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	)	

FIFTH REPORT AND ORDER

Adopted: June 11, 2012 **Released: June 12, 2012**

By the Commission: Commissioners McDowell, Clyburn, and Pai issuing separate statements.

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I. INTRODUCTION

1. With this Fifth Report and Order (Fifth R&O) in the DTV cable carriage docket, we announce the sunset of the Commission's current "viewability" rule, which mandates that cable operators

with hybrid systems[1] carry digital must-carry signals[2] in an analog format for the benefit of analog-service customers. As explained below, we believe the statutory viewability requirement is best read to give the operator of a hybrid system greater flexibility in deciding how to comply with the viewability mandate. In particular, while such an operator may continue to carry a must-carry signal in a format that is capable of being viewed by analog-service customers without the use of additional equipment, 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 systems, as required by statute. Because a cable operator's exercise of this additional flexibility would involve operational changes that affect must-carry broadcast stations and viewers, we establish a six-month transitional period, until December 12, 2012, during which hybrid systems will continue to carry the signals of must-carry stations in analog format to all analog cable subscribers. In addition, we find it is in the public interest to extend for three more years the HD carriage exemption for eligible small cable system operators.

II. VIEWABILITY REQUIREMENT

A. Background

2. Pursuant to Section 614(b)(4)(B) of the Communications Act of 1934, as amended (the "Act"),[3] the Commission initiated this proceeding in 1998 to address the responsibilities of cable television operators with respect to carriage of digital broadcast stations in light of the nation's transition to digital television.[4] After Congress selected a date certain for the digital transition of full-power broadcast television stations, the Commission, in 2007, adopted the *Viewability Order* which, among other things, established a rule to ensure that after the DTV transition, cable subscribers would continue to be able to view 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]

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[1] A hybrid system is a cable system that offers both analog and digital cable service to its subscribers. By contrast, an analog-only system or all-digital system provide only analog or digital service, respectively.

[2] The "must-carry" provisions of the Communications Act entitle local television stations to have qualifying signals carried on cable systems in the same markets. Section 614(a) of the Communications Act provides that "[e]ach 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 in this section." 47 U.S.C. § 534(a). Section 615(a), 47 U.S.C. § 535(a), imposes a similar requirement to carry "the signals" of qualifying non-commercial television stations.

[3] 47 U.S.C. § 534(b)(4)(B).

[4] *Carriage of the Transmissions of Digital Television Broadcast Stations: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15093, ¶¶ 1-2 (1998). *See also* 47 U.S.C. § 534(b)(4)(B) (directing the Commission to "initiate a proceeding to establish any changes in signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards").

[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"* or *"Third Further Notice"*).

[6] *Id*. at 21065, ¶ 1.

[7] *Id*. at 21065, n.3.

Although all cable systems were expected to eventually 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] Thus, in anticipation of the approaching end of the digital television transition and in light of the state of technology and the marketplace, 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]

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 is scheduled to sunset on June 12, 2012.[16]

5. On February 10, 2012, we 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] We received four

[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.

[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 (2012) (*Fourth FNPRM*).

comments, five reply comments, and numerous *ex parte* submissions in response to our *Fourth FNPRM*.[18] In their comments, broadcasters support retention of the viewability rule, while cable operators urge us to let it expire.[19]

B. Discussion

6. Based on significant changes in the marketplace and technology that have occurred over the past five years, and our current understanding of the statutory viewability requirement as explained herein, we find it in the public interest to allow the viewability rule to sunset as scheduled, on June 12, 2012. Because we anticipate that our revised interpretation of the statutory viewability requirement will lead to the widespread deployment of small, affordable set-top boxes, we establish a transitional period of six months after expiration of the current rule – that is, until December 12, 2012 – during which hybrid systems will continue to carry the signals of must-carry stations in analog format to all analog cable subscribers. This transitional period will give consumers, cable operators, and broadcasters that rely on must-carry access an opportunity to prepare for that deployment and to take other necessary steps resulting from changes in cable carriage.

1. Statutory Analysis

7. 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."[20] 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."[21] In the 2007 *Viewability Order*, the Commission found that these statutory requirements "plainly apply" to cable carriage of digital broadcast

[18] We identify the list of commenters and reply commenters in Appendix A. In addition, we note that we received numerous *ex parte* submissions. All of the filings made in this docket are available to the public both online via the Commission's Electronic Comment Filing System ("ECFS") at http://www.fcc.gov/cgb/ecfs/ and during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554.

[19] *See*, *e.g.*, NAB comments at 3; NCTA comments at 5; TWC comments at 25.

[20] 47 U.S.C. § 534(b)(7).

[21] 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 "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. *See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Issues*, MM Docket No. 92–259, Report and Order, 8 FCC Rcd 2965, 2974, ¶ 32 (1993) ("*Analog Must Carry Order*") (noting that all must-carry signals must be available to all subscribers); *see also Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 18223, 18308-09, ¶ 162 (1996) ("*1996 OVS Order*") ("Pursuant to Section 614(b)(7) and 615(h), the operator of a cable system is required to ensure that signals carried in fulfillment of the must-carry requirements are provided to every subscriber of the system"). *Cf. U.S. v. Taylor,* 640 F.3d 255, 258 (7th Cir. 2011) ("It would be unrealistic to suppose that Congress never uses synonyms—that every word or phrase in a statute has a unique meaning, shared by no other word or phrase elsewhere in the vast federal code"). We note that no commenter has suggested that we impose different carriage obligations for commercial stations and noncommercial stations. *But see* Bright House Reply at 9-10, n.12 (arguing the Commission erred in adopting an expansive reading of Section 614(b)(7) and applying that reading to noncommercial stations governed by Section 615(h)). For purposes of this proceeding, we will continue to treat 614(b)(7) and 615(h) as imposing identical obligations.

signals, and, "as a consequence, cable operators must ensure that all cable subscribers – including those with analog television sets – continue to be able to view all commercial and non-commercial must-carry broadcast stations" after the DTV transition.[22] The Commission interpreted the viewability mandate to require that a cable operator "ensure that the broadcast signals in question are actually viewable on their subscribers' receivers."[23] The Commission rejected cable commenters' argument that the viewability mandate is satisfied when a cable operator transmits broadcast signals and offers to sell or lease a set-top box to their customers that will allow those signals to be viewed on their receivers.[24] The Commission found that argument "at odds with both the plain meaning of the statutory text as well as the structure of the provision," explaining that "[t]o the extent that such subscribers do not have the necessary equipment, … the broadcast signals in question are not 'viewable' on their receivers."[25] To implement the viewability mandate, the Commission concluded that cable operators that choose to operate a hybrid system – *i.e.*, operators that offer both analog and digital service tiers – were required to carry the must-carry stations' signals in analog format to their analog cable subscribers, while also ensuring the signals were viewable to digital subscribers.[26]

8. After consideration of the statutory arguments raised by the parties to this proceeding,[27] and upon further review of the statute, we find that the language of the Act is less definitive than our earlier decision suggested. Nothing in the language of the statute plainly prohibits cable operators from

[22] *Viewability Order,* 22 FCC Rcd at 21070, ¶ 15.

[23] *Id.* at 21074, ¶ 22.

[24] *Id.* at 21073-4, ¶ 22.

[25] *Id.*

[26] *Id.* at 21070, ¶ 15. *See also* 47 C.F.R. § 76.56(d)(3).

