ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

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.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioners are Agape Church, Inc., London Broadcasting Company, Una Vez Mas, LP, and the National Association of Broadcasters. The respondents are the Federal Communications Commission and the United States of America. The intervenors are the National Hispanic Media Coalition, the National Cable & Telecommunications Association, and Time Warner Cable, Inc.

2. Rulings under review.

Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, *Fifth Report and Order*, 27 FCC Rcd 6529 (2012) (JA 296).

3. Related cases.

This case has not previously been before this Court or any other court. We are aware of no pending cases related to this one.

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GLOSSARY

DTA	Digital Transport Adapter. A small, low-cost set-top box that enables a customer to view digital signals without having to obtain a more expensive, full-featured digital set-top box.

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BRIEF FOR RESPONDENTS

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 2342(1) over final orders of the Federal Communications Commission. The petition for review was timely filed. We do not challenge the associational standing of petitioner the National Association of Broadcasters (NAB). Although petitioners' opening brief fails to specifically identify any member of NAB that would have standing to challenge the Commission's order, *see Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011); *American Library Ass'n. v. FCC*, 406 F.3d 689, 696-697 (D.C. Cir. 2005), we understand that NAB's members

include must-carry stations that would have individual standing to challenge the order on review.

QUESTIONS PRESENTED

Section 614 of the Communications Act requires cable television systems to carry the signals of local broadcast stations, 47 U.S.C. § 534(a), and specifies that the signals of these "must-carry" stations "shall be viewable … on all television receivers of a subscriber" for which the cable company provides a connection, 47 U.S.C. § 534(b)(7). In implementing these statutory requirements, the Commission has taken account of technological changes over the years – including, in particular, changes in transmission formats from analog to digital – and has modified its understanding of Section 614's "viewability" mandate accordingly.

In 2007, when nearly half of all television viewers could receive only analog signals, the FCC adopted a "viewability" rule requiring most cable television systems to carry the signals of must-carry stations in analog format, so those stations could be viewed by system subscribers with analog television sets without using a device that converts the signals from digital to analog format. By its terms, however, the viewability rule was scheduled to expire three years after its June 2009 effective date, unless extended by the Commission.

In the order on review, *Carriage of Digital Television Broadcast Signals*, 27 FCC Rcd 6529 (2012) (*Sunset Order*) (JA 296), the FCC determined that technological and marketplace changes during the previous five years justified allowing the rule to expire as planned. The Commission allowed cable systems to provide must-carry signals exclusively in digital format, but only so long as the cable company makes available to customers free of charge or at a nominal fee a device that converts the signals to analog format.

The questions presented are:

1) Whether the Commission reasonably concluded that a cable operator may discharge its statutory obligation to make the signals of must-carry broadcast stations "viewable" under 47 U.S.C. § 534(b)(7) by making available to its subscribers free of charge or at low cost a device that converts those signals into a viewable format;

2) Whether the *Sunset Order* was a reasonable exercise of the Commission's discretion;

3) Whether the Commission provided adequate notice that it was considering the approval of signal conversion devices to satisfy the viewability requirement.

STATUTES AND REGULATIONS

Pertinent materials are attached.

COUNTERSTATEMENT

In legislation enacted in 1992, Congress required cable television systems to carry the signals of local commercial broadcast television stations. 47 U.S.C. § 534(a); *see* the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act) (adding new Sections 614 to the Communications Act). In Section 614(b)(7) of the Communications Act, 47 U.S.C. § 534(b)(7), Congress further required that the signals of such "must-carry" stations be "viewable via cable on all television receivers of a subscriber." *Ibid*. This case concerns the Commission's interpretation of Section 614(b)(7).[1]

Whether a station is viewable by a given subscriber to a cable system depends on the technology employed by both the system and the subscriber. Two technological developments are particularly relevant here. First, starting in June 2009, television broadcasters switched technology from analog, the traditional form of transmission, to digital, a new technology that allows more content, such as a high definition picture or multiple channels, to be transmitted in the same system capacity or "bandwidth." Separately, over the

[1] Congress created a similar regime for noncommercial stations. 47 U.S.C. § 535.

past several years, cable systems also have been switching from analog to digital signal carriage. Although the broadcast digital transition is complete, the cable transition is still in progress. As a result, some cable systems supply programming exclusively in digital format, but many cable systems are "hybrid" systems that transmit a combination of analog and digital signals. At the same time, some customers have newer television sets that can process digital or analog signals, while others have legacy analog-only sets. Because of the mixture of technologies on both the transmitting and receiving ends (*i.e.*, the cable system and the viewer's television set), any given cable customer may or may not need a device that converts signals from digital to analog format to watch cable programming.

In 2007, the Commission adopted a "viewability" rule that required hybrid cable systems to provide the signals of must-carry stations in analog format. That rule enabled all subscribers to hybrid systems to view must-carry stations without using a converter box to turn digital signals into analog signals, even if they had an analog television set. Cable systems that transmitted only in digital format were not subject to that requirement even though their customers who used analog televisions required a converter box. The Commission set the viewability rule to expire three years from its June 2009 effective date.

In the order on review, the Commission allowed the viewability rule to expire as planned; hybrid cable systems no longer are required to supply an analog signal for must-carry stations. Those stations must still be viewable by cable subscribers as required by Section 614(b)(7), but a cable system may now fulfill that requirement by making available to subscribers who need it a device that converts digital signals to analog signals. The Commission specified that the device must be provided either free of charge or for a nominal charge.

1. Digital Broadcast And Cable Television.

On June 12, 2009, by congressional directive, all full-power broadcast television stations in the country switched their signal transmitting format from analog to digital. *See* Pub. L. No. 109-171 § 3002, 120 Stat. 4, 21 (2006) (establishing February 2009 switch date and specifying that only full-power, as opposed to low-power, stations must transition); Pub. L. No. 111-4, 123 Stat. 112 (2009) (extending date to June 2009). That switch rendered analog television sets incapable of displaying broadcast television pictures unless the digital signal is converted into an analog format. *See C-SPAN v. FCC*, 545 F.3d 1051, 1053 (D.C. Cir. 2008). A viewer thus may watch over-the-air television either by purchasing a television set equipped with a digital

tuner or by acquiring a digital-to-analog converter for use with an analog television set.

Cable television is in a similar process of converting to digital format. Unlike broadcast television, however, there is no statutory deadline, so cable is transitioning on a schedule driven by market factors. Thus, some cable systems are now all-digital, but many systems still carry a mixture of both digital and analog programming formats. *See Sunset Order* ¶2 (JA 298). Digital video signals are far more bandwidth-efficient – an analog channel requires 6 megahertz of bandwidth for a single broadcast station, whereas the same bandwidth can carry 15 or more standard definition or approximately two high definition channels. *See* Walter Ciciora *et al*., Modern Cable Television Technology 75 (2nd Ed. 2003).

Digital cable signals are not viewable on analog televisions unless they are converted to analog format. The conversion can occur in either of two places: (1) at the cable system's "head-end" (where the system receives video programming signals), which requires the cable system to carry the bandwidth-intensive analog signal; or (2) at the customer's premises, through the use of a set-top converter box. *Carriage of Digital Television Broadcast Signals*, 22 FCC Rcd 21064, 21071 ¶18 (2007) (*Viewability Order*).

Thus, a cable customer who receives service from an all-digital cable system, but desires to watch it on an analog television set, must have a device that converts the digital signal to analog format (a function built into most digital cable set-top boxes).[2] For the digital cable subscriber with an analog TV, a set-top box is therefore required. Subscribers to all-digital systems who own digital television sets do not necessarily need converter boxes. Most digital televisions can process digital cable signals, so a digital set owner typically needs no special equipment to watch broadcast stations via cable. A set-top box is necessary, however, to receive on-demand programming, pay-per-view, and other such services.[3]

2. Must-Carry.

Section 614(a) of the Communications Act provides that "[e]ach cable operator shall carry … the signals of local commercial television stations." 47 U.S.C. § 534(a). The Act imposes a similar requirement for non-commercial stations. 47 U.S.C. § 535(a). Cable systems with more than 12

[2] The cable converter is not the same as the device that converts over-the-air broadcast signals from digital to analog, so the two cannot be used interchangeably.

