
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1334

AGAPE CHURCH, INC., *ET AL.*,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

OPPOSITION OF FEDERAL
COMMUNICATIONS COMMISSION TO
PETITIONERS' MOTION FOR STAY PENDING
JUDICIAL REVIEW

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INTRODUCTION

Petitioners seek a stay pending judicial review of the FCC’s decision to allow its “viewability rule” to sunset. Adopted pursuant to section 614(b)(7) of the Communications Act, 47 U.S.C. § 534(b)(7), that rule required certain cable operators, for three years after the 2009 completion of the digital television transition, to carry the signals for local over-the-air channels in both analog and digital format, at the cost of significant system capacity.

In the *Order* under review, the FCC determined that sunset of the viewability rule should take effect.¹ After examining the statutory language again, the Commission determined that it was ambiguous and that, particularly in light of significant technological and marketplace changes that have occurred since the rule was adopted, cable operators could satisfy their statutory obligation to make local television signals “viewable” by transmitting those signals in digital-only format. They could only do so, however, if they made available to their subscribers free or low-cost equipment permitting such signals to be viewed on analog television sets. If cable operators do not make that equipment available, they must continue to transmit signals in both analog and digital format. To allow cable operators, broadcasters, and viewers to adjust to the sunset of the prior rule, the FCC provided for an additional six-month transition period during which analog carriage of local television signals still would be required.

¹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules* (CS Docket No. 98-120), Fifth Report and Order, 27 FCC Rcd 6529 ¶¶ 1, 6 (rel. June 12, 2012) (“*Order*”).

As demonstrated below, petitioners have failed to satisfy the stringent requirements for a stay pending review. First, the FCC’s decision to permit the viewability rule to sunset is based on a reasonable interpretation of the statute and the ordinary meaning of the term “viewable,” which means “capable of being viewed.” That term is reasonably understood to be satisfied if a provider makes programming watchable by an effective means. Indeed, petitioner NAB conceded in a filing below (that it later sought to withdraw) that the statute could reasonably be read to allow programs to be made viewable with equipment provided by the cable operator. *See infra* page 12. At the very least, that fact undermines the current claim that the text of the statute precludes the FCC’s reasonable conclusion.

Second, petitioners’ claims that they will suffer irreparable injury are based on speculative assertions regarding loss of subscribership and advertising that are unsupported by the record and in conflict with FCC findings. In particular, the FCC found that, contrary to petitioners’ claims, the requirement to provide free or low-cost equipment will ensure the continued availability of local television signals to cable subscribers. Finally, the balance of harms and the public interest weigh decidedly against a stay. As the FCC determined, by permitting cable operators to carry local television stations in digital-only format, the *Order* provides cable operators with the “flexibility to meet fast-changing consumer demands for HD cable services and high-speed broadband services.” *Order* ¶ 16.

BACKGROUND

Under the Communications Act’s “must-carry” provisions, cable television operators are required “to devote a portion of their channels to the transmission of local broadcast television stations.” *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 626 (1994). *See* 47 U.S.C. § 534(a) (must-carry requirements for commercial television stations). Section 614(b)(7) of the Communications Act, 47 U.S.C. § 534(b)(7), requires cable operators to ensure that the signals of commercial must-carry stations are “viewable” to all cable subscribers. In 2007, after Congress required that all full-power over-the-air broadcast television stations transition their signals from analog to digital format (the digital television – or “DTV” – transition), *see* 47 U.S.C. § 309 Note, the FCC adopted a “viewability” rule to ensure that cable subscribers would continue to be able to view must-carry broadcast stations after the DTV transition.²

The FCC understood at that time that there would “continue to be a large number of cable subscribers with legacy, analog-only television sets after the end of the DTV transition.” *Viewability Order* ¶ 1. The FCC also recognized that, notwithstanding the transition to digital over-the-air broadcast signals, the cable television industry’s transition to all-digital systems, while likely, would take “some period of time.” *Id.* ¶ 20. Although the record showed that some cable operators might wish to quickly convert to all-digital systems, other cable

² *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules* (CS Docket No. 98-120), Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 (2007) (“*Viewability Order*”).

operators might choose to establish “hybrid” systems in which they would create a digital tier, but also “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.” *Id.* (internal quotations omitted). Accordingly, the Commission adopted a rule giving a cable operator two options to comply with the statutory viewability requirement for must-carry broadcast stations after the DTV transition: The operator could either transition to an all-digital system, or it could transmit the signals of its must-carry stations in analog format to all of its analog cable subscribers, in addition to any digital version carried. 47 C.F.R. § 76.56(d)(3)(2008).

The FCC did not make its 2007 viewability rule permanent. Instead, it provided that the rule “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.” 47 C.F.R. § 76.56(d)(5) (2008); *see also Viewability Order* ¶ 16. The sunset provision, the FCC explained, would “provide[] the Commission with the opportunity after the [DTV] transition to review these rules in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace.” *Ibid.* The DTV transition was completed on June 12, 2009; accordingly, by its terms, the rule was scheduled to sunset three years from that date (absent further FCC action).

On February 10, 2012, the FCC issued a notice of proposed rulemaking “seek[ing] comment on whether we should extend the viewability rule or permit it

to sunset.”³ The FCC also sought comment “on any other proposals that would achieve the results necessary to assure the viewability of must carry signals through an approach different than that of our existing rules.” *NPRM* ¶ 16. The FCC noted in the *NPRM* that it previously had “determined that the viewability rule was consistent with constitutional requirements.” *Ibid.* It therefore asked whether “any marketplace or other changes . . . have since occurred that may impact our analysis of the constitutional issues.” *Ibid.*

After reviewing the record developed in response to the *NPRM*, the FCC released the *Order* under review, which allowed the viewability rule to sunset in accordance with its terms. *Order* ¶ 6. “To facilitate a smooth transition,” however, the FCC adopted an “interim requirement” that, for six months following expiration of the rule (until December 12, 2012), “operators of hybrid cable systems must continue to carry the signals of must-carry stations in analog format to all analog cable subscribers.” *Id.* ¶ 17.

The FCC predicated its decision on “significant changes in the marketplace and technology” regarding the prevalence of analog cable service since the agency issued its *Viewability Order* in 2007, and the impact of those changes on the proper “understanding of the statutory viewability requirement.” *Id.* ¶ 6. With respect to the changing marketplace and technology, the FCC noted that, at the time the *Viewability Order* was adopted, 58 percent of television households subscribed to

³ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules* (CS Docket No. 98-120), Fourth Further Notice of Proposed Rulemaking and Declaratory Order, 27 FCC Rcd 1713 ¶ 9 (2012) (“*NPRM*”).

cable service “and 46 percent of these cable subscribers (40 million households) received analog service.” *Order* ¶ 12. Furthermore, there was at that time “no low-functionality and/or low-cost digital set-top box option available to ensure analog cable subscribers could access digital must-carry signals.” *Ibid.* “[T]he rule requiring hybrid cable systems serving analog subscribers to carry must-carry stations in analog format” was thus, under the circumstances prevailing in 2007, “a reasonable measure to ensure that must-carry signals were ‘viewable’ and ‘available’ to all subscribers” at the time. *Ibid.* (quoting 47 U.S.C. §§ 534(b)(7) & 535(h)).

The record evidence showed, however, that “[t]he state of technology and the marketplace is significantly different now.” *Order* ¶ 13. Today only “about 12 million households” – “down from 40 million households” in 2007 – receive analog service, and analog households were “expected to drop to 16 percent (or fewer than 10 million households) by the end of 2012.” *Ibid.* “More importantly,” the FCC found, “low-functionality/low cost digital equipment is now readily available as an option to cable consumers.” *Order* ¶ 14. In particular, “simple one-way digital-to-analog set-top boxes” called Digital Transport Adaptors (or “DTAs”) “that can provide cable consumers with access to the basic service tier” are now widely available, and several cable operators are already providing them “to some or all of their customers at minimal or no cost.” *Id.* ¶ 14 & n.60 (internal quotation omitted). The FCC found that the availability of these devices for “free or a monthly fee of no more than \$2” would “satisfy the requirement for affordable equipment . . . needed to ensure viewability on a hybrid cable system.” *Id.* ¶ 14.

The FCC further determined that the record evidence refuted the claim made by certain broadcasters that allowing the viewability rule to expire on schedule would threaten the viability of must-carry stations. *Id.* ¶ 15. The FCC explained that this argument improperly “assumes that elimination of the rule will automatically result in the broadcaster’s signal being unavailable to all analog subscribers.” *Ibid.* Rather, the FCC predicted, the availability of DTAs at no cost or low cost would ensure the continued availability of access to those signals. *Ibid.* The FCC also predicted that the issue would “diminish over time” as more cable customers upgrade to full digital service and more cable systems complete their transition to all-digital systems. *Ibid.*

In contrast with these limited burdens on must-carry broadcasters and analog cable customers, the FCC determined that allowing the rule to sunset would “result in significant benefits to cable operators in meeting the increasing demands of the large majority of their customers [that subscribe] to digital services.” *Order* ¶ 16. The FCC noted that cable systems, on average, carry more than seven must-carry stations, each of which – when carried in analog format – occupies bandwidth that otherwise could be used “for 10-12 standard definition (“SD”) digital streams, 2-3 [high definition (“HD”)] video streams, or significant broadband capacity.” *Ibid.* Sunset of the viewability rule, the FCC concluded, “will provide operators the needed flexibility to meet fast-changing consumer demands for HD cable services and high-speed broadband services” without harmful impact on the viewability of must-carry signals. *Ibid.*

The FCC acknowledged that, in 2007, it had rejected – as “at odds with both the plain meaning of the statutory text” and “the structure of the provision” – the argument that section 614(b)(7)’s viewability mandate is satisfied “when a cable operator transmits broadcast signals and offers to sell or lease a set-top box to . . . customers that will allow those signals to be viewed on their receivers.” *Order* ¶ 7 (quoting *Viewability Order* ¶ 22). But “upon further review” in the 2012 *Order*, the agency found that “[n]othing in the language of the statute plainly prohibits cable operators from offering equipment to satisfy the viewability requirement.” *Id.* ¶ 8. Rather, the term “viewable” in section 614(b)(7) is reasonably understood to mean “that the operator must make the broadcast signal available or accessible to its subscribers by an *effective* means, which may include offering the necessary equipment for sale or lease, either for free or at an affordable cost that does not substantially deter use of the equipment.” *Ibid.* (emphasis added).