[27] We disagree with NAB's contention that the *Fourth FNPRM* did not ask for comment on the Commission's prior statutory analysis of the viewability requirement in Section 614(b)(7) and that cable commenters, having failed to seek timely review or reconsideration of the 2007 *Viewability Order,* are barred from reopening the issue now. *See* NAB Reply Comments at 2-3. To the contrary, the *Fourth FNPRM* specifically asked for parties to include a statutory analysis with any proposals for changing the viewability rule. *See Fourth FNPRM*, 27 FCC Rcd at 1721, ¶ 16 ("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"). As requested in the *Fourth FNPRM,* cable operators provided a statutory analysis to support their alternative proposal for satisfying the viewability requirement. *See, e.g.,* TWC Comments at 3-7. We also reject ION's claim that the *Fourth FNPRM* did not provide interested parties with an opportunity to comment on the DTA proposal nor "consider[] alternative proposals that would result in eliminating the rule." ION Media Networks and Liberman Broadcasting *Ex Parte* (dated Jun. 1, 2012) at 6-7. To the contrary, the *Fourth FNPRM* specifically sought comment on possible alternatives to the viewability rule. *See Fourth FNPRM*, 27 FCC Rcd at 1721, ¶ 16 ("we 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.") 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 provided analog customers access to digital must-carry signals made our rule obsolete. NCTA Comments at 12 ("DTAs could be used to receive digital must-carry signals"). Indeed, the cable industry has argued the former point since 2007, so there is nothing new about an approach to satisfy the viewability requirement by offering to sell or lease equipment to cable customers. Thus, the public had ample notice and opportunity to respond during the comment cycle and to file *ex parte* responses to any alternative proposals suggested by commenters, as ION itself has done in this proceeding.

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 do not believe that Section 614(b)(7) unambiguously requires that cable subscribers must be capable of viewing must-carry signals without the use of additional equipment. We instead conclude that "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.[28] We believe 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 if the customer is willing to incur significant additional expense.[29] It is consistent with both the ordinary meaning of the word "viewable" – defined as "capable of being seen or inspected"[30] – and also prior interpretations of the Communications Act.[31] 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).[32] Indeed, even 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 NAB otherwise argued.[33] We thus agree with cable commenters that the

[28] *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)").

[29] In 2001, we determined that Section 614(b)(7) did not require cable operators to sell or lease set top boxes to subscribers that could not view digital broadcast signals on their analog television sets. *See Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules Implementation of the Satellite Home Viewer Improvement Act of 1999*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2631-2633, ¶¶ 77-79 (2001). In 2001, the Commission's simulcast requirements were about to commence (requiring television broadcast licensees to simulcast a certain percentage of their analog channel's programming on their DTV channel), and the Commission decided that subscribers should not be forced to pay "substantial additional costs" for equipment that would serve only to convert to analog format digital programming that could be identical in content to the analog programming subscribers already could access directly through their analog televisions. *Id.* In that context, the Commission sought to avoid forcing upon customers "substantial additional costs" associated with receiving duplicative programming. Although made in a very different context, our decision today once again ensures that compliance with the viewability mandate does not impose "substantial additional costs" on consumers.

[30] *See* Webster's Third New International Dictionary 2551 (1993); *see also* TWC Comments at 4 (seeking this definition for "viewable").

[31] *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)).

[32] *See* NAB *Ex Parte* (dated April 13, 2012) at 1. S*ee 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)]").

[33] *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 (continued….)

term "viewable" does not unambiguously *require* that must-carry stations must be capable of being seen without the use of additional equipment.[34] In reaching this conclusion, we note that agencies may change their interpretation of an ambiguous statutory provision and that such a revised interpretation is entitled to deference.[35]

9. Broadcasters argue that allowing cable operators to satisfy the viewability requirement by requiring subscribers to purchase or lease equipment would "make the second sentence [in] Section 614(b)(7) surplusage, and remove any meaning from the word 'additional' in the third sentence of Section 614(b)(7)."[36] We disagree. The first sentence of Section 614(b)(7) requires that each must carry signal "shall be provided to every subscriber to a cable system."[37] As the Commission has explained, this provision requires that every class of subscriber must receive all must carry signals.[38] Cable operators have complied with this requirement through the use of a basic service tier,[39] *i.e.,* a level of service to which subscription is required in order to be eligible for access to any other tier of service at additional charge.[40] 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 and third

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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 through the use of DTAs. *See* NAB *Ex Parte* (dated June 8, 2012).

[34] *See* TWC Comments at 4.

[35] *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.")

[36] *See* NAB *Ex Parte* (dated May 4, 2012) Attachment at 2. Section 614(b)(7) provides:

> SIGNAL AVAILABILITY. – Signals carried in fulfillment of the requirement 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 623(b)(3).

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

[37] *Id.*

[38] *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-up; 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).

[39] *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").

[40] 47 U.S.C. § 543(b)(7)(A).

sentences of Section 614(b)(7) likewise are distinct mandates, as we observed in the 2007 *Viewability Order*.[41] 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 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."[42] 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.[43] In short, our interpretation of the term "viewable" in the second sentence 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)."[44]

10. NAB further argues that allowing cable operators to satisfy the viewability requirement by providing equipment conflicts with the "signal quality" provision set forth 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."[45] NAB argues that reliance on set-top equipment "would allow cable operators to discriminate by, for example, offering non-broadcast programming in a viewable format but not local broadcast signals," or to provide some local signals to analog subscribers, but not others.[46] It is not clear, however, that this provision applies here. Section 614(b)(4)(A) speaks specifically to the issue of "nondegradation" and "technical specifications," and does not address the issue of viewability. In any event, even if that provision were to apply, it is not clear that carrying must-carry signals only in a digital format would violate the terms 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 should be no perceivable difference between them.[47] Moreover, 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.

11. Based on the foregoing, we agree with cable commenters that the statutory viewability requirement is ambiguous, and reasonably can be read in a manner to permit cable operators to require the

[41] *See Viewability Order,* 22 FCC Rcd at 21073, ¶ 22.

[42] 47 U.S.C. § 534(b)(7).

[43] *See* note 36, *supra.*

[44] 47 U.S.C. § 534(b)(7). We note that our new statutory interpretation (*i.e.,* that a hybrid system cable operator may satisfy the viewability mandate by offering analog subscribers equipment for free or at an affordable cost) is being implemented pursuant to Sections 614(b)(7) and 615(h) of the Act, not as a rate regulation prescribed under Section 623(b)(3) of the Act. Although some requirements set forth in Section 623(b) are lifted when an operator is deregulated, deregulation would not be an exemption from the carriage requirements of the statute. *See Viewability Order,* 22 FCC Rcd at 21078, ¶ 29.

[45] 47 U.S.C. § 534(b)(4)(A). *See also* NAB *Ex Parte* (dated May 4, 2012) Attachment at 2.

[46] NAB *Ex Parte* (dated April 13, 2012) at 2.

[47] *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*").

use of equipment to view must-carry signals – although we emphasize that such equipment must be both available and affordable (or provided at no cost). We here choose a reasonable interpretation of the statutory text that best effectuates the statutory purpose in light of current marketplace conditions.[48] Moreover, the doctrine of constitutional avoidance[49] counsels us to interpret the Act as not imposing a rigid analog-carriage requirement on cable operators, where the record establishes a reasonable, less burdensome alternative that meets the statutory objectives.[50] Specifically, we are persuaded by cable commenters' argument 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.[51] The current record lacks evidence that infringing on cable operators' discretion by requiring both digital and analog carriage of the same broadcast stations 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. Nor is 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 will diminish the availability or quality of broadcast programming.[52] We thus find that the burden placed on cable operators by the viewability rule is not justified on the current record, which demonstrates that a less burdensome alternative is available. Based on our analyses of current technology and marketplace conditions,[53] set forth in detail below, we now find that the most reasonable interpretation of the statute is

[48] *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").

[49] *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").

[50] *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").

[51] *See, e.g.,* TWC Comments at 18. NAB observes that compliance with the viewability rule remains voluntary as operators have the option to convert their systems to all-digital operation, and thereby obviate the need to comply with the rule's analog carriage requirement. *See* NAB *Ex Parte* (dated April 13, 2012) at 4-5. Cable commenters, on the other hand, maintain that forcing operators to carry must-carry signals in analog format unduly hampers the efforts of cable operators to manage their own gradual transition to all-digital service in a manner that attracts customers to digital services while retaining value for those customers who still choose to rely only on analog service. *See* NCTA *Ex Parte* (dated April 5, 2012) at 2; *see also* Bright House Reply at 6 (a cable system's digital transition must continue at a pace that properly balances the needs of its subscribers with available spectrum and allowing the viewability rule to sunset would aid the cable industry's digital transition).