[3] The Commission recently authorized digital-only cable operators to encrypt all of their programming. *See Basic Service Tier Encryption*, 27 FCC Rcd 12786 (2012). If a digital cable operator chooses to encrypt the basic tier, which includes must-carry stations, all of its subscribers must have a set-top box to decode the signals. That authorization does not apply to hybrid systems.

channels (which includes almost every system in operation today), must carry these stations on "up to one-third of the aggregate number of usable activated channels of such system." 47 U.S.C. § 534(b)(1)(B).[4] "Signals carried in fulfillment" of the must-carry requirements "shall be provided to every subscriber of a cable system," and "[s]uch signals shall be viewable via cable on all television receivers of a subscriber" that are connected to the system through connections supplied by the cable operator. 47 U.S.C. § 534(b)(7).

Congress enacted the must-carry requirement in order to counteract a "competitive imbalance" in market power between cable systems and broadcast stations. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 633 (1994) (*Turner I*). By 1992, 60 percent of television households subscribed to cable, which therefore controlled most viewers' access to television programming, including broadcast stations. 1992 Cable Act § 2(a)(3). Thus, "[b]y refusing carriage of broadcasters' signals, cable operators, as a practical matter, can reduce the number of households that have access to the broadcasters' programming, and thereby capture advertising dollars that would otherwise go to broadcast stations." *Turner I*,

[4] Not all broadcast stations rely on must-carry to obtain cable carriage. Some stations are carried under "retransmission consent," under which the cable system and the station bargain over the terms of carriage, such as payment to the station. *See* 47 U.S.C. § 325.

512 U.S. at 633-634. In the absence of mandatory carriage, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id*. at 634. *See* 1992 Cable Act §§ 2(a)(13)-(16).

3. The *Viewability Order*.

In 2007, the Commission issued the *Viewability Order* to implement Section 614(b)(7) in light of the then-upcoming digital broadcast transition. The agency recognized that immediately after the DTV transition there would "continue to be a large number of cable subscribers with legacy, analog-only television sets" – 40 percent of all television households – that were incapable of processing digital signals. *Viewability Order* ¶1. It also understood that the cable industry's own transition to digital would take "some period of time" beyond the broadcast transition. *Id*. ¶20.

The Commission accordingly gave cable systems two choices: (1) convert operations entirely to digital format, which would require that all subscribers have the necessary equipment to view the signal – either a digital TV capable of displaying the digital cable signal or a set-top box that will allow an analog TV to display a digital cable signal; or (2) establish a hybrid system with mandatory carriage of must-carry stations in an analog format that could be decoded by analog television sets without additional equipment.

Viewability Order ¶¶18, 20; *see* 47 C.F.R. § 76.56(d)(3) (2010). Under that rule, a hybrid system was required to convert digital broadcast signals to analog format at the head-end and supply analog signals to its customers. An all-digital system, by contrast, could choose to carry only the digital version of the broadcast signal, which would be converted to analog format by the set-top cable box.

The Commission's approach rested on what it deemed a "straightforward reading" of section 614(b)(7). The statute directs that the signals of must-carry stations "shall be viewable," and the Commission interpreted that language to mean that "the operators of either all-digital or mixed digital-analog systems will be responsible … for ensuring that mandatory carriage stations are actually viewable by all subscribers." *Viewability Order* ¶23.

Although the Commission described its decision to require the provision of an analog signal as being rooted in the "plain meaning" of the statute, *Viewability Order* ¶22, it specified that the viewability rule would by its own terms expire in three years unless the agency affirmatively extended the rule. *Id*. ¶16. "A three-year sunset ensures that both analog and digital cable subscribers will continue to be able to view the signals of must-carry stations," the Commission explained, "and provides the Commission with the

opportunity after the transition [from analog to digital broadcasting] to review these rules in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace." *Ibid*.

4. The *Sunset* Proceeding.

a. Approximately four months before the viewability rule was set to lapse, the Commission began the promised rulemaking proceeding. *Carriage of Digital Television Broadcast Signals*, 27 FCC Rcd 1713 (2012) (*Sunset Notice*) (JA 69). The agency did not directly propose either to extend the rule or to let it expire, but sought information necessary to make that decision. Such information, the Commission explained, would "provid[e] an opportunity … to determine whether extending the current rule is necessary to fulfill th[e] statutory [viewability] mandate, given the current state of technology and the marketplace." *Id*. ¶5 (JA 71). The Commission asked interested parties to provide "specific information" on topics such as "how the sunset of the viewability requirement would impact the financial resources of must carry stations," "the range of costs per digital [converter] box, and the range of rental fees" for boxes, and "any marketplace or other changes" since 2007. *Id*. ¶¶10, 13, 16 (JA 74, 75, 77).

The Commission noted that in the *Viewability Order* it had considered and rejected "possible alternatives," such as "a rule that would allow [cable

systems] to carry must-carry signals in digital so long as they made [signal conversion] equipment available for lease or sale to subscribers." *Sunset Notice* ¶14 & n.48 (JA 76). Reviving that alternative as a means to achieve compliance with the viewability mandate, the agency called for comment on "proposals that would achieve the results necessary to assure the viewability of must carry signals through an approach different than that of [the] existing rule," including solutions "that will satisfy the statute in a less burdensome manner." *Id*. ¶16 (JA 77).

b. In the *Sunset Order*, the Commission decided to allow the viewability rule to expire as originally planned, after a six-month transition period. Since the original 2007 rule had been adopted, the agency found, "rapid changes in the marketplace and technology," including the proliferation of digital television sets and the widespread availability of inexpensive digital set-top boxes, made feasible "alternative means by which must-carry television signals can be made viewable." *Sunset Order* ¶1 (JA 297).

The record revealed "marketplace changes that have occurred over the past five years." *Sunset Order* ¶8 (JA 301); *accord id*. ¶6 (JA 299). In 2007, roughly half of all television households were analog-only cable subscribers, *id*. ¶12 (JA 305), and there were no inexpensive converters available to

ensure that analog subscribers would have the equipment needed for viewability, *ibid*. In those circumstances, "a significant number of cable customers could lose access to must-carry channels if hybrid systems were permitted to carry such signals only in digital format." *Ibid*.

Today, by contrast, "[t]he state of technology and the marketplace is significantly different." *Sunset Order* ¶13 (JA 305). At the time of the order, about 20 percent of cable subscribers received analog-only service. The Commission expected that number to drop below 16 percent by the end of 2012. *Ibid*. (JA 306). Since cable accounts for about half of all television households, *ibid*., analog-only subscribers were expected to make up about 8 percent of the total television audience – down from 40 percent five years earlier. And that number is falling: the Commission predicted 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 systems." *Id*. ¶15 (JA 309-310).

Thus, by the end of 2012, analog-only subscribers would constitute at most only 8 percent (and falling) of the market. Moreover, the Commission anticipated that some of those households could view must-carry stations even without the use of additional equipment because many analog-only

customers have digital television sets: today, 64 percent of all television viewers have them. *Sunset Order* n.59 (JA 306). Television sets manufactured since 2007 have the tuners needed to receive digital cable signals, *ibid*., so any analog customer who has bought a new set in at least the past five years is digital-ready.

