); *see also* paragraphs 30 and 36, *infra*.

fails to recognize that to the extent operators choose the second option and become "all-digital," these rules could contribute to a very positive impact on independent programmers' ability to make carriage deals due to the concomitant effective increase in channel capacity. The Africa Channel, et al. ("TAC") also argue that the potential loss of independent cable programmers serving focused audiences "are digital transition issues as important as a consideration of what constitutes viewability or material degradation for broadcasters who are the least likely television market participants to be left behind with or without burdensome new must-carry rules."[83] In essence, TAC argues that independent cable programmers deserve protections on par with must-carry broadcasters. Congress, however, disagrees, and the Supreme Court has upheld the must-carry regime to ensure the viewability and prevent the material degradation of the signals of those broadcasters.[84]

27. Some commenters have incorrectly characterized our rule as "dual carriage."[85] Comcast attempts to frame this requirement as "a requirement to carry broadcast signals in [analog]… in perpetuity."[86] Not only is this not the Commission's rule, Comcast's proposal for avoiding "dual carriage" would read "viewability" itself out of the Act. Dual carriage, as considered and rejected by the Commission, would have required cable operators "to carry both the digital and analog signals of a station during the transition when television stations are still broadcasting analog signals"; that is, the mandatory simultaneous carriage of two different channels broadcast by the same station.[87] The Commission ultimately rejected this concept.[88] The rule we establish in this *Third Report and Order* is quite distinct. It requires carriage only of a single broadcast signal, and gives operators the freedom to choose how to ensure that signal is viewable by all subscribers. It does not require carriage of more than one broadcast signal from a given must-carry broadcaster, and it does not require carriage of an analog version of a signal unless an operator chooses not to operate an all-digital system.

28. NCTA notes that the Act allows a cable operator to decline to carry signals from stations whose programming substantially duplicates that of a station it already carries.[89] The commenter argues from this that the statute can not be read to require carriage of additional versions of a signal under any circumstances.[90] The connection, however, is tenuous at best. Section 614(b)(5) speaks specifically to the issue of the carriage of different stations providing substantially identical programming, and does not address a requirement to carry multiple versions of a single station's signals. In the former case, subscribers would be receiving multiple channels all showing the same programs at virtually the same time. In this case, however, some subscribers will not be able to see any of a station's programming unless a downconverted version is carried. From the perspective of these subscribers, the actual people Sections 614 and 615 were designed to reach, there need not be more than one viewable version of a

[83] Reply of The Africa Channel at 34.

[84] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II"*).

[85] Comments of Comcast at 15, et. seq., Comments of Time Warner at 3, and Comments of NCTA at 4.

[86] Comments of Comcast at 24.

[87] *Second Report and Order*, 20 FCC Rcd at 4516, para. 1.

[88] *Id.* at para. 27

[89] *See* 47 U.S.C. § 534(b)(5).

[90] Reply of NCTA at 5-6.

broadcaster's signal – but there must be at least one.

29. Comcast argues that enforcement of the viewability provisions of the Act will force the Commission into conflict with other sections of the Act, particularly the effective competition provisions of Section 623(b).[91] Comcast misstates the case, however, when it says that a deregulated system may provide must carry stations "in any format that it wishes."[92] Indeed, as the Commission made clear in the 2001 Order, signals broadcast in HD must be carried by cable operators in HD, regardless of whether or not the system is rate-regulated.[93] While some requirements are lifted when an operator is deregulated, deregulation is not an exemption from the carriage requirements of the statute.[94] Stations electing mandatory carriage must be carried, they must not be materially degraded, and they must be made viewable.

30. If an operator chooses not to operate an "all-digital system" and therefore ensures viewability by providing a digital broadcast signal and a downconverted version of the signal for analog subscribers, it will in some cases use more than the 6 MHz of bandwidth occupied by an analog must-carry signal alone. Comcast argues that this improperly forecloses the use of the bandwidth for other purposes.[95] Congress recognized the importance of preserving cable bandwidth for non-broadcast programmers when it mandated that systems with more than 12 usable activated channels need carry local commercial television stations only "up to one-third of the aggregate number of usable activated channels of such system[s]."[96] This 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.[97] Moreover, to the extent that a cable operator wishes to free bandwidth for other purposes, it may choose to operate an "all-digital" system.

31. We are bound by statute to ensure that commercial and non-commercial mandatory carriage stations are actually viewable by all cable subscribers. The Commission also believes, however, that it is important to provide cable operators flexibility in meeting the requirements of Sections 614(b)(7) and 615(h). Therefore, we have declined to require a specific approach, instead allowing operators to choose whether or not to operate "all-digital systems," and therefore whether or not to provide mandatory carriage stations in an analog format.[98] This is in accord with the Commission's decision, in the *First*

[91] Comments of Comcast at 24.

[92] *Id.*

[93] *First Report and Order*, 16 FCC Rcd at 2629, para. 73.

[94] Nothing in Sections 614 or 615 suggest that must-carry requirements apply only to rate-regulated systems. Section 615(h) specifically requires provision on the "lowest priced tier," a requirement distinct from the "basic tier" created in Section 623 and an indication that Congress intended that all cable subscribers be able to see must-carry signals, regardless of whether their cable operator faced effective competition.

[95] Comments of Comcast at 34; *See also* Reply of NCTA at 3-4.

[96] 47 U.S.C. § 534(b)(1)(B).

[97] *See generally*, *Turner II*, 520 U.S. 180.

[98] *See* Appendix C, *infra*.

Report and Order, not to require operators to provide set-top boxes.[99]

32. Time Warner argues that the requirement of Section 629, that navigation devices be available at retail, supersedes the requirements of Section 614(b)(7), which was enacted four years earlier.[100] We disagree. Section 629(f) provides that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under [the] law" prior to the 1996 Telecommunications Act. This includes the viewability provisions of Section 614(b)(7). Furthermore, Time Warner's argument is premised on an interpretation of Section 614(b)(7) that we decline to adopt, namely that it requires cable operators to provide set top boxes. Indeed, the retail availability of set-top boxes should facilitate subscriber purchase of digital equipment and lessen the burden on all-digital cable operators to provide such boxes.[101] However, we adopt the analog downconversion option to address these very concerns, and provide an option which does not even potentially implicate set-top boxes. An operator may choose not to go "all-digital," and instead satisfy its Section 614(b)(7) obligations by downconverting must carry stations to analog, until the operator concludes that the local market is ready for an all-digital cable system.

33. We note that Americans for Tax Reform, Ovation, LLC, and other commenters appear to misapprehend the functionality of the "converter boxes" that will be available through the NTIA coupon program.[102] These boxes will, by design, be limited to use in converting over-the-air digital signals into analog signals that can be interpreted by an analog television.[103] Because of differences in the modulation used by digital broadcasters and digital cable systems, these boxes will not be usable by digital cable subscribers to connect their analog receivers. Such converters will be available, but it is important to ensure that the public understands that there are different functionalities provided by different boxes.[104]

34. Discovery observes that, during the transition period, a digital-only broadcaster has had the

[99] *First Report and Order*, 16 FCC Rcd at 2632-3, paras. 79-80. We neither require nor reject boxes in this Order, and our rule is totally agnostic as to their use. Allowing operators the discretion to pursue either viewability option will give them the flexibility they need to respond to their local market while ensuring the continued availability, to all consumers, of must-carry stations.

[100] Comments of Time Warner at 22.

[101] Comcast observes that the ongoing and accelerating move by consumers to digital cable will continue for the remainder of the transition. Therefore, there will be fewer than 32 million analog subscribers remaining as the nation approaches February 17, 2009, and the cost of transitioning to an all-digital system at that time will be concomitantly lower. Comments of Comcast at 29, note 88. We note also that many operators are promoting the subscriber-level switch to digital. *See, e.g.*, Reply of Cequel at 2.

[102] Reply of Americans for Tax Reform at 1; Reply of Ovation LLC at 4 (citing to Comments of NAB and MSTV at 11 that clearly deal with over-the-air converter boxes when discussing the easy availability of converter boxes to cable subscribers).

[103] Rules to Implement and Administer a Coupon Program for Digital to Analog Converter Boxes, NTIA Docket No. 0612242667705101, Final Rule, 72 FR 12097 at paragraph 8 ("NTIA Coupon Program Final Rule"); 47 C.F.R. § 301.

[104] We note also that use of over-the-air converter boxes and antennas, contrary to the suggestion of TAC, cannot fulfill the statutory mandate that must-carry signals be "viewable via cable." *See* Reply of The Africa Channel, et al. at 34-35.

right to request carriage in digital only, rendering it non-viewable to analog subscribers.[105] As the Commission explained in the *First Report and Order*, however, this is an interim policy, assisting both broadcasters and cable operators to adjust to digital broadcasting over a limited period of time.[106] Discovery argues that the post-transition period will "similarly be limited," and indeed, eventually analog-only sets will be as rare as VHF tuner-only sets are today.[107] There are still important differences, however. In the post-transition period, every channel subject to mandatory carriage will be broadcast solely in digital, while the use of analog receivers will continue for an indefinite time. Furthermore, making stations actually viewable to cable subscribers is the most fundamental interest expressed in the must carry rules that have been upheld by the Supreme Court. If we declined to enforce the viewability requirement it would render the regime almost meaningless, contrary to the clearly expressed will of the Congress as upheld by the Supreme Court.[108]

35. Because the interim policy governing downconversion makes it an option exercised by broadcasters, they are responsible for any associated costs.[109] Cequel argues that post-transition analog downconversion would only be necessary because the broadcaster itself is no longer providing an analog signal, and that any costs should therefore be borne by the broadcaster.[110] Agape Church Inc. and other broadcast commenters agree with our proposal that, because the decision will shift to cable operators after the transition, so should the costs.[111] NAB and MSTV further argue that these downconversion costs would be modest.[112] ACA says that one of its members paid as much as $4,390.25 per channel to downconvert from HD to analog, and argues in an ex parte that these costs could approach $16,500 per channel. We find this estimate surprisingly high and note that $12,000 of this total appears to be dedicated to format conversion, rather than digital to analog conversion. It is also unclear whether or not the prices or equipment quoted are industry standards, or whether some of the equipment costs presented cumulatively are actually redundant or usable for more than just analog downconversion of one broadcast signal. Nevertheless, we are taking up the issue of flexibility for small cable operators in the *Third Further Notice*, *infra*. Entravision Holdings, LLC (Entravision) notes that, while it supports our proposal, it would not object to a requirement that broadcasters pay the cost of downconversion if it became necessary in order to ensure the continued viewability of must-carry stations for analog subscribers.[113] However, since the post-transition downconversion will be undertaken by operators at their discretion, in order to comply with the Act, we adopt the proposal that any expense necessary for an operator's compliance with the requirements of Sections 614(b)(7) and 615(h) shall be borne by the

[105] Comments of Discovery at 4-5.

[106] *First Report and Order,*16 FCC Rcd at 2606, para. 15. This is also exactly the kind of flexibility Congress gave the Commission in Section 614(b)(4)(B) to ensure that the nation would make a smooth transition from analog to digital.

[107] Comments of Discovery at note 16.

[108] *Turner II*, 520 U.S. 180.

[109] *First Report and Order*, 16 FCC Rcd at 2602, para. 7.

[110] Reply of Cequel at 12-13.

[111] Comments of NAB and MSTV at 11, Comments of Entravision at 5, Reply of Agape at 1.

[112] Comments of NAB and MSTV at 11, note 11.

[113] Comments of Entravision at 5.

operator, and not the broadcaster.[114] Specifically, operators of systems that provide analog service are responsible for the cost of downconverting a digital must-carry signal to analog at the headend.[115]

36. Such downconverted signals will, however, count toward the one-third carriage cap. Section 614(b)(1)(B) of the Act requires that cable systems with more than "12 usable activated channels" devote "up to one-third of the aggregate number of usable activated channels of such system[s]" to the carriage of local commercial television stations.[116] Beyond this requirement, the carriage of additional commercial television stations is at the discretion of the cable operator.[117] The Commission determined in the *First Report and Order* that with respect to carriage of digital broadcast signals, the channel capacity calculation will be made by taking the total usable activated channel capacity of the system in megahertz and dividing it by three to find the limit on the amount of system spectrum that a cable operator must make available for commercial broadcast signal carriage purposes.[118] After the transition, when calculating whether an operator has reached or exceeded the one-third cap, we will count the system spectrum occupied by all versions of a commercial broadcast signal (both digital and analog).

37. We also find that operators of systems with an activated channel capacity of 552 MHz or less that do not have the capacity to carry the additional digital must-carry stations may seek a waiver from the Commission.[119]

38. We observe that a number of cable comments imply or state that it is not possible to transition from a system that provides analog service to an all-digital system without the agreement of all current subscribers.[120] While each operator will choose to transition or not based on local market conditions and other business considerations, it is clear that this choice is fully within their discretion. Both of these options are available to all operators at any time, a fact unaffected by this rule. We do note, that as with any change in programming service, particularly one which will have an impact on the compatibility of subscriber equipment, cable operators must comply with certain notice requirements. We remind operators who transition their systems to all-digital that they must provide written notice to subscribers about the switch, containing any information they need or actions they will have to take to continue receiving service.[121]

39. Entravision, licensee of a number of commercial broadcast stations, argues that analog

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[114] *See* Appendix C, *infra*.

[115] To the extent that a standard definition digital subscriber is unable to view a high definition signal via their equipment, operators have a similar responsibility to ensure that the signal is viewable.

[116] 47 U.S.C. § 534(b)(1)(B).

[117] 47 U.S.C. § 534(b)(2). Section 615 also requires carriage of noncommercial stations. *See* 47 U.S.C. § 535(a).

[118] *First Report and Order*, 16 FCC Rcd at 2614-5, paras. 39-40.

[119] Such systems must, however, commit to continue carrying an analog version such that their subscribers are assured of being able to view all must-carry stations carried on the system.

[120] Comments of Comcast at 34, n. 102, Comments of Time Warner at 23-4, and Comments of NCTA at 1-2; *but see* Reply of Americans for Prosperity, et al., at 2 (recognizing that the decision to become an all-digital system rests with the operator).

[121] 47 C.F.R. §§ 76.1603, 76.1622.

downconversion is the best way to ensure continued viewability, but does not object to the use of other methods by cable operators so long as the result is the same. [122] As an alternative to the option we proposed for systems that continue to carry analog programming, Entravision proposes that must-carry stations be provided in analog, but only until such time as 85% of subscribers in each zip code served by a given operator have the means to view those signals if provided in digital.[123] As Entravision acknowledges, however, the statute requires that must carry broadcast stations be made available to all cable subscribers with analog television sets.[124] As we have noted before, we do not believe we have the authority to exempt any class of subscribers from this requirement, no matter how few the analog subscribers.[125] Therefore, we decline to adopt the proposal offered by Entravision.