[52] We are not persuaded by broadcasters' argument that allowing the rule to sunset will threaten the viability of local broadcasters because their analysis assumes that elimination of the viewability rule will automatically result in the broadcaster's signal being unavailable to all analog subscribers. *See* NAB *Ex Parte* (dated April 23, 2012) Attachment. Their analysis fails to take into account that those analog customers who value must-carry channels may opt for equipment made available by the cable operator to continue accessing must-carry channels and other programming offered by the cable operator in a digital format. *See infra*, ¶ 16.

[53] *See American Trucking Assns. v. Atchison, T. &S.F. Ry.,* 386 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are (continued….)

that an operator of a hybrid system may comply with the viewability mandate by carrying a must-carry signal in a format that is capable of being viewed by analog customers either without the use of additional equipment or 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.

2. Changes in Technology and the Marketplace

12. Significant changes that have occurred in the marketplace and technology over the past five years confirm our determination that it is in the public interest to allow the 2007 viewability rule to sunset. At the time the rule was adopted, the Nation was preparing for the digital television transition, and a significant number of television viewers were unequipped to receive a digital signal.[54] In 2007, about 58 percent of television households subscribed to cable service and 46 percent of these cable subscribers (40 million households) received analog service. Moreover, there was no low-functionality and/or low-cost digital set-top box option available to ensure analog cable subscribers could access digital must-carry signals.[55] Consequently, the Commission faced the very real possibility that a significant number of cable customers could lose access to must-carry channels if hybrid cable systems were permitted to carry such signals only in digital format. Based on the state of the marketplace in 2007, the rule requiring hybrid cable systems serving analog subscribers to carry must-carry stations in analog format was a reasonable measure to ensure that must-carry signals were "viewable" and "available" to all subscribers as required by statute.[56]

13. The state of technology and the marketplace is significantly different now. About 50

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neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday"); *American Civil Liberties Union v. FCC,* 823 F.2d 1554, 1565 (D.C. Cir. 1987) (FCC should "carefully monitor the effects of its regulations [of cable television rates] and make adjustments where circumstances so require…. [W]e would not expect the Commission to adhere blindly to regulations that are cast in doubt by new developments or better understanding of the relevant facts"), *cert. denied,* 485 U.S. 959 (1988); *Natural Resources Defense Council, Inc. v. Herrington,* 768 F.2d 1355, 1408 (D.C. Cir. 1985) (DOE efficiency standards for household appliances "would be patently unreasonable" if "based on data half a decade old").

[54] *See, e.g.,* Brighthouse Reply at 4 ("When the Commission adopted the *Viewability Order*, it was confronting the broadcast industry's DTV transition and the fear that this historic event would trigger major viewer disruption. In that context, the Commission chose – *on a temporary basis* -- to broadly apply cable's must-carry obligations so as to minimize the transitional impact on cable customers who were accustomed to receiving broadcast channels in analog. With that same transitional objective in mind, the cable industry acquiesced").

[55] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment; Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Oahu Central Cable System; Cox Communications, Inc. Fairfax County, Virginia Cable System; Cable One, Inc.'s Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules,* Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657, 14681-14682, ¶¶ 49-50 (2010) ("*2010 CableCARD Order*") (exempting for the first time HD DTAs from the Commission's integration ban; *see* 47 C.F.R. §§ 76.640(b)(4) and 76.1204(a)(1)). In addition, we note that only about 25 percent of television households had HD television sets. The Nielsen Company, *Nielsen Universe Estimates*, Jan. 1, 2007 - Jan. 1, 2011, "Mkt Breaks"; *National Media Related Universe Estimates*, Feb. 2011, "Media UE Trends"; *Television Audience Report*, 2010-2011, at 4, http://www.nielsen.com/us/en/insights/reports-downloads/2011/television-audience-report-2010-2011.html (visited Mar. 23, 2012).

[56] *See* NCTA Reply at 4 (cable industry's commitment to comply with federal rules and to carry must-carry stations in analog format reflected a commitment the cable industry had previously made to Congress – "a commitment that also was expressly limited to three years").

percent of television households now subscribe to cable service (down from 58 percent in 2007), about 20 percent of these cable subscribers (about 12 million households) receive analog service (down from 40 million households in 2007), and the latter number is expected to drop to 16 percent (or fewer than 10 million households) by the end of 2012.[57] We continue to expect most cable operators will eventually transition to all-digital systems.[58]

14. More importantly, unlike in 2007, low-functionality/low cost digital equipment is now readily available as an option to cable consumers.[59] The cable industry has encouraged the development of small, low-cost set-top boxes, called "Digital Transport Adapters" ("DTAs"),[60] to enable customers to view digital signals, without having to obtain full-featured digital set-top boxes.[61] NCTA states that

[57] *See* SNL Kagan, "Video growth enjoys seasonal lift in Q1; service providers notch sub gains," (May 16, 2012) ("More than 80% of basic subs are now digital."); SNL Kagan, "SNL Kagan's 10-Year Cable TV Projections," (Jul. 28, 2011).

[58] *Id*. *See also* NCTA *Ex Parte* in MB Docket No. 11-169 (dated Feb. 7, 2012) at 4 (noting that "in light of … pro-consumer benefits, cable operators have strong incentives to migrate rapidly to all-digital networks"); SNL Kagan, "Cable's all-digital transition marches on without universal support," (Dec. 14, 2011) (stating that "the U.S. cable industry's all-digital future is inevitable"). We note, for example, that BendBroadband and RCN have completed their transition to all-digital service, and Comcast and Cablevision are rapidly transitioning to all-digital service. *See* BendBroadband Comments in MB Docket No. 11-169 at 1-2; RCN Comments in MB Docket No. 11-169 at 2; Comcast Comments in MB Docket No. 11-169 at 4; Cablevision Comments in MB Docket No. 11-169 at 13; SNL Kagan, "Video growth enjoys seasonal lift in Q1; service providers notch sub gains," (May 16, 2012) ("Greater than 93% of Comcast basic subs and more than 97% of Cablevision basic subs are now digital. Cablevision intends to complete the conversion of its entire network to digital later this year.").

[59] We note that the number of television households with HD television sets has increased to about 64 percent for the 2010-2011 TV season (up from 25 percent in 2007). *See* The Nielsen Company, *Nielsen Universe Estimates*, Jan. 1, 2007 - Jan. 1, 2011, "Mkt Breaks"; *National Media Related Universe Estimates*, Feb. 2011, "Media UE Trends"; *Television Audience Report*, 2010-2011, at 4, http://www.nielsen.com/us/en/insights/reports-downloads/2011/television-audience-report-2010-2011.html (visited Mar. 23, 2012). We also note that analog cable subscribers with digital TV sets with QAM tuners will be able to continue to view must-carry signals in digital without attaching additional equipment. Most television sets, consumer electronics devices, and leased set-top boxes have included QAM tuners since at least 2007, meaning that those devices are capable of tuning unencrypted digital cable service. *See Basic Service Tier Encryption*, MB Docket No. 11-169, *Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Notice of Proposed Rulemaking, 26 FCC Rcd 14870, 14872-14876, ¶¶ 4-6 (2011) ("*BST Encryption NPRM*"). In the pending *BST Encryption NPRM*, the Commission sought comment on whether to retain the basic service tier encryption prohibition for all-digital cable systems; the Commission did not propose to allow encryption of basic service tier signals on hybrid systems, which are at issue here. *Id*. at 14877-78, ¶ 9. *See also* Bright House Reply at 5 (explaining that many cable customers who have not yet subscribed to a digital service tier are able to directly access unencrypted digital signals included in their cable system's basic service tier through their television sets purchased within the last five years).