Today, technological improvements have simplified device-assisted viewability for the relatively few remaining analog-only customers without digital television sets. In 2007, the only signal conversion devices available were full-featured digital set-top boxes, which were expensive and bulky. Now, however, "low-functionality/low cost digital [conversion] equipment is … readily available." *Id*. ¶14 (JA 306). As the Commission noted in the *Sunset Order*, equipment manufacturers now produce "Digital Transport Adapters" (DTAs), which are "small, low-cost set-top boxes" that "enable customers to view digital signals, without having to obtain full-featured digital set-top boxes." *Ibid*. Twenty-seven million DTAs already had been deployed by the end of 2011, and cable operators collectively serving a large majority of analog-only customers, pledged to make the devices available at low cost. *Ibid*. & nn.65 & 90 (JA 307, 312). Indeed, one large cable company, Comcast, has made DTAs available free of charge, and another, Time Warner, offers two years of free usage, after which it charges less than a

dollar per month. *Ibid*. (JA 307-308). Such minimal cost, the Commission determined, "is unlikely to discourage use of this equipment" and thus would satisfy the viewability requirement. *Ibid*. (JA 308)

The FCC determined further that the record evidence did not support the claims of broadcasters that allowing the viewability rule to expire on schedule would threaten the viability of must-carry stations. *Sunset Order* ¶15 (JA 308). The Commission 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.* (JA 309). Instead, 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 Commission acknowledged that its 2007 *Viewability Order* had understood Section 614(b)(7) to require viewability of must-carry stations on analog sets without additional equipment, such as a converter box. *Sunset Order* ¶7 (JA 300). On further review in 2012, however, and in light of dramatically different market conditions, the Commission found the statute "less definitive than our earlier decision suggested." *Id*. ¶8 (JA 300). As the agency explained, the text of the statute "do[es] not state that a signal is not 'viewable' if the consumer needs to use additional equipment," and does not "unambiguously require[] that cable subscribers must be capable of viewing

must-carry signals without the use of additional equipment." *Ibid*. (JA 301-302). Indeed, "[n]othing in the language of the statute plainly prohibits cable operators from offering equipment to satisfy the viewability requirement"; rather, the statute does not "state that a signal is not 'viewable' if the consumer needs to use additional equipment." *Ibid*.

"Viewable," the Commission determined, "can reasonably be read to mean that the [cable] 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." *Sunset Order* ¶8 (JA 301). The Commission specified, however, that the cost to subscribers of signal conversion equipment would have to be "either … free or at an affordable cost that does not substantially deter use of the equipment." *Ibid*.

The Commission explained that not only did its "reasonable interpretation of the statutory text … best effectuat[e] the statutory purpose in light of current marketplace conditions," but also that the interpretation was buttressed by "the doctrine of constitutional avoidance." *Sunset Order* ¶ 11 (JA 304). As the agency observed, that doctrine 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." *Ibid*. Cognizant of the

Supreme Court's recognition that cable operators engage in speech when deciding which channels to carry, 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." *Sunset Order* ¶11 (JA 304).

The Commission deferred the sunset date for six months, until December 12, 2012, as a "transitional period." *Sunset Order* ¶6 (JA 299). During that period, cable operators will be able to "acquire an adequate supply of equipment" necessary to supply to analog-only subscribers. *Id*. ¶17 (JA 311). Cable operators also will have sufficient time to "comply with … existing [FCC] rules requiring notification to broadcasters and customers about any planned change in carriage or service and the operator's equipment offerings." *Ibid*. Specifically, FCC Rule 76.1601, 47 C.F.R. § 76.1601, requires written a minimum 30-day notice prior to the repositioning of any station. FCC Rule 76.1603(b), 47 C.F.R. § 76.1603(b), similarly requires a minimum 30-day notice of any changes in programming services. *See Sunset Order* n.89 (JA 311). If a broadcaster believes that a cable operator is not complying with the viewability requirement, it may file a complaint pursuant

to 47 C.F.R. § 76.61. *See Sunset Order* ¶18 (JA 313). The Commission also observed that it would "consider informal consumer complaints." *Ibid.* If it receives multiple complaints "that an operator is not effectively making affordable set-top boxes available to customers," the Commission noted, "one of the possible remedies would be to require the operator to resume analog carriage of the channel." *Ibid*.

5. Subsequent Proceedings.

On August 1, 2012, petitioners asked the Commission to stay the *Sunset Order*. The Commission's Media Bureau denied the stay on August 24. *Stay Order*, 27 FCC Rcd 10217 (MB 2012). Petitioners then asked this Court to stay the *Sunset Order*. By order of September 24, 2012, the Court denied the stay. As a result, the viewability rule sunset on December 12, 2012.

Petitioners now ask the Court to reverse the *Sunset Order* and reinstate the requirement that hybrid systems provide the signals of must-carry stations in analog format.

SUMMARY OF ARGUMENT

Five years ago, when the Commission adopted the requirement that hybrid cable systems provide the signals of must-carry stations in analog format, forty percent of all television viewers were analog-only cable

subscribers, and no inexpensive signal conversion devices were commercially available. The loss of a major portion of their audience would have threatened the economic viability of stations that the must-carry statute is designed to protect.

Today, the situation is very different. All television sets sold during the past five years can process digital cable signals, and many cable systems have converted to all-digital operation. As a result, by the end of 2012, a predicted 8 percent of television viewers – one-fifth of the 2007 figure – will be analog-only cable subscribers. That percentage is expected to continue to fall as more systems convert to all-digital and more people buy new television sets. At the same time, inexpensive new signal conversion devices have become widely available, and cable operators serving the majority of analog-only customers have pledged to make the devices available either free of charge or at nominal cost.

On that record, the Commission reasonably determined that there was no longer a threat to the viability of must-carry stations that justified the burden on cable-operator speech imposed by an analog carriage requirement. Taking account of the significant technological changes in the marketplace since 2007, the Commission re-interpreted Section 614(b)(7), and reasonably

determined that cable operators could satisfy the viewability requirement by making signal conversion devices available for at most a nominal charge.

1. The Commission's interpretation of Section 614(b)(7) is consistent with the text, structure, and purposes of that provision. The statute provides only that must-carry stations must be "viewable," a term that the Commission reasonably understood to mean "capable of being seen." The statute says nothing about whether cable subscribers must be able to view must-carry stations without the use of additional equipment, such as a signal converter – and petitioner NAB itself advised the Commission that the statute could be satisfied with the use of DTAs. "Viewable" thus can be reasonably construed to mean making the signal accessible by an effective means, which includes an inexpensive signal converter. That interpretation is supported by other provisions in the Cable Act and FCC precedent reflecting the understanding that set-top boxes are often required to watch must-carry stations. Indeed, petitioners themselves support conversion of hybrid systems to all-digital systems, which require the use of a set-top box.

The Commission's approach is also consistent with the structure of Section 614(b)(7). The second and third sentences of the statute address different situations and perform distinctive functions. The second sentence – which contains the viewability requirement that applies only to must-carry

stations – applies only to subscribers who 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). By contrast, the third sentence, which applies more broadly to "all broadcast stations," 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." *Ibid*. (emphasis added). Thus, the third sentence ensures that cable operators may not simply refuse necessary equipment to customers who choose to install their own connections, a function not addressed by the second sentence. Moreover, the required price for boxes supplied under the second sentence to satisfy the viewability requirement – free or nominal – may be less than the price for boxes supplied under the third sentence, which can be based on the cost of the equipment.

2. The Commission's revised interpretation of Section 614(b)(7) was also reasonable. Must-carry is intended to protect the economic viability of local broadcast stations, and the Commission reasonably predicted that allowing the analog carriage requirement to sunset, as planned, would not undermine the must-carry regime. The Commission properly balanced the insubstantial benefits of continued mandatory analog carriage against the burdens such carriage imposed on the First Amendment rights of cable

operators. In light of the fact that a single analog channel takes up the same bandwidth as 12 digital channels, the Commission reasonably concluded that the burden of mandatory analog carriage is not constitutionally justified given the diminishing threat to must-carry stations and the widespread availability of inexpensive signal conversion equipment.

3. The Commission properly revisited its interpretation of Section 614(b)(7). Statutory interpretations are not carved in stone; otherwise, agencies would be powerless to respond to rapid changes in technology. Here, the Commission explained at length the changes in the market that justified a revised interpretation of the viewability provision. It also explained the basis for its predictive judgment that sunset of the analog carriage requirement would not adversely affect the viability of must-carry stations.

Petitioners raise a host of arguments claiming that the Commission acted arbitrarily, but each lacks merit. Substantial record evidence showed that signal converters are now available at minimal prices. And the agency had good reason to adopt a six-month transition period after the viewability rule was scheduled to expire.

4. Finally, the Commission provided reasonable notice that it would consider a device-based viewability approach. By its own terms, the analog

carriage requirement was scheduled to expire in three years; subject to the six-month transition period, the Commission let it do so as planned. Thus, parties had ample notice of the impending sunset. If any additional notice of device-based viewability was required, it was supplied. The Commission asked for comment on whether extending the current rule was necessary "*given the current state of technology*," *Sunset Notice* ¶5 (JA 71), and specifically sought data on "the range of costs per digital converter box, and the range of rental fees" for boxes, *id*. ¶¶10, 12 (JA 74, 75). Device-based viewability was thus squarely raised, as demonstrated by comments filed with the agency on that very subject.