40. The Consumer Electronics Association (CEA) asks that the Commission rely on technical solutions shaped by earlier rules and developed by the market to resolve concerns about viewability.[126] CEA suggests that the agency can rely on the retail availability of sets with digital tuners to ensure continued viewability of high quality programming.[127] It argues that this can be assured by requiring the carriage of must carry signals to conform to three requirements: (1) unencrypted, unscrambled, and in QAM (i.e., "in the clear"); (2) modulated using MPEG-2, a widely used and accepted codec; and (3) not in switched digital. [128] CEA expresses concern that the requirement to carry must-carry stations "in the clear" is not sufficiently articulated outside the context of rate-regulated systems.[129] Although we decline to reach the question of requiring MPEG-2 and prohibiting switched digital, as they are beyond the scope of this proceeding, we do address CEA's essential concern, which is at the heart of our viewability proceeding.[130] Like CEA's proposals, our rules are designed to ensure that all subscribers to a cable system have "in the clear" access to all must carry stations.[131]

[122] Comments of Entravision at 3-4.

[123] *Id.* at 4-5.

[124] *Id.* at 2.

[125] *Second Further Notice* at para. 17.

[126] Comments of CEA at 1; *see* also Reply of Chris Llana.

[127] Comments of CEA at 4-5.

[128] *Id.* at 6-10.

[129] *Id.* at 7-8.

[130] As discussed in note 93, *supra*, the "viewability" language in 615(h) expressly refers to carriage on the "lowest priced tier." 47 U.S.C. § 535(h).

[131] We note in passing that CEA appears to misunderstand the statistic that roughly half of current cable subscribers are analog subscribers, cited by the Commission in paragraph 4 of the *Second Further Notice*. CEA believes this number stands for the proposition that "50 percent of all cable subscribers do *not* take a proprietary set-top box" and that "[t]his means that half of all subscribers… look to the competitive retail market for their devices." Comments of CEA at 3 (emphasis in original). This number does not actually speak to the number of subscribers who rely on set top boxes, proprietary or not. Many analog subscribers do use a set-top box, and the growing use of Cablecards means that more and more digital subscribers do not use a box. The statistic CEA cites actually means that "half of all subscribers" choose to look neither to their cable operator nor to the "competitive retail market" for their "devices." Instead, they choose to rely on the equipment they have already purchased. It is the

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C. Constitutional Issues

1. The Viewability Requirements Are Consistent with the First Amendment

41. A number of commenters assert that the rules we adopt herein constitute "mandatory dual carriage" and are unconstitutional.[132] We disagree. The statutory must-carry provisions upheld by the Supreme Court in *Turner II*[133] include the requirement that must-carry signals "shall be viewable" on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection.[134] The rules we adopt in this order do nothing more than ensure the continued fulfillment of this statutory mandate at the conclusion of the digital television ("DTV") transition in February 2009. The must-carry obligation is meaningful only if all cable subscribers are able to view local broadcasters' signals, even if they have analog televisions. If we fail to act, however, analog cable subscribers will be unable to view must-carry stations after the DTV transition. Rather than mandating downconversion to prevent this loss of signals after the transition, however, we offer cable operators a choice: those operators that choose not to operate an "all-digital system" must down-convert the broadcasters' digital signal for their analog subscribers. Cable operators that elect to operate "all-digital" systems, on the other hand, do not have to down-convert these signals and may provide them solely in a digital format. The choice rests with the individual cable operator. In this way, cable operators decide for themselves, taking into account their particular circumstances, how best to operate following the digital transition.[135]

42. We reject the argument of cable commenters that the "second option is effectively no option at all,"[136] or that we have presented cable operators with a "Hobson's Choice."[137] Rather, we believe that the second option represents a viable choice for complying with the viewability mandate. Cable operators complain about the burden of transitioning to "all-digital systems." In particular, they object to requiring subscribers with analog television sets who do not yet have digital-set top boxes to use such boxes because, they argue, it is not "feasible" to require those customers to install set-top boxes, because customers do not want set-top boxes, or because of the expense associated with providing the boxes.[138]

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interests of these consumers, and their full access to programming, that drives the Commission's decisions on viewability.

[132] *See, e.g.,* Comments of NCTA at 7, 13-14; Comments of Comcast at 6, 15.

[133] *Turner II*, 520 U.S. 180.

[134] 47 U.S.C. § 534(b)(7) ("Signals carried in fulfillment of the requirements of this section [must-carry signals] shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection").

[135] *See* Comments of NAB and MSTVat 5-10.

[136] Comments of NCTA at 2; *see also* Comments of Time Warner at 3 ("to most cable operators and subscribers, the NPRM single carriage proposal will be unavailable"); Comments of Comcast at 34, note 102.

[137] Comments of NCTA at 23 (contending that forcing cable subscribers to install digital boxes on their television sets to receive must-carry broadcasts is "no choice at all").

[138] *See* Comments of Time Warner at 3; Comments of NCTA at 2-3, 23; Reply of Cequel Communications at 4 (expressing concern over the "uncertainty" caused by new rules).

After the DTV transition, however, some sort of set-top or converter box will be the rule rather than the exception for those Americans with analog television sets. Whether consumers currently obtain video programming through over-the-air broadcasts, cable, or DBS, they generally will need either set-top boxes or digital televisions to receive programming once the transition is complete.[139] Thus, cable operators' fear that they will lose customers to other providers of video programming if they pursue this option seems misplaced.[140] As to cable operators' concerns about the expense of providing set-top boxes, nothing in this order precludes them from recovering the costs of those boxes from subscribers, and cable operators offer no evidence to support their claim that they will lose a meaningful number of customers because of such charges.[141] Indeed, such claims are rather ironic in light of the cable industry's recent practice of raising its prices at a rate significantly in excess of inflation.[142]

43. Cable operators' complaints about the second option are also belied by these same parties' assurances that they have both the incentive and the means to "mak[e] the digital transition as seamless as possible for their customers."[143] NCTA asserts, for example, that cable operators have committed to "ensure that cable viewers do not experience disruption after February 17, 2009," and that they "already have the means to ensure continuing service to analog television sets with no government intervention or subsidy required."[144] Cequel Communications notes that it has every incentive to continue providing must-carry stations to all subscribers after the transition, if only because it welcomes free programming.[145] Comcast similarly assures us that "cable operators have powerful incentives to meet their customers' demands"[146] and that "no cable operator will allow its subscribers to become 'disenfranchised' since to do so would be economically irrational."[147] If cable operators, in fact, "have every incentive to move customers to digital"[148] and "equipment will be available to enable cable

[139] Only those consumers of cable systems that continue to offer analog programming after the transition can avoid the need for a set-top box (or a digital television). In addition, while analog television sets will continue to receive signals from Low Power broadcasters, who will still be lawfully transmitting analog signals on February 18, 2009, and for some time afterwards, we doubt very much that cable subscribers, because they object to using a set-top box, will choose instead to rely solely on over-the-air signals from Low Power broadcasters.

[140] *See, e.g.,* Comments of NCTA, Appendix A, 35-36.

[141] For this reason, we also reject any notion that the all-digital option results in an unconstitutional taking of property without just compensation. *See* Comments of Comcast at 35-36; Comments of NCTA at 25-26. We address the cable operators' Fifth Amendment arguments in greater detail below. *See infra* paras. 64-71.

[142] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15087-88, para. 2 ("*2006 Cable Price Report"*).

[143] Comments of NCTA at 8.

[144] Comments of NCTA at 2; *see also* note 67, *supra*.

[145] Reply of Cequel at 2.

[146] Comments of Comcast at 16-17.

[147] *Id.* at 16, 17 ("consumers will go elsewhere" if cable operators do not provide them the channels they want or make available to them the equipment needed to view those channels).

[148] Comments of NCTA at 5.

customers to view digital broadcast signals,"[149] then we do not understand the cable companies' complaint that the all-digital option is so burdensome that it is merely a "fantasy."[150] Indeed, numerous cable operators have indicated to the Commission their intent to convert to all-digital operations prior to February 2009.[151] The record in this proceeding also demonstrates that cable operators are already reducing analog programming and moving it to digital tiers.[152] For all of these reasons, we conclude that the second option set forth in this item offers cable operators a meaningful choice about how to fulfill their must-carry obligations.

44. Turning to the First Amendment challenge, we do not believe that the "all-digital" option for complying with the statute's viewability mandate implicates any First Amendment interest beyond that inherent in the must-carry mandate for digital signals already adopted by the Commission.[153] We note, moreover, that this mandate is significantly less burdensome than the analog must-carry mandate upheld by the Supreme Court in *Turner II* because digital signals occupy much less bandwidth on a cable system than do analog signals. The "all-digital" option does not require cable operators to carry *any* additional signals over its system or to displace *any* additional programming beyond that required by the Commission's previously adopted digital must-carry mandate. Rather, it simply requires cable operators to take steps to ensure that all subscribers are able to view signals that will already be carried on their systems, and we do not believe that such a mandate can reasonably be described as an independent "infringement" of cable operators' free speech rights.

45. While cable commenters argue that the second option triggers additional First Amendment scrutiny, we do not find their claims to be persuasive. We do not agree that the second option coerces operators into downconverting broadcaster's digital signals or impermissibly penalizes them for failing to downconvert. The purpose and effect of the second option are neither to coerce operators into downconverting nor to penalize them for failing to do so. Rather, they are to provide cable operators with an alternative means of fulfilling the statutory requirement that the signals of must-carry stations

[149] Comments of NCTA at 24; *id.* at 32 ("Every signal will be carried, the signal will be viewable from day one with the right receiving equipment (as half of U.S. cable households already have)").

[150] Comments of NCTA at 5.

[151] *See, e.g., Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices,* CS Docket No. 97080, Memorandum Opinion and Order, 22 FCC Rcd 11780 (MB Jun. 29, 2007) ("*All-Digital Waiver Order"*) (granting limited waiver of ban on integrated set-top boxes to over 100 cable MVPDs that operate all-digital systems or will transition to all-digital systems by February 17, 2009). The Media Bureau previously granted similar waivers to three other MVPDs that had committed to all-digital operations. *Id.* at para. 4.

[152] *See* Comments of NCTA at 19 & n.35 (noting Comcast plans to eliminate 38 channels on its expanded basic analog tier to reclaim the bandwidth for digital signals).

[153] *First Report and Order*, 16 FCC Rcd at 2602, para. 7 (citing *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules,* WT Docket No. 99-168, *et al.,* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 20845, 20871, para. 65 (2000) (clarifying that cable systems ultimately are obligated to accord "must-carry" rights to local broadcasters' digital signals)).

must be viewable by all subscribers.[154]

46. However, even if we were to find that the second option implicates a First Amendment interest beyond that inherent in the must-carry mandate for digital signals already adopted by the Commission or, for that matter, that the second option did not represent a realistic choice for cable operators, we would still conclude that our approach here is constitutional because we believe that *both* options for complying with the viewability mandate are fully and independently consistent with the First Amendment.

47. *Content-Neutral Regulation.* As articulated by the Supreme Court in *Turner II*, "[a] content-neutral regulation will be sustained under the First Amendment 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."[155] There can be little argument that must-carry obligations are content-neutral regulations. The Supreme Court held in *Turner I* that must-carry does not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" but is instead a content-neutral regulation subject to intermediate-level scrutiny under the First Amendment.[156] Similarly, with respect to the first option provided to cable operators today, requiring downconversion of digital signals does not distinguish speech on the basis of content; it merely requires cable operators to carry whatever message the must-carry stations choose to transmit. We thus reject the notion that ensuring that cable subscribers with analog television sets are able to view must-carry stations reflects an "'effort to exercise content control'" that triggers strict scrutiny.[157] With respect to the "all-digital" option, we do not think that permitting cable operators to fulfill their must-carry obligations by providing digital must-carry signals that are viewable by all of their subscribers changes the analysis. This option does not distinguish speech on the basis of content; instead, it simply requires that subscribers can view broadcasters' digital signals – regardless of the content those signals contain.

48. We also reject the argument that, in light of "enormous technological and market changes," a First Amendment challenge to must-carry regulations today would be subject to strict scrutiny.[158] This argument is premised on the mistaken notion that the Supreme Court applied intermediate scrutiny to

[154] NCTA's contention that the second option represents an impermissible "time, place and manner restriction" is also inapposite. Comments of NCTA, Appendix A at 32-33. To the extent that cable operators wish to continue transmitting analog signals to their customers, they are free to do so under the first option set forth above. If, however, cable operators choose to comply with the viewability mandate by ensuring that all customers are able to view digital signals rather than downconverting, then there is no legitimate reason why such operators would continue to transmit any analog signals. Indeed, NCTA itself admits that the purpose of such analog transmissions would be to provide service to "those television households who rely on analog TVs and who do not want converter boxes cluttering up their homes… . " *Id*. at 33. Continuing analog service to subscribers who do not have digital equipment, purporting to satisfy the second option, would constitute a clear circumvention of the statute's viewability mandate.

[155] *Turner II*, 520 U.S. at 189 (citing *United States v. O'Brien,* 391 U.S. 367, 377 (1968)).

[156] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994)("*Turner I*"). *See also Satellite Broadcasting and Communications Ass'n v. FCC,* 275 F.3d 337, 353-55 (concluding that "carry one, carry all" rule is a content-neutral measure and thus subject to intermediate scrutiny).

[157] *See* Comments of Time Warner at 11 (quoting *Turner I*, 512 U.S. at 652).

[158] Comments of NCTA at 15-16, Appendix A, 6-13.

must-carry regulation due to the existence of cable market power. The Court made clear, however, that the applicable level of scrutiny was tied to the content-neutral character of must-carry regulation.[159] Like the regulations upheld in the *Turner* decisions, requiring cable operators to down-convert digital must-carry signals or make such signals viewable by all subscribers is a content-neutral regulation that guarantees the carriage of broadcast programming regardless of content and is not designed to promote speech of a particular content.

49. Moreover, 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. Although it faces competition by DBS operators and others, the cable industry by far remains the dominant player in the MVPD market, commanding approximately 69 percent of all MVPD households.[160] By contrast, the percentage of households that rely on over-the-air broadcast signals has declined significantly since the *Turner* decisions. In 1992, 40 percent of American households continued to rely on over-the-air signals for television programming.[161] Today, however, that figure has shrunk to 14 percent.[162] The shift in the competitive balance between broadcast and cable can also be seen in viewership trends. Between 1995 and 2006, ad-supported cable channels' total day share of the market increased from 28 to 49.5 percent, whereas the total day share of ABC, CBS, and NBC affiliates shrunk precipitously from 44 percent to 23.5 percent.[163] As cable capacity and the number of cable programming networks have grown, the fragmentation of the market for video programming has accelerated, further weakening broadcast stations.[164]

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[159] *See Turner I*, 512 U.S. at 647 (rejecting argument that the must-carry regulations are content- based because Congress's overriding objective of preserving access to free television programming "is unrelated to the content of expression disseminated by cable and broadcast speakers"); *id.* ("The design and operation of the challenged provisions confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech."); *Turner II*, 520 U.S. at 225-26 (Breyer, J., concurring in part) (joining the majority opinion (and providing the fifth vote) "except insofar as [it] . . . relies on an anticompetitive rationale").