[60] DTAs are simple one-way digital-to-analog set-top boxes that can provide cable consumers with access to the basic service tier and the expanded basic service tier. These devices are small enough to be attached to the back of a television set. *See*, *e.g.*, "The Comcast Digital Transport Adapter" at http://www.bocsco.com/comcast_dta.php (BOCS website visited May 3, 2012) (link contained in NCTA Comments at 13); "All About Digital Adapters" at http://customer.comcast.com/help-and-support/cable-tv/digital-adapter/ (Comcast website visited May 3, 2012); Jeff Baumgartner, "Digital Transport Adapters (DTAs)," Light Reading (Jul. 15, 2009), available at http://www.lightreading.com/document.asp?doc_id=179245 (visited May 3, 2012). *See also* Cisco Systems, Inc. *Ex Parte* (dated May 23, 2012) Attachments.

[61] *See* NCTA Comments at 12. *See also* TWC *Ex Parte* (dated May 7, 2012) at 1 (in connection with one of its system's all-digital transition, the cable operator offered its subscribers the use of one or more DTAs at no charge for two years, as an alternative to leasing full-featured set-top boxes or purchasing CableCARD-equipped retail (continued….)

"some cable operators … are already providing digital transport adapters (DTAs) to some or all of their customers at minimal or no cost."[62] According to industry reports, about 27 million DTAs were already deployed by year-end 2011.[63] In addition to DTAs, NCTA explains that "[o]ther operators … are providing other types of affordable digital set-top boxes, with lesser capabilities and/or at substantially reduced prices for basic-only customers."[64] Moreover, NCTA states that "the eight largest incumbent cable operators" have committed to "make available to analog-only households, upon request, low-cost set-top devices capable of displaying basic service tier signals on analog television sets."[65] Therefore, we expect that DTAs, or similar devices, will be made broadly available on cable systems throughout the country.[66] The low cost set-top box offers reflected in our record will satisfy our new interpretation of the viewability requirement, permitting a cable operator to make the must-carry signals available by offering analog customers the necessary digital equipment at an affordable cost.[67] Specifically, the record reflects that Comcast, for a period of time after migrating a system to all-digital, typically offers two or three free DTAs to customers at no cost, and charges less than $2 for additional boxes.[68] Similarly, Time Warner

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devices, and offered subscribers the opportunity to lease one or more DTAs for 99¢ per month after the initial free offer expires).

[62] NCTA *Ex Parte* (dated April 26, 2012) at 2.

[63] *See* SNL Kagan, "Cable set-top forecast: Industry's move to IP video impacts projections," (Sept. 16, 2011).

[64] NCTA *Ex Parte* (dated April 26, 2012) at 2. *See also* ACA *Ex Parte* (dated Jun. 4, 2012) at 3 (stating that "ACA members who operate hybrid analog/digital systems make available for lease digital set-top boxes that permit digital-only signals to be viewed on analog television sets, and analog-only cable customers that are served by these hybrid systems can commonly obtain boxes from their providers at low cost").

[65] NCTA *Ex Parte* (dated May 17, 2012) at 2 (noting that the eight largest cable operators "collectively serve more than 70 percent of all analog-only cable customers").

[66] We understand that DTAs are widely available to cable systems using Motorola technology and, according to TWC, "Cisco does make DTAs available for use with Cisco headend equipment." *See* TWC *Ex Parte* (dated May 7, 2012) at 2 (noting, however, that "TWC to date has not deployed DTAs in a Cisco cable system"). *See also* Cisco Systems, Inc. *Ex Parte* (dated May 23, 2012) at 1 (stating it has produced and "markets Digital Transport Adaptors for use in conjunction with multichannel video programming distribution systems").

[67] Our ruling today is not inconsistent with Section 629 of the Act, which was enacted to ensure the commercial availability of navigation devices. 47 U.S.C. § 549. We expect many cable operators will offer DTAs to analog subscribers to fulfill the viewability mandate. Therefore, we do not expect that these low-cost limited functionality devices will have an effect on the development of a commercial market for navigation devices. *See*, *e.g.*, *2010 CableCARD Order*, 25 FCC Rcd at 14681, ¶ 49 (exempting limited capability HD set-top boxes from the integration ban); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices: Cable One, Inc.'s Request for Waiver of Section 76.1204(a)(1)*, CS Docket No. 97-80, Memorandum Opinion and Order, 24 FCC Rcd 7882, 7887, ¶ 13 (2009) ("*Cable One Waiver*"). As noted previously, for purposes of the retail market, consumers prefer advanced two-way devices capable of receiving the electronic programming guide, video on demand, and other interactive features, which are not made available by DTAs. *See Cable One Waiver*, 24 FCC Rcd at 7887, ¶¶ 13-14. Nevertheless, to the extent such advanced two-way boxes are offered below the cost reasonably allocable to such box, we remind operators of their obligations to offer a comparable discount to CableCARD customers on the same service plan. 47 C.F.R. § 76.1205(b)(5)(ii)(B)(2).

[68] *See* NCTA *Ex Parte* (dated Feb. 21, 2012) in MB Docket No. 11-169 at 4; New Jersey Division of Rate Counsel Comments in MB Docket No. 11-169 at 6. *See also*, *e.g.*, SNL Kagan, "All-digital migration drives set-top outlook," (Sept. 22, 2009); Jeff Baumgartner, "Comcast Seeds Digital Shift With Free Boxes," Light Reading (Nov. 4, 2008), available at http://www.lightreading.com/document.asp?doc_id=167256&site=lr_cable (visited May 3, 2012); Jeff Baumgartner, "Comcast Starts to Kiss Analog TV Goodbye," Light Reading (Jan. 6, 2012), available at http://www.lightreading.com/document.asp?doc_id=216104&site=lr_cable (visited May 3, 2012).

Cable states that in transitioning one of its systems to digital it has offered subscribers "one or more" DTAs free of charge for the first two years and 99 cents per month thereafter.[69] In addition, Bright House states that it offers set-top boxes to basic service tier subscribers for $1 a month.[70] We find that this range of charges for DTAs and set-top boxes – *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.[71] Materially higher leasing fees, however, could deter subscriber willingness to order the equipment needed to ensure viewability on a hybrid cable system.[72] Accordingly, such fees would not meet the statutory viewability requirement as we interpret it.[73]

3. Effect on Must-Carry Stations, Cable Operators, and Consumers

15. We are not persuaded by the broadcasters' analysis that allowing the current viewability rule to expire on schedule will threaten the viability of must-carry stations.[74] According to the

[69] TWC *Ex Parte* (dated May 7, 2012) at 1.

[70] Bright House *Ex Parte* (dated May 14, 2012) at 1.

[71] We note that, to the extent a cable operator of a hybrid system elects to cease down-converting a must-carry signal and instead chooses to provide analog customers the necessary digital equipment to view such signal, such equipment must continue to meet the affordability requirements described herein until the operator completes its transition to all-digital service.

[72] Concerns in the record about the cost of equipment appear to assume costs comparable to those ordinarily charged for full-function boxes, while our affordability requirement ensures that if equipment is used to provide viewability, that equipment will be available at a nominal cost or no charge. *See*, *e.g.*, National Black Religious Broadcasters, Lieberman Broadcasting Inc., Una Vez Mas, ION Media Networks, NRJ TV LLC (collectively "Must-Carry Broadcasters") Joint *Ex Parte* (dated Jun. 9, 2012) at 4, n.6.

[73] We note that, to the extent such equipment is subject to rate regulation, operators must also comply with those requirements. *See* 47 U.S.C. § 543(b)(3); 47 C.F.R. § 76.923.