The FCC concluded that this “reasonable interpretation of the statutory text . . . best effectuates the statutory purpose in light of current marketplace conditions” and is further supported by “the doctrine of constitutional avoidance,” which counsels against a statutory interpretation that would impose “a rigid analog-carriage requirement on cable operators, where the record establishes a reasonable, less burdensome alternative that meets the statutory objectives.” *Id.* ¶ 11. The FCC determined that, unlike the record before the agency in 2007, “[t]he current record lacks evidence that infringing on cable operators’ discretion is necessary to protect the viability of over-the-air broadcasting where an affordable

set-top box option, that will achieve the same viewability, is readily available to customers.” *Ibid.* This less burdensome alternative confirmed the agency’s statutory interpretation. *Ibid.*

On August 1, 2012, petitioners filed a petition with the FCC seeking an administrative stay of the *Order* pending judicial review. On August 24, 2012, the FCC’s Media Bureau, acting on delegated authority, denied the stay request.⁴ After detailing the infirmities of the broadcasters’ statutory arguments, *Stay Order* ¶ 11, as well as their claims that the sunset (even taking into account the 6-month transition) would cause them irreparable injury, *id.* ¶ 23, the Bureau concluded that the balance of the hardships and the public interest supported the FCC’s action. “[E]limination of the viewability rule,” the Bureau explained, “will provide operators with much needed flexibility to meet fast-changing consumer demands for HD cable services and high-speed broadband services, while ensuring subscribers continued access to must-carry channels.” *Id.* ¶ 24.

ARGUMENT

To obtain a stay pending judicial review, a party must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); D.C. Cir. Rule 18(a)(1). The Supreme Court has underscored

⁴ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules* (CS Docket No. 98-120), DA 12-1399 (Media Bur. Aug. 24, 2012) (“*Stay Order*”) (copy attached).

that a “stay is an ‘intrusion into the ordinary processes of administration and judicial review,’ . . . and accordingly ‘is not a matter of right, even if irreparable injury might otherwise result to the appellant.’” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). Accordingly, a stay “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 24.

I. PETITIONERS HAVE FAILED TO SHOW THAT THEY ARE LIKELY TO PREVAIL ON THE MERITS.

Petitioners argue that they will likely prevail on the merits because, they contend, the *Order*: (1) adopts an impermissible interpretation of section 614(b)(7) of the Act, 47 U.S.C. § 534(b)(7); (2) violates a prohibition on discriminatory carriage in section 614(b)(4)(A), 47 U.S.C. § 534(b)(4)(A); (3) violates the “basic tier” requirements contained in section 623(b)(7), 47 U.S.C. § 543(b)(7); and (4) is arbitrary and capricious under the Administrative Procedure Act, principally insofar as it adopts a six-month transition period. There is no merit to these claims.

1. *Section 614(b)(7)*. The second sentence of section 614(b)(7) of the Communications Act provides that must-carry 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.” 47 U.S.C. § 534(b)(7). As the *Order* explained, the ordinary meaning of the term “viewable” is simply “‘capable of being seen or inspected.’” *Order* ¶ 8 (quoting Webster’s *Third New International Dictionary* 2551 (1993)). The term does not speak to the presence or absence of additional equipment needed to accomplish that end. The FCC thus determined that “viewable,” in context, “can reasonably be read to mean

that the operator must make the broadcast signal available or accessible to its subscribers by an *effective* means.” *Order* ¶ 8 (emphasis added). And the FCC properly concluded, on the record before it, that a cable operator would do so if it “offer[s] the necessary equipment for sale or lease, either for free or at an affordable cost that does not substantially deter use of the equipment.” *Ibid.*

The FCC acknowledged that in the 2007 *Viewability Order*, it had rejected the argument that the “viewability mandate is satisfied when a cable operator . . . offers to sell or lease a set-top box to their customers that will allow” broadcast signals carried on the system “to be viewed on their receivers,” deeming that argument “at odds with both the plain meaning of the statutory text as well as the structure of the provision.” *Order* ¶ 7 (quoting *Viewability Order* ¶ 22). Upon “further review” in 2012, however, the Commission found that the statutory language was “less definitive than our earlier decision suggested.” *Order* ¶ 8. As the FCC pointed out, “the statutory sections at issue do not state that a signal is not ‘viewable’ if the consumer needs to use additional equipment,” and do not “unambiguously require[] that cable subscribers must be capable of viewing must-carry signals without the use of additional equipment.” *Ibid.* In addition, the FCC found that constitutional concerns counseled against adhering to “a rigid analog-carriage requirement . . . where the record establishes a reasonable, less burdensome alternative that meets the statutory objectives.” *Id.* ¶ 11 (citing *Frisby v. Schultz*, 487 U.S. 474, 483 (1988)).

It is well settled that an agency may revise or modify its interpretation of an ambiguous provision of a statute that it administers, so long as it acknowledges the

change and provides an adequate explanation for doing so. *E.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). Here, the FCC reasonably explained that it was appropriate to revise its interpretation of the statute to conform it to the ordinary meaning of the word “viewable.” That revised understanding of the statute was particularly reasonable in light of the “marketplace changes” – including a decline in the number of analog cable households and a proliferation of inexpensive DTA set-top boxes – that had occurred “over the past five years.” *Order* ¶ 8; *see id.* ¶¶ 12-14; *see also* pp. 5-7, above.⁵ Indeed, although it subsequently attempted to withdraw the filing, *see Order* ¶ 8 & n.33, petitioner NAB previously adopted this same statutory understanding and represented to the FCC in this proceeding that a cable operator could “comply with the statutory viewability requirement” by providing free equipment enabling access to digital broadcast signals for three years. NAB Ex Parte Letter, at 2-3 (May 23, 2012) (“Such a rule . . . would afford operators additional flexibility without controverting the plain language or intent of Section 614(b)(7).”). At the least, NAB’s filing demonstrates that the statute does not unambiguously preclude the Commission’s interpretation of viewability here.

In sum, because the agency fully acknowledged and explained its change in course, and its revised interpretation is reasonable, the fact that it previously

⁵ Petitioners’ challenge to the adequacy of record evidence that affordable DTAs are available (Motion 14) not only is insubstantial, *see Order* ¶ 14; it also is inconsequential, given that, under the *Order*, “a hybrid cable operator may stop carrying the analog signal of a must-carry station *only* if it is making affordable set-top equipment available to its subscribers.” *Stay Order* ¶ 19; *see Order* ¶ 14.

adhered to a different view is of no moment. *Fox*, 556 U.S. at 515. Under petitioners’ flawed argument, an erroneous reading of a statute (or one that makes no sense under present marketplace conditions) would forever be carved in stone.⁶

Petitioners next claim that the FCC’s construction conflicts with the statute’s structure by “render[ing] the distinction between the second and third sentences of Section 614(b)(7) meaningless.” Motion 8. That is incorrect. The third sentence requires cable operators to offer or sell converter boxes to subscribers to whom the operator “does *not* provide” additional receiver connections or “the equipment and materials for such connections.” 47 U.S.C. § 534(b)(7) (emphasis added). By contrast, the second sentence, which contains the “viewability” requirement, applies only to subscribers who *are* “connected to a cable system *by* a cable operator or for which a cable operator [*does*] provide[] a connection.” 47 U.S.C. § 534(b)(7) (emphasis added). Because the two sentences address different situations, the FCC reasonably explained that “allowing cable operators to satisfy the viewability obligation of the second sentence either without the use of additional equipment or by making equipment available at no cost or an affordable

⁶ Petitioners contend that by reversing course, the *Order* “violates the APA’s notice requirements.” Motion 14-15. But the *NPRM* expressly sought comment on “whether we should extend the viewability rule or permit it to sunset.” *NPRM* ¶ 9. And in seeking comment on alternative viewability proposals, the *NPRM* required parties to submit an analysis of how the proposals would “satisfy the statute.” *Id.* ¶ 16; *see Order* n.27; *Stay Order* ¶ 19. In any event, no notice was required. The viewability rule was scheduled to sunset by its own terms, and the *Order*’s interpretative ruling regarding the requirements of section 614(b)(7) itself is not subject to APA notice requirements. *See* 5 U.S.C. § 553(b)(A) (the APA notice requirements “do not apply . . . to interpretive rules”).

cost does not render the second sentence ‘irrelevant’ or ‘surplusage’ in light of the third sentence, which requires operators, in a more limited situation, to offer to sell or lease converter boxes to subscribers at regulated rates.” *Order* ¶ 9. The express reference to a converter box requirement in the third sentence of section 614(b)(7), but not the second, simply reflects Congress’s recognition that, while the cable operator must take whatever steps are necessary to ensure viewability when it provides the connection itself, it is not permitted to wash its hands of all viewability obligations when it authorizes the customer to supply its own connections. *See* S. Rep. No. 102-92, at 86 (describing obligations under second and third sentences).