[160] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2503, 2506, para. 8 (2006) ("*Twelfth Annual Video Competition Report*") (69.4 percent of MVPD subscribers received video programming from a cable operator). While the number of DBS subscribers has increased since the Supreme Court's *Turner* decisions, there is no evidence in the record that DBS places meaningful pressure on cable operators to carry all broadcast stations.

[161] *Turner II*, 520 U.S. at 190.

[162] *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2552, para. 96, 2617, Appendix B, Table B-1.

[163] NCTA 2007 Industry Overview at 9 (available at http://i.ncta.com/ncta_com/PDFs/NCTA_Annual_Report_04.24.07.pdf) (visited August 15, 2007). The total day share of all other TV sources declined slightly between 1995 and 2006 from 28 to 27 percent. *Id. See Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2579, para. 165 (for two years, the combined audience share of all cable programmers has been higher than the combined share of all broadcast TV stations for daytime and prime time viewing).

[164] *See* Letter from Helgi C. Walker, Wiley, Rein & Fielding, LLP, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 98-120 (filed June 2, 2006), attaching study titled *Promoting the Public Interest Benefits of Broadcasting in the New Millenium: The FCC Can and Should Update Its Existing Carriage Regulation to Meet the Demands of the Digital Age* ("*Promoting the Public Interest"*), at 12 ("The increase in the number of available sources of video programming -- which remains ongoing due to innovation -- has fundamentally altered the environment that broadcasters face by placing them in the midst of an increasingly fragmented market.").

50. In addition, cable operators continue to "exercise 'control over most (if not all) of the television programming that is channeled into the subscriber's home [and] can thus silence the voice of competing speakers with a mere flick of the switch.'"[165] As in 1992, few consumers have the choice of more than one cable operator.[166] Cable systems also are more clustered than they were in 1992.[167] While clustering may have beneficial effects, the Supreme Court has recognized that it also may increase cable's threat to local broadcasters and the risk of anticompetitive carriage denials.[168] Furthermore, the share of subscribers served by the 10 largest multiple system operators ("MSOs") has continued to accelerate since Congress recognized a trend toward horizontal concentration of the cable industry, "giving MSOs increasing market power."[169] The figure was nearly 54 percent in 1989 and over 60 percent in 1994.[170] The figure remains over 60 percent in 2005.[171] And there remains a significant amount of vertical integration in the cable industry. In 2005, approximately 22 percent of the 531 nonbroadcast video programming networks were vertically integrated with at least one cable operator.[172] "Congress concluded that vertical integration gives cable operators the incentive and ability to favor their

[165] *Turner II,* 520 U.S. at 197 (internal quotes and citations omitted).

[166] *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2570, para. 144 ("Relatively few consumers … have a second wireline alternative, such as an overbuild cable system, as indicated by the small number of subscribers to BSPs [broadband service providers] and the limited entry by LEC[s] thus far. Several other MVPD technologies, such as private cable systems and wireless cable systems, offer consumers alternatives to incumbent cable services, but only in limited areas, and their overall share of the MVPD market has declined from 3.29 percent to 2.88 percent over the last year" (internal citations omitted)). *See Turner II,* 520 U.S. at 197.

[167] *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Petition for Reconsideration of ABC Television Affiliates Association, CBS Television Network Affiliates Association, NBC Television Affiliates, ABC Owned Television Stations, NBC and Telemundo Stations (April 21, 2005) ("*Network Affiliates Petition*") at 18; *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2509, para. 20 (at the end of 2004, there were 118 clusters with approximately 51.5 million subscribers). *See Turner II*, 520 U.S. at 206 (noting evidence on remand of trend toward clustering).

[168] *See Turner II*, 520 U.S. at 207 ("The FTC study the dissent cites … concedes the risk of anticompetitive carriage denials is 'most plausible' when 'the cable system's franchise area is large relative to the local area served by the affected broadcast station,' and when 'a system's penetration rate is both high and relatively unresponsive to the system's carriage decisions.' That describes 'precisely what is happening' as large cable operators expand their control over individual markets through clustering. As they do so, they are better able to sell their own reach to potential advertisers, and to limit the access of broadcast competitors by denying them access to all or substantially all the cable homes in the market area") (citations omitted); *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2574, para. 154 (noting that, in the license transfer proceeding relating to the sale of Adelphia's systems to Comcast and Time Warner, in which the transfer of systems will enlarge or consolidate various clusters owned by Comcast and Time Warner, BellSouth "argues that consolidation and clustering in the cable industry increases the ability of cable operators to gain exclusive contracts with unaffiliated cable networks" (citation omitted)).

[169] *Turner II*, 520 U.S. at 197.

[170] *Id.* at 197, 206.

[171] *See Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2620, Appendix B, Table B-3. This figure includes cable MSOs only. Including DBS operators DirecTV and Echostar, the top 10 MSOs serve 88 percent of subscribers. *Id*.

[172] *Twelfth Annual Video Competition Report,* 21 FCC Rcd at 2575, para. 157.

affiliated programming services."[173]

51. The incentives that the *Turner II* Court recognized for cable operators to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advertisers also have steadily increased. The Court explained that:

> Independent local broadcasters tend to be the closest substitutes for cable programs, because their programming tends to be similar, and because both primarily target the same type of advertiser: those interested in cheaper (and more frequent) ad spots than are typically available on network affiliates. The ability of broadcast stations to compete for advertising is greatly increased by cable carriage, which increases viewership substantially. With expanded viewership, broadcast presents a more competitive medium for television advertising. Empirical studies indicate that cable-carried broadcasters so enhance competition for advertising that even modest increases in the numbers of broadcast stations carried on cable are correlated with significant decreases in advertising revenue for cable systems. Empirical evidence also indicates that demand for premium cable services (such as pay-per-view) is reduced when a cable system carries more independent broadcasters. Thus, operators stand to benefit by dropping broadcast stations.[174]

In addition, the Court observed that "[t]he incentive to subscribe to cable is lower in markets with many over-the-air viewing options."[175]

52. Consistent with the *Turner II* Court's analysis, the evidence confirms that local advertising revenue has become an increasingly important source of revenue for the cable industry, "providing a steady, increasing incentive to deny carriage to local broadcasters in an effort to capture their advertising revenue."[176] For example, between 1992 and 2003, cable revenue from local advertising rose

[173] *Turner II*, 520 U.S. at 198 (internal quotes and citations omitted); *id.* at 200 (noting evidence on remand of "cable industry favoritism for integrated programmers").

[174] *Turner II*, 520 U.S. at 200-01 (citations omitted). *See id.* at 203-04 (finding substantial evidence that advertising revenue would be of increasing importance to cable operators as cable systems mature and penetration levels off). Cable subscribership has been declining slightly. *See Twelfth Annual Video Competition Report,* 21 FCC Rcd at 2617, Appendix B, Table B-1.

[175] *Turner II,* 520 U.S. at 201.

[176] *Id.* at 203. *See Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2521, Table 4 (showing 12% increases in cable industry local advertising revenues from 2003 to 2004 and from 2004 to 2005), 2551, para. 94 (cable programming networks experienced a 17.7% increase, to $16.4 billion, in advertising revenue in 2004, compared to $14 billion in 2002); *Network Affiliates Petition* at 18 n.67 ("The industry's revenue from local advertising increased an estimated 13.5% from 2003 to 2004") (citations omitted); *Carriage of Digital Broadcast Signals,* CS Docket No. 98-120, Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Ass'n (filed Jan. 8, 2004) ("*NBC Factual Submission*"), at 11-12, 15 n.39 (cable operators are encroaching on broadcasters' advertising base); *Carriage of Digital Broadcast Signals,* CS Docket No. 98-120, Special Factual Submission by the CBS Television Network Affiliates Association in Support of Multicast Carriage Requirement (filed Jan. 13, 2004) ("*CBS Factual Submission*") at 14-15 ("cable operators have experienced a dramatic rise in advertising revenue to the detriment of local broadcasters").

dramatically, increasing by approximately 525 percent.[177] Thus, cable operators have even greater incentives today to withhold carriage of broadcast stations.

53. We also cannot conclude that the option of switching between cable and broadcast input significantly weakens cable operators' ability to harm broadcasters. With respect to the A/B switch, the Supreme Court found, *inter alia*, that many households lack adequate antennas to receive broadcast signals and that installation and use of such switches with other video equipment could be cumbersome or impossible.[178] Notwithstanding technical improvements since then, moreover, there is no evidence of consumer acceptance of the switch,[179] or that more households have adequate antennas to receive broadcast signals.[180] And since the percentage of television viewers relying solely on broadcast signals has dropped from approximately 40 percent to 14 percent in the years since *Turner II*,[181] the number of households with adequate antennas to receive broadcast signals through an A/B switch has almost certainly dropped. Thus, while A/B switches have largely moved from mechanical to electronic in the decade since the *Turner* decisions, switching signal sources still remains cumbersome or impossible for television viewers and does not represent an adequate alternative to must-carry regulation. In sum, we cannot conclude that technological and market changes dictate that must-carry obligations would now be subject to strict constitutional scrutiny.

54. *Important Governmental Interests*. The Supreme Court has already recognized that must-carry regulations serve important governmental interests. In particular, it held that there was substantial evidence to support a finding that must-carry requirements serve the important, and interrelated, governmental interests of (1) preserving the benefits of free, over-the-air local broadcast television; and (2) promoting the widespread dissemination of information from a multiplicity of sources.[182] Congress found, and the Court agreed, that both these interests were threatened by cable operators' refusals to carry local broadcast stations. Broadcasters denied carriage on cable systems lose a substantial portion

[177] *See* http://www.ncta.com/ContentView.aspx?contentId=70 (viewed Aug. 16, 207) (showing increase in cable network local/spot advertising revenue from $818 to $4,296 (in millions) between 1992 and 2006).

[178] *See Turner II,* 520 U.S. at 219-220.

[179] *See id.* at 220-21 (Congress reasonably decided that use of A/B switches was not a real alternative to must-carry based in part on lack of consumer acceptance where evidence showed that "it is rare for [cable subscribers] ever to switch to receive an over-the-air signal," even after FCC-mandated technical improvements and an extensive educational program on the use of A/B switches) (internal quotes and citations omitted). NCTA dismisses these findings as dated, *see* Comments of NCTA, App. A at 12 ("that was fifteen years ago – an epoch in terms of electronic technology"), and asserts that today's television viewer can use a universal remote control "to switch seamlessly" from a cable signal to a broadcast signal to a DBS signal, *id.*, but it provides no data to demonstrate that consumers have accepted this technology and use it widely.

[180] *See id.* at 219 (data before Congress showed that "many households lacked adequate antennas to receive broadcast signals"). *See also Promoting the Public Interest*, *supra* n.164, at 14, note 82 (in adopting the Satellite Home Viewer Improvement Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999), "Congress recognized the need to ensure that satellite television subscribers would not be 'required to go to the trouble and expense of installing off-air antennas to improve their reception of local television signals,' in recognition of the fact that the use of such equipment is, at best, inconvenient") (quoting S. Rep. No. 106-51, at 5 (1999)).

[181] *See Turner II*, 520 U.S. at 221; *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2552, para. 96.

[182] *Turner II,* 512 U.S. at 189-90, 209.

of their audience, which, in turn, translates into lost advertising revenues.[183] As a result, the stations have less money to invest in equipment and programming, leading to further reductions in audience size. This cycle of audience loss followed by revenue loss repeats to the point that the stations "deteriorate to a substantial degree or fail altogether."[184] Thus, the viability of local broadcast stations and, consequently, the availability of over-the-air broadcasts for non-cable households depend to a material extent on cable carriage.[185] Furthermore, we note that the must-carry mandate found by the Court in *Turner II* to advance these governmental interests required that the signals of must-carry stations be viewable by all cable subscribers; it did not merely require cable operators to carry such signals and make them viewable to a limited class of their customers.

55. The steps we take here to ensure that cable operators comply with the statutory viewability requirement after the DTV transition serve these same interests. Cable operators are free to choose whether or not to operate as all-digital systems. We require cable operators that choose not to operate "all-digital systems" to down-convert the digital broadcast signals; otherwise, their analog subscribers will lose access to must-carry stations altogether on February 17, 2009. This fact distinguishes the present circumstances from those the Commission addressed in 2005 when it decided not to require cable operators to carry both the digital and analog signals of broadcast stations during the DTV transition, while television stations continue to broadcast analog signals.[186] At that time, the Commission concluded that a dual carriage requirement was not needed to preserve over-the-air broadcasting for viewers who lack cable because local analog broadcasts were already carried on virtually every cable system.[187] Therefore, the lack of a dual carriage requirement would not have any meaningful effect on a station's viewership, and there was thus no evidence that the absence of dual carriage would diminish the availability of broadcast signals to non-cable subscribers.[188] In contrast, this order addresses the impact of the end of the DTV transition, where the signals of must-carry stations will be completely unavailable to analog cable subscribers, absent the actions we take here. This obviously poses a much more serious challenge for must-carry stations. For this reason, we do not agree that this order is at odds with the Commission's 2005 constitutional analysis.[189] If cable operators did not downconvert the digital signals, broadcasters would stand to lose an audience of millions of households that are analog cable subscribers[190] and the concomitant advertising revenues,[191] thus jeopardizing their continued health and

[183] *Id.* at 208-09.

[184] *Id.* at 208 (quoting *Turner I*, 512 U.S. at 666).

[185] *Id.*

[186] *See Carriage of Digital Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516 (2005).

[187] *Id.* at 4525.

[188] *Id.*

[189] *See, e.g.,* Comments of Comcast at 25; Comments of NCTA at 14-15; Comments of Time Warner at 15.

[190] *Second Further Notice* at para. 4 and note 7. Comcast suggests that the 32 million households that are currently analog cable subscribers is "far from an accurate guess" as to how many households will be unable to view must-carry stations after the transition, because cable customers are "rapidly adopting digital services." Comments of Comcast at 29 n.88. In addition to supporting our conclusion that conversion to all-digital is a reality, not a "fantasy," as NCTA contends, (note 150, *supra*) Comcast does not offer any alternative figure. Even if, as we expect, there are fewer analog cable subscribers by 2009, the loss of millions of households predictably will have an adverse financial impact on broadcasters.

viability.[192] Should these stations deteriorate or cease to exist, the impact of these lost programming options would fall most heavily on those that most need them: the roughly fifteen percent of Americans who rely solely on over-the-air television, which disproportionately consist of low-income and minority households.[193] This is precisely the harm that Congress sought to prevent when it enacted the must-carry

(…continued from previous page)

[191] *See, e.g.,* Comments of Religious Voices in Broadcasting at 2-3 (reducing audience share affects advertising revenue for local broadcast stations and substantially hinders the stations' ability to continue offering quality programming).