[74] *See* NAB *Ex Parte* (dated April 23, 2012) Attachment (providing an economic analysis on the impact of reduced cable carriage on must-carry stations). *See also* NAB *Ex Parte* (dated April 23, 2012) Attachment at 3 (if a must-carry station "were to lose access to a number of cable households through the elimination of the viewability rule, its revenue would certainly decrease"); NAB *Ex Parte* (dated April 13, 2012) at 2-3 (if the viewability rule were allowed to sunset, "there is a significant potential for must carry stations to lose audience share" and to the extent a must carry station's financial viability is harmed, it "would harm not only the cable subscribers that can no longer view must carry stations, but potentially all of those stations' viewers"). Several must-carry broadcasters filed *ex parte* letters to support NAB's analysis. *See*, *e.g.*, Liberman Broadcasting, Inc. ("Liberman") *Ex Parte* (dated Apr. 26, 2012); National Religious Broadcasters *Ex Parte* (dated Apr. 26, 2012); ION Media Networks ("ION") *Ex Parte* (dated Apr. 27, 2012); Una Vez Mas, LP *Ex Parte* (dated Apr. 27, 2012); Francis Wilkinson (Costa De Oro Media, LLC) *Ex Parte* (dated Apr. 30, 2012); Sunbelt Multimedia Co., *Ex Parte* (dated May 1, 2012); WTVA, Inc. *Ex Parte* (dated May 2, 2012); Named State Broadcaster Associations *Ex Parte* (dated May 3, 2012); Mapale LLC *Ex Parte* (dated May 7, 2012); The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, and the NBC Television Affiliates (the "Affiliates Associations") (dated May 9, 2012); The Ohio Association of Broadcasters (OAB), the Virginia Association of Broadcasters (VAB), and the North Carolina Association of Broadcasters (NCAB) *Ex Parte* (dated May 9, 2012); Daystar Television Network (DTN) *Ex Parte* (dated May 11, 2012); FOX Affiliates Association *Ex Parte* (dated May 14, 2012); Christian Television Network *Ex Parte* (dated May 22, 2012); Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network (TBN) *Ex Parte* (dated May 24, 2012); Regional News Network (WRNN-TV) *Ex Parte* (dated May 25, 2012); Bert Ellis *Ex Parte* (dated Jun. 4, 2012); Entravision Holdings, LLC *Ex Parte* (dated Jun. 4, 2012); KVMD Licensee Co., L.L.C. *Ex Parte* (dated Jun. 4, 2012); NRJ TV LLC ("NRJ") *Ex Parte* (dated Jun. 4, 2012); Rancho Palos Verdes Broadcasters, Inc.(RPVB) *Ex Parte* (dated Jun. 4, 2012); Northwest Broadcasting Inc. *Ex Parte* (dated Jun. 5, 2012); Ramar Communications, Inc. *Ex Parte* (dated Jun. 5, 2012); OTA Broadcasting *Ex Parte* (dated Jun. 6, 2012); Must-Carry Broadcasters Joint *Ex Parte* (dated Jun. 9, 2012).

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."[75] As NCTA points out, however, the broadcasters' analysis overstates the impact on such stations because it assumes that elimination of the rule will automatically result in the broadcaster's signal being unavailable to all analog subscribers.[76] To the contrary, our new statutory interpretation – which hinges on a cable operator making equipment available at no cost or an affordable cost[77] – will ensure that subscribers on hybrid systems may continue to access these signals at little or no additional expense.[78] As cable commenters explain, a must-carry signal carried only in digital format would still be included in the basic service tier; analog cable subscribers would not be required to subscribe to an enhanced tier of service to view the digital version of a must-carry channel.[79] We also expect this issue 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

[75] *See also* NAB *Ex Parte* (dated April 23, 2012) Attachment at 2. In addition, Affiliate Associations argue that if the viewability rule was allowed to sunset, stations electing retransmission consent could also "face audience and revenue losses because many retransmission consent agreements reference the requirements of the viewability rule. If the rule were to go away, cable operators likely would insist that they have no obligation to ensure retransmission consent signals are available to all subscribers." *See* Affiliates Associations *Ex Parte* (dated May 9, 2012) at 2; FOX Affiliates Association *Ex Parte* (dated May 14, 2012) at 2. We do not find this argument to be persuasive or to provide a basis for extending the viewability rule. As we have said before certain local broadcast station programming is "highly valued by consumers" and "carriage of local television broadcast station signals is critical to MVPD offerings." *General Motors Corporation and Hughes Electronics, Corp. Transferors and the News Corporation, Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 565, ¶ 202 (2004). Given cable subscribers' demand for access to retransmission consent stations, we do not expect our approach to the viewability requirement for must-carry stations to significantly impact carriage of broadcast stations that elect to negotiate terms for retransmission consent rather than invoking their statutory must-carry rights.

[76] *See* NCTA *Ex Parte* (dated April 26, 2012) at 2.

[77] We are not persuaded by broadcasters' argument that equipment use here should be banned for the same reason the "A/B switch" solution was rejected in the early 1990s. *See* ION and Liberman Joint *Ex Parte* (dated June 1, 2012) at 6. An "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. The "A/B switch" solution was rejected because of numerous technical problems associated with the device and considerable evidence (including two empirical studies) showing a lack of consumer acceptance of the switch. *See Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180, 219-21 (1997). We are presented with a very different situation here. First, while the "A/B switch" required subscribers to access must-carry stations over-the-air, in the situation here must-carry stations will continue to be carried on the digital tier of the cable system. There will be no manual toggling involved to access must-carry stations. Rather, the available DTA (or similar equipment) will provide subscribers equivalent access to all cable programming, including must-carry stations. In addition, the record lacks any suggestion of technical problems associated with the use of DTAs or low-cost set-top boxes. Likewise, there is no evidence of any problem with customer acceptance. As indicated above, for example, approximately 27 million DTAs had been deployed by year-end 2011. *See supra,* ¶ 14.

[78] We note that subscribers served by analog-only systems would not be impacted by the sunset of the viewability rule because those systems would be 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.

[79] *Id.* at 2. *See also* TWC *Ex Parte* (dated May 7, 2012) at 2 (explaining that the rates TWC charges for the basic service tier do not vary depending on whether the subscriber accesses an analog or digital version of services carried on that tier).

digital service and as more hybrid cable systems complete their transition to all-digital systems.[80]

16. The record further reflects that eliminating the rule will result in significant benefits to cable operators in meeting the increasing demands of the large majority of their customers, *i.e.,* those subscribing to digital services.[81] NCTA explains 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."[82] NCTA explains 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.[83] According to staff review of the 2011 Annual Cable Operator Report data and the 2010 Cable Price Survey data, 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.[84] 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.[85] Thus, as cable commenters explain, elimination of the viewability rule will provide operators the needed flexibility to meet fast-changing consumer demands for HD cable services and high-speed broadband services.[86]

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[80] *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 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").

[81] *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").

[82] 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 take up more bandwidth than 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.").

[83] NCTA Comments at 13.

[84] *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*.

[85] *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").

[86] *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 (continued….)

4. Six-Month Transition Period

17. To facilitate a smooth transition, we adopt, for a six-month transition period following the sunset of our viewability rule,[87] an interim requirement that operators of hybrid cable systems must continue to carry the signals of must-carry stations in analog format to all analog cable subscribers. Critical to our decision to allow the viewability rule to sunset is the availability of affordable set-top boxes to affected cable subscribers. A six-month transition period will provide cable operators an opportunity to acquire an adequate supply of equipment for subscribers impacted by any carriage change.[88] It will also provide time for cable operators to comply with our existing rules requiring notification to broadcasters and customers about any planned change in carriage or service and the operator's equipment offerings, as well as allow consumers sufficient time to make any necessary arrangements.[89] As part of the cable operators' required notification to their subscribers of any carriage

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programming services as well as from broadband video services"); Bright House Reply at 6 (explaining that data-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).

[87] *I.e.*, December 12, 2012.