Contrary to petitioners’ argument (Motion 7-8), the legislative history nowhere “confirms that the Act was intended to prevent local stations from being ‘located on a channel . . . that subscribers . . . cannot view without added equipment.’” (quoting S. Rep. No. 102-92, at 45). As explained in the *Stay Order* (at ¶ 14) the quoted language came from *questions* posed in a Senate Report associated with section 614, and thus “hardly constitutes a legislative ban on required equipment use in connection with must-carry channels.”⁷

Similarly, contrary to petitioners’ contention (Motion 8), Congress’s decision to reject the equipment-based A/B input selector switch as a sufficient

⁷ Petitioners’ reference to Congressional testimony of a broadcasting representative quoted in the corresponding House Report also is unavailing. Motion 8 n.10 (citing H. Rep. No. 102-68, at 55). That reported testimony complained of channel relocations – *without offsetting offers of equipment* – that had the effect of making certain channels unviewable.

means to ensure local broadcast stations' access to cable subscribers has no bearing on the FCC's interpretation that the offering of affordable DTAs by cable operators can lawfully ensure viewability under section 614(b)(7). The A/B switch "is a method of manually toggling between cable and broadcast programming to allow cable subscribers to watch broadcast programming not carried on cable." *Order* n.77. But the must-carry programming at issue here "will continue to be carried on the digital tier of the cable system," and "[t]here will be is no manual toggling involved" to access such stations. *Ibid.* Moreover, while the A/B switch was plagued with "technical problems," the record before the FCC here revealed no such problems – or any difficulties with customer acceptance – as to DTAs. *Ibid.*

Finally, given the FCC's conclusion that "allowing the viewability rule to sunset where the cable operator makes the digital signal available to its analog subscribers by offering the necessary equipment at an affordable cost" would *not* "diminish the availability or quality of broadcast programming," *Order* ¶ 11, there is no merit to petitioners' claim (Motion 9) that the FCC's interpretation of section 614(b)(7) is inconsistent with the purposes of the must-carry statute.

2. *Section 614(b)(4)(A)*. Contrary to petitioners' claims (Motion 11), the *Order* also is consistent with section 614(b)(4)(A)'s requirement that "the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal." 47 U.S.C. § 534(b)(4)(A). As the FCC explained, in its expert judgment, that provision speaks to signal quality "nondegradation" and "technical specifications," and there is no evidence that

carriage of must-carry signals only in digital format would result in lower signal quality. *Order* ¶ 10; *Stay Order* ¶ 15.

The FCC also reasonably rejected petitioners’ claim that the *Order*’s equipment-based viewability solution constituted discrimination in the “‘quality of . . . carriage provided’” within the meaning of section 614(b)(4)(A). Motion 12. Petitioners’ only support for expanding the scope of section 614(b)(4)(A) beyond the technical signal-quality issues reflected in the provision’s caption (“Signal Quality”) is a staff-level decision construing a *different* statutory provision, 47 U.S.C. § 338(d), that – unlike section 614(b)(4)(A) – is directed to “channel positioning” rather than “signal quality” and imposes a requirement of “nondiscriminatory” access by its terms. *See Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, 17 FCC Rcd 6065 (Media Bur. 2002) (construing 47 U.S.C. § 338(d)); *Stay Order* ¶ 16 & n.56.

3. *Section 623(b)(7)*. The agency also refuted petitioners’ claim (Motion 12-13) that the *Order* violates the “basic tier” requirement of section 623(b)(7) that must-carry signals be made available at the lowest priced tier, *see* 47 U.S.C. § 543(b)(7)(A)(i), because it may result in some subscribers paying an additional minimal charge for DTAs.

That claim “conflate[s] equipment fees with service fees.” *Stay Order* ¶ 18. “The two are regulated separately,” *ibid.*, and section 623(b)(3) – which authorizes the FCC to “establish . . . the price or rate for . . . installation and lease of the equipment used by the subscriber to receive the basic service tier,” 47 U.S.C. § 543(b)(3)(A) – expressly “contemplates that cable operators may charge for

equipment to access the basic service tier.” *Stay Order* ¶ 18. Thus, “so long as must-carry channels remain included in the basic tier of service, and the only additional fee for viewing such signals is the separate fee that customers might have to pay for equipment needed to view such signals, the basic tier requirement of Section 623 is met.” *Ibid.*

4. *The Transition Period.* Lastly, petitioners contend that the establishment of a six-month transition period was “arbitrary and capricious.” Motion 15. But as the FCC explained, establishing a six-month transition period before hybrid cable systems are permitted to carry must-carry signals only in digital format “will provide cable operators an opportunity to acquire an adequate supply of equipment for [affected] subscribers,” comply with FCC requirements governing notification of carriage and equipment changes, and give consumers “sufficient time to make any necessary arrangements.” *Order* ¶ 17.

There is no merit to petitioners’ contention that the *Order* unreasonably relies on voluntary notice commitments by “a limited number of cable operators.” Motion 15. Those companies (the eight largest incumbent cable operators, as well as a number of smaller providers) serve *over 90%* of the nation’s incumbent cable subscribers. *Order* ¶ 17 & nn.89-91.⁸ Moreover, their commitments are backed up by mandatory notice requirements already codified in FCC rules, *Order* ¶ 17 &

⁸ See <http://www.ncta.com/Stats/TopMSOs.aspx> (reporting subscribership data for the eight largest incumbent cable operators: Comcast, Time Warner Cable, Cox, Charter, Cablevision, Bright House, Suddenlink, and Mediacom); <http://www.ncta.com/Statistics.aspx> (reporting an industry total of 57.3 million cable video customers).

n.89, and, in any event, cable operators may not cease carrying analog must-carry signals unless and until they actually are providing affordable DTAs to subscribers. *Stay Order* ¶ 20.

II. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THEY WILL SUFFER IRREPARABLE INJURY.

A stay applicant must demonstrate irreparable injury that is “certain and great,” “actual and not theoretical,” and “of such *imminence* that there is a ‘clear and present’ need for equitable relief.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citations omitted). “[E]conomic loss does not, in and of itself, constitute irreparable harm. . . . ‘The key word in this consideration is *irreparable*.’” *Id.* at 674. And “revenues and customers lost to competition which can be regained through competition are not irreparable.” *Central & Southern Motor Freight Tariff Ass’n v. United States*, 757 F.2d 301, 309 (D.C. Cir. 1985).

Petitioners contend that the *Order* will cause them irreparable harm in the form of lost viewers, audience share, good will, advertising revenues, and programming resources. Motion 16-19. This unsupported claim ignores the fact that the *Order* has no impact at all on most (*i.e.*, digital cable) subscribers’ access to must-carry stations, is contrary to the FCC’s findings that expiration of the viewability rule would not “threaten the viability of must-carry stations,” and assumes a substantial loss of viewership even though the *Order* ensures that “subscribers on hybrid systems may continue to access [must-carry] signals at little or no additional expense.” *Order* ¶ 15; *see Stay Order* ¶ 23.

The only purported support petitioners provide for their injury claims consists of virtually identical declarations from seven broadcasting executives who assert, without providing any specifics, that their “experience in the digital television transition” suggests that viewers will not be aware of the impending change or will fail to acquire the equipment needed to view digital transmissions. *See* Motion, Exhibit A ¶ 3, Exhibit B ¶ 5, Exhibit C ¶ 5, Exhibit D ¶ 5, Exhibit E ¶ 5, Exhibit F ¶ 5, Exhibit G ¶ 5. The comparison is inapt. Because over-the-air viewers have no ongoing business relationship with broadcasters, during the DTV transition the entire burden of purchasing and installing the equipment necessary to enable analog television sets to receive over-the-air digital broadcast signals fell on viewers. Cable subscribers, by contrast, can simply accept their cable operators’ offer – which the *Order* compels – to supply DTAs at minimal (or no) cost and can request installation as well. The equipment-based viewability solution at issue here should be far easier to implement than the broadcast DTV transition was.

Petitioners’ speculation also largely ignores the fact that the *Order* provides them with six months to raise the awareness of their viewers about how to access their stations if they are moved to digital-only carriage. *Order* ¶¶ 17-18. Stations also will have at least 90 days’ notice that a change is actually occurring. *Id.* ¶ 17. And, apart from any steps broadcasters might prudently be advised to take to educate their viewers, cable operators must provide subscribers at least 30 days’ notice before converting the stations to digital-only format. *Id.* & n.89 (citing 47 C.F.R. § 76.1603(b)). In light of these protections, petitioners’ assertion that viewers will likely be unaware or confused about a station’s digital-only carriage

(Motion 16) is baseless. Nor do petitioners provide any foundation for their claim (*ibid.*) that, once made aware, viewers otherwise interested in a must-carry station's programming will not respond to offers of low cost (or no cost) DTAs.