[192] We note that the economic health of local broadcasters is substantially weaker than it was when Congress imposed the must-carry requirements in 1992. Among other things, broadcasters face increasing competition from cable operators for advertising dollars. *See NBC Factual Submission* at 15 n.39 ("[t]rends confirm that increasingly consolidated cable operators are making troubling inroads into the local advertising market – a critical source of support for free, over-the-air television"); *CBS Factual Submission* at 14 (citing Kathleen Anderson, Cablers Wage War for Ad Dollars: Industry Economics Making Ops Competitive with Local Stations, Hollywood Reporter, Dec. 8, 2003). Additional financial demands have resulted from the costs associated with purchasing the transmitters and other equipment needed to broadcast a digital signal. *See NBC Factual Submission* at 15-16 & n.40; *CBS Factual Submission* at 15. For example, it has been estimated that it would cost broadcasters between $2.3 million and $3.1 million per station to comply with the Commission's initial requirements for digital transmission, a figure that represents up to 242% of annual station revenues and does not even take into account additional program production or acquisition costs. *See* General Accounting Office, *Many Broadcasters Will Not Meet May 2002 Digital Television Deadline*, GAO 02-466 (April 2002), at 16-18. Overall, it is estimated that broadcasters will spend between $10 billion and $16 billion on the digital transition. *See Digital Television Transition: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 109th Cong. 2 (2005) (Testimony of Edward O. Fritts, President & CEO, NAB, at 2). The economic health of independent broadcasters, those that are most likely to benefit from must-carry regulation, is particularly tenuous. According to recent figures, at least 25 percent of independent stations across the country had a negative cash flow, and one-quarter of independent stations had a pre-tax loss of over half a million dollars. *See Station Revenues, Expenses, and Profit: Television Financial Report, 2005 Edition*, at 157. Moreover, the economic difficulties experienced by independent stations are not limited to those in small markets. In the top twenty-five markets, for example, at least 25 percent of independent stations experienced a negative cash flow, and one-quarter of independent stations had a pre-tax loss that exceeded $800,000. *See id.* at 159. The hardship is also particularly great for broadcasters in smaller markets, who generally have more restricted revenue opportunities, and stations affiliated with minor networks. In non-top 25 markets, for example, most WB affiliates reported a pre-tax loss in 2004, with twenty-five percent of such stations reporting a loss of over one million dollars. *See id*. at 155. Twenty-five percent of all UPN affiliates reported a pre-tax loss of over $290,000. *See id*. at 145. And outside of the top 100 markets, twenty-five percent of Fox affiliates registered a pre-tax loss of over $220,000. *See id*. at 131. Additionally, according to NBC, "in markets 51-175, the fourth-ranked station went from an average revenue gain in 1997 of $2.4 million to an average loss of $2.7 million in 2001." *NBC Factual Submission*, at 16. *See generally* Ottina, *The Declining Financial Position of Television Stations in Medium and Small Markets* (Dec. 2002) (Attachment C to Comments of NAB in MB Docket No. 02-277 (Jan. 2, 2003)). *See also* Letter from Brandon Burgess, President and Chief Executive Officer, ION Media Networks, Inc., to Chairman Kevin J. Martin, *et al.*, FCC, CS Docket No. 98-120, at 2-3 (filed Aug. 28, 2007) (continued full carriage of broadcast signals is critical to continued viability of independent broadcasters post-DTV transition; the only way to fulfill congressional intent is to ensure that "no television viewers suffer exclusion from over-the-air broadcasting in the DTV transition"); Letter from Frank Wright, President & CEO, National Religious Broadcasters, to the Honorable Kevin Martin, FCC, CS Docket No. 98-120 (filed Aug. 21, 2007) (failure to ensure that all cable subscribers are able to view all local broadcast television stations in the post-analog world "would cause significant hardship for religious and other non-profit broadcasters, making it difficult to fulfill their educational mission").

[193] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Comments of the NAB (filed Nov. 29, 2006), at 3.

provisions upheld by the Supreme Court in *Turner II*, and no party has suggested a plausible argument that preserving free, over-the-air broadcast television no longer qualifies as an important governmental interest.[194] The Court also recognized that "preserving a multiplicity of broadcasters"[195] serves the related governmental interest of "promoting the widespread dissemination of information from a multiplicity of sources." All cable programming other than that carried in fulfillment of must-carry obligations is under the control of cable operators.[196] Unless we act, analog cable subscribers and households that rely solely on over-the-air broadcast television may well face "a reduction in the number of media voices" and the loss of "the widest possible dissemination of information from diverse and antagonistic sources."[197] Thus, this Order clearly advances the important governmental interests identified by Congress and upheld by the Supreme Court. Alternatively, cable operators may fulfill their must-carry and viewability obligations by providing digital signals that are viewable by all of their subscribers, thus serving the same governmental interests upheld in the *Turner* cases.

56. In addition, the actions we take here advance a separate, but also important, governmental interest of minimizing adverse consumer impacts associated with the DTV transition. The DTV transition results in the return of analog spectrum that can be allocated for other important, indeed critical, purposes,[198] but Congress also recognized the need to protect consumers by ensuring that their television sets continue to work at the end of the transition just as they do today. To that end, Congress created a program to make available coupons that consumers can use to buy digital-to-analog converter boxes for the analog television sets in their homes.[199] Just as Congress sought to minimize the burden of the DTV transition on consumers who rely on over-the-air broadcasting, we act here to minimize the impact of the DTV transition on cable subscribers. Analog downconversion minimizes the impact of the DTV transition on cable subscribers who do not own digital television sets. By ensuring that these

[194] Although cable operators frame their arguments in terms of the absence of an important governmental interest, their real quarrel is with the means chosen to advance that interest. *See, e.g.,* Comments of Comcast at 29 (over-the-air signals will continue to be available through the use of converter boxes); Comments of NCTA at 21 (carrying digital signal only is sufficient because any customer who wants to view the signal can do so, presumably through the use of converter boxes); Comments of Time Warner at 12 n.39 ("the goal of ensuring that cable subscribers with analog television sets are able to continue viewing must-carry stations . . . could be fully achieved by providing digital set-top boxes to subscribers"). Of course, cable operators have the option under this order to avoid downconversion by becoming "all-digital" systems.

[195] *Turner II*, 520 U.S. at 194.

[196] *See id.* at 197.

[197] *Id.* at 192-93 (internal citations and quotations omitted). *See also* Letter from Joe Uva, Chief Executive Officer, Univision Communications, Inc., to Marlene Dortch, Secretary, FCC, CS Docket No. 98-120, at 2 (filed Aug. 24, 2007) (Univision is the primary source of local news and informational programming, as well as public affairs programming for "millions of Spanish-speaking homes in dozens of local markets;" this "already- underserved population therefore is at significant risk of being disenfranchised if the Commission does not ensure that cable systems continue to make broadcast programming available on analog sets following the DTV transition").

[198] *See Carriage of Digital Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd at 4528 ("A swift digital transition and the return of the analog spectrum for other uses are important governmental concerns.").

[199] Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 3005, 120 Stat. 4, 23-24 (2006).

consumers continue to receive local broadcast signals, we ensure that they experience little or no disruption in service due to the DTV transition.[200] We do not agree that requiring cable systems offering analog programming to down-convert digital signals undermines, rather than promotes, the digital conversion by encouraging continued dependence on analog televisions.[201] Just as Congress's set-top box program does not undermine but merely smoothes the transition for certain vulnerable consumers, we act here to promote widespread consumer acceptance of the DTV transition by addressing a major source of potential consumer confusion and frustration. Similarly, subscribers to cable systems that convert to all-digital operations will continue to receive local broadcast signals without interruption and thus will experience minimal disruption due to the DTV transition.[202]

57. For all of these reasons, we conclude that both options available to cable operators – downconversion of digital signals and the operation of all-digital systems – advance numerous important governmental interests.

58. *Burden on Speech.* The thrust of the cable operators' objections to downconversion is the "severe burden" they allege it imposes on protected speech.[203] They contend that a downconversion obligation imposes a greater burden than the must-carry rules upheld in *Turner II* because cable companies will now be required to transmit the must-carry stations' digital signal *and* down-convert it to analog, thus displacing additional speech.[204] Even assuming that analog downconversion, together with digital must-carry, requires greater bandwidth than existing must-carry requirements, we do not agree that it burdens "substantially more speech than necessary" to further the government's important interests.[205]

59. The relative burden that must-carry regulation places on cable operators must be measured in context. At the time of the *Turner* cases, cable capacity was significantly more constrained than it is today. In the early 1990s, most cable systems were all-analog and offered far fewer than 100 channels.[206] In 1995, for example, the Commission defined a "high capacity" cable system as a system with 54 or

[200] *See Requirements for Digital Television Receiving Capability*, ET Docket No. 05-24, Second Report and Order, 20 FCC Rcd 18607, 18609, para. 6 (2005) (stating that "consumers must be able to receive digital TV signals for the transition to move forward to a successful completion"); *recon., Requirements for Digital Television Receiving Capability*, 21 FCC Rcd 9478, 9480, para. 7 (2006)(same); *see also* Comments of NAB and MSTV at 2, 4-7 (Commission's proposed actions will "ameliorate adverse consumer effects from the DTV transition").

[201] *See* Comments of NCTA at 23 ("Perpetuating analog carriage makes it *unnecessary* for customers to transition to digital in order to watch must-carry channels") (emphasis in original); Comments of Discovery at 9-11; Comments of Comcast at 31; Comments of Time Warner at 13.

[202] *See Requirements for Digital Television Receiving Capability*, ET Docket No. 05-24, Second Report and Order, 20 FCC Rcd 18607, 18609, para. 6 (2005) (stating that "consumers must be able to receive digital TV signals for the transition to move forward to a successful completion"); *recon., Requirements for Digital Television Receiving Capability*, 21 FCC Rcd 9478, 9480, para. 7 (2006)(same); *see also* Comments of NAB and MSTV at 2, 4-7 (Commission's proposed actions will "ameliorate adverse consumer effects from the DTV transition").

[203] *See* Comments of NCTA at 17-20; *see also* Comments of Comcast at 33-35.

[204] Comments of NCTA at 17.

[205] *See Turner II*, 520 U.S. at 213-14.

[206] Comments of NAB and MSTV at 13.

more channels.[207] By contrast, analog carriage today accounts for only a small percentage of the total number of cable channels and spectrum capacity.[208] By 2004, cable operators were providing, on average, 70 analog video channels and approximately 150 digital video channels, with enough additional bandwidth to provide high-definition television, video-on-demand, Internet access services, and both circuit-switched and IP-based voice services.[209] As a result, the *relative* burden of the first option set forth above on cable operators today would be far less of a burden than was the analog mandate upheld by the Supreme Court in *Turner II*.

60. The Supreme Court foresaw in 1994 that "rapid advances in fiber optics and digital compression technology" might one day result in "no practical limitation on the numbers of speakers that may use the cable medium."[210] And today, we have every reason to expect that cable capacity will continue to expand in future years, thus further decreasing the relative burden on cable operators.[211] Cable operators continue to develop ways to use their available capacity more efficiently. For example, cable operators, in order to keep pace with their competitors, are beginning to deploy "switched digital" capability in their networks. In a switched digital environment, a channel is transmitted via coaxial cable to a subscriber's premises only when the subscriber tunes to that channel. Time Warner already has deployed switched digital in three cities.[212] Time Warner has said that switched digital gives cable operators the means of adding channels and never running out of capacity.[213] Moreover, because digital cable systems offer so much more capacity, the proportion of overall bandwidth devoted to must-carry signals is that much smaller than was the case at the time of the *Turner* decisions. For example, NAB and MSTV explain that 18 basic analog channels, which includes all must-carry stations, represent about 4.2 percent of the total number of channels and about 6.8 percent of the total downstream spectrum of a typical cable system today. In 1993, by contrast, the same number of channels represented 33 percent of the capacity of a "high capacity" cable system.[214] We believe that the typical cable operator electing to

[207] *Id*.

[208] *Id*.

[209] *The Commission's Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, 9403, para. 50 (2005) (citing *Annual Assessment on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, Eleventh Annual Report, 20 FCC Rcd 2755, 2772, Table 3 (2005)). *See also Network Affiliates Petition* at 15 (cable capacity has doubled or tripled since analog carriage rules were adopted).

[210] *Turner I*, 512 U.S. at 639. *See also Turner II*, 520 U.S. at 228 (Breyer, J., concurring in part)("the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers is limited and will diminish as typical cable system capacity grows over time").

[211] *See generally Carriage of Digital Broadcast Television Signals*, CS Docket No. 98-120, Letter from NBC Television Affiliates Group, NBC Television Station, CBS Television Network Affiliates Association, and ABC Television Affiliates Association to Chairman Michael Powell, FCC (filed Apr. 16, 2004), Attachment (*Network Affiliates Capacity White Paper*).

[212] *See* USA Today, http://www.usatoday.com/tech/products/services/2006-06-04-cable-hdtv_x.htm (visited Jun. 12, 2006) (noting that Time Warner plans to use switched digital on all of its systems and that Cox and Cablevision are developing plans for its use as well).

[213] *Id.* (quoting Mike LaJoie, Time Warner Cable Chief Technology Officer, as saying that "[o]nce I have the switching fabric in place, I can add as many channels as I want and never overload").

[214] Comments of NAB and MSTV at 13-14.

down-convert digital signals will devote significantly less than one-third of its channel capacity to local broadcasters, the cap that was upheld in *Turner II*.[215]

61. We also conclude that the relative burden on speech of downconversion is outweighed by the benefits.[216] Unless we act, subscribers of cable systems that choose not to operate "all-digital systems" will suffer both the loss of local broadcasts and confusion over that loss, and non-MVPD consumers risk deterioration, if not loss, of over-the-air broadcasting options. Preserving local television broadcasting will help these consumers more than a downconversion obligation will hurt cable operators, particularly given that downconversion is necessary only until cable operators complete the transition to all-digital systems. We also reject Time Warner's contention that a downconversion requirement burdens more speech than is necessary because the governmental interests at issue can be promoted in a less burdensome manner – namely by providing digital set-top boxes to subscribers.[217] Time Warner's objection proves too much, of course, for we have provided cable operators with precisely that choice: they may avoid analog downconversion by converting to all-digital systems, including by providing their subscribers with set-top boxes. Also, to the extent that cable operators do not take the necessary steps to ensure that the digital signals of must-carry stations can be viewed by all subscribers, the carriage of analog signals is necessary to advance the governmental interests identified above.[218] Although we conclude that downconversion is in fact necessary to advance important governmental interests, we note that a regulation is not invalid under the intermediate scrutiny analysis even if the government's interest might be adequately served by some less-restrictive alternative.[219] Finally, we note that the cable operators' arguments about the burdens of downconversion are undercut by their admission that they might down-convert on a purely voluntary basis.[220] For all these reasons, we find that analog-down conversion does not burden "substantially more speech" than is necessary and, therefore, this option does not violate the First Amendment.[221]

62. We also conclude that the "all-digital" option does not burden "substantially more speech than necessary" to further the important governmental interests discussed above. Indeed, this option imposes less of a burden on speech than the must-carry regulations upheld in *Turner II*. The transmission of digital signals requires far less bandwidth than that required for analog signals,[222] so cable companies

[215] *See* 47 U.S.C. § 534(b)(1)(B).