STANDARD OF REVIEW

Petitioners contend principally that the Commission misread 47 U.S.C. § 534(b)(7). "*Chevron*'s familiar framework applies." *NCTA v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009), citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–843 (1984). The Court must first determine "if the statute unambiguously forecloses the agency's interpretation." *NCTA*, 567 F.3d at 663. If so, the Court will "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. If Congress has not "directly spoken to the precise question at issue," *id*. at 842, the Court will defer to the agency's interpretation of an ambiguous provision "so long as it is

reasonable." *NCTA*, 567 F.3d at 663. Deference applies equally when an agency changes its interpretation of a statute. *Chevron*, 467 U.S. at 863-864.

Petitioners also contend that allowing the viewability rule to sunset as planned was not the product of reasoned decision-making. Under 5 U.S.C. § 706(2)(A), the Court may reverse a Commission order "only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Ibid*. The Court's review is "necessarily deferential." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003). The Court will "presume the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Ibid*.

To the degree this case turns on the adequacy of the rulemaking record, the question is whether the Commission's judgments were supported by substantial evidence. 5 U.S.C. § 706(2)(E). That standard requires only that the record contain "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996).

ARGUMENT

I. THE COMMISSION'S READING OF THE VIEWABILITY REQUIREMENT IS CONSISTENT WITH THE STATUTE AND WITHIN THE AGENCY'S INTERPRETIVE DISCRETION UNDER *CHEVRON*.

A. The Commission's Interpretation Is Consistent With The Statutory Language.

1. The viewability requirement of Section 614(b)(7) states in its entirety: "Such [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). The ordinary meaning of "viewable" is simply "*capable* of being seen." *Sunset Order* ¶8 (JA 301) (emphasis added), quoting Webster's *Third New International Dictionary* 2551 (1993).

As the Commission explained, the statute "do[es] not state that a signal is not 'viewable' if the consumer needs to use additional equipment," nor does it "unambiguously require[] that cable subscribers must be capable of viewing must-carry signals without the use of additional equipment." *Sunset Order* ¶8 (JA 301). Congress thus did not address the "precise" question at issue in petitioners' claim that the statute plainly forbids the requirement of a signal conversion device. *Chevron*, 467 U.S. at 842. That legislative silence renders the statute ambiguous. *See Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 869 (D.C. Cir. 1996).

Consistent with the statutory text, the Commission determined that must-carry signals are "viewable" – capable of being seen – on analog televisions when a viewer uses a device provided by the cable system at a nominal charge to convert digital signals into an analog format. "Viewable," in other words, reasonably can be read "to mean that the [cable] operator must make the broadcast signal available or accessible to its subscribers by an *effective* means." *Sunset Order* ¶8 (JA 301) (emphasis added). Section 614(b)(7) thus is satisfied when a cable operator "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*. If the price of the equipment is sufficiently low not to deter usage, the equipment is an effective means of achieving viewability.

Before the Commission, petitioner NAB agreed with that reading of the statute. It informed the agency of its view that cable operators could, "without controverting the plain language or intent of Section 614(b)(7)," comply with the viewability requirement by providing signal conversion equipment free of charge. NAB May 23, 2012 *ex parte* (JA 218); *see Sunset Order* ¶8 & n.33 (JA 301). The language of the statute draws no distinction between a set-top box supplied free of charge and one supplied for a nominal fee.

NAB now tries to change its tune, claiming that the only permissible reading of Section 614(b)(7) is that "must-carry signals be viewable without added equipment." Br. 25, 30. A regime that requires a converter box, it says, violates the unambiguous language of the statute. But, as NAB recognized previously, the statute says nothing about the use of equipment provided by the cable system; it requires only that the signal be viewable. Although NAB attempts to disavow its earlier position, Br. 38-39 n.11, the admission that the statute *could* be fulfilled through conversion equipment refutes a claim that any "equipment-based solution" to viewability, *ibid.*, necessarily violates the only permissible reading of the statute.

NAB's new position is also inconsistent with its recognition that cable systems may lawfully switch to all-digital service. Br. 46. Subscribers to all-digital cable systems who have analog television sets must obtain either a set-top box with a signal converter or an entirely new television set to view must-carry stations. Petitioners do not claim that the necessity of a conversion device in that situation is inconsistent with Section 614(b)(7).

Indeed, Section 614(b)(7) itself refutes the idea that the statute unambiguously forbids a device-based approach to viewability. Congress recognized that some stations "cannot be viewed via cable without a converter box" and required cable systems to "offer to sell or lease … a

converter box" to subscribers that install their own wiring. 47 U.S.C. § 534(b)(7) (we discuss that provision at pages 31-34 below in a different context). Congress understood that many signals, including must-carry signals, would not be viewable in the absence of the additional equipment. Congress expressed the same understanding in Section 623(b)(3)(A), which regulates the price cable companies can charge for "installation and lease of the equipment used by subscribers to receive the basic tier, including a converter box." 47 U.S.C. § 543(b)(3)(A).

The legislative history similarly demonstrates that Congress recognized that a set-top box would often be required to view must-carry stations. The Senate Report expressed concern that stations located above channel 13 "are not viewable on cable-connected sets that are not 'cable ready.'" S. Rep. No. 102-92 at 44 (1991). The House Report explained similarly that in many places "television sets connected to the cable do not have converter boxes" and that stations located above channel 13 "are not viewable via cable on these television sets." H.R. Rep. No. 102-628 at 55 (1992). Thus, far from intending to prohibit viewability via added equipment, Congress recognized at the time of the 1992 Cable Act that viewability could be achieved in many instances only with the use of a set-top box.

The Commission has long recognized that signal conversion devices may be necessary to make cable television signals viewable. In 1994, the Commission faced the situation where "a converter box supplied by a cable operator does not contain the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter." It ruled that "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." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723 ¶16 (1994); *see Sunset Order* n.31 (JA 301). Additional equipment plainly was necessary to view must-carry stations.

The understanding expressed by Congress, the Commission, and NAB (before its change of heart) that viewability can be satisfied by signal conversion equipment is based soundly on the nature of television reception. Both broadcast and cable signals are transmitted electromagnetic waves; they are never "viewable" without conversion to a picture at some point. In some television sets, the conversion takes place inside the set itself, by the installed tuner. Other sets do not have internal tuners capable of processing the available signals, which therefore must be converted externally by a set-top box. In every instance, however, a signal conversion device of some sort is

required. *See generally*, Simon Haykin, *Communications Systems* 2 (4th Ed. 2001).

Petitioners argue that the statute's use of the word "shall" in the phrase "shall be viewable" mandates that every subscriber have the capability to convert signals and disallows a regime that gives cable customers the option to obtain a converter. Br. 21. But that claim begs the question of what "viewable" means. Petitioners' argument that "viewable" means "actually viewable" (Br. 21) is no more illuminating. As set forth above, the Commission reasonably determined that providing cable subscribers with an effective and affordable option to view signals makes must-carry stations viewable within the meaning of the statute. That is all Congress required.

2. Petitioners next contend that the Commission's interpretation of "viewable" is invalid because it "renders the distinction between the second and third sentences of Section 614(b)(7) meaningless." Br. 22. The second and third sentences read:

> [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. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer

> to sell or lease such a converter box to such subscribers at rates in accordance with section 543(b)(3) of this title.

47 U.S.C. § 534(b)(7).

Petitioners assert that the third sentence's allowance of an "offer to sell or lease" a converter demonstrates that the second sentence disallows the Commission from allowing cable operators to satisfy the viewability mandate by offering a converter at a nominal charge. Br. 22.

The Commission acted reasonably in rejecting that reading of the statute. The substantial differences between the second and third sentences of Section 614(b)(7) show that the two provisions address different circumstances; they are, the agency explained, "distinct mandates" that apply to different situations. *Sunset Order* ¶9 (JA 303).