III. A STAY WOULD HARM OTHER PARTIES AND THE PUBLIC INTEREST.

Finally, as the FCC reasonably determined, a stay would harm cable operators and many of their customers by denying cable systems relief from capacity constraints that result from requiring hybrid systems to transmit must-carry signals in both analog and digital format. *Stay Order* ¶ 24. A stay thus potentially would prevent cable operators from “meet[ing] fast-changing consumer demands for HD cable services and high-speed broadband services.” *Ibid.* By contrast, the FCC has found that the equipment-based viewability solution adopted in the *Order* should “ensur[e] subscribers continued access to must-carry channels.” *Ibid.*

CONCLUSION

For the foregoing reasons, the motion for stay pending review should be denied.

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August 30, 2012

ATTACHMENT

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

In the Matter of)	
)	
Carriage of Digital Television Broadcast)	CS Docket 98-120
Signals: Amendment to Part 76 of the)	
Commission's Rules)	

ORDER

Adopted: August 24, 2012

Released: August 24, 2012

By the Chief, Media Bureau:

I. INTRODUCTION

1. On August 1, 2012, Agape Church, Inc. (“Agape”), London Broadcasting Company (“London”), the National Association of Broadcasters (“NAB”), and Una Vez Mas, LP (“UVM”) (collectively, “Movants”) filed a petition¹ requesting a stay of the Commission’s *Fifth Report and Order* in this docket that allowed the Commission’s “viewability” rule to sunset as scheduled under the terms of the rule. The “viewability” rule required cable operators with hybrid systems either to convert to all-digital systems or to carry digital must-carry signals in an analog format for the benefit of analog-service customers.² The Movants seek a stay of the implementation of the *Fifth Report and Order* pending the completion of judicial review.³ For the reasons stated below, we deny the petition for stay.

II. BACKGROUND

2. Sections 614(b)(7) and 615(h) of the Communications Act of 1934, as amended (the “Act”), require cable operators to ensure that commercial and non-commercial must-carry broadcast stations are “viewable” or “available” to all cable subscribers.⁴ In the 2007 *Viewability Order*, in

¹ Agape Church, Inc., London Broadcasting Company, the National Association of Broadcasters, and Una Vez Mas, LP (collectively, “Movants”), Joint Motion for Stay, CS Docket No. 98-120 (filed August 1, 2012) (“Movants Petition”).

² *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No 98-120, Fifth Report and Order, 27 FCC Rcd. 6529 (2012) (“*Fifth Report and Order*”).

³ Movants Petition at 1. Movants have filed a joint petition for review of the *Fifth Report and Order* with the U.S. Court of Appeals for the District of Columbia Circuit. *Agape Church, Inc., London Broadcasting Company, the National Association of Broadcasters, and Una Vez Mas, LP v. FCC*, No. 12-1334 (D.C. Cir. docketed July 31, 2012). The *Fifth Report and Order* also extended for three more years the HD carriage exemption for eligible small cable system operators, but that decision is not the subject of the joint petition for review or of the instant stay request.

⁴ 47 U.S.C. § 534(b)(7), 535(h). Section 614(b)(7) of the Communications Act, which covers commercial stations, states that broadcast signals that are subject to mandatory carriage “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.” 47 U.S.C. § 534(b)(7). 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.” 47 U.S.C. § 535(h). As the Commission observed in the 2007 *Viewability Order*, although Sections 614(b)(7) and 615(h) use different language – *i.e.*, 614(b)(7) directs that signals shall be

anticipation of the approaching end of the digital television transition and in light of the state of technology and the marketplace, the Commission established a rule to ensure that, after the DTV transition, cable subscribers would continue to be able to view must-carry broadcast stations, as required by statute.⁵ The Commission was concerned that there would “continue to be a large number of cable subscribers with legacy, analog-only television sets after the end of the DTV transition.”⁶ In 2007, the Commission estimated that about 35 percent of all television homes, or approximately 40 million households, were analog-only cable subscribers.⁷ Although all cable systems were expected eventually to transition to all-digital systems, the Commission recognized that there may be two different types of cable systems in operation for some period of time after completion of the DTV transition.⁸ Some operators may choose to deliver programming in both digital and analog format (“hybrid systems”), *i.e.*, in addition to a digital tier, the operator would offer an analog tier and continue to provide local television signals and, in some cases, a subset of cable channels, to analog receivers in a format that does not require additional equipment.⁹ Other operators may choose to operate or transition to all-digital systems, providing cable service in only digital format.¹⁰ Therefore, the Commission adopted a rule providing cable operators of hybrid systems two options to comply with the statutory viewability requirement for must-carry broadcast television stations: (1) carry the digital signal in analog format to all analog cable subscribers in addition to any digital version carried, or (2) transition to an all-digital system and carry the signal only in digital format, provided that all subscribers have the necessary equipment to view the broadcast content.¹¹

3. The Commission did not make the viewability rule permanent. Instead, the Commission decided to have the rule remain in force for three years after the date of the digital transition, subject to review by the Commission during the last year of the three-year period.¹² With respect to the viewability rule, the Commission stated that, “[i]n light of the numerous issues associated with the transition, it is important to retain flexibility as we deal with emerging concerns.”¹³ The Commission explained that a three-year sunset “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.”¹⁴ The Commission identified certain factors it believed would be relevant to its later review, including digital cable penetration, cable deployment of digital set-top boxes with various levels of processing capabilities, and cable system capacity constraints.¹⁵

“viewable” whereas 615(h) directs that signals shall be “available” – the Commission consistently has treated them as imposing identical obligations. *Viewability Order*, 22 FCC Rcd at 21070, ¶ 15, n.36.

⁵ See generally *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No 98-120, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 (2007) (“*Viewability Order*”).

⁶ *Id.* at 21065, ¶ 1.

⁷ *Id.* at 21065, n.3.

⁸ *Id.* at 21072, ¶ 20.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 47 C.F.R. § 76.56(d)(3).

¹² *Viewability Order*, 22 FCC Rcd at 21070, ¶ 16.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at n. 39.

4. The full-power digital television transition was successfully completed on June 12, 2009, after Congress chose to delay it from the originally scheduled conclusion on February 17, 2009. Accordingly, under the terms of the 2007 *Viewability Order*, absent Commission action, the viewability rule was scheduled to, and ultimately did, sunset on June 12, 2012.¹⁶

5. On February 10, 2012, the Commission initiated the Fourth Further Notice of Proposed Rulemaking (“*Fourth FNPRM*”) in this docket to determine whether it would be in the public interest to retain the viewability rule, given the current state of technology and the marketplace.¹⁷ Notably, the *Fourth FNPRM* sought “comment on how the sunset of the viewability requirement would impact the financial resources of must-carry stations” and sought “specific information that [would] allow [the Commission] to build a solid record that supports either the retention or the sunset of the viewability rule.”¹⁸ In addition, the *Fourth FNPRM* specifically sought comment on possible alternatives to the viewability rule and specifically asked for parties to include a statutory analysis with any proposals for changing the viewability rule.¹⁹ In response to the *Fourth FNPRM*, the Commission received nine comments (four comments and five reply comments) during the official comment period in this proceeding and numerous *ex parte* submissions after the official comment cycle ended. Of the Movants, only NAB filed comments within the official comment period.²⁰

6. On June 12, 2012, the Commission released the *Fifth Report and Order* in this docket and found that it was in the public interest to allow the viewability rule to sunset as scheduled. The *Fifth Report and Order* determined that the statutory term “viewable” is an ambiguous term. It then adopted a reasonable interpretation of the statutory text that best effectuates the statutory purpose in light of current marketplace conditions and technology developments that had occurred over the past five years. For example, the Commission observed that 80 percent of cable customers now subscribe to digital cable service and noted the widespread availability of small digital set-top boxes that cable operators are making available at low cost (or no cost) to analog customers of hybrid systems. The *Fifth Report and Order* reinterpreted the statutory viewability requirement to permit cable operators of hybrid systems to require the use of set-top equipment to view must-carry signals, provided that such equipment is both available and affordable (or provided at no cost). In this connection, the Commission found that small, limited-capability set-top boxes, called “Digital Transport Adapters” (“DTAs”) can be made available at affordable cost. The Commission found that the range of charges reflected in the record for DTAs – *i.e.*, free or a monthly fee of no more than \$2 – would satisfy the requirement for affordable equipment because the minimal additional cost, if any, is unlikely to discourage use of this equipment. The

¹⁶ *Id.* at ¶ 16.

¹⁷ *Carriage of the Transmissions of Digital Television Broadcast Stations: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, 27 FCC Rcd 1713, 1714, ¶ 3 (2012) (*Fourth FNPRM*). The *Fourth FNPRM* expressly sought comment on “whether [the Commission] should extend the viewability rule or permit it to sunset,” noting that the proceeding “provides an opportunity for [the Commission] to consider whether extending this rule best fulfills the statutory mandate, by reviewing it ‘in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace.’” *Id.* at 1717, ¶ 9.

¹⁸ *Id.* at 1718, ¶ 10.

¹⁹ *See Id.* at 1721, ¶ 16 (“[W]e seek comment on any other proposals that would achieve the results necessary to assure the viewability of must-carry signals through an approach different than that of our existing rule. To the extent any parties find the current rule burdensome, we seek comment on proposals that will satisfy the statute in a less burdensome manner. Is any rule necessary to effectuate the statutory intent? If so, any proposals for an alternative rule to ensure the actual viewability of must-carry signals should include specific proposed wording, as well as an analysis of how the proposal is consistent with the statute.”).

²⁰ The *Fourth NPRM* afforded 35 days after the date of publication in the Federal Register for parties to file comments and replies. The official comment period closed March 22, 2012.