[216] *See Turner II*, 520 U.S. at 228-29 (Breyer, J., concurring in part) (because Congress could reasonably conclude that must-carry helps the typical over-the-air viewer more than it hurts the typical cable subscriber, the First Amendment does not dictate a result that favors cable viewers).

[217] Comments of Time Warner at 12 n.39.

[218] *See supra* paras. 54-57. *See also* note 44, *supra* (describing cable's plans to voluntarily carry an analog version of broadcast signals).

[219] *Turner II*, 520 U.S. at 217-18.

[220] *See* Comments of NCTA at 8 ("This is not to say that cable operators will necessarily choose to provide must-carry signals only in a digital format. Cable operators have every interest in making the digital transition as seamless as possible for customers . . . . If significant numbers of customers wish to receive broadcast signals in an analog format, operators will have every incentive to provide them.")(emphasis in original).

[221] U.S. CONST. amend. I.

[222] *See* Comments of Time Warner at 6.

transmitting signals, including must-carry signals, in digital rather than analog will gain bandwidth. In addition, while cable operators complain that transitioning to "all-digital systems" will impose an onerous burden on them and therefore does not represent a meaningful choice, we reject those arguments for the reasons discussed above.[223]

63. We conclude, therefore, that both analog downconversion and the "digital-only" options are consistent with the First Amendment on a stand-alone basis. By offering cable operators the flexibility to choose, based on their particular circumstances, either option to fulfill their must-carry obligations, moreover, we have minimized the burden imposed on any particular cable operator.

2. The Viewability Requirements Are Consistent with the Fifth Amendment

64. In addition to the First Amendment issue, some parties contend that requiring downconversion of digital must-carry signals constitutes a taking of property without just compensation in violation of the Fifth Amendment.[224] To begin with, as discussed above, we provide cable operators here with two options for complying with the statutory viewability requirement and do not mandate the downconversion of digital signals. But in any event, for the reasons stated below, we also conclude that requiring cable operators to down-convert the digital must-carry signals so that they are viewable by their subscribers with analog televisions would present no problems under the Fifth Amendment.

65. The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[225] In general, there are two types of Fifth Amendment takings: "per se" takings and "regulatory" takings.[226] Government authorization of a permanent physical occupation of property constitutes a per se taking.[227] A permanent physical occupation of property is a taking without regard to the public interest that it may serve,[228] the size of the occupation,[229] or the economic impact on the property owner.[230] NAB has argued elsewhere that must carry regulation cannot constitute a per se taking because no physical property is involved; rather the "property" taken consists of

[223] *See supra* para 42.

[224] *See* Comments of Comcast at 35-36; Comments of NCTA at 25-26.

[225] U.S. CONST. amend. V.

[226] *See generally Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992).

[227] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (in addition to a permanent physical occupation, a *per se* taking is effected by a government action that "denies all economically beneficial or productive use of land").

[228] *Loretto*, 458 U.S. at 426 ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

[229] *Id*. at 436-37 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied").

[230] *Id*. at 434 ("[O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."). *See also Yee*, 503 U.S. at 527; *Nollan v. California Coastal Comm.*, 483 U.S. 825, 831 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987).

electronic bits.[231] Moreover, we agree that the downconversion obligation does not affect the takings analysis.[232] As NAB states:

> if requiring cable operators to carry channels of broadcast signals indeed takes 'private property for public use' without compensation, then the requirement is unconstitutional regardless of whether the cable companies must accommodate one, five, or one hundred channels.[233]

66. Applying the above framework to the issue here, we believe that a court would find that a per se takings analysis would not apply. The Supreme Court has advised that a per se taking is "relatively rare and easily identified,"[234] and this is not one of those rare and easily identifiable instances. Mandatory carriage regulation effectuates no permanent physical occupation of a cable operator's property, such as the installation of physical equipment that was at issue in *Loretto v. Teleprompter Manhattan CATV Corp*.[235] Rather, multiple programming streams are simply transmitted in bits of data over cable bandwidth through electrons or photons at the speed of light while the cable operator retains complete control over its physical property (i.e., headend equipment). Courts have consistently rejected attempts to apply the concept of permanent physical occupation to the technological realm,[236] and we believe these decisions to be consistent with the Supreme Court's admonition that a permanent physical occupation of property is easily identified and, where found, "presents relatively few problems of proof."[237]

67. We therefore turn to whether requiring downconversion of digital must-carry signals would constitute a regulatory taking. An allegation that a regulation is so onerous as to constitute a regulatory taking is analyzed under the multi-factor inquiry set forth by the Supreme Court in *Penn Central Transportation Co. v. City of New York*.[238] A court will examine the following factors identified in *Penn Central* to determine whether a regulatory taking has occurred: (1) the character of the governmental action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations.[239] Applying this test here, we easily conclude that requiring downconversion of digital signals does not effectuate a regulatory taking.

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[231] *See* Letter from Jack N. Goodman, NAB, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 98-120 (filed Aug. 5, 2002) (*NAB August 2002 Ex Parte*), at 18-20 (citing *Loretto*, 458 U.S. at 419 ("carriage requirements in no way resemble the type of 'permanent physical occupations of real property' subject to Loretto's per se rule")).

[232] We note that Congress expressly stated in 1992 that the must-carry requirements do not constitute an unconstitutional taking. *See* H. Rep. 102-628, at 67 (1992).

[233] *NAB August 2002 Ex Parte* at 17.

[234] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002).

[235] *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1992).

[236] *See, e.g., Qwest Corp. v. United States*, 48 Fed. Cl. 672, 693 (2001).

[237] *Loretto*, 458 U.S. at 437.

[238] *See Florida Power*, 480 U.S. at 252 (citing *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978)).

[239] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See also Yee*, 503 U.S. at 523; *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

68. First, looking at the character of the governmental action at issue here, we believe it to be a quite modest attempt to "adjust the benefits and burdens of economic life to promote the common good."[240] As explained above, requiring downconversion of digital must-carry signals will likely impose only a modest burden on a cable operator's system as a whole and will materially advance the government's important interests in preserving over-the-air broadcasting, promoting the widespread dissemination of information from a multiplicity of sources, and minimizing any adverse consumer impacts associated with the DTV transition.[241] Moreover, it is critical to recognize that the government action here involves what traditionally has been and remains a heavily regulated industry.[242]

69. Second, there is no evidence in the record that the economic impact on cable operators of requiring downconversion will cause significant harm. As we explain above, mandatory carriage of analog signals accounts for only a small percentage of the total number of cable channels and total spectrum capacity. As cable operators continue to convert to digital programming, must-carry signals will impose a decreasing relative capacity burden. Given that the cable channels devoted to the mandatory carriage of commercial broadcast signals is capped at one-third of the cable system's usable capacity and in practice is likely to be significantly less than one-third, we find the economic burden on cable operators to be modest.

70. Third, there is no evidence in the record that requiring downconversion will interfere with reasonable investment-backed expectations. Based upon the statutory cap for commercial stations and the numerical limit for non-commercial stations, cable operators should reasonably expect to devote up to one-third of their capacity to carriage of local broadcast stations.[243] Requiring downconversion of digital must-carry signals does not change this limit. Finally, cable operators should have reasonably expected that they would be required to comply with the statutory viewability mandate after the digital transition. For all of these reasons, we conclude that requiring downconversion does not interfere with reasonable investment-backed expectations.[244]

71. We do not find evidence or persuasive argument in the record that requiring downconversion transforms must-carry regulation into a per se taking or a regulatory taking.

D. Other Issues

72. In its comments, United Communications Corporation made an argument for a revision of the Must Carry rules generally, to increase the carriage rights of low power stations, particularly Class A stations that serve as local network affiliates.[245] Ensuring the continued viability of low power

[240] *Penn Cent. Transp. Co.*, 438 U.S. at 124.

[241] *See supra* paras 35, 54, and 56.

[242] *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end") (quoting *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

[243] *See* 47 U.S.C. §§ 534(b) and 535(b).

[244] *See, e.g., Multi-Channel TV Cable Corp. v. Charlottesville*, 65 F.3d 1113, 1124 (4th Cir. 1995). *See also Park Avenue Tower Assoc. v. City of New York*, 746 F.2d 135, 138 (2d Cir. 1984).

[245] *See generally*, Comments of United Communications Corporation.

broadcasters is a major concern of the Commission; these proposals, however, are beyond the scope of the current proceeding. We will consider whether there is some alternative or future proceeding in which they could be more fully addressed.

73. Given the statutory directive to treat OVS operators like cable operators with regard to broadcast signal carriage, we find that OVS operators must carry digital-only television stations pursuant to Section 76.1506 of the Commission's Rules. Thus, OVS operators must comply with all requirements set forth in this *Third Report and Order*. Section 653(c)(1) of the Act provides that any provision that applies to cable operators under Sections 614, 615, and 325, shall apply to open video system operators certified by the Commission.[246] Section 653(c)(2)(A) provides that, in applying these provisions to open video system operators, the Commission "shall, to the extent possible, impose obligations that are no greater or lesser" than the obligations imposed on cable operators.[247] The Commission, in implementing the statutory language, held that there are no public policy reasons to justify treating an open video system operator differently from a cable operator in the same local market for purposes of broadcast signal carriage.[248] Thus, OVS operators generally have the same requirements for the carriage of local television stations as do cable operators except that these entities are under no obligation to place television stations on a basic service tier.[249] OVS operators are also obligated to abide by Section 325 and the Commission's Rules implementing retransmission consent.[250] We note that Section 76.1506(e) specifically emphasizes the mandate to make must carry signals viewable, and reiterates that the requirements established in this *Third Report and Order* apply equally to cable operators and OVS operators.

E. Conclusion

74. For the reasons discussed above, we adopt these rules with respect to material degradation and viewability.[251] A number of detailed issues must be addressed now that the broad framework of rules has been established. We believe it is appropriate to provide stakeholders and the public with an opportunity to weigh in on these matters; therefore the *Third Further Notice* seeks comment on some specific applications of these general rules.

III. THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

75. While this *Third Report and Order* resolves the major questions about material degradation and viewability after the transition, we now seek comment on a number of related issues which were not specifically raised in the *Second Further Notice*. Now that the general rules are in place, we believe it is

[246] 47 U.S.C. § 573(c)(1).

[247] 47 U.S.C. § 573(c)(2)(A).

[248] *See Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order*, 11 FCC Rcd 18223, 18307-08 (1996).

[249] *Id*. at 18308-09, n.371. We note, however, that an OVS operator must make qualified local commercial and noncommercial educational television stations available to every subscriber. *See* 47 C.F.R. § 76.1506(e).

[250] *See* 47 U.S.C. § 573(c)(1)(B); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd at 18311-13 (1996).

[251] *See* Appendix C, *infra*.

appropriate to move toward an expeditious resolution of these outstanding matters so that all parties will have sufficient time to prepare for compliance with these new rules.

A. Issues Related to Downconversion

76. **Channel Placement:** Section 614(b)(6) generally provides that commercial television stations carried pursuant to the mandatory carriage provision are entitled to be carried on a cable system on the same channel number on which the station broadcasts over-the-air.[252] Under Section 615(g)(5) noncommercial television stations generally have the same right.[253] The Act also permits commercial and noncommercial television stations to negotiate a mutually beneficial channel position with the cable operator.[254] In the *First Report and Order*, the Commission found that it was unnecessary to place broadcast signals on a specific frequency in order to ensure nondiscriminatory treatment of television stations by cable operators.[255] Instead, the Commission required that channel mapping information be passed through as part of the program and system information protocol ("PSIP"), linking the digital channel number with the appropriate primary video and program-related content.[256] How should these channel positioning rules apply to operators carrying more than one version of a station's signal? We seek comment on this question. For systems that provide analog service, we propose that the analog version be physically located on the appropriate channel as determined by the channel placement rules, and that the version as broadcast appear on that same channel for digital subscribers who can view it.[257] We seek comment on this proposal. We also seek comment on whether it will be technically possible for multiple digital versions to appear on the same channel from a subscriber perspective (e.g., channel 35 in HD for subscribers with HD, and the same channel 35 in SD for subscribers with SD). If so, should we adopt such a requirement?

77. **Format:** NAB and MSTV raise the point that "[w]hen digital programming is broadcast in a 16:9 format, downconversion of the signal to analog generally requires that the program be reformatted to fit the 4:3 analog aspect ratio."[258] Broadcasters may broadcast not only in different resolutions – HD, ED, SD – but also in different formats – 16:9 or 4:3. When a digital signal is downconverted, particularly from HD to analog, it is likely to be a 16:9 signal being adjusted for display on a 4:3 screen. However, at times, particularly during the early years of the post-transition period, even HD broadcasters are likely to occasionally show images in a 4:3 aspect ratio, adding static bars to the edge of the broadcast picture to compensate. How should the downconverted signal be adjusted (letterboxing,

[252] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a). There are three channel positioning options for commercial television stations but in the *First Report and Order* the Commission decided that only the on-channel option is relevant to the new digital signals. *First Report and Order* (motions for reconsideration have been filed on this issue).

[253] 47 U.S.C. § 535(g)(5); 47 C.F.R. § 76.57(b).

[254] 47 U.S.C. §§ 534(b)(6), 535(g)(5).

[255] *First Report and Order*, 16 FCC Rcd at 2633-36, paras. 81-83.

[256] *Id.*

[257] The PSIP provides for display of the "major channel number" which in most cases is the station's former analog channel. *See Program and System Information Protocol for Terrestrial Broadcast and Cable*, ATSC Document A/65 (Dec. 23, 1997).

[258] Comments of NAB and MSTV at 24.

centering, etc.), and if the Commission does not adopt a rule, who should make that decision? NAB proposes that, for signals converted at the headend, broadcasters make the determination, and for signals converted at a converter box, the boxes be required to allow the consumer to determine the format (as in the NTIA boxes).[259] NCTA responds with a proposal to allow operators to determine the format of downconverted signals, arguing that operators are best able to determine how to "serve the needs of their analog viewing customers."[260] We seek comment on the appropriate approach for the Commission to take, and the costs and benefits of these proposals and any others offered by commenters.