[88] *See* TWC *Ex Parte* (dated May 7, 2012) at 2 (confirming that "TWC to date has not deployed DTAs in a Cisco cable system, but TWC understands that Cisco does make DTAs available for use with Cisco headend equipment"). *See also* Baja Broadband Operating Company, LLC, Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, CSR-8357-Z, DA No. 12-899 (rel. Jun. 7, 2012) (noting that HD DTAs are expected to be available to the small cable operator by October 2012). Contrary to the broadcasters' suggestion, the Baja waiver grant does not suggest an issue with the availability of DTAs in general. *See* NAB *Ex Parte* (dated Jun. 8, 2012) at 2, n.5; Must-Carry Broadcasters *Ex Parte* (dated Jun. 9, 2012) at 4. First, the Bureau Order pertains to a small cable operator's short term need for HD DTAs. The Bureau Order does not address the availability of SD DTAs, which would also be sufficient for purposes of accessing the signals of must-carry stations carried in digital format. *See* NCTA *Ex Parte* (dated Jun. 11, 2012) at 2 ("Analog customers typically use standard-definition DTAs to access digital cable services on their analog TVs. There is no shortage of such DTAs in the marketplace. In fact, cable operators have deployed tens of millions of such DTAs to date, and these DTAs are in plentiful supply from a variety of vendors. The types of DTAs referenced in the Baja Broadband Waiver Order – HD DTAs – are just now coming to market and are expected to become more widely available in coming months."). Second, the Bureau Order observes that the HD DTAs are expected to be available in October 2012 (*i.e.*, within seven months of the waiver request date of March 9, 2012), a time frame consistent with the six-month transition period that we adopt today. Thus, the transition period should afford small operators the time needed to acquire any necessary equipment, including HD DTAs. Moreover, we expect that our Order today will provide an incentive for DTA manufacturers to ramp up production. Third, we reiterate that cable operators must have an adequate supply of affordable boxes to offer their customers in order to satisfy the statutory viewability requirement. To the extent that DTAs or low cost set-top boxes are not otherwise available to a particular hybrid cable operator, that operator could not terminate analog carriage of the must-carry stations.

[89] *See* 47 C.F.R. §76.1601 (requiring cable operators to "provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system."); 47 C.F.R. §76.1603(b) (requiring cable operators (i) to notify customers of any changes in rates, programming services or channel positions "as soon as possible in writing"; (ii) to give customers notice at least 30 days in advance of such changes if the change is within the control of the cable operator; and (iii) to notify subscribers 30 days in advance of any significant changes in other information listed in Section 76.1602); 47 C.F.R. §76.1602(b) (listing customer service-general information to include (1) products and services offered and (2) prices and options for programming services and conditions of subscription to programming and other services). *See also* NCTA *Ex Parte* (dated May 17, 2012) at 2 (stating that the eight largest incumbent cable operators have committed to "make available to analog-only households, upon request, low-cost set-top devices capable of displaying basic service tier signals on analog television sets" and to "provide ample notice to affected subscribers of these set-top box offers"); TWC *Ex Parte* (dated May 7, 2012) at 2 ("where TWC chooses to (continued….)

changes, the cable operators have committed to inform affected subscribers that equipment is required to continue viewing the must-carry signal and how to obtain that equipment.[90] We believe informing consumers about equipment is a critical part of a hybrid operator's viewability obligations in these circumstances and thus rely upon this commitment in rendering our decision today. Similarly, we rely upon the cable operators' commitment to give broadcasters a minimum of 90 days notice before undertaking any carriage changes.[91] We believe that such advance notice will provide repositioned must-carry stations sufficient time to communicate with their viewers. Advance notice about planned carriage changes will allow must-carry stations to notify their viewers – through on-air messages, website postings, mailings or other forms of communications of their choosing – about the planned change in carriage, and about the viewers' options to ensure continued access to the station's programming.[92] We believe effective consumer outreach, particularly during the six-month transition period, will greatly minimize the impact that sunset of our viewability rule may have on consumers and must-carry stations.

18. We remind cable operators that the sunset of our viewability rule does not otherwise affect the must-carry requirements of Section 76.56 of our rules.[93] Cable operators providing digital cable service must continue to carry local broadcast stations electing mandatory carriage, including in HD format when broadcast in such format, and cable operators providing only analog cable service (no digital service) must continue to carry local broadcast stations electing mandatory carriage in analog format.[94] By allowing our current viewability rule to sunset, however, we provide hybrid cable system operators the flexibility to best meet the needs of their subscribers during their move to an all-digital system. Under our more flexible statutory interpretation, operators of hybrid systems may choose to comply with the statutory viewability mandate by continuing to down-convert digital must-carry stations to analog format in addition to carrying those stations in digital SD and/or HD format if that best suits their individual business plans. Alternatively, 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.[95] Additionally, sunset of the current viewability rule allows hybrid cable system operators the flexibility to benefit from future marketplace and technology developments through possible methods of compliance not contemplated on the record now before us. We emphasize that, while

(Continued from previous page)
cease analog transmission of one or more must-carry stations in a hybrid digital/analog cable system, it will provide advance notice regarding available equipment that will enable subscribers with direct connections to analog television sets to continue viewing such broadcast signals"); Bright House *Ex Parte* (dated May 14, 2012) at 1; NCTA *Ex Parte* (dated May 17, 2012) at 2; TWC *Ex Parte* (dated May 7, 2012) at 2 (committing to providing advance notice when terminating analog carriage).

[90] *See* NCTA *Ex Parte* (dated May 17, 2012) at 2 (stating that the eight largest incumbent cable operators will "provide ample notice to affected subscribers" of the availability of low-cost set-top devices capable of displaying basic service tier signals on analog television set); ACA *Ex Parte* (dated Jun. 11, 2012) at 1 (stating similar commitment by ACA's 14 largest members serving more than 50% of all subscribers served by ACA membership).

[91] *See* NCTA *Ex Parte* (dated Jun. 8, 2012) at 2 (stating that where the eight largest incumbent cable operators wish to stop carrying the analog version of a must-carry station's signal, such cable systems will provide notice to the affected must-carry station at least 90 days in advance of the carriage change); ACA *Ex Parte* (dated Jun. 11, 2012) at 1-2 (stating similar commitment by ACA's 14 largest members serving more than 50% of all subscribers served by ACA membership).

[92] *Id*.

[93] 47 C.F.R. § 76.56.

[94] *See id*.

[95] *See* ¶ 14, *supra*.

we allow our viewability rule to sunset, the statutory viewability requirement remains in effect. Therefore, a must-carry station may file a complaint pursuant to Section 76.61 of our rules if it believes a cable operator has failed to meet its statutory carriage obligations.[96] In addition, we will consider informal consumer complaints when evaluating compliance with the statutory viewability requirement.[97] If we receive a significant number of well-founded consumer complaints that an operator is not effectively making affordable set-top boxes available to customers in lieu of analog carriage of a channel, one of the possible remedies would be to require the operator to resume analog carriage of the channel.[98]

III. HD CARRIAGE EXEMPTION

A. Background

19. The Act requires that cable operators carry broadcast signals "without material degradation."[99] In the context of the carriage of digital signals, the Commission has interpreted this requirement to contain two parts: first, cable operators may not discriminate in their carriage between broadcast and non-broadcast signals, and, second, HD broadcast signals must be carried to viewers in HD.[100] In response to concerns from small cable operators about cost and technical capacity, the *Fourth Report & Order* afforded a temporary exemption from the HD carriage requirement for certain small systems.[101] Specifically, the Commission exempted small cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers, and those with an activated channel capacity of 552 MHz or less. The exemption from the material degradation rules allows such systems to carry broadcast signals in standard definition (SD) digital and/or analog format, even if the signals are broadcast in HD, as long as all subscribers can receive and view the signal.[102] The Commission provided that the exemption would expire three years after the conclusion of

[96] *See* 47 C.F.R. § 76.61.

[97] Consumers may file a complaint electronically using the Commission's online complaint form, Form 2000e - Media (General) Complaint, available at http://esupport.fcc.gov/complaints.htm. Consumers may also file complaints by fax to 1-866-418-0232 or by letter mailed to Federal Communications Commission, Consumer & Governmental Affairs Bureau, Consumer Inquiries & Complaints Division, 445 12th Street, SW, Washington, DC 20554. Consumers who want assistance filing their complaint may contact the Commission's Consumer Call Center by calling 1-888-CALL-FCC (1-888-225-5322) (voice) or 1-888-TELL-FCC (1-888-835-5322) (tty). There is no fee for filing a consumer complaint.

[98] We recognize that resolving whether an analog carriage remedy is appropriate could in some cases raise issues that would appropriately be considered by the full Commission in the first instance.