Commission determined, however, that materially higher leasing fees could deter subscriber willingness to order the equipment needed to ensure viewability on a hybrid cable system. Accordingly, it ruled that such fees would not meet the statutory viewability requirement as the Commission interpreted it.²¹

7. Therefore, until a hybrid cable system operator completes its transition to all-digital service, it may comply with the statutory viewability requirement in two ways. The operator must deliver a must-carry signal in a format that is capable of being viewed by analog customers either (1) without the use of additional equipment or (2) alternatively with equipment made available by the cable operator at no cost or at an affordable cost that does not substantially deter use of the equipment. The *Fifth Report and Order* established a transitional period of six months after expiration of the current rule – that is, until December 12, 2012 – during which hybrid systems are required to continue to carry the signals of must-carry stations in analog format to all analog cable subscribers. This post-sunset transitional period gives cable operators an opportunity to acquire an adequate supply of the necessary equipment and time to comply with notification requirements to affected broadcasters and customers about changes in carriage. In addition, the transitional period gives affected must-carry stations sufficient time to communicate with their viewers and gives subscribers time regarding any arrangements necessary to continue viewing a station’s signal after changes in cable carriage.²²

8. The Movants seek to stay the implementation of the *Fifth Report and Order* until the D.C. Circuit Court of Appeals acts on their petition for review.²³ The National Cable & Telecommunications Association (“NCTA”) filed an opposition to the Movants’ motion for stay.²⁴ For the reasons discussed below, we deny the Movants’ petition for stay.

III. DISCUSSION

9. In determining whether to stay the effectiveness of one of its orders, the Commission applies the four-factor test established in *Virginia Petroleum Jobbers Ass’n v. FPC*, as modified in *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*²⁵ Under this standard, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.²⁶ The relative importance of the four criteria will vary depending on the circumstances of the case,²⁷ but a showing of irreparable injury is generally a critical element in justifying a request for stay of an agency order.²⁸

10. In the instant case, we conclude that the Movants have satisfied none of the four factors

²¹ *Fifth Report and Order* at ¶ 14.

²² *Fifth Report and Order* at ¶ 17.

²³ Movants Petition at 1.

²⁴ National Cable & Telecommunications Association (“NCTA”), Opposition to Joint Motion for Stay, CS Docket No. 98-120 (filed August 8, 2012) (“NCTA Opposition”).

²⁵ *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“*Virginia Petroleum*”); *Washington Metropolitan Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (“*Washington Metro*”).

²⁶ *Virginia Petroleum*, 259 F.2d at 925; *Washington Metro*, 559 F.2d at 843; see also *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (“*Winter*”).

²⁷ See, e.g., *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

²⁸ See *Winter*, 555 U.S. at 22 (“Our frequently reiterated standard requires plaintiffs seeking an injunction to demonstrate that irreparable injury is *likely* in the absence of an injunction.”); see also *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying requests for stay after considering only the second factor) (“*Wisconsin Gas*”).

in the stay calculus. They fail at the outset to demonstrate that they are likely to prevail in the merits of their claims. Nor have they demonstrated irreparable injury to themselves absent a stay, the absence of harm to other interested parties if a stay is granted, or that a stay would serve public interest. Accordingly, we find that a stay is not warranted.

A. The Movants Are Unlikely to Prevail on the Merits

11. The Movants have failed to show that they will likely prevail on the merits. The Movants contend that they are likely to succeed on the merits because “Section 614(b)(7) clearly requires ‘must-carry’ signals be actually viewable” without additional equipment.²⁹ The Commission rejected this argument in the *Fifth Report and Order*.³⁰ Nothing in the language of the statute plainly prohibits cable operators from offering equipment to satisfy the viewability requirement, *i.e.*, the statutory sections at issue do not state that a signal is not “viewable” if the consumer needs to use additional equipment. Accordingly, we disagree with the Movants that Section 614(b)(7) unambiguously requires that cable subscribers must be capable of viewing must-carry signals without the use of additional equipment. As the Commission concluded in the *Fifth Report and Order*, the term “viewable” can reasonably be read to mean that the operator must make the broadcast signal available or accessible to its subscribers by an effective means, which may include offering the necessary equipment for sale or lease, either for free or at an affordable cost that does not substantially deter use of the equipment.³¹ This interpretation is reasonable in light of marketplace changes that have occurred over the past five years. This reading ensures access to must-carry stations as a practical matter – rather than just a theoretical option dependent on the customer’s willingness to incur significant additional effort and expense. It is consistent with both the ordinary meaning of the word “viewable” – defined as “capable of being seen or inspected”³² – and also prior interpretations of the Communications Act.³³ Accordingly, we disagree with broadcasters’ sweeping arguments that requiring any sort of equipment use at all by subscribers would be “contrary to the statute” and “flatly inconsistent” with Section 614(b)(7).³⁴

12. Indeed, even NAB conceded before the Commission that it is consistent with the statutory language for a signal to be accessible with the use of additional equipment. Specifically, NAB suggested that a cable operator could satisfy the statutory viewability requirement by providing “free equipment to subscribers that enables access to digital broadcast signals for a period of three years,” which acknowledges that the statute is not as inflexible as the Movants now assert in their petition for

²⁹ Movants Petition at 6-7.

³⁰ See *Fifth Report and Order* at ¶ 8.

³¹ See, *e.g.*, TWC Comments at 4 (“A station plainly is capable of being viewed if it can be seen with the purchase or lease of equipment (such as a set-top box or digital terminal adapter)”).

³² See Webster’s Third New International Dictionary 2551 (1993).

³³ See, *e.g.*, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶ 16 (1994) (“Where a cable operator chooses to provide subscribers with signals of must-carry stations through the use of converter boxes supplied by the cable operator, the converter boxes must be capable of passing through all of the signals entitled to carriage on the basic service tier of the cable system, not just some of them. In addition, any converter boxes provided for this purpose must be provided *at rates* in accordance with Section 623(b)(3). Therefore, in a situation where the subscriber’s converter is supplied by the cable operator, and is incapable of receiving all signals as required by Section 614(b)(7), the cable operator must make provision for a converter which is capable of providing these signals.” (emphasis added)).

³⁴ See NAB *Ex Parte* (dated April 13, 2012) at 1. See also ION Media Networks *Ex Parte* (dated Apr. 27, 2012) at 1; Affiliates Associations *Ex Parte* (dated May 9, 2012) at 1; FOX Affiliates Association *Ex Parte* (dated May 14, 2012) at 1 (arguing that “the viewability rule is dictated by the plain meaning of [Section 614(b)(7)]”). See *Fifth Report and Order* at ¶ 8 (rejecting these same arguments).

stay.³⁵ Once one acknowledges that equipment may be required, we see no basis in the statutory text to distinguish between offering that equipment for free or at a nominal fee. We thus find that the term “viewable” does not unambiguously *require* that must-carry stations be capable of being seen without the use of additional equipment.³⁶ In reaching this conclusion, we note that an agency may change its interpretation of an ambiguous statutory provision and that such a revised interpretation is entitled to deference.³⁷

13. The Movants also assert that the *Fifth Report and Order*’s “new interpretation is at odds with the statutory structure because it renders the distinction between the second and third sentences of Section 614(b)(7) meaningless.”³⁸ The Commission rejected this argument, as well, in the *Fifth Report and Order*.³⁹ The first sentence of Section 614(b)(7) requires that each must-carry signal “shall be provided to every subscriber to a cable system.”⁴⁰ As the Commission has explained, this provision requires that every class of subscriber must receive all must-carry signals.⁴¹ Cable operators have complied with this requirement through the use of a basic service tier,⁴² *i.e.*, a level of service to which a viewer must subscribe in order to be eligible for access to any other tier of service at additional charge.⁴³ The second sentence of Section 614(b)(7) is concerned with a subscriber’s ability actually to “view” the must-carry signals that have to be provided under the first sentence. The second sentence of Section 614(b)(7) is also a distinct mandate from the third sentence, as the Commission observed in both the 2007 *Viewability Order* and *Fifth Report and Order*.⁴⁴ The second sentence covers “all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator

³⁵ See NAB *Ex Parte* (dated May 23, 2012) at 2-3; see also Consumers Union *Ex Parte* (dated June 5, 2012) at 1 (noting that, if the Commission “chooses to revise the [viewability] rule, it should require the availability of set-top boxes at no cost to the consumer.”). We note that in an *ex parte* dated June 8, 2012, NAB sought to “withdraw” its statement that cable operators may satisfy their viewability obligations by providing free equipment to subscribers. See NAB *Ex Parte* (dated June 8, 2012).

³⁶ See *Fifth Report and Order* at ¶ 8. See also TWC Comments at 4.

³⁷ See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863 (1984) (“The fact that the agency has from time to time changed its interpretation of the term ‘source’ does not, as respondents argue, lead us to conclude that no deference should be accorded the agency’s interpretation of the statute.”); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.... But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”) See *Fifth Report and Order* at ¶ 8.

³⁸ Movants Petition at 6-7.

³⁹ See *Fifth Report and Order* at ¶ 9.

⁴⁰ *Id.*

⁴¹ See, e.g., *Analog Must Carry Order*, 8 FCC Rcd at 2974, ¶ 34 (1993) (declining request for a special exception for commercial subscribers (e.g., hotels and hospitals) that receive specially designed channel line-ups; finding the Act is clear in its application of 614(b)(7) to every subscriber of a cable system and that it grants no authority to exempt specific classes of cable subscribers from the carriage requirements).