B. Material Degradation Issues

78. As NAB and MSTV note, the Commission found in 1993 that the material degradation rules apply equally to must carry stations and retransmission consent stations.[261] They argue that this should be the case after the transition as well. NCTA, however, notes that in the *First Report and Order*, the Commission said that

> *in the context of mandatory carriage of digital broadcast signals*, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer (e.g., non-broadcast cable programming, other broadcast digital program, etc.) carried on the cable system.[262]

We seek comment on the applicability of the material degradation rules adopted by this Order.

C. Availability of Signals

79. **Notice**: As discussed above in paragraph 38, we will require that cable operators notify their subscribers if they decide to become an all-digital system. We believe that the existing notice provisions are sufficient to enforce this requirement.[263] We request comment on these rules, and on whether we need more specific rules to govern notice to subscribers.

D. Small Business

80. As we noted in the *Second Further Notice*, we particularly welcome comments offering alternative rules that would "minimize the economic impact for small cable operators while still complying with the statutory requirements."[264] Several commenters argue that the rules we adopt in the

[259] *Id.*

[260] Reply of NCTA at 19.

[261] Comments of NAB and MSTV at 17-18 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report & Order, 8 FCC Rcd 2965, 3004 (1993).

[262] Comments of NCTA at 27-28 (citing *First Report and Order*, 16 FCC Rcd at 2629, paras. 73) (emphasis added). They also point to Section 325(b)(3)(C)(4) of the Act, which provides that "if an originating television station elects… to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not apply to carriage of the signal of such station by the cable system." See Reply of NCTA at 14.

[263] 47 C.F.R. §§ 76.1601, 76.1603, and 76.1622.

[264] *Second Further Notice* at para. 12.

Third Report and Order would impose high costs, particularly on small cable companies. ACA states that carriage of a single HD broadcast station could cost as much as $34,000 under our rules. We observe that these estimates appear to involve duplication of equipment, and that 75% of the listed costs are for equipment dealing with format conversion, something not resolved by this Order because it was first raised in comments and which is the subject of this *Third Further Notice*, *supra*. ACA's estimates are in contrast to the comments of NAB, who describe the costs of downconversion as "modest." We welcome comment on these cost estimates. We also urge commenters to offer alternatives and explain how they would comply with the statute as well as minimize the impact on small operators.[265]

81. The American Cable Association (ACA) offers three proposals, and argues that failing to adopt them, at least as to small cable operators, would cause "many" financial failures among independent cable companies.[266]

82. They propose: (1) no change to the material degradation rules; (2) allowing operators to meet the viewability requirement by converting broadcast signals into a format that they can cablecast to all their subscribers; and (3) requiring must-carry broadcasters to pay the cost of any downconversion.[267] The decisions made in the *Third Report and Order* largely track the first two of these proposals. Specifically, we retained the material degradation requirements described in the *First Report and Order*[268] and expressly provided that cable systems may convert digital signals to analog format to be viewable for their subscribers.[269] We also found that operators of systems with an activated channel capacity of 552 MHz or less could seek a waiver from the Commission if they do not have the capacity to carry the additional digital versions of must-carry stations.[270]

We seek comment on whether it would be appropriate to adopt the other rules proposed by ACA, for small cable operators only. Would such rules for small operators comply with the statute?

83. Block Communications offers a viewability proposal essentially identical to ACA's. They suggest a rule that operators be allowed to downconvert must carry digital signals into a format they can deliver to all subscribers; in their case, this would be analog, although in an all-digital system this would presumably be SD.[271] Block proposes that "[i]f the station wanted more, it could elect retransmission consent and negotiate for it."[272] These proposals appear to seek reconsideration of the Commission's long-standing requirement of HD carriage.[273] Although petitions for reconsideration of that requirement remain pending, we seek comment on this approach generally. ACA argues that if an operator provided

[265] *See, e.g.*, Comments of NCTA at 6 and Comments of Time Warner at 6.

[266] Comments of ACA at 5-6.

[267] *Id*. at 10.

[268] *See* paragraph 7, *supra.*

[269] *See, e.g.,* note 55, *supra.*

[270] *See* paragraph 37 and note 119, *supra.*

[271] Comments of Block at 4

[272] *Id.*

[273] Comments of ACA at 6-8; *See also* note 46, *supra*.

carriage on identical terms to broadcasters and cable programmers it would not be in violation of Section 614(b)(4)(A).[274] Given our interpretation of the statute set out in the Third Report and Order above, do we have any flexibility to alter the requirements for small cable operators?

84. Finally, ACA's last proposal is for must-carry broadcasters to bear the cost of downconversion. As NAB and MSTV have noted, this is a modest cost. Are the savings this would provide significant for small cable operators? Would the imposition of these costs on small broadcasters counteract the benefit to small business generally?

85. We also seek comment on the system characteristics that would be appropriate for relief; such as, number of subscribers, system capacity or something else. As discussed in the *Second Further Notice*, and in the Initial Regulatory Flexibility Analysis ("IRFA") at Appendix B, there are at least four different approaches to measuring the size of a cable operator, and resolving this question is essential if the Commission is to consider applying different rules for such operators.

86. Finally, we seek further proposals for means to minimize the impact on small cable operators, whether they be alternative rules, ameliorated timetables, or any other approaches that would conform to the requirements of the statute.

87. The Commission will complete an Order concerning these small cable systems within six months.

E. Other Issues

88. We welcome comment on any other matters relating to material degradation and viewability, and particularly the proper and sufficient application of the rules in this Order.

IV. PROCEDURAL MATTERS

A. Third Report and Order

1. Final Regulatory Flexibility Analysis

89. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[275] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Third Report and Order*. The FRFA is set forth in Appendix A.

2. Final Paperwork Reduction Act Analysis

90. This *Third Report and Order* contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. The modified information collection requirements relate solely to Office of Management and Budget ("OMB") Control No. 3060-0647, the Commission's Annual Cable Price Survey. They will be submitted to OMB for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the modified information collection requirements contained in this proceeding. In addition,

[274] Comments of ACA at 6-7.

[275] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4), we have considered how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." We find that the modified requirements must apply fully to small entities (as well as to others) to protect consumers and further other goals, as described in the Order.

3. Congressional Review Act

91. The Commission will send a copy of this *Third Report and Order* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[276]

B. Third Further Notice of Proposed Rulemaking

1. Initial Regulatory Flexibility Analysis

92. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[277] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") relating to this *Third Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix B.

2. Initial Paperwork Reduction Act Analysis

93. This *Third Further Notice of Proposed Rulemaking* has been analyzed with respect to the PRA and does not contain proposed information collection requirements. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.[278]

3. Ex Parte Rules

94. Permit-But-Disclose. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's Rules.[279] *Ex parte* presentations are permissible if disclosed in accordance with Commission Rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[280] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

4. Filing Requirements

95. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[281]

[276] 5 U.S.C. § 801(a)(1)(A).

[277] *See* 5 U.S.C. § 603.

[278] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. § 3506(c)(4).

[279] *See* 47 C.F.R. § 1.1206(b); *see also* 47 C.F.R. §§ 1.1202, 1.1203.

[280] *See id*. § 1.1206(b)(2).

[281] *See* 47 CFR §§ 1.415, 1.419.

interested parties may file comments on or before 30 days after publication in the Federal Register, and reply comments on or before 45 days after publication in the Federal Register using: (1) the Commission's Electronic Comment Filing System ("ECFS"), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[282]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.
    - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
    - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
    - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
    - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

96. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

97. Accessibility Information. To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: http://www.fcc.gov.

[282] *See Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998).

C. Additional Information

98. For more information on this *Third Report and Order and Third Further Notice of Proposed Rule Making*, please contact Lyle Elder, Lyle.Elder@fcc.gov, or Eloise Gore, Eloise.Gore@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

V. ORDERING CLAUSES

99. IT IS ORDERED that, pursuant to the authority contained in Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 534, and 535, this Third Report and Order and Third Further Notice of Proposed Rule Making IS ADOPTED and the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix C.

100. IT IS FURTHER ORDERED that this *Third Report and Order* and the rules in Appendix C ARE ADOPTED and SHALL BE EFFECTIVE 30 days after publication in the Federal Register, except that the modified information collection requirements concerning the Annual Cable Price Survey will become effective upon approval by the Office of Management and Budget and our publication in the Federal Register of a notice announcing the effective date of the modified requirements.

101. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Third Report and Order and Third Further Notice of Proposed Rule Making, including the Initial and Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

102. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Third Report and Order and Third Further Notice of Proposed Rule Making in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Regulatory Flexibility Analysis For the *Third Report and Order*

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Second Further Notice of Proposed Rulemaking* (*Second Further Notice*).[2] The Commission sought written public comment on the proposals in the *Second Further Notice*, including comment on the IRFA. The comments responsive to the IRFA are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. This *Third Report and Order* adopts rules implementing some of the statutory requirements under Sections 614 (local commercial television station mandatory carriage) and 615 (noncommercial educational television station mandatory carriage) of the Communications Act of 1934, as amended (the "Act"), when digital broadcasters seek mandatory carriage for their digital signal after February 17, 2009, the date established by Congress as to when analog service must cease.[4] The rules establish the requirements for avoiding material degradation of digital signals, and for ensuring their viewability by all subscribers. The rules pertaining to viewability shall be in force for three years from the date of the digital transition, subject to review by the Commission during the last year of this period (i.e., between February 2011 and February 2012).[5]

3. The rules require that, in order to avoid material degradation of digital signals, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any other signal on the system, and a cable operator must carry broadcast stations such that, when compared to the broadcast signal, the difference is not really perceptible to the viewer.[6] Therefore, an HD broadcast signal must always be carried by the cable operator in HD format.

4. Cable operators must ensure that must-carry broadcast channels remain viewable to all subscribers after the transition. To the extent that cable operators choose not to operate all digital systems, and they have subscribers who do not have the capability of viewing digital signals, those cable operators must "carry the signals of commercial and non-commercial must-carry stations in analog format" to those subscribers in those systems, after downconverting the signals from their original digital

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Further Notice of Proposed Rulemaking, FCC 07-71 (Rel. May 4, 2007) ("*Second Further Notice*").

[3] *See* 5 U.S.C. § 604.

[4] *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2006). Among other things, Title III, entitled the Digital Television Transition and Public Safety Act of 2005, establishes a hard deadline of February 17, 2009, for the end of analog transmissions by full power television stations.

[5] *See* para. 16, *supra*.

[6] *See* para. 7, *supra.*

format at the headend.[7] In the alternative, operators have the choice of operating "all-digital systems."[8] Under this option, operators will not be required to downconvert the signal to analog, and may provide these stations only in a digital format. A cable operator must provide a digital version of the signal that will be viewable to all digital subscribers. In any event, any downconversion costs will be borne by the operator. The Order also found that operators of systems with an activated channel capacity of 552 MHz or less could seek a waiver from the Commission if they do not have the capacity to carry the additional digital versions of must-carry stations.[9]

5. These rules will ensure both that all operators remain in compliance with the requirements of the Communications Act after the Digital Transition, and that cable subscribers will also be able to experience the benefits of the digital transition.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. The American Cable Association ("ACA") was the only commenter to reply specifically to the Initial Regulatory Flexibility Analysis. ACA made three specific proposals that it argues would "facilitate the digital transition in the smaller and rural communities served by ACA's members" by addressing the special concerns of those small member cable operators. ACA observes the important obligation the Commission has to fully consider the impact of its rules on small entities, and we welcome further comments on that question in the *Third Further Notice*. To that end, we have offered ACA's specific suggestions, two of which were echoed by other commenters, for comment in the *Third Further Notice* itself.

7. The Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") did not specifically file a comment in response to the IRFA, but did express some concern that Local Exchange Carriers ("LECs") were not specifically addressed in Section C of that previous IRFA. They explain that roughly half of their members offer video services to customers, and were concerned that the absence of LECs from the IRFA represented a failure to consider those operators. As a matter of statute, LECs who provide video service function as either cable system operators or Open Video System ("OVS") operators. Both types of systems will be governed by these rules, and were discussed in the IRFA. The interests of small operators like OPASTCO's members have been considered throughout the rulemaking process, and we note that the *Third Further Notice* asks for additional comment from and about all small operators.

C. Description and Estimate of the Number of Small Entities To Which the Proposals Will Apply

8. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[10] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small

[7] *See Third Report and Order*, paragraph 18, *supra.*

[8] "All-digital" systems are systems that do not carry analog signals or provide analog service.

[9] *See* para. 37, *supra*.

[10] 5 U.S.C. § 603(b)(3).

organization," and "small governmental jurisdiction."[11] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[12] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[13] The rules we adopt in this *Third Report and Order* primarily affect cable operators and television stations. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

9. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[14] The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having $13.5 million or less in annual receipts.[15] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[16] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[17] Thus, under this size standard, the majority of firms can be considered small. We note, however, that the rules we adopt in this *Third Report and Order* only apply at this time to cable operators and OVS operators, and not other MVPD providers.[18]

10. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's Rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[19] Industry data indicate

[11] 5 U.S.C. § 601(6).

[12] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.".

[13] 15 U.S.C. § 632.

[14] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[15] 13 C.F.R. § 121.201, NAICS code 517510.

[16] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[17] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[18] On this point, we note that the rules do not, for example, apply to DBS services.

[19] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[20] In addition, under the Commission's Rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[21] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[22] Thus, under this second size standard, most cable systems are small.

11. *Cable System Operators*. The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[23] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[24] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[25] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[26] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

12. *Television Broadcasting.* The proposed rules and policies apply to digital television broadcast licensees, and potential licensees of digital television service. The SBA defines a television broadcast station as a small business if such station has no more than $13 million in annual receipts.[27] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[28] According to Commission staff review of the BIA Publications, Inc. Master Access

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[20] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[21] 47 C.F.R. § 76.901(c).

[22] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[23] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[24] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[25] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[26] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's Rules. *See* 47 C.F.R. § 76.901(f).

[27] *See* 13 C.F.R. § 121.201, NAICS Code 515120.

[28] *Id*. This category description continues, "[t]hese establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing

(continued….)

Television Analyzer Database ("BIA") on October 18, 2005, about 873 of the 1,307 commercial television stations[29] (or about 67 percent) have revenues of $12 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[30] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

13. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

14. *Other Program Distribution.* The SBA-recognized definition of Cable and Other Program Distribution includes other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS and OVS. This definition provides that a small entity is one with $13.5 million or less in annual receipts.[31] As previously noted, according to the Census Bureau data for 2002, there were a total of 1,191 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,087 firms had annual receipts of under $10 million and an additional 43 firms had receipts of $10 million or more, but less than $25 million. The Commission estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

15. Concerning ITFS, we note that educational institutions are included in this analysis as small entities.[32] There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

16. *Radio and Television Broadcasting and Wireless Communications Equipment*

(…continued from previous page)
programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[29] Although we are using BIA's estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1,368. *See News Release*, "Broadcast Station Totals as of June 30, 2005" (dated Aug. 29, 2005); *see* http://www.fcc.gov/mb/audio/totals/bt050630.html.