[99] *See* 47 U.S.C. § 534(b)(4)(A) ("The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.") and § 535(g)(2) ("A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation.").

[100] *Viewability Order*, 22 FCC Rcd at 21067, ¶ 7; *see also* 47 C.F.R. § 76.62.

[101] *See generally Fourth Report & Order*.

[102] *Fourth Report & Order*, 23 FCC Rcd at 13620, ¶ 5. We note that our rules do not require cable operators, irrespective of system size, to carry an SD digital version of a broadcast station's signal, in addition to the analog version, to satisfy the material degradation requirement. This is because both an SD digital version and an analog version of the digital broadcast signal received at the headend should have the same resolution – 480i – and thus there should be no perceivable difference between the two versions of the signal. *Id*.

the DTV transition, but said it would consider whether to extend the exemption in the final year.[103] The *Fourth FNPRM* undertook this review and tentatively concluded to extend the existing exemption for three more years, given small cable systems' apparent widespread reliance on it.[104] In response to the *Fourth FNPRM,* cable commenters support extension of the HD carriage exemption, while broadcasters suggest that the exemption should not apply if a system carries any signal in HD.[105]

B. Discussion

20. We find that the small-system HD carriage exemption continues to serve the public interest and adopt our tentative conclusion to extend the exemption for three more years.[106] The record shows that a significant number of small systems with financial or channel capacity constraints continue to rely on the HD carriage exemption and require additional time to come into compliance in a cost-effective way.[107] For example, ACA reports that at least 52 of its members, representing more than 385 small systems, still rely on the exemption.[108]

21. We find that the same financial and capacity constraints that faced small cable operators when we initially adopted this exemption continue to exist today. For example, cable commenters persuaded the Commission in 2008 that, without an exemption from the material degradation rules, "small systems [would] be forced to absorb or impose significant and unsustainable price increases, or in some instances to shut down altogether."[109] This is because some small systems did not have the technical capability or system capacity to carry high definition digital signals, and in some cases had so few subscribers that per-subscriber costs to upgrade to that capacity would be so high as to make it not worthwhile to continue operating the system.[110] The record shows that the challenges facing small systems have not diminished since the Commission adopted the exemption and that requiring small systems to comply with the HD carriage requirement would result in these systems dropping existing channels or shutting down.[111] Thus, as ACA points out, the result for subscribers of these systems could include "increased rates, loss of desired channels, loss of not only video service, but the potential for

[103] *Id.* at 13622, ¶ 11 (stating 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").

[104] *Fourth FNPRM*, 27 FCC Rcd at 1714, ¶ 3. Based on the 2010 data from the Annual Cable Operator Report (FCC Form 325), the *Fourth FNPRM* indicated that many small systems were relying on the exemption. *Fourth FNPRM*, 27 FCC Rcd at 1722, ¶ 20; *see also Fourth FNPRM* at Appendix B (discussing our analysis of FCC Form 325 data).

[105] *See*, *e.g.*, NAB comments at 8; NCTA comments at 29; ACA comments at 18-19.

[106] We note that we are not changing the existing exemption in any way and this includes retaining our existing definition of small systems that are eligible for this exemption.

[107] *See*, *e.g.*, ACA Comments at 4-6; NCTA Comments at 22.

[108] *See* ACA comments at 5; ACA reply at 7-8 ("Of these 385 small systems, 45 rely on the exemption because they have less than 553 MHz of capacity; 106 systems rely on it because they have fewer than 2,501 subscribers; and 234 systems rely on the exemption because they have both less than 553 MHz of capacity and fewer than 2,501 subscribers. These numbers only include the respondents to ACA's survey, and the total number of ACA members and the total number of their systems that are currently utilizing the HD carriage exemption is likely higher.").

[109] National Cable & Telecommunications Association Comments at 12 (March 3, 2008).

[110] *Fourth Report & Order*, 23 FCC Rcd at 13620-1, ¶¶ 6-7.

[111] *See*, *e.g.*, ACA Reply at 3.

broadband Internet access, and the loss of the benefits that flow from competition."[112] NCTA explains that eliminating the HD exemption would also impede small operators' "ability to offer new services like video-on-demand, deploy broadband, or introduce enhanced new speed tiers of broadband to more rural, smaller market customers."[113] ACA maintains that, for most capacity-constrained small systems, the unused channel capacity available has actually decreased over the past three years.[114] In addition, ACA reports that, for most financially-constrained small systems, operation costs have increased more than revenues over the last three years, leaving these systems without the financial resources to purchase the necessary equipment to upgrade service.[115] Notably, these small systems often serve rural and smaller market consumers, making the potential loss of such service particularly troubling.[116] As noted in the *Fourth Report & Order*, the loss of a small cable system could mean the effective loss of all MVPD service for some customers.[117] Moreover, in some areas, due to poor over-the-air reception, the loss of a small cable system could mean the loss of any access to some or all broadcast signals as well. Accordingly, we find that the exemption remains necessary to protect the viability of small systems and their service to rural and smaller market consumers.[118]

22. This exemption will sunset on June 12, 2015, unless the Commission takes action to extend it in light of the potential cost and service disruption to consumers and the state of technology and the market at that time. We note that this exemption is not intended to be permanent and that its purpose is to provide small systems with additional time to upgrade and, where necessary, expand their systems to come into full compliance with the material degradation provisions of the carriage rules by carrying HD versions of all HD broadcast signals without having to make relatively large expenditures over a short period of time.

23. We decline, at this time, to further restrict the exemption for small systems by eliminating it for systems that carry any signal in HD, as suggested by NAB.[119] The Commission has already crafted the exemption quite narrowly to excuse only a limited number of systems with particularly limited channel capacity or low subscribership.[120] We agree with ACA that a small system's ability to offer some HD service does not refute an argument that it may be significantly burdensome to offer additional HD service.[121] Further, we do not want to create a disincentive for these systems to take incremental steps toward offering more HD programming to their subscribers by using the carriage of any HD signals as a threshold for applying the HD must-carry requirement to small cable systems.[122] Although we understand

[112] *Id*. at 5-6.

[113] NCTA Comments at 27.

[114] ACA Comments at 7.

[115] ACA Comments at 11.

[116] NCTA Comments at 23.

[117] *Fourth Report & Order*, 23 FCC Rcd at 13621, ¶ 7.

[118] ACA and NCTA also sought a permanent exemption from the HD carriage obligation to cable systems that offer all of their programming in analog only. ACA Comments at 17-18; NCTA Comments at 28-29. We received little in the record on this issue, and need not resolve it here. To the extent these systems are small systems as defined in this Order, of course, they are exempted for three years from the HD carriage obligation.

[119] *See* NAB Comments at 8.

[120] *See* ACA Comments at 16 (exemption "is limited to only the smallest and most at-risk systems").

[121] ACA Reply at 6.

[122] *See* ACA Reply at 7.

NAB's concern that small systems could possibly misuse the exemption of the HD carriage requirement to unfairly discriminate against must-carry HD signals in favor of other HD signals,[123] broadcasters have not presented any evidence to suggest that this is, or ever has been, an issue. Moreover, to the extent that cable operators utilizing the exemption do start to carry a wide range of HD channels, broadcasters are free to bring such evidence to the Commission's attention, and we will then be able to evaluate whether the exemption's contours should be adjusted.

IV. CONCLUSION

24. For the reasons stated above, we find the viewability rule is no longer necessary to ensure must-carry signals are viewable to all subscribers and therefore will allow the rule to sunset. As an interim measure, we require hybrid systems to continue to carry the signals of must-carry stations in analog format to all analog cable subscribers for six months after expiration of the viewability rule, until December 12, 2012. We extend for three more years the existing HD carriage exemption for eligible small cable system operators.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

25. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[124] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this Report and Order. The FRFA is set forth in Appendix C.