Specifically, the second sentence requires that *must-carry* stations be viewable when "a cable operator provides a connection" to the customer's television set. 47 U.S.C. § 534(b)(7). The third sentence, by contrast, comes into play "in [the] more limited situation," *Sunset Order* ¶9 (JA 303), when the customer himself "install[s] additional receiver connections" using his own "equipment and materials." In that situation, the cable operator must notify the customer "of *all broadcast stations*" that cannot be viewed without a converter box "and shall offer to sell or lease such a converter box … at

rates in accordance with" FCC rate regulations. 47 U.S.C. § 534(b)(7) (emphasis added).

Thus, as the Commission recognized, the two provisions address entirely different situations. The second sentence establishes a viewability requirement only for must-carry stations when the cable operator provides the customer's connection – for example, to the customer's main television set in the living room. The third sentence, by contrast, applies to all broadcast stations, and only when the customer provides his own connection by, for example, purchasing the necessary hardware and running his own line to a bedroom with an extra television set. By requiring the cable operator to offer a signal converter in that situation, the third sentence ensures that the cable operator may not refuse necessary equipment and divest itself of all viewability obligations; instead, it must offer to make a converter box available.

Furthermore, the Commission interpreted the second sentence to allow cable operators to ensure viewability of must-carry stations by making a signal converter available "at no cost or an affordable cost," *Sunset Order* ¶9 (JA 303). By contrast, the third sentence requires cable operators "in a more limited situation, to offer to sell or lease converter boxes … *at regulated rates*" under 47 U.S.C. § 543(b)(3). *Sunset Order* ¶9 (JA 303) (emphasis

added). In other words, the statutory text does not preclude the cable operator from charging more for set-top boxes offered under the third sentence than for DTAs offered under the second.

Petitioners are thus wrong that the Commission has "render[ed] the distinction between the second and third sentences … meaningless." Br. 22. As explained, the two sentences address different situations and retain different functions and purposes. Petitioners' argument fails because it does not come to grips with the substantial differences between the two provisions.

3. Petitioners argue that a Senate Report described the second and third sentences of the statute to mean that giving subscribers an option to obtain a conversion box would not satisfy the second sentence. Br. 23, citing S. Rep. No. 102-92 at 86. That is wrong because the cited passage simply paraphrases the two sentences of the statute. It does not state the proposition for which petitioners cite it.[5] Thus, petitioners' argument is identical to its claim, addressed immediately above, that the Commission's interpretation of

[5] The Senate Report states: "If the cable operator installs wires for connection to a television set or provides materials to connect a television set to the cable system, it must ensure that all must-carry signals can be viewed on that set. If, however, the cable system authorizes subscribers to connect additional receivers, but neither provides the connections nor the equipment or material needed for such connections, its only obligation is to notify subscribers of any broadcast stations carried on the cable system which cannot be viewed via cable without a converter box, and to offer to sell or lease such a converter at reasonable rates." S. Rep. No. 102-92 at 86.

the second sentence renders the third sentence meaningless. It fails for the same reason.

Petitioners' assertion that the Senate Report states that Section 614(b)(7) was "intended to prevent cable operators from carrying local broadcast signals 'on a channel … that subscribers cannot view without added equipment'" is groundless. Br. 23-24, quoting S. Rep. No. 102-92 at 45. That part of the Report discusses a number of factors that can influence "[h]ow a cable operator's market power will be exercised" over a broadcast station. S. Rep. No. 102-92 at 45. The factors are phrased in the form of illustrative questions, one of which is: "Will the station be located on … a channel location that subscribers … cannot view without added equipment?" *Ibid*. Taking that statement wholly out of context, petitioners claim that the Report expresses a congressional intention to forbid any requirement that additional equipment may be offered. It says nothing of the sort. In fact, on the prior page of the same Report, the Senate recognized that more than 40 percent of television sets in the country at the time were not "cable ready" and could not receive UHF channels on cable without a conversion device. S. Rep. No. 102-92 at 44.

Petitioners similarly are not helped by a statement in a House Report that the general policy favoring "competition in the video marketplace will be

threatened if cable systems have unfettered discretion" to carry must-carry stations "in a disadvantageous manner." Br. 24, citing H.R. Rep. No. 102-628 at 51. That statement does not address device-based viewability and thus is not relevant to petitioners' plain meaning argument. Moreover, petitioners' reliance on the statement rests on the assumption that device-based viewability will materially impede the competitive viability of must-carry stations, a position that the Commission reasonably rejected. *See Sunset Order* ¶15 (JA 309); pp. 38-39, *infra*.

Petitioners' argument also is not advanced by the fact that, in enacting the 1992 Cable Act, Congress rejected a proposal to use an "A/B input selector" approach – *i.e.*, a physical switch between cable and over-the-air viewing. The A/B switch was rejected as an alternative to *any* form of must-carry obligation – not as a means of ensuring viewability. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 220 (1997) (*Turner II*). More to the point, as the Commission explained, the A/B switch suffered from "numerous technical problems" that do not exist here. *Sunset Order* n.77 (JA 309); *see also Turner II*, 520 U.S. at 220; *Viewability Order*, 22 FCC Rcd at 21090 ¶53. Petitioners have failed to refute (or even acknowledge) the Commission's discussion of this issue. In short, Congress' rejection of the flawed A/B switch as an alternative to must-carry does not

mean that Congress rejected *any* "equipment-based solution to viewability." Br. 24.

Also without merit is petitioners' claim (Br. 27-30) that the *Sunset Order* violates Section 614(b)(4)(A), entitled "Nondegradation; technical specifications," which requires that "the quality of signal processing and carriage provided [for must-carry 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 Commission explained, that provision "speaks specifically to the issue of 'nondegradation' and 'technical specifications,' and does not address the issue of viewability." *Sunset Order* ¶10 (JA 303). If the statute applied at all, the Commission held, "carrying must-carry signals only in a digital format would [not] violate the terms of 614(b)(4)(A)" because both digital and analog signals have the same quality of signal processing. *Sunset Order* ¶10 (JA 303). Moreover, the record did not show that digital carriage would degrade the signal. *Ibid*. Petitioners read "quality" to mean identical treatment in all respects, Br. 29, but they provide no basis for such an

assertion.[6] The statutory text refers to "quality of signal processing," 47 U.S.C. § 534(b)(4)(A), and petitioners offer no sound reason for rejecting the views of the expert agency regarding the meaning of that term.

In sum, petitioners have failed to show that the Commission's reading of the statute is unambiguously foreclosed by its text. *See Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 704 (D.C. Cir. 2011) (deferring to FCC's reasonable construction of the Communications Act "if Congress has not unambiguously foreclosed the agency's construction").

B. The Commission's Interpretation Was Reasonable.

1. The Commission "offered a reasoned explanation for why it chose [its] interpretation" of Section 614(b)(7). *Village of Barrington v. STB*, 636 F.3d 650, 660 (D.C. Cir. 2011). The purpose of the must-carry regime and its viewability component is to protect against "significant numbers of broadcast stations … deteriorat[ing] to a substantial degree or fail[ing] altogether" if a lack of cable-based audience eroded stations' financial viability. *Turner II*,

[6] In support of the proposition that DTAs provide a "bad quality" signal, petitioners rely on a website (http://www.bocsco. com/comcast_dta.php) operated by a company whose products compete with DTAs. Br. 30, citing NAB *ex parte* of June 8, 2012 (JA 281). It is clear from the context that the website's evaluation of "bad quality" is based on a comparison with the high-definition output available using a full-function digital cable box, not with a standard definition signal. The Commission has determined that an analog signal converted from a digital signal has the same quality as a standard definition digital signal. *Viewability Order*, 22 FCC Rcd at 21069 ¶13.

520 U.S. at 191-192; *see id*. at 197 (must-carry serves the purpose of "broadcasters' economic viability"); *see id*. at 193 (Congress's purpose was "to prevent any significant reduction in the multiplicity of broadcast programming sources"); *Viewability Order*, 22 FCC Rcd at 21092 ¶55 (must-carry intended to prevent harm of "stations deteriorat[ing] or ceas[ing] to exist").

The Commission found that the record showed no likelihood of such harm in the absence of mandatory analog carriage. By the end of 2012, more than 90 percent of television households are expected to have access to digital must-carry signals in the same manner as all other channels they receive, without the use of any additional equipment. The remaining 8 percent – dwindling in number – will either have television sets capable of displaying digital signals or the opportunity to obtain signal converters, which will be available "at little or no additional expense." *Sunset Order* ¶15 (JA 309-310). On that record, the Commission reasonably predicted that sunset of the viewability rule would not "threaten the viability of must-carry stations." *Sunset Order* ¶15 (JA 308).