[30] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[31] 13 C.F.R. § 121.201, NAICS code 517510. This NAICS code applies to all services listed in this paragraph.

[32] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

Manufacturing. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment."[33] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.[34] According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.[35] Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.[36] Thus, under this size standard, the majority of firms can be considered small.

D. Description of Projected Reporting, Record Keeping, and other Compliance Requirements for Small Entities

17. The *Third Report and Order* establishes rules to address post-transition obligations of cable operators with respect to carriage of digital broadcast signals pursuant to the must carry requirements in the Communications Act. Small cable operators currently have obligations with respect to carriage of local commercial and non-commercial broadcast stations which vary according to the size of the cable system. As with existing statutory and regulatory requirements, small cable operators will need engineering and legal services to comply with the new rules. The *Third Report and Order* requires that a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any other signal on the system and a cable operator must carry broadcast stations such that, when compared to the broadcast signal, the difference is not really perceptible to the viewer.[37] The 2001 *First Report and Order* recognized that the material degradation requirements as to HD signals could impact small cable operators disproportionately and made special provision for such situations. This recognition is retained in these rules. The *Third Report and Order* also requires that cable operators must make the primary video and any program-related material transmitted by a digital broadcaster electing mandatory carriage viewable by all of their subscribers and permits cable operators to comply with the "viewability" provisions by either: (1) carrying the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or (2) for all-digital systems, carry those signals only in digital format, provided that all subscribers with analog television sets have the

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[33] U.S. Census Bureau, 2002 NAICS Definitions, "334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing"; http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342.

[34] 13 C.F.R. § 121.201, NAICS code 334220.

[35] U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); http://factfinder.census.gov. The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

[36] *Id*. An additional 18 establishments had employment of 1,000 or more.

[37] *See Third Report and Order,* paragraph 7*, supra.*

necessary equipment to view the broadcast content. Small cable operators will need engineering and legal analysis to comply with this rule. Small broadcast stations will also be affected by the rules in the *Third Report and Order*, but we do not have any reason to expect that the compliance burden will be any greater than under the prior rules, except that, initially, broadcasters may need additional legal services.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

18. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[38]

19. The requirements established in the *Third Report and Order* are the result of statutory requirements that do not expressly provide exceptions for small entities. Broadcast stations, including small entity stations, are afforded the flexibility to elect mandatory carriage of their digital signal or elect to negotiate carriage with cable systems. The rules do not impose any significant burdens on small television stations, nor were any comments submitted describing any adverse impact on small television stations. Every effort has been and is continuing to be made to minimize the impact of these rules on cable operators, in particular finding that operators of systems with an activated channel capacity of 552 MHz or less could seek a waiver from the Commission if they do not have the capacity to carry the additional digital versions of must-carry provided such systems commit to continue carrying an analog version such that their subscribers are assured of being able to view all must carry stations carried on the system.[39] In the IRFA, we sought comment on whether there is a specific legal basis for affording operators that qualify as small systems special consideration. While we did not receive comments on this question, we have asked for additional further comment on this issue in the *Third Further Notice*. As noted above, we also have asked for comment on commenter's proposals for alternative rules that would apply to small cable operators. Furthermore, we anticipate that more and more cable systems will become all-digital cable systems in the coming years, thereby minimizing any potential impact that these rules might have. Finally, we are mindful of the potential concerns of small entities and will, therefore, continue to carefully scrutinize our policy determinations going forward.

F. Report to Congress

20. The Commission will send a copy of the *Third Report and Order*, including this FRFA,

[38] 5 U.S.C. §§ 603(c)(1)-(c)(4)

[39] *See Third Report and Order,* paragraph 37, note 119, *supra.*

in a report to be sent to Congress pursuant to the Congressional Review Act.[40] In addition, the Commission will send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[41]

[40] *See* 5 U.S.C. § 801(a)(1)(A).

[41] *See* 5 U.S.C. § 604(b).

APPENDIX B

Initial Regulatory Flexibility Analysis For the *Third Further Notice*

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible economic impact on a substantial number of small entities by the policies and rules proposed in this *Third Further Notice of Proposed Rulemaking* ("*Third Further Notice"*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Third Further Notice* as indicated on the first page of the Order. The Commission will send a copy of the *Third Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *Third Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposals

2. This *Third Further Notice* seeks comment on several detailed issues related to the major questions about material degradation and viewability after the transition. Our goal in this proceeding is to determine how best to implement the requirements adopted in the *Third Report and Order* when digital broadcasters seek mandatory carriage for their digital signal after February 17, 2009, the date established by Congress as to when analog service must cease.[4] We ask how the channel positioning rules should apply to operators carrying more than one version of a station's signal, and seek comment on a proposal that on systems that provide analog service, the analog version be physically located on the appropriate channel as determined by the channel placement rules, and that the version as broadcast appear on that same channel for digital subscribers who can view it. We also seek comment on the practicality and wisdom of a proposal for multiple digital versions of a signal to appear on the same channel from a subscriber perspective. We generally seek comment on the issue of changing display formats during downconversion, and note two proposals offered by commenters. We seek comment on the applicability of the material degradation rules adopted by the associated Report and Order. We ask whether the current notice rules are sufficient to enforce the requirement that cable operators notify their subscribers if they decide to become an all-digital system, and if not what changes are necessary. We again ask for alternative rules that would "minimize the economic impact for small cable operators while still complying with the statutory requirements,"[5] request comment on the appropriate small business size standard to use under these rules, and seek any further proposals to minimize the impact on small cable operators, whether they are alternative rules, ameliorated timetables, or any other approaches that would conform to the requirements of the statute. We offer for comment specific proposals raised by ACA and other commenters. Finally, we welcome comment on any other matters relating to material degradation and viewability, and particularly the proper and sufficient application of the rules in this Order.

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

[4] *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2006). Among other things, Title III, entitled the Digital Television Transition and Public Safety Act of 2005, establishes a hard deadline of February 17, 2009, for the end of analog transmissions by full power television stations.

[5] *Second Further Notice* at para. 12.

B. Legal Basis

3. The authority for the action proposed in this rulemaking is contained in Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 534, and 535.

C. Description and Estimate of the Number of Small Entities To Which the Proposals Will Apply

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.[6] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[9] The rules we may adopt as a result of the comments filed in response to this *Third Further Notice of Proposed Rulemaking* will primarily affect cable operators and television stations. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

5. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[10] The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having $13.5 million or less in annual receipts.[11] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[12] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[13] Thus, under this size standard,

[6] 5 U.S.C. § 603(b)(3).

[7] 5 U.S.C. § 601(6).

[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register".

[9] 15 U.S.C. § 632.

[10] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[11] 13 C.F.R. § 121.201, NAICS code 517510.

[12] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[13] *Id*. An additional 61 firms had annual receipts of $25 million or more.

the majority of firms can be considered small. We note, however, that the proposals at issue in this *Third FNPRM* only apply at this time to cable operators,[14] and not other MVPD providers.[15]

6. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[16] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[17] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[18] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[19] Thus, under this second size standard, most cable systems are small.

7. *Cable System Operators*. The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[20] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[21] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[22] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[23] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

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[14] The proposals would also apply to OVS operators.

[15] On this point, we note that the proposals do not, for example, apply to DBS services.

[16] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[17] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[18] 47 C.F.R. § 76.901(c).

[19] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[20] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[21] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[22] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[23] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's Rules. *See* 47 C.F.R. § 76.909(b).

8. *Television Broadcasting.* The proposed rules and policies apply to digital television broadcast licensees, and potential licensees of digital television service. The SBA defines a television broadcast station as a small business if such station has no more than $13 million in annual receipts.[24] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[25] According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on October 18, 2005, about 873 of the 1,307 commercial television stations[26] (or about 67 percent) have revenues of $12 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[27] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

9. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

10. *Other Program Distribution.* The SBA-recognized definition of Cable and Other Program Distribution includes other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS and OVS. This definition provides that a small entity is one with $13.5 million or less in annual receipts.[28] As previously noted, according to the Census Bureau data for 2002, there were a total of 1,191 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,087 firms had annual receipts of under $10 million and an additional 43 firms had receipts of $10 million or more, but less than $25 million. The Commission estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

11. Concerning ITFS, we note that educational institutions are included in this analysis as

[24] *See* 13 C.F.R. § 121.201, NAICS Code 515120.

[25] *Id*. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[26] Although we are using BIA's estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1,368. *See News Release*, "Broadcast Station Totals as of June 30, 2005" (dated Aug. 29, 2005); *see* http://www.fcc.gov/mb/audio/totals/bt050630.html.

[27] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[28] 13 C.F.R. § 121.201, NAICS code 517510. This NAICS code applies to all services listed in this paragraph.

small entities.[29] There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

12. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "[t]his industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment."[30] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.[31] According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.[32] Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.[33] Thus, under this size standard, the majority of firms can be considered small.

[29] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[30] U.S. Census Bureau, 2002 NAICS Definitions, "334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing"; http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342.

[31] 13 C.F.R. § 121.201, NAICS code 334220.

[32] U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); http://factfinder.census.gov. The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

[33] *Id*. An additional 18 establishments had employment of 1,000 or more.

D. Description of Projected Reporting, Record Keeping, and other Compliance Requirements for Small Entities

13. The *Third Further Notice* seeks comment on a number of proposals and issues that deal with implementation of the rules adopted in the *Third Report and Order*. Small cable operators currently have obligations with respect to carriage of local commercial and non-commercial broadcast stations which vary according to the size of the cable system. As with existing statutory and regulatory requirements, small cable operators will need engineering and legal services to comply with the proposed rules, but if the proposed rules are implemented we do not anticipate that this need will be any different for small operators than for large operators. The *Third Further Notice* solicits alternative approaches that would reduce the burden on small cable operators of compliance with the rules established in the *Third Report and Order* while still complying with statutory requirements. Small broadcast stations would also be affected by the proposed rules and other issues raised in the *Third Further Notice*, and their costs could increase under some of the commenter proposals discussed in the *Third Further Notice.* Also, initially, broadcasters may need additional legal services.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[34] We seek comment on the applicability of any of these alternatives to affected small entities.

15. The requirements proposed in the *Third Further Notice* would in most cases create minimal economic impact on small entities, and in some cases could provide positive impact. Broadcast stations, including small entity stations, are afforded the flexibility to elect mandatory carriage of their digital signal or elect to negotiate carriage with cable systems. Station licensees and other parties are encouraged to submit comment on the proposals' impact on small television stations. Every effort will be made to minimize the impact of any adopted proposals on cable operators. In this IRFA, we seek comment on whether there is a specific legal basis for affording operators that qualify as small systems special consideration in this regard. Finally, we are mindful of the potential concerns of small entities and will, therefore, continue to carefully scrutinize our policy determinations going forward. We invite small entities to submit comment on how the Commission could further minimize potential burdens on small entities if the proposals provided in the *Third Further Notice*, or those submitted into the record, are ultimately adopted.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

16. None.

[34] 5 U.S.C. § 603(c)(1) – (c)(4).

APPENDIX C

Amended Rules[1]

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 – Multichannel Video and Cable Television Service

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 336, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.56 is amended by adding new subsections (d)(3), (d)(4) and (d)(5) and revising subsection (e) to read as follows:

§ 76.56 Signal carriage obligations.

* * * * *

(d) *Availability of signals.*
* * * * *

(3) The viewability and availability requirements of this section require that, after the broadcast television transition from analog to digital service for full power television stations cable operators must either:

> **(i) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or**
>
> **(ii) for all-digital systems, carry those signals in digital format, provided that all subscribers, including those with analog television sets, that are connected to a cable system by a cable operator or for which the cable operator provides a connection have the necessary equipment to view the broadcast content.**

(4) Any costs incurred by a cable operator in downconverting or carrying alternative-format versions of signals under §76.56(d)(3)(i) or (ii) shall be the responsibility of the cable operator.

(5) The requirements set forth in paragraph (d)(3) of this section shall cease to be effective three years from the date on which all full-power television stations cease broadcasting analog signals, unless the Commission extends the requirements in a proceeding to be conducted during the year preceding such date.

(e) *Calculation of Broadcast Signals Carried*
When calculating the portion of a cable system devoted to carriage of local commercial television stations under paragraph (b) of this section, a cable operator may count the primary video and program-related signals of all such stations, and any alternative-format versions of those signals,

[1] Changes are indicated in **bold**.

that they carry.

3. Section 76.62 is amended by revising subsection (b) and adding subsection (e) to read as follows:

§ 76.62 Manner of carriage.

* * * * *

(b) Each **digital** television broadcast signal carried shall be carried without material degradation**. Each analog television broadcast signal carried shall be carried without material degradation and** in compliance with technical standards set forth in subpart K of this part.

(c) Each local commercial television station whose signal is carried shall, to the extent technically feasible and consistent with good engineering practice, be provided no less than the same quality of signal processing and carriage provided for carriage of any other type of standard television signal.
(d) Each qualified local noncommercial educational television station whose signal is carried shall be provided with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried.

(e) If a digital television broadcast signal is carried in accordance with § 76.62(b) and either (c) or (d), the carriage of that signal in additional formats does not constitute material degradation.

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

In the Matter of *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*

I am pleased with the action that the Commission takes today. With the adoption of this Order, cable operators will be obligated to ensure that all of their customers will be able to watch all broadcast stations after the digital transition.

This item, at its core, is about the consumer. It is about ensuring that all Americans with cable – regardless of whether they are analog or digital subscribers – are able to watch the same broadcast stations the day after the digital transition that they were watching the day before the transition. If the cable companies had their way, you, your mother and father, or your next door neighbor could go to sleep one night after watching their favorite channel and wake up the next morning to a dark fuzzy screen. This is because the cable operators believe that it is appropriate for them to choose which stations analog cable customers should be able watch. It is not acceptable as a policy matter or as a legal matter. The 1992 Cable Act is very clear. Cable operators must ensure that all local broadcast stations carried pursuant to this Act are "viewable" by all cable subscribers. Thus, they may not simply cut off the signals of these must-carry broadcast stations after the digital transition. The Order we adopt today prevents the cable operators from doing just that.

To put this in perspective, according to Commission staff calculations, there are approximately 15 million households with more than 30 million television sets that rely on over-the-air signals - that is, do not subscribe to any cable or satellite service. But there are over 40 million homes with 120 million analog cable television sets. Thus, in the absence of the action we took today, some broadcast stations would have become unwatchable on these 120 million television sets. And, millions of consumers will be disenfranchised.