B. Final Paperwork Reduction Act of 1995 Analysis

26. This Report and Order has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[125] and does not contain any new or modified information collection requirements. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.[126]

C. Congressional Review Act

27. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[127]

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[123] NAB Comments at 8 ("Congress intended by [Section 614(b)(4)(A) of the Act] to make sure that cable systems did not provide technically advantageous carriage to favored signals, and provide lower quality carriage to others, particularly local television signals.).

[124] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[125] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

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

[127] *See* 5 U.S.C. § 801(a)(1)(A).

D. Additional Information

28. For more information on this proceeding, contact Steven Broeckaert, Steven.Broeckaert@fcc.gov, or Evan Baranoff, Evan.Baranoff@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

29. Accordingly, **IT IS ORDERED** that pursuant to Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 534, and 535, this *Fifth Report and Order* IS ADOPTED, and the Commission's rules ARE HEREBY AMENDED by removing Section 76.56(d)(3)-(d)(5), as set forth in the final rule changes appendix (Appendix B) attached to this *Fifth Report and Order*.

30. **IT IS FURTHER ORDERED** that, pursuant to 5 U.S.C. § 553(d)(3) and 47 C.F.R. § 1.427(b), this *Fifth Report and Order* and the attached rule amendment SHALL BE EFFECTIVE immediately upon publication in the Federal Register.[128]

31. **IT IS FURTHER ORDERED** that, pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission WILL SEND a copy of this *Fifth Report and Order* in a report to Congress and the General Accounting Office.

32. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, WILL SEND a copy of this *Fifth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[128] *See* 5 U.S.C. § 553(d)(3) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except ... as otherwise provided by the agency for good cause found and published with the rule."); *see also* 47 C.F.R. §§ 1.103(a), 1.427(b). Section 76.56(d)(5) provides that the viewability requirements set forth in Section 76.56(d)(3) will expire three years from the date on which all full-power television stations cease broadcasting analog signals (June 12, 2012) unless the Commission extends the requirement. *See* 47 C.F.R. § 76.56(d)(5). The HD exemption for small cable operators will expire on June 12, 2012, unless the Commission extends the exemption. We thus find good cause to make these rule changes effective upon publication in the *Federal Register*. The sunset of the viewability requirement is contemplated in the original rule. The transition period adopted herein will preserve the status quo for six months, and not impose any new requirements on any entity. Similarly, extension of the HD exemption provides relief to small cable systems and will not impose any new requirements on any entity. Accordingly, no entity will be harmed as a result of our decision to make these rule changes effective upon publication in the *Federal Register*.

APPENDIX A

List of Commenters

COMMENTS

1. American Cable Association ("ACA")
2. National Association of Broadcasters ("NAB")
3. National Cable & Telecommunications Association ("NCTA")
4. Time Warner Cable Inc. ("TWC")

REPLY COMMENTS

1. ACA
2. Bright House Networks, LLC ("Bright House Networks")
3. NAB
4. NCTA
5. New Jersey Division of Rate Counsel ("NJ Rate Counsel")

APPENDIX B

Final Rule Changes

The Federal Communications Commission amends Part 76 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

PART 76 – Multichannel Video and Cable Television Service.

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

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. In §76.56, remove paragraphs (d)(3) through (d)(5).

§ 76.56 Signal carriage obligations.

* * * * *

(d) Availability of signals.

* * * * *

(3) **[Removed]**
(4) **[Removed]**
(5) **[Removed]**

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Fourth FNPRM* in this proceeding.[2] The Commission sought written public comment on the proposals in the *Fourth FNPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the *Fifth Report & Order*

2. *Viewability Requirement*. Sections 614(b)(7) and 615(h) of the Communications Act require cable operators to ensure that commercial and non-commercial must-carry broadcast stations are "viewable" or "available" to all cable subscribers. 47 U.S.C. § 534(b)(7), 535(h). In the 2007 *Viewability Order*, in anticipation of the approaching end of the digital television transition and in light of the state of technology and the marketplace, the Commission adopted a rule providing cable operators operating hybrid systems (*i.e.*, cable systems that provide both digital and analog cable service) two options to comply with the statutory viewability requirement: (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. Thus, the "viewability" rule required cable operators with hybrid systems to carry digital must-carry signals in both digital and analog format. The Commission, however, decided that the rule would 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. 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." Therefore, absent Commission action, the viewability rule is scheduled to sunset on June 12, 2012. The *Fourth FNPRM* considered whether to retain the viewability rule or allow it to sunset, given the current state of technology and the marketplace.

3. The *Fifth Report and Order* finds it in the public interest to allow the viewability rule to sunset as scheduled, on June 12, 2012. The *Fifth Report and Order* determines that the statutory term "viewable" is an ambiguous term. It then chooses a reasonable interpretation of the statutory text that best effectuates the statutory purpose in light of current marketplace conditions and technology developments that have occurred over the past five years (*e.g.,* 80% of cable customers now subscribe to digital cable service and 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* reinterprets the statutory viewability requirement to permit cable operators 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). Therefore, until it completes its transition to all-digital service, a hybrid system operator may comply with the statutory viewability requirement in two ways. The operator can carry 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*

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *See, generally, Fourth FNPRM*.

[3] *See* 5 U.S.C. § 604.

Order establishes a transitional period of six months after expiration of the current rule – that is, until December 12, 2012 – during which hybrid systems will be required to continue to carry the signals of must-carry stations in analog format to all analog cable subscribers. This post-sunset transitional period will give consumers, cable operators, and broadcasters that rely on must-carry access an opportunity to prepare for the widespread deployment of small, affordable set-top boxes and to take other necessary steps resulting from changes in cable carriage.

4. *HD Carriage Exemption*. Sections 614(b)(4)(A) of the Communications Act requires that cable operators carry broadcast signals "without material degradation." Accordingly, at the same time the Commission adopted the viewability rule, it adopted a related rule prohibiting material degradation of broadcast signals when carried by cable systems. The rule requires that any signal broadcast in HD be carried by cable operators in HD. In response to concerns from small cable operators about cost and technical capacity, the 2008 Fourth Report & Order afforded a temporary exemption from this HD carriage requirement ("HD carriage exemption") for certain small systems. Specifically, the Commission exempted small cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers, and those with an activated channel capacity of 552 MHz or less. The exemption from the material degradation rules allows such systems to carry broadcast signals in standard definition (SD) digital and/or analog format, even if the signals are broadcast in HD, as long as all subscribers can receive and view the signal. The Commission, however, decided that the HD carriage exemption would 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. Therefore, absent Commission action, the HD carriage exemption is scheduled to sunset on June 12, 2012. The *Fourth FNPRM* considered whether to retain the HD carriage exemption or allow it to expire.

5. The *Fifth Report and Order* concludes that the small-system HD carriage exemption continues to serve the public interest and adopts the *Fourth FNPRM's* tentative conclusion to extend the existing exemption for three more years. The Fifth Report and Order finds that a significant number of small systems with financial or channel capacity constraints continue to rely on the HD carriage exemption and require additional time to come into compliance with the material degradation rules in a cost-effective way. Accordingly, the HD carriage exemption will sunset on June 12, 2015, unless the Commission takes action to extend it in light of the potential cost and service disruption to consumers and the state of technology and the market at that time.

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

6. The Commission did not receive any comments in response to the IRFA.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

7. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction"[5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] A "small business

[4] 5 U.S.C. § 603(b)(3).

[5] 5 U.S.C. § 601(b).

[6] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity (continued….)

concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[7] The final rules adopted herein affect small television broadcast stations and small cable operators. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

8. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[8] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[9] The Commission has estimated the number of licensed commercial television stations to be 1,387.[10] According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations[11] in the United States have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational ("NCE") television stations to be 396.[12] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[13] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

9. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted,

(Continued from previous page)
for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[7] 15 U.S.C. § 632.

[8] *See* 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

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

[10] *See* News Release, "Broadcast Station Totals as of March 31, 2012," 2012 WL 1243354 (F.C.C.) (dated Apr. 12, 2012) ("*Broadcast Station Totals*"); also available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0412/DOC-313533A1.pdf.

[11] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 10; however, we are using