⁴² See *1996 OVS Order*, 11 FCC Rcd at 18308-09, ¶ 163 (1996) (recognizing that cable operators have complied with the must-carry rules through the use of a basic tier, but allowing OVS operators to comply with the must-carry rules without necessarily using a basic tier, reasoning that OVS operators “may discover alternate methods to ensure that subscribers receive all appropriate must-carry channels”).

⁴³ 47 U.S.C. § 543(b)(7)(A).

⁴⁴ See *Viewability Order*, 22 FCC Rcd at 21073, ¶ 22; *Fifth Report and Order* at ¶ 9.

provides a connection,” whereas the third sentence covers the situation 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.”⁴⁵ Because of this difference, allowing cable operators to satisfy the viewability obligation of the second sentence either without the use of additional equipment or by making equipment available at no cost or an affordable cost does not render the second sentence “irrelevant” or “surplusage” in light of the third sentence, which requires operators, in a more limited situation, to offer to sell or lease converter boxes to subscribers at regulated rates. In short, the second sentence as interpreted by the Commission is different in scope and substance from the requirement set forth in the third sentence, which requires cable operators to offer or sell converter boxes to certain subscribers “at rates in accordance with section 623(b)(3).”⁴⁶

14. We disagree, as well, with the Movants’ contention that “the legislative history confirms that the Act was intended to prevent local stations from being ‘located on a channel . . . that subscribers . . . cannot view *without added equipment*.’”⁴⁷ The Movants’ selective quotation of the Senate Report distorts its meaning. In considering methods by which cable operators could exercise market power, the Senate Committee merely posed questions which included “Will the station be located on a channel different from the one assigned by the FCC for over-the-air service or on a channel location that subscribers rarely view or cannot view without added equipment?”⁴⁸ The posing of that question hardly constitutes a legislative ban on required equipment use in connection with must-carry channels. Indeed, such an interpretation would be inconsistent with rate regulation provisions of the Act, which expressly contemplate use of equipment by subscribers receiving the basic service tier – a tier that includes must-carry channels.⁴⁹ As NCTA points out, conversion to all-digital systems, which indisputably is permissible, would require additional equipment use in connection with analog television sets.⁵⁰

15. The Movants further argue that allowing cable operators to satisfy the viewability requirement by providing equipment conflicts with the “signal quality” provision in Section 614(b)(4)(A), and in particular the requirement that “the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.”⁵¹ The Commission also rejected this argument in the *Fifth Report and Order*.⁵² The Commission observed that Section 614(b)(4)(A) speaks specifically to the issue of signal quality “nondegradation” and “technical specifications” and does not address the issue of “viewability.”⁵³ The Movants, moreover, have not shown that carrying must-carry signals only in a digital format would violate the “nondegradation” and “technical specification” requirements of 614(b)(4)(A). From a technical standpoint, a must-carry signal carried in standard definition (SD) arguably has the same “quality of signal processing and carriage” as a signal carried in analog format, because both versions received at the headend should have the same resolution – 480i – and thus there

⁴⁵ 47 U.S.C. § 534(b)(7).

⁴⁶ 47 U.S.C. § 534(b)(7).

⁴⁷ Movants Petition at 6 (quoting S. Rep. No. 102-92, at 44, 45) (emphasis supplied by the Movants).

⁴⁸ S. Rep. No. 102-92, at 45.

⁴⁹ See 47 U.S.C. § 543(b)(3)(A) (regulations prescribed by the Commission “shall include standards to establish, on the basis of actual cost, the price or rate for – installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit. . .”); 47 U.S.C. § 543(b)(7) (listing must-carry channels as among the required components of the basic service tier).

⁵⁰ NCTA Opposition at 4.

⁵¹ Movants Petition at 9-10.

⁵² See *Fifth Report and Order* at ¶ 10.

⁵³ *Id.*

should be no perceptible difference between them.⁵⁴ Furthermore, there is no evidence in the record to suggest that cable operators intend to use digital compression or other bandwidth saving techniques to “degrade” must-carry signals in such a way as to affect the subscriber’s viewing experience.⁵⁵

16. The Movants, however, suggest that this statutory provision extends beyond issues of signal quality, saying that the *Fifth Report and Order* ignored a statutory bar on discrimination in the “quality of ... carriage provided.”⁵⁶ We disagree with Movants’ claim of such a statutory bar. Movants only support for this assertion is a Media Bureau decision interpreting a *different* statutory provision, Section 338(d), which applies to satellite carriage of local broadcast stations. We find that Bureau decision (which in all events was not binding on the Commission) to be irrelevant to the proper interpretation of Section 614(b)(4)(A). Rather, we agree with NCTA that this provision “is all about the comparative signal quality of must-carry signals and other signals carried on a cable system.”⁵⁷ As NCTA observes in its Opposition, “Section 614(b)(4) is captioned ‘Signal Quality,’ and Section 614(b)(4)(A) is captioned ‘Nondegradation; Technical Specifications.’”⁵⁸

17. The Movants assert that the *Fifth Report and Order* departs from the Commission’s settled interpretation of the statute “absent reasoned explanation.”⁵⁹ The Movants argue in this regard that “nothing in the language of Section 614 has changed” and therefore the Commission’s interpretation should not change.⁶⁰ In addition, the Movants contend that the interpretation is inconsistent with the fundamental purpose of must-carry.⁶¹ We disagree with the Movants’ assertions. As noted above, the Commission did not make the viewability rule permanent. Rather, the Commission established the rule

⁵⁴ *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Fourth Report and Order, 23 FCC Rcd 13618, 13620, ¶ 5 (2008) (“*Fourth Report & Order*”). See *Fifth Report and Order* at ¶ 10.

⁵⁵ *Id.*

⁵⁶ Movants Petition at 10 (citing National Association Of Broadcasters And Association Of Local Television Stations; Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, CSR-5865-Z1, Declaratory Ruling and Order, 17 FCC Rcd. 6065, 6076, ¶ 23 (MB 2002), vacated in part by Memorandum Opinion and Order, 22 FCC Rcd. 16074 (MB 2007)). In the 2002 Declaratory Ruling, the Media Bureau found that EchoStar’s “two-dish” plan – a practice of placing some, but not all, local stations in a market on a “wing” satellite that necessitated subscriber use of a second satellite dish antenna – violated Section 338(d) of the Act. 47 U.S.C. § 338(d) (A satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers “on contiguous channels and provide access to such station’s signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.”). The Declaratory Ruling, however, did not specifically prohibit a two-dish approach, but instead ordered EchoStar to comply with various remedial measures to eliminate the unlawful discrimination. There was no Commission-level review of the Bureau’s 2002 Declaratory Ruling. See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (absent an order on review, there is no way to know how the Commission would have ruled on the issue). Subsequent to the Bureau’s ruling, Congress amended the statute to specifically prohibit the two-dish approach. See 47 U.S.C. § 338(g). See also 47 U.S.C. § 338(g)(1) (“Each satellite carrier that retransmits the analog signals of local television broadcast stations in a local market shall retransmit such analog signals in such market by means of a single reception antenna and associated equipment.”). Section 338(g)(2) provides an exception to this requirement in the case of local digital signals by allowing satellite carriers to retransmit local digital channels to subscribers by means of a separate dish, provided they transmit all local digital channels to the same dish. See 47 U.S.C. § 338(g)(2). In 2007, in light of the amendment to the statute, the Bureau vacated its Declaratory Ruling to the extent that it concluded that EchoStar’s former two-dish approach could comply with the statutory requirements.

⁵⁷ NCTA Opposition at 10.

⁵⁸ NCTA Opposition at 10 (quoting 47 U.S.C. § 534(b)(4)).

⁵⁹ Movants Petition at 8-9.

⁶⁰ Movants Petition at 9.

⁶¹ Movants Petition at 7-8.

for three years based on the marketplace conditions at the time (the uncertainty surrounding the advent of the digital television transition as well as the unavailability of low-cost DTAs) and determined to reevaluate the rule three years after the DTV transition in light of then-existing marketplace conditions. Subsequently, in the *Fifth Report and Order*, the Commission chose a reasonable interpretation of the statutory text that best effectuates the statutory purpose in light of current marketplace conditions.⁶² Moreover, the Commission explained that the doctrine of constitutional avoidance⁶³ counseled it to interpret the Act as not imposing a rigid analog-carriage requirement on cable operators, where the record established a reasonable, less burdensome alternative that meets the statutory objectives.⁶⁴ Specifically, the Commission was persuaded by cable commenters' arguments that the dramatic changes in technology and the marketplace over the past five years render less certain the constitutional foundation for an inflexible rule compelling carriage of broadcast signals in both digital and analog formats.⁶⁵ The Commission found that the current record lacked evidence that limiting cable operators' discretion by requiring both digital and analog carriage of the same broadcast station content was necessary to protect the viability of over-the-air broadcasting where an affordable set-top box option that will achieve the same viewability was readily available to customers.⁶⁶ Nor was there evidence showing that allowing the viewability rule to sunset where the cable operator makes the digital signal available to its analog subscribers by offering the necessary equipment at an affordable cost would diminish the availability or quality of broadcast programming.⁶⁷ The Commission thus found that the burden placed on cable operators by the 2007 viewability rule was not justified on the current record, which demonstrated that a less burdensome alternative was available.⁶⁸

18. The Movants also assert that the *Fifth Report and Order* "is inconsistent with the basic tier requirements" in Section 623(b)(7) that all broadcast signals be available in the lowest price tier because, without the viewability rule, cable subscribers may be required to pay more for access to must-carry broadcast stations" due to added equipment fees.⁶⁹ We disagree. The Movants conflate equipment fees with service fees. The two are regulated separately. Section 623(b)(3) contemplates that cable operators may charge for equipment to access the basic service tier.⁷⁰ We agree with NCTA that so long as must-carry channels remain included in the basic tier of service, "and the only additional fee for viewing such signals is the separate fee that customers might have to pay for equipment needed to view

⁶² *Fifth Report and Order* at ¶ 11. See, e.g., *NCTA v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) ("ambiguity in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion").