Importantly, in the item we adopt today, we do not dictate how cable operators must fulfill their statutory requirement to make all broadcast signals viewable to its subscribers. Rather, we give them a choice. Accordingly, the Commission is not forcing consumers to purchase or lease a set top box to continue watching their favorite channels. This decision lies in the hands of the cable company. They can avoid the need for new boxes by choosing to downconvert the digital signal into analog at their headend. This downconversion would permit analog cable subscribers to continue watching broadcast television just as they do today without disruption. Of course, to the extent that a cable system is all-digital, like DBS systems are, all consumers are given a box that allows them to watch all of the broadcast stations.

Significantly, the statute's viewability requirements do not contain an exception for small cable operators. And, there was not much in our record to justify carving out some subset of such operators from the rules we adopt today. Although I believe that the benefits of the digital transition should be shared by all Americans, I also have sympathy for the constraints of very small cable systems. For this reason, we will allow these providers to file waivers to the extent they can show that they do not have the capacity to carry another digital channel. And, we have sought comment in a FNPRM as to whether we should adopt some different rules for a small subset of cable operators. I look forward to completing this proceeding in the next six months - well in advance of the February 2009 transition - so that these operators have sufficient notice of their obligations.

Today's item guarantees that consumers will be able to watch all broadcast stations at least until February 2012. In advance of this date, the Commission will review whether these rules continue to be

necessary to protect consumers. Some of the factors that I believe are important for the Commission to consider in its review are the extent to which consumers still rely on analog cable service, the state of the cable systems' conversion to digital, how customers have fared under the digital transition (including any added costs or service disruption they may experience), and the extent to which additional resources have been allocated by Congress to help consumers manage the transition.

The American consumer is, and continues to be, our highest priority. Without the proper policies in place, some viewers may be left in the dark or be unable to realize the full opportunities offered by digital technology. This is just one of numerous policy proceedings that the Commission has undertaken to facilitate the nation's transition from analog to digital television. During the next 17 months, we plan to issue additional orders that will adjust our rules and policies in anticipation of the transition on February 17, 2009. We are committed to taking whatever actions are necessary to minimize the potential burden the digital transition could impose on consumers and maximize their ability to benefit from it.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

In the Matter of *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*

The Digital Television Transition, as Americans will come to understand—I hope sooner rather than later—brings new services to consumers, but new challenges, too. It can be a multi-faceted opportunity or a hydra-headed monster. We'll know which it is in 17 months and seven days. And which it is depends entirely on the efforts of industry and government between now and February 2009. Today's Order broaches an important part of the transition that has not received the nation's attention to the degree it merits. It is the role of cable and making sure that consumers (1) continue to receive signals when the transition occurs and (2) that these services include the best that digital technology has to offer. While this Order may seem crammed with legalisms—some might even allege technical mumbo-jumbo—it contains important news for consumers.

First, it ensures that no cable subscriber will lose access to a single broadcast station when the DTV transition occurs on February 17, 2009. That is, cable subscribers can rest easy that night knowing they will awaken in the morning to the same complement of broadcast stations on cable they received the night before. This Order provides much needed assurance for the large percentage of U.S. households that receive their programming via cable.

Second, although the obligation imposed today to make broadcast signals viewable on analog sets presumptively expires in 2012, the Commission pledges to conduct a formal review of the rule during its final year. That is, like the program access exclusivity ban we are considering today, the Commission will examine the viewability requirement to determine whether and how it should be extended. This review will need to focus on such relevant factors as: (1) minimizing potential cost and service disruption to consumers; (2) the state of cable systems' conversion to digital; (3) technological and other marketplace developments; and (4) the impact on other cable services. I am pleased that my colleagues have agreed to begin collecting, via industry reporting, some of the key underlying data that will inform the Commission's ongoing decision-making process.

Third, the Order ensures that cable subscribers have access to broadcasters' pristine digital signals on day one. So if a broadcaster has made the investment to transmit in HD, that's exactly what cable subscribers will get. That obligation never sunsets and should provide an additional incentive for cable subscribers to purchase digital equipment. While I would have preferred an accommodation for small cable systems in the present Order, I am pleased that we agree to complete the Further Notice within six months—well before the February 2009 effective date of the requirement.

We have 525 days until the end of analog broadcasting. In a transition this massive and with so many moving parts, that's precious little time. With such little time, so many people to inform and so much to do, it's time to get everyone's focus and everyone's efforts on making the DTV transition something we can look back on with pride rather than sour memories. Again, it can go either way.

I know the Bureau worked mightily on this item and I thank them for that, and I am grateful to my colleagues who worked so hard and clocked so many miles walking the Eighth floor to achieve workable agreement. (I notice the carpet is wearing out up there, which is another reason to modify the closed meeting rule so we can come together as a body and achieve consensus without all the inter-office commuting.)

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, DISSENTING IN PART

In the Matter of *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*

Today, the Commission acts to ensure that, at the end of the national transition to digital television (DTV), cable operators will not disenfranchise their viewers. We take important steps to ensure that digital broadcast signals of must-carry stations will be carried on cable systems and consumers, including analog cable subscribers, will be able to view the signals. In short, we preserve the vitality of the free over the air broadcasting system, and ensure that the critical public interest value of broadcast television is enjoyed by cable consumers.

The useful attention we are providing to protecting the vitality of our over-the-air system stands in stark contrast to the outright dereliction of our duty in fulfilling the obligation to protect other interests of American viewers during this DTV transition. Since 1999, the Commission has failed to act on defining the public interest obligations of digital TV broadcasters. Today, I again implore my colleagues to act on this critical issue.

Since, as the *Order* makes clear, "must-carry requirements serve the important and interrelated governmental interests of (1) preserving the benefits of free, over-the-air local broadcast television; and (2) promoting the widespread dissemination of information from multiplicity of sources," *Order* at ¶ 54, we should fulfill the congressional mandate to define the "benefits" broadcasters are required to provide the American viewer. The *Order* dwells on the point that "[b]roadcasters denied carriage on cable systems lose a substantial portion of their audience, which, in turn, translates into lost advertising revenues." *Id.* There is no mention, however, about how broadcasters will serve the public in the digital era. This stark omission belies the integrity of this Commission's commitment to advancing the DTV transition in the interests of American consumers. *See* Recommendations of the FCC Consumer Advisory Committee.

The Commission's hitherto lackluster participation in educating over-the-air viewers about the DTV transition is also troubling. While the firm DTV transition cut-off date was signed into law since February 8, 2006, the Commission has yet to develop a comprehensive, coordinated plan to educate over-the-viewers, which include some of the most vulnerable members of society. In fact, it was only last month – more than a year after the hard date was set – and only after prodding from Members of Congress -- that the Commission contemplated issuing a Notice of Proposed Rulemaking on proposals relating to DTV consumer education.

While the Commission's effort to date – in terms of protecting consumers – has been disappointing, the broadcast, cable and consumer electronics industries have picked up the slack, and they have economic incentives to do so. The DTV Transition Coalition has done an admirable job in attempting to coordinate the efforts of industry and consumer advocacy groups. With only 525 days left, the Commission has no more time to waste.

In today's *Order*, we endeavor to not only protect must-carry stations, but also ensure that we minimize the potential cost and service disruption to consumers. Accordingly, the Commission's action today has much to do with allocating the burden and costs associated with the national DTV transition. But, to be sure, our guiding principle is that no over-the-air viewer or analog cable subscriber is left behind.

In this regard, the Commission has permitted a limited number of over-the-air broadcasters to turn off their analog signals and to transmit in digital only. Moreover, in the Third Periodic proceeding, the Commission is also considering whether to permit broadcasters to reduce the power of their analog signals during the transition, in order to minimize the costs associated with transmitting in both analog and digital. The net effect of these actions is that many over-the-air viewers are today required to either purchase digital TV sets or pay for a digital-to-analog converter box. If an over-the-air viewer does neither, he may be left behind before February 17, 2009.

In the cable context, the Congress, the courts, and the Commission have recognized that the relationship between a cable operator and a subscriber is different than that of the broadcaster and over-the-air viewer. Nevertheless, the Commission is required to ensure that cable subscribers are not left behind after the DTV transition. We must ensure that cable subscribers will receive a signal that is "viewable," pursuant to Section 617(b)(7). The instant *Order* accomplishes this important goal.

Because the Commission has twice rejected mandatory dual carriage and multicast must-carry, it is important to recognize that the *Order* is not intended to be mandatory dual or multicast carriage disguised as "viewability". The requirement that cable operators must deliver a "viewable" signal to cable subscribers is not a mandate for the Commission to specify the ways in which an operator can deliver a "viewable" signal. Nevertheless, if a cable operator fails to deliver a "viewable" signal to any cable subscriber, the Commission is obligated to protect the consumer. Cable operators must ensure that all customers can obtain the necessary equipment to view the signal. This is analogous to the need for over-the-air viewers to purchase digital TV sets or invest in a digital-to-analog converter box in order to view over-the-air signals.

Within this context of "viewability", the *Order* provides cable operators with hybrid analog/digital systems the flexibility to carry the signals of must-carry stations in different ways, as long as all customers receive a "viewable" signal. The practical effect of this flexibility is that some cable operators could carry the analog, SD and HD signals to viewers. Other operators could carry the analog and the HD signal to viewers, when the must-carry stations broadcasts in HD only. The operator could also decide to go "all digital" and invest in set-top boxes for all of their subscribers. This solution protects consumers' right to a "viewable" signal, and it ensures that must carry stations will be "viewable" by all cable subscribers.

We encourage cable operators to upgrade their systems and deploy solutions, such as switched digital, QAM or IPTV, to increase system capacity for more channels, enhanced services and faster broadband speeds. Such technological innovations promote efficient network management and the greater diversity of programming. But even as cable operators deploy these and other approaches, they must protect cable subscribers' ability to view signals. Nothing in this *Order* precludes a cable operator from making available equipment – preferably for free -- that would enable subscribers to take advantage of these innovations.

In 1992, Congress determined that the preservation of free over the air television, for the benefit of cable and non-cable households, required mandating cable systems to carry all local television broadcast stations up to no more than one-third of a cable system's capacity. The *Order* achieves this goal.

Beyond achieving the statutory goal of "viewability," the *Order* should have better advanced the interrelated goal of promoting broadband, pursuant to section 706 of the Communications Act. The telecommunications and cable industries are the principal providers of broadband services to most Americans. And, as the Commission has stated repeatedly, encouraging the deployment of broadband is one of our primary goals

I must dissent in part because the *Order* does not provide small, often rural, cable operators a much-needed exemption from the carriage obligations in this *Order*. Unlike the major MSOs and LECs, small system operators face serious financial and technological resource constraints, and the Commission should consider these limitations moving forward. We cannot achieve our goal of promoting rural broadband if the Commission forces small rural cable operators to use their limited capacity for uses other than what the market and their customers demand, including broadband. While I am pleased that the *Order* provides for waivers, it is not fair to ask these tiny rural systems to engage lawyers in Washington when a simple exemption would have sufficed.

In terms of broadband, other than the failure to provide for small rural systems, this *Order* has come a long way to balance the needs of these systems to have the capacity to deliver the higher speeds consumers are demanding, along with the diversity of channels that they also enjoy. Some of the proposals considered, such as shoving "all the bits" down operators' throats, even though the human eye cannot tell the difference, would have been an enormous waste of capacity that can be better deployed for broadband and programming diversity. I am pleased that reason prevailed in terms of the standard we employ to ensure there is no material degradation of the signals. Consumers are the big winners when such gratuitous regulation does not distort the marketplace incentives operators have to deliver what their customers want. Moreover, there have never been actionable complaints upheld to date complaining of material degradation.

In short, I thank all my colleagues for working together to craft a reasonable proposal that has dramatically improved from what was presented to us. Together, we achieved the paramount goal of ensuring that all cable subscribers can continue to view broadcast signals after the digital transition is complete. Now, we must attend to the overdue work of rolling up our sleeves to ensure that over-the-air viewers are better informed about the ongoing DTV transition.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

In the Matter of *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*

The 2009 digital transition presents this Commission with a number of technical legal and policy issues. At the heart of the Commission's responsibility is ensuring that American consumers continue to receive uninterrupted television signals. This goal requires us to work together- and not just as Commissioners, but as an entire industry. From cable operators to programmers to broadcasters to members of Congress, we must focus on how we can best effect a smooth and efficient transition. This item responds to concerns regarding the continued viewability of must-carry broadcast signals carried by cable operators. The Commission has made clear that such signals must be viewable on all television sets of all cable subscribers both now and after the dtv transition.

This item appropriately reinforces the requirement that must-carry broadcast signals be carried at as good a quality of signal carriage as all other signals. There can be no discrimination by cable operators between signals from a must-carry broadcaster and a cable-affiliated programmer. All have the right to the same level of viewability.

In addition, it is critical that those cable subscribers with analog-only television sets continue to receive digital signals after the transition. Requiring carriage of must-carry digital signals in both analog and digital formats for three years following the transition will give the Commission an opportunity to review the status of changes within the cable industry, as well as allow consumers to adjust to the upgraded technology. The world of digital technology is experiencing evolutionary changes. Developments in new compression technology, such as switched digital, allow cable operators to conserve valuable spectrum while providing quality video service. Other technological changes we likely cannot even anticipate at this point. For this reason we must remain flexible as we approach our rulemaking procedures. Most importantly, we must continue to approach this transition with a consumer mindset, understanding that viewers depend on television for vital news and information.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

In the Matter of *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*

We at the Commission have worked hard to establish rules and policies to ensure a smooth digital transition for broadcast television. We now turn towards a separate but related issue: addressing carriage of broadcasters' digital signals by cable operators. The Communications Act directs the Commission to ensure both that cable operators carry broadcasters' signals without "material degradation" and all cable subscribers have the ability to view their local must-carry station broadcast signals.

Regarding material degradation, the Order retains the nondiscrimination standard adopted by the Commission in 2001 with respect to digital signals and the requirement that HD signals be carried in HD. We do not adopt the "all content bits" proposal upon which we sought comment. In my opinion, our decision strikes the appropriate balance between ensuring that broadcast signals are not materially degraded and permitting cable operators to use their technology efficiently to produce both high quality video and high-speed broadband offerings for consumers. The standard we reaffirm today will permit cable operators to take advantage of technological innovations, such as switched digital and advanced compression technologies, to continue providing service to consumers with greater efficiency.

With respect to viewability, my colleagues and I endeavored to ensure that analog cable subscribers – I am one, by the way – do not lose their local must-carry stations from their channel line-ups after the digital transition. The order requires cable systems that are not "all-digital" to provide must-carry signals in analog format to their analog subscribers. This requirement will sunset three years after the broadcast digital transition hard date, with review by the Commission of the rule within the final year. However, I am concerned about the effect this Order may have on smaller cable operators, particularly those with systems of 552 MHz or less. I will urge the Commission to consider waiver requests expeditiously and grant waivers for such providers, where relief is warranted.

I thank my colleagues and the Bureau for their hard work on this item.