The Commission also properly took account of the changing technology of video distribution. Broadcast television has already switched to digital format – and every over-the-air viewer with an analog television has

had to obtain and install a converter box (or get a new television set) in order to continue to receive signals – while cable is in the transition process. Because an analog signal requires the same amount of bandwidth as 10 to 12 standard definition digital signals and up to 3 high definition digital signals, *Sunset Order* ¶16 (JA 310), analog carriage imposes significant costs on cable operators. In the *Sunset Order*, the Commission properly found that those costs – which ultimately result in less programming choice for consumers – outweighed the minimal risk of harm to must-carry stations.

The Commission properly considered the costs and benefits of the viewability rule. The Supreme Court established in the *Turner* cases that cable operators "transmit speech" through "exercising editorial discretion over which stations or programs to include in [their] repertoire." *Turner I*, 512 U.S. at 636. Restrictions on cable operator choice of programming thus are subject to intermediate scrutiny under the First Amendment. Under that standard, the Commission must consider whether the rule "burden[s] substantially more speech than necessary to further" the governmental interests at stake. *Turner II*, 520 U.S. at 189. Intermediate scrutiny does not require the least restrictive means of carrying out the government's interests, *Turner I*, 512 U.S. at 662, but the FCC reasonably determined that constitutional concerns counseled against continued adherence to a "rigid

analog-carriage requirement … where the record establishes a reasonable, less burdensome alternative that meets the statutory objectives." *Sunset Order* ¶11 (JA 304), citing *Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

Especially in light of intervening technological changes, the Commission had good reason to emphasize the burden imposed by the 2007 viewability rule on cable operators' First Amendment rights. As a practical matter, that rule required that cable systems carry signals in both analog and digital format. *Sunset Order* ¶11 (JA 304). The "signal degradation" provision, 47 U.S.C. § 534(b)(4)(A), requires that the "quality of signal processing and carriage" for must-carry stations be no less than that for other signals. That provision therefore requires cable systems to carry broadcast signals in high-definition when they are transmitted in that format. Because the viewability rule required analog carriage, cable systems had been required to carry both analog and high-definition versions of the same signal. That burden, the Commission determined, "is not justified on the current record." *Sunset Order* ¶11 (JA 304). The burden is particularly significant because as many as 12 digital stations can be carried in the bandwidth required by a single analog station. *Id*. ¶16 (JA 310). In light of those constitutional concerns, petitioners are flatly wrong in contending that the burden on cable

operators is "a factor entitled to no weight in the analysis." Br. 17; *see* Br. 35.

Though the constitutional dimensions of viewability were expressly relied on by the Commission, petitioners fail to address them anywhere in their brief. As a result, petitioners have waived any objection to the Commission's constitutional analysis and should not be heard about the matter on reply. *See Cablevision Sys. Corp.*, 649 F.3d at 719 ("because petitioners first raised this argument in their reply brief, we treat it as forfeited.") (citation omitted).

2. Petitioners nevertheless challenge (Br. 25-27) the Commission's prediction that the sunset of the viewability rule will not "threaten the viability" of must-carry stations, *Sunset Order* n.52 (JA 304), and is thus fully consistent with the must-carry regime. Petitioners' claim to the contrary assumes that no analog-only subscriber will obtain and install a signal converter, even though substantial evidence showed that such converters are inexpensive and widely available. The Commission reasonably rejected petitioners' assumption about the future use of such equipment. *Sunset Order* ¶15 (JA 309). When an agency must predict uncertain future events, "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency," and the

Court will defer to the agency's reasonable judgment. *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C. Cir. 1998) (citation omitted).

The Commission's determination that the basic viability of must-carry stations is not threatened when they retain access to at least 92 percent of their audience was a classic line-drawing exercise. The Commission has "wide discretion to determine where to draw administrative lines," *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000), and the Court is generally "unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977) (*en banc*). The line-drawing was especially reasonable given the Commission's finding that the minimal threat to viability did not justify a more burdensome analog carriage requirement under the First Amendment. *See* pp. 40-41, *supra*.

Finally, petitioners are wrong in suggesting that the must-carry statute was intended to place must-carry stations "on equal footing with other signals and channels," which the *Sunset Order* allegedly does not do. Br. 31-32. Petitioners point to no language in the must-carry statute that establishes such a non-discrimination regime. Had Congress intended such an approach, it would have so indicated explicitly, as it did, for example, with respect to

satellite-based television service. *See* 47 U.S.C. § 338(d) (satellite video distributors must "provide access to [television] stations' signals at a nondiscriminatory price and in a nondiscriminatory manner").

II. THE COMMISSION ACTED CONSISTENTLY WITH THE APA IN ADOPTING THE *SUNSET ORDER*.

A. The Commission Properly Revised Its Interpretation Of Section 614(b)(7).

In the *Viewability Order*, the Commission determined that the "plain meaning of the statutory text" would not be satisfied by an "offer to sell or lease" a converter box to an analog-only cable subscriber. 22 FCC Rcd at 21073 ¶22. In the *Sunset Order*, the Commission acknowledged that, "upon further review of the statute," the key term "viewable" was ambiguous. *Sunset Order* ¶8 (JA 300). That word could "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." *Ibid*. (JA 301). Petitioners claim that the Commission erred in changing its reading of the statute. Br. 35-38.

An agency's initial reading of a statute is not "carved in stone;" rather, it is entirely proper for the agency to "consider varying interpretations and the

wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-864; *accord FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-515 (2009). *Chevron* deference thus applies to an agency's interpretation of a statute it administers even if the agency had previously interpreted the statute differently. *NCTA v. Brand X Internet Services*, 545 U.S. 967, 981-982 (2005). For that reason, petitioner's assertion, Br. 38, that "nothing in the language of Section 614 has changed" since 2007 misses the mark.

Petitioners claim (Br. 38) that the Commission "depart[ed] from its settled precedent absent reasoned explanation" fares no better. The Commission acknowledged expressly that it was changing its interpretation of the statute and explained at length why it was doing so. Faced with two plausible definitions of the term "viewable," the Commission adopted a device-based interpretation in light of "dramatic changes in technology and the marketplace" that had taken place since the *Viewability Order* had been issued. *Sunset Order* ¶11 (JA 304). Specifically, in 2007 nearly half of all television households received analog-only cable service, and mandatory analog carriage was "a reasonable measure to ensure that must-carry signals were 'viewable,'" *id*. ¶12 (JA 305). Today, by contrast, only about 8 percent are analog-only customers. *See* pp. 13-14, *supra*; *Sunset Order* ¶¶12-13 (JA

305-306). The importance of the analog-only cable subscriber to must-carry stations today is a fraction of what it was five years ago.

The need for viewability without a conversion device is lessened considerably by the ready availability of "low-functionality/low cost" signal conversion equipment, which did not exist in 2007. *Id*. ¶14 (JA 306). Cable operators have made the converters – 27 million of which are currently in use – available either free of charge or for a nominal fee. *Ibid*. (JA 307-308). Such a minimal cost, the Commission predicted, "is unlikely to discourage use of this equipment." *Ibid*. (JA 308).

The "dramatic changes in technology and the marketplace" also altered the constitutional calculus and weighed in favor of eliminating the mandatory analog carriage rule. *Id*. ¶11 (JA 304). The agency reasonably concluded that, to the extent new technology and marketplace developments permitted a less burdensome alternative to the requirement set forth in 2007, that less speech-restrictive alternative was preferable so long as it was consistent with the text and purposes of the statute. *See* pp. 40-41, *supra*.

In the 2007 *Viewability Order*, moreover, the Commission explicitly foreshadowed that the agency might change its application of Section 614(b)(7). The Commission set the viewability rule to expire in three years, stating that it would review the rule "in light of the potential cost and service

disruption to consumers, and the state of technology and the marketplace." *Viewability Order* ¶16. Upon consideration of those very factors five years later, the Commission chose a different approach, based on a revised interpretation of the statute. The Commission thus advanced a reasoned explanation of the changes in marketplace conditions and technology that led it to allow the viewability rule to sunset as originally planned.