⁶³ See *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (it is a "well-established principle that statutes will be interpreted to avoid constitutional difficulties").

⁶⁴ *Fifth Report and Order* at ¶ 11. See TWC Comments at 7-8 ("particularly in light of significant First Amendment concerns presented by the Commission's viewability mandate, the Commission should allow that mandate to sunset as planned"); Bright House Reply at 9 ("The realities of today's video marketplace render obsolete any logical basis for burdening the First Amendment rights of cable operators and limiting the viewing options of cable customers by continuing to insist that hybrid cable systems not only carry must-carry signals, but carry them in analog"); but see NAB Reply Comments at 7-9; NAB *Ex Parte* (dated April 13, 2012) at 3-4 ("cable operators offer no evidence that the impact of the viewability rule on their First Amendment rights has materially changed since 2007; indeed, as more cable systems increase capacity or convert to digital, the actual impact of the rule will steadily decrease").

⁶⁵ *Fifth Report and Order* at ¶ 11.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Movants Petition at 10-11.

⁷⁰ 47 U.S.C. § 543(b)(3).

such signals, the basic tier requirement of Section 623 is met.”⁷¹ In any event, under the Commission’s *Fifth Report and Order*, any necessary equipment will be provided by the cable operator for free or at an affordable cost that does not substantially deter use of the equipment.⁷²

19. The Movants also assert that the *Fifth Report and Order* violates the Administrative Procedure Act (APA) for several reasons.⁷³ We reject each in turn. Contrary to the Movants’ assertion, the *Fifth Report and Order* did provide a detailed explanation for its reinterpretation of the statute. After consideration of the statutory arguments raised by the parties, and on further review of the statute, the Commission found that rapid changes in the marketplace and technology – in particular, the widespread availability of small digital set-top boxes that cable operators are making available at low cost (or no cost) to analog customers of hybrid systems – provide alternative means by which must-carry television signals can be made viewable to all analog customers who are served by hybrid cable systems.⁷⁴ The Movants also argue that “greater evidence of DTA availability was required.”⁷⁵ We disagree, and reiterate that the availability of affordable set-top boxes is a pre-condition for hybrid cable operators to stop carrying must-carry stations in analog format. To be clear, a hybrid operator may stop carrying the analog signal of a must-carry station *only* if it is making affordable set-top equipment available to its subscribers. The Movants also argue that the *Fifth Report and Order* violates the APA’s notice requirements because it adopted an equipment-based approach that the NPRM observed was previously rejected by the Commission in the 2007 *Viewability Order*.⁷⁶ We disagree. While noting the Commission’s prior rejection of an equipment-based approach, the *Fourth FNPRM* specifically sought comment on possible alternatives to the viewability rule, including on proposals that would satisfy the statute in a less burdensome manner.⁷⁷ In response, cable commenters generally argued that offering to sell or lease equipment to consumers would satisfy the statute, and specifically argued that the availability of DTAs that provide analog customers access to digital must-carry signals makes the Commission’s viewability rule obsolete.⁷⁸

20. The Movants also argue that the *Fifth Report and Order*’s “conclusion that six months will allow a ‘smooth transition’ is arbitrary and capricious.”⁷⁹ The Commission found in the *Fifth Report and Order* that six months struck an appropriate balance by easing the burden on cable operators while affording broadcasters and cable operators alike sufficient time to prepare their operations and consumers for the changes in carriage. Indeed, we note that the viewability rule was scheduled to sunset on June 12,

⁷¹ NCTA Opposition at 11. NCTA observes that “[t]he fact that some customers might have to acquire additional equipment to view some but not all signals (including some must-carry signals) in the mandatory basic tier has never been viewed as violative of the basic tier requirement.” *Id.* NCTA further explains that “customers without cable ready television sets used to have to obtain converter boxes (for which they were required by the rate regulation rules to pay an additional fee) to view any basic tier services provided on channels other than the 12 channels that could be tuned directly by their sets. Yet cable operators were never required to place all must-carry signals on channels 2-13 in order to comply with the basic tier requirement. In fact, the statute gives must-carry broadcasters the option of channel placement on their over-the-air channel number – which, in many cases, is a UHF channel number that cannot be tuned without a cable ready set or an additional set-top converter box.” *Id.*

⁷² See *Fifth Report and Order* at ¶ 11.

⁷³ Movants Petition at 11.

⁷⁴ See *Fifth Report and Order* at ¶ 2.

⁷⁵ Movants Petition at 12.

⁷⁶ Movants Petition at 12 *citing* 5 U.S.C. § 553(b)(3).

⁷⁷ See *Fourth FNPRM*, 27 FCC Rcd at 1721, ¶ 16.

⁷⁸ NCTA Comments at 12 (“DTAs could be used to receive digital must-carry signals”).

⁷⁹ Movants Petition at 12-13.

2012, without any additional transitional period. We further reiterate that hybrid cable operators may not terminate analog carriage without first making set-top boxes available to subscribers at no cost or at an affordable cost. The Movants also argue that the *Fifth Report and Order* “undermines, rather than promotes” the purpose of the viewability rule “by allowing hybrid operators simply to drop analog must-carry signals rather than completing the transition to all-digital systems.”⁸⁰ We disagree. The interpretation of the statutory viewability requirement will continue to ensure that all must-carry television signals will remain viewable to all analog customers who are served by hybrid systems, while easing burdens on cable operators. We also expect that all operators will eventually transition to all-digital systems, but note that doing so is a business decision at a cable operator’s discretion.

B. The Movants Would Not Suffer Irreparable Harm

21. The Movants fail to show that they would be irreparably harmed if a stay is not granted. In claiming irreparable harm, the Movants assert that, absent a stay, “must-carry broadcasters likely will lose viewership and audience share”⁸¹ and “Movants will lose advertising revenues that cannot be recouped” even absent actual losses in viewership.⁸² Movants claim that, because any effort to quantify loss in overall corporate value for must-carry broadcasters would be “exceedingly speculative,” the loss is thus irreparable.⁸³ The Movants further assert that must-carry broadcasters “will suffer irreparable competitive injury” and, in particular, must-carry broadcasters serving niche audiences will be disproportionately adversely impacted.⁸⁴

22. To warrant injunctive relief, an injury must be “both certain and great; it must be actual and not theoretical.”⁸⁵ Petitioners must provide “proof indicating that the harm [they allege] is certain to occur in the near future.”⁸⁶ Moreover, economic loss does not, by itself, constitute irreparable harm

⁸⁰ Movants Petition at 13.

⁸¹ Movants Petition at 13-14.

⁸² Movants Petition at 14.

⁸³ *Id. citing CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673-74 (D.C. Cir. 2005). The Movants’ reliance on the D.C. Circuit’s decision in *CSX Transp.* is unavailing to establish “irreparable injury.” In that case, the D.C. Circuit granted a rail carrier’s request for a preliminary injunction of a D.C. law that would prohibit rail transport of certain hazardous materials within a two mile zone around the U.S. Capitol building. Although the court in *CSX Transp.* observed that “it would be exceedingly speculative ... to place a dollar figure” on the petitioner’s injury, it was not merely the inability to calculate an exact dollar amount that established “irreparable injury” in that case. *Id.*, 406 F.3d at 673. Rather, in that case, the court found “irreparable injury” based on the petitioner’s specific evidence demonstrating that the D.C. law being challenged would constrain petitioner’s railroad operations by “significantly decreas[ing] the capacity and flexibility” of the petitioner’s rail network. *Id.* Here, by contrast, the Movants have offered no specific evidence of injury, relying instead on speculative claims of economic loss based on concerns of total loss of analog viewers and possible declines in advertising revenue. Movants’ assumptions, however, fail to take into account the measures adopted in the *Fifth Report and Order* that are designed to minimize, if not eliminate, any disruption to viewing must-carry stations, including that hybrid cable operators must first make the necessary equipment available to subscribers before they can stop carrying must-carry channels in analog format, the equipment must be offered at no cost or at an affordable cost that does not substantially deter use of the equipment, and hybrid cable operators must comply with notification requirements to affected broadcasters and customers before making changes in carriage of must-carry stations. In addition, the six-month transitional period adopted by the Commission provides affected must-carry stations an opportunity to conduct public outreach efforts directly to their viewers to inform them about any upcoming carriage changes..

⁸⁴ Movants Petition at 15-16.