B. The Commission Properly Considered The Record.

Petitioners allege that the FCC "failed to examine the relevant data" or to set forth a rational basis for its decision. Br. 42. Not so.

The Administrative Procedure Act requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission did just that. The agency acknowledged that sunset of the viewability rule could affect the 8 percent (and falling) of television households that continue to receive analog-only service. *Sunset Order* ¶15 (JA 309-310). It concluded, however, that sunset of the rule would not adversely affect the economic viability of must-carry stations. *Ibid*. As set forth above, the FCC explained that the relatively small number of affected customers, the availability of simple and affordable signal conversion devices, and the probability that some analog-only customers already own

digital television sets would ensure an adequate viewership. The Commission also explained that in light of changes in the marketplace and technology, constitutional considerations weighed against any decision to perpetuate the significant burdens of a dual carriage requirement. *See* pp. 45-46, *supra*.

Petitioners identify no specific record data that the Commission did not consider. They rely on an *ex parte* letter submitted by NAB claiming that must-carry stations would suffer "severe economic consequences," Br. 40-41, but that is a conclusion, not evidence. The other "evidence" relied on by petitioners (Br. 41) similarly amounts to speculation about cable subscribers' willingness to employ conversion boxes. The Commission expressly considered such submissions and rejected them. It concluded that NAB's claims of harm rested upon the unwarranted assumption that no analog-only subscribers would acquire a signal conversion device. *Sunset Order* n.52 (JA 304). Instead, the Commission reasonably predicted that cable customers would not be deterred by the need to obtain such widely available and inexpensive equipment. *Id*. ¶14 (JA 306-308).

Petitioners do not challenge, or even acknowledge, those findings, which refute their claim that the Commission failed to consider the evidence presented. *See Thompson Med. Co. v. FTC*, 791 F.2d 189, 196 (D.C. Cir.

1986) (Court's role "is not to reweigh the evidence de novo," but simply "to determine if the Commission's finding is supported by substantial evidence on the record as a whole."). Petitioners also fail once again to confront the Commission's determination that the constitutional implications of the viewability rule outweighed any minimal adverse impact on must-carry stations. *See* pp. 40-41, *supra*.

At bottom, petitioners' argument reduces to a request that the Court accept their predictions about the effect of the viewability rule sunset rather than the FCC's predictions. But the Court has recognized that it "will not substitute [its] judgment for the agency's, especially when, as here, the decision under review requires expert policy judgment of a technical, complex, and dynamic subject." *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C. Cir. 2010). That is particularly so when the matter turns on judgments of future consumer behavior. In that situation, the Court accords "substantial deference" to the FCC's predictive judgments. *Cablevision Systems Corp.*, 649 F.3d at 716, citing *Nuvio Corp. v. FCC*, 473 F.3d 302, 306 (D.C. Cir. 2006); *see Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 (D.C. Cir. 1983) ("predictive judgments about areas that are within the agency's field of discretion and expertise" are entitled to "particularly deferential" treatment).

C. The Commission Reasonably Concluded That Conversion Devices Are Available.

Petitioners claim that the record fails to support the Commission's finding that digital transport adapters would be available at affordable rates. Br. 42-44. They raise three specific claims, all of which are baseless.

First, petitioners claim that the record showed that cable companies were charging up to $7.00 per month for DTAs, not $2.00 per month or less as determined by the agency. Br. 43 (citing a pleading filed by the National Cable & Telecommunications Association). In fact, the pleading says nothing of the sort. Supporting the Commission's conclusion, NCTA informed the agency that many cable companies "are already providing digital transport adapters (DTAs) to some or all of their customers at minimal or no cost." NCTA April 26, 2012 *ex parte* at 2 (JA 188). NCTA then indicated that "*other types* of affordable digital set-top boxes" – *i.e.*, *not* DTAs – were being made available for prices between one and seven dollars per month, "depending on the particular cable operator and the box capabilities." *Id*. at 2 & n.6 (JA 188) (emphasis added). The letter supports the Commission's findings.

Second, petitioners claim that the record does not support the Commission's determination that DTAs would be affordable. Br. 43; *see* Int. Br. 21. The argument is that $2.00 per month is unaffordable for some

families. In fact, the Commission determined that the "range of charges" reflected in the record varied from free-of-charge to $2.00 and that several large cable companies were charging no more than a dollar. *Sunset Order* ¶14 (JA 308). A free device plainly is "affordable." It was reasonable for the Commission to conclude that analog-only cable customers could afford a fee of $2.00 or less in light of the price of cable service. As of January 2011, the average nationwide price for basic cable service was about $20.00 per month, a cost borne by every subscriber, and the average cost of "expanded basic" cable (the basic tier plus the most popular national cable networks, such as CNN) approached $60.00 per month. *See Report on Cable Industry Prices*, 27 FCC Rcd 9326, 9331 Table 1 (Media Bur. 2012). Moreover, if cable companies convert to more all-digital service that requires rental of a more expensive set-top box – an outcome to which petitioners' do not object, *see* Br. 46 – subscriber costs may well rise. Faced with this evidence of consumer behavior, it was reasonable for the Commission to conclude that a $2 charge for conversion equipment is not so onerous as to render the viewability requirement meaningless.

Third, petitioners claim that the Commission erroneously found that that DTAs would be readily available. Br. 43-44. The record showed, however, that 27 million DTAs have been deployed as of December 2011,

and that "there is no shortage of DTAs in the marketplace," *Sunset Order* n.88 (JA 311), quoting NCTA June 11, 2012 *ex parte* (JA 294). On that record, and with decreasing numbers of analog-only subscribers, the Commission reasonably predicted that sufficient DTAs would be available to ensure customers' ability to view must-carry stations. *Id*. ¶¶14, 15 (JA 307, 309).

Furthermore, the *Sunset Order* defines "viewability" to exist only when the cable provider can make a must-carry signal available "by an effective means." *Sunset Order* ¶8 (JA 301). If the cable provider cannot supply the necessary signal conversion equipment (at the requisite price), it may not discontinue analog service. *See Sunset Order* ¶18 (JA 312) ("after December 12, 2012, an operator of a hybrid system may choose to satisfy the viewability mandate by making must-carry signals available to analog subscribers by 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."); *Stay Order*, 27 FCC Rcd at 10227 n.83 ("hybrid cable operators must first make the necessary equipment available to subscribers before they can stop carrying must-carry channels in analog format").

D. The Commission Reasonably Considered The Burden Of Analog Carriage.

Petitioners contend that the Commission erred when it considered the burden analog carriage places on cable systems because Congress already struck the appropriate balance by requiring cable systems with more than 12 channels to devote up to one-third of their channel capacity to must-carry stations. Br. 44-47, citing 47 U.S.C. § 534(b)(1)(B).

There is no logical reason, however, why Congress's choice of a *maximum* permissible burden arising under a statutory must-carry requirement should forbid the FCC from determining whether the burden of an agency-crafted rule is justified. Congress itself recognized limitations on mandatory carriage below the limit. It specified, for example, that cable operators are not required to carry any station that "substantially duplicates the signal of another … station" carried on the system. 47 U.S.C. § 534(b)(5). For its part, the Commission rejected a requirement of "dual must-carry" of both analog and digital signals during the broadcast transition to digital format. *See Carriage of Digital Television Broadcast Signals*, 20 FCC Rcd 4516 (2005). The Commission appropriately recognized then that it must consider the benefits and burdens of mandatory analog carriage. It did so again in the *Viewability Order* when it promised to weigh the benefits

and burdens again at the sunset date, 22 FCC Rcd at 21070 ¶16. Petitioners show no error in that approach.

Petitioners' claim that the Commission is required to maximize the number of must carry stations up to the statutory limit not only lacks a basis in the statutory text, but also runs afoul of the First Amendment. Under intermediate scrutiny, the Commission must consider any speech-restrictive effects of its rules and ensure that those rules do not burden "substantially more speech than necessary" to further the government's legitimate interests. *Turner II*, 520 U.S. at 189. The Commission appropriately weighed those burdens here.

E. The Six-Month Transition Period Is Reasonable.

The Commission established a six-month transition period during which cable systems would continue to carry analog must-carry signals. Petitioners contend that period of time is unreasonably short because there was a longer transition period when broadcast television switched from analog to digital. Br. 47-49.

The comparison is inapt. The over-the-air transition to digital involved the complete termination of all analog service that rendered almost all television sets in the country incapable of receiving broadcast signals overnight. Without a signal converter, everyone who relied on broadcast

television signals would lose all service entirely, including access to emergency communications. The matter was described by a commenter before the Commission as "the most significant event for television-viewers since the invention of television itself." *DTV Consumer Education Initiative*, 23 FCC Rcd 4134, 4136 (2008). As petitioners themselves recognize, those circumstances called for "a massive effort by government and industry to educate consumers regarding necessary equipment." Br. 49.

The transition here is not remotely comparable. The sunset of the viewability rule will require a dwindling number of cable subscribers to obtain a signal converter to watch at most a small handful of stations. Unlike the digital broadcast transition, not all cable systems will decide to discontinue analog carriage at the same time or even at all. Because of the dramatically less complex process involved here, a shorter transition was fully justified.[7]

Petitioners charge the Commission with "fail[ing] to adopt *any* measures to ensure consumer awareness of this new transition," Br. 50, but

[7] The same reasoning applies to intervenor's argument – never raised before the Commission – that the Commission's decision here is inconsistent with its decision in the *Basic Service Tier Encryption* proceeding, 27 FCC Rcd at 12799, to require notice and the provision of free de-encryption equipment. Int. Br. 28-29. Analogous to the digital broadcast transition, encryption of the basic tier would render viewers who lack the necessary equipment unable to view all broadcast stations and all other content on the tier.

that is not so. The Commission requires cable systems to provide "notification to broadcasters and customers about any planned change in carriage or service" 30 days in advance. *Sunset Order* ¶17 & n.89 (JA 311), citing 47 C.F.R. §§ 76.1601, 76.1603(b). The Commission also made its ruling contingent upon the commitment by cable operators "to inform affected subscribers that equipment is required to continue viewing the must-carry signal and how to obtain that equipment." *Sunset Order* ¶17 (JA 312). Must-carry stations, to which cable operators have pledged to provide 90 days notice before any change, *ibid*, may also inform their viewers of the impending change (and have been able to do so since the *Sunset Order* was released in June 2012). Petitioners provide no reason to second-guess the Commission's judgment that those steps will allow adequate time to prepare. Indeed, cable operators have an economic incentive to ensure that they adequately inform their customers of material service changes lest irate customers switch service providers or cancel their service entirely. In short, petitioners fall far short of meeting their burden to show that the Commission has "failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n*, 347 F.3d at 300.

III. THE COMMISSION GAVE ADEQUATE NOTICE THAT IT WOULD CONSIDER A DEVICE-BASED VIEWABILITY APPROACH.

Finally, petitioners advance the perfunctory claim that the Commission "failed to provide interested parties with adequate notice that it was considering an equipment-based alternative" to the 2007 viewability rule. Br. 51. Intervenors make this claim their principal argument. Int. Br. 20-24. In fact, parties had notice.

The Administrative Procedure Act requires an agency to provide notice of "*either* the terms or substance of the proposed rule *or* a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (emphasis added). This Court has held that "the notice must be sufficient to fairly apprise interested parties of the issues involved, but it need not specify every precise proposal which [the agency] may ultimately adopt as a rule." *Action for Children's Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977) (internal quotation marks and citations omitted). In short, the notice must give "interested parties a reasonable opportunity … to present relevant information" on the central issues. *WJG Tel. Co. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982) (internal quotation marks and citations omitted).

Petitioners' argument is curious at the outset because, by its own terms, the viewability rule expired three years from its inception, *see* 47 C.F.R.

§ 76.56(d)(5) (2010) (rule "shall cease to be effective" in three years), and in the *Sunset Order* the Commission allowed it to expire as planned. *See Sunset Order* ¶29 (ordering that previous rule be removed from the C.F.R.) (JA 317); App. B (JA 319).[8] The expiration of the rule was announced three years in advance and subject to an additional round of comment prior to the end of that period. The Commission took the very action it had indicated.

Petitioners nevertheless insist that the Commission was required to announce that its decision to allow the viewability rule to expire as planned would turn on the availability of signal conversion equipment. Br. 52. If that is the case, the FCC provided adequate notice. The Commission described the proceeding initiated by the *Sunset Notice* as "an opportunity … to determine whether extending the current rule is necessary to fulfill th[e] statutory [viewability] mandate, *given the current state of technology* and the

[8] To be sure, the original sunset date was extended during the six-month transitional period. But petitioners do not complain about the allowance for an additional transitional period; indeed, they assert that the period was too short. Br. 47-49.

marketplace." *Id*. ¶5 (JA 71) (emphasis added).[9] In particular, the Commission noted that set-top boxes would be required in the absence of an analog carriage requirement and asked interested parties to provide data on "the range of costs per digital [converter] box …, and the range of rental fees" for boxes, and "any marketplace or other changes" since 2007. *Id*. ¶¶10, 13, 16 (JA 74, 75, 77). Market developments such as the availability and cost of signal converters were plainly raised as topics relevant to the Commission's ultimate decision.

Furthermore, the Commission noted in the *Sunset Notice* that in the *Viewability Order* it had considered and rejected "possible alternatives," such as "a rule that would allow [cable systems] to carry must-carry signals in digital so long as they made [signal conversion] equipment available for lease or sale to subscribers." *Sunset Notice* ¶14 & n.48 (JA 76). When the agency called for comment on "proposals that would achieve the results necessary to assure the viewability of must carry signals through an approach different than that of [the] existing rule," including solutions "that will satisfy the

[9] Contrary to petitioners' repeated assertion (Br. 6, 39, 51), the Commission did not directly propose to extend the rule for an additional three years. Quite to the contrary, the Commission was studiously neutral, simply "seek[ing] comment on whether it is necessary to extend the rule in its current form." *Sunset Notice* ¶10 (JA 74). The *Sunset Notice* included proposed language that would have extended the rule (JA 83), but the body of the notice cannot fairly be read to propose any outcome.

statute in a less burdensome manner," *id*. ¶16 (JA 77), it was referring to such things as the previously rejected approach. The *Sunset Notice* thus unquestionably gave interested parties fair notice that device-based viewability was one of the issues presented.

Unsurprisingly, some parties interpreted the *Sunset Notice* as a call for comment on device-based solutions. NCTA informed the Commission that "even those customers who have not chosen to purchase the full array of digital services available over full-service digital set-top boxes, now have equipment that enables them to view digitally delivered must-carry signals." Comments of NCTA at 12 (Mar. 12, 2012) (JA 113). This Court has found such pertinent comments to be evidence that notice was adequate. *See Nuvio Corp*. 473 F.3d at 310.

CONCLUSION

The petition for review should be should be denied for the foregoing reasons.

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February 14, 2013

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

AGAPE CHURCH, INC., ET AL., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 12-1334

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 12,677 words.

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STATUTORY APPENDIX

47 U.S.C. § 534(a)
47 U.S.C. § 534(b)(7)

47 C.F.R. § 76.56(d)(2010)

47 U.S.C. § 534

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART II. USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

§ 534. CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNALS

(a) Carriage obligations

Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b) of this title.

(b) Signals required

* * * * * *

(7) Signal availability

Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 543(b)(3) of this title.

* * * * * *

47 C.F.R. § 76.56(d)(2010)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 76. MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART D. CARRIAGE OF TELEVISION BROADCAST SIGNALS

§ 76.56 SIGNAL CARRIAGE OBLIGATIONS.

* * * * * *

(d)Availability of signals.

(1) Local commercial television stations carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection.

(2) Qualified local NCE television stations 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 service tier that includes the retransmission of local commercial television broadcast signals.

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

(i) Carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or

(ii) For all-digital systems, carry those signals in digital format, provided that all subscribers, including those with analog television sets, that are connected to a cable system by a cable operator or for which the cable

operator provides a connection have the necessary equipment to view the broadcast content.

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

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

* * * * * *

CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that on February 14, 2013, I filed the foregoing final Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Any participant who is not a registered CM/ECF user will be served by mail unless another attorney for the same party is receiving electronic service.

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