⁸⁵ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

⁸⁶ *Id.*

unless it threatens the very existence of the movant's business.⁸⁷

23. The Movants' irreparable injury argument does not meet this exacting standard. The fact that equipment may be necessary at no cost or an affordable cost does not result in "irreparable injury" to must-carry broadcasters. Congress specifically contemplated that equipment might be required for subscribers to receive the basic service tier – a tier which includes must-carry channels.⁸⁸ In any event, the Movants largely repeat claims about loss of viewers and advertising revenues that the Commission rejected in its *Fifth Report and Order* factual findings. Most notably, the Commission in the *Fifth Report and Order* rejected the broadcasters' claims that allowing the viewability rule to expire on schedule will threaten the economic viability of must-carry stations.⁸⁹ According to the broadcasters, approximately 12.6 million households receive only analog cable service, representing approximately 11 percent of all U.S. television households, and removing that percentage of a station's audience "could well have a profound impact on affected stations."⁹⁰ But the Commission concluded that this analysis improperly assumed that elimination of the rule would automatically result in the broadcaster's signal being unavailable to analog subscribers.⁹¹ The Commission found that the analysis failed to take into account that analog customers will be able to continue to access must-carry channels (as well as other programming offered by the cable operator in digital format) through free or affordable equipment made available by the cable operator.⁹² The Commission determined that its statutory interpretation – which hinges on a cable operator's making equipment available at no cost or an affordable cost⁹³ – will ensure that subscribers on hybrid systems can continue to access these signals at little or no additional expense.⁹⁴ A must-carry signal carried only in digital format will still be included in the basic service tier; analog cable subscribers will not be required to subscribe to an enhanced tier of service to view the digital version of a must-carry channel. The Commission also noted that the significance of this issue is expected to diminish over time given that the number of analog cable subscribers is expected to continue to decrease as more cable customers choose to upgrade to full digital service and as more hybrid cable systems complete their transition to all-digital transmission.⁹⁵ We also note that hybrid system cable

⁸⁷ *Id.*; see also *Brady v. National Football League*, 640 F.3d 785, 794-95 (8th Cir. 2011).

⁸⁸ See 47 U.S.C. § 543(b)(3)(A) (regulations prescribed by the Commission "shall include standards to establish, on the basis of actual cost, the price or rate for – installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit..."); 47 U.S.C. § 543(b)(7) (listing must-carry channels as among the required components of the basic service tier).

⁸⁹ *Fifth Report and Order* at ¶ 15.

⁹⁰ See also NAB *Ex Parte* (dated April 23, 2012) Attachment at 2. Notably, the broadcasters' financial impact showing was not submitted during the official comment period, despite the NPRM's clear request for such information. *Fourth NPRM* at 1718, ¶ 10. Nonetheless, the Commission considered NAB's economic analysis, but found it unpersuasive. *Fifth Report and Order* at ¶ 15.

⁹¹ *Fifth Report and Order* at ¶ 15. See NCTA *Ex Parte* (dated April 26, 2012) at 2.

⁹² *Fifth Report and Order* at n. 52.

⁹³ We note that the available DTA (or similar equipment) will provide subscribers equivalent access to all cable programming, including must-carry stations.

⁹⁴ We note that subscribers served by analog-only systems will not be impacted by the sunset of the viewability rule because those systems are required to continue to carry must-carry channels in analog format. See 47 C.F.R. § 76.56. According to NCTA, more than half a million cable customers are served by analog-only systems as of year-end 2011. See NCTA *Ex Parte* (dated April 26, 2012) at 2, n.7.

⁹⁵ See SNL Kagan, "SNL Kagan's 10-Year Cable TV Projections," (Jul. 28, 2011). SNL Kagan projects that the percentage of cable subscribers subscribing to digital cable service will reach about 84 percent by year-end 2012, 88 percent by year-end 2013, 91 percent by year-end 2014, and 93 percent by year-end 2015. *Id.* See also NCTA *Ex Parte* dated April 26, 2012, at 2-3 (noting that the number of digital households increased from 54% to 78% during the four years between 2007 and 2011, and that the percentage of digital households had further increased by

operators alternatively may choose to continue to carry the digital signal of must-carry stations in analog format to all analog cable subscribers in addition to any digital version carried.

C. Harm to Others and Public Interest Considerations

24. The Movants have also failed to show that the balance of hardships and the public interest favor a stay. The Movants state that no party would be harmed because a stay would maintain the status quo.⁹⁶ The record shows, however, that allowing the rule to sunset as scheduled will relieve constraints on cable system capacity that hybrid operators maintain they need to meet the increasing demands of their customers.⁹⁷ Cable commenters explained that “cable operators face capacity demands from an increasing proliferation of HD programming services as well as from broadband video services” and need flexibility to “serve the needs of all their customers while transitioning from analog to digital service.”⁹⁸ Cable commenters explained that there are currently more than 183 HD cable networks (including basic, premium, and regional sports channels), up from only 22 in September 2007 when the Commission adopted the viewability rule.⁹⁹ The Commission in the *Fifth Report and Order* noted that more than 96 percent of cable systems carry at least one must-carry station, and, on average, each system carries more than seven must-carry stations.¹⁰⁰ Each must-carry station carried in analog occupies 6 MHz of bandwidth that the cable operator could otherwise use for 10-12 standard definition (“SD”) digital streams, 2-3 HD video streams, or significant broadband capacity.¹⁰¹ Thus, as cable commenters explained, elimination of the viewability rule will provide operators with much needed flexibility to meet fast-changing consumer demands for HD cable services and high-speed broadband services, while ensuring subscribers continued access to must-carry channels.¹⁰²

December 2011 to 79.4%; and stating that “there is no reason to believe that the steady decline in the number of analog-only households will not continue”).

⁹⁶ Movants Petition at 16.

⁹⁷ See, e.g., Bright House Reply at 5-6 (arguing that the viewability rule inefficiently consumes “precious cable capacity that could be better deployed for enhanced broadband services” with “little to no offsetting public benefit”).

⁹⁸ NCTA Reply at 5; Bright House Reply at 4 (“[a]nalog carriage of each and every must carry station imposes a heavy burden on capacity-strained cable systems”). See also Bright House Reply at 6 (“Data-usage by the average Internet user has increased a thousand-fold in the last decade. Over the next three years, this trend will continue and even accelerate, and cable operators will need flexibility to meet fast-changing consumer demands”). Broadcasters do not dispute that carriage of analog signals takes up more bandwidth than carriage of digital signals, but respond that a cable operator could avoid the bandwidth issue by transitioning its hybrid system to an all-digital system. NAB Comments at 5 (“As cable systems convert, whatever burden the Viewability Rule might have imposed will disappear.”).

⁹⁹ NCTA Comments at 13.

¹⁰⁰ See *Fourth FNPRM*, 27 FCC Rcd at 1718, ¶ 10, n.36. In the *Fourth FNPRM*, we estimated that almost 40 percent of all broadcast stations elected or defaulted to must-carry rather than electing retransmission consent. *Id.*

¹⁰¹ See, e.g., SNL Kagan, “All-digital footprints make gains amid uneven commitment by operators,” (Dec. 13, 2010) (noting potentially significant efficiencies from reclaiming analog channels); Communications Technology, “QAM Modulator: Tactics at the Edge,” (Aug. 24, 2009) available at http://www.cable360.net/ct/news/ctreports/QAM-Modulator-Tactics-at-the-Edge_37234.html (visited May 7, 2012). See also Bright House Reply at 6-7 (“Requiring a cable operator to carry a single must-carry channel in analog consumes the same cable spectrum as a dozen standard digital services. This lopsided loss of programming (which will only grow more extreme as new compression advancements are implemented) is clearly contrary to the best interests of the vast majority of cable customers, who can already view must carry programming in digital”).

¹⁰² See, e.g., NCTA Comments at 15 (stating that “greatly increased demand for capacity to accommodate HD cable services and broadband video services has made it imperative for cable operators to use their capacity efficiently.”); NCTA Reply at 5 (explaining that the rule impedes consumer demands for “an increasing proliferation of HD programming services as well as from broadband video services”); Bright House Reply at 6 (explaining that data-

25. Finally, the Movants argue that judicial review will not be possible before the transition period ends on December 12, 2012 and that “millions of analog cable subscribers, including some of the most vulnerable groups, such as foreign language speakers and minorities, will lose access to must-carry signals.” Again, we disagree with Movants’ assumption that all (or, indeed, any) analog subscribers on hybrid cable systems will lose access to must-carry stations upon conclusion of the transitional period. Hybrid cable operators must continue to carry local broadcast stations electing mandatory carriage on the basic service tier in digital format. And we repeat that hybrid operators may not cease analog carriage without first making affordable set-top boxes available to subscribers at no cost or at an affordable cost. Therefore, we believe the Commission’s interpretation of the statutory viewability requirement will ensure continued subscriber access to must-carry television signals, while doing so in a less burdensome manner.

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended,¹⁰³ and Section 1.43 of the Commission’s Rules,¹⁰⁴ the Movants’ Joint Motion for Stay IS DENIED.

27. This action is taken under delegated authority pursuant to Sections 0.61 and 0.283 of the Commission’s Rules.¹⁰⁵

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief
Media Bureau

usage by the average Internet user has increased a thousand-fold in the last decade and over the next three years this trend will continue and even accelerate).

¹⁰³ 47 U.S.C. §§ 151, 154(i) and (j).

¹⁰⁴ 47 C.F.R. § 1.43.

¹⁰⁵ 47 C.F.R. §§ 0.61, 0.283.

12-1334

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Agape Church, Inc., et al., Petitioners

v.

Federal Communications Commission and the
United States of America, Respondents

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on August 30, 2012, I electronically filed the foregoing Opposition to Petitioner's Motion for Stay Pending Judicial Review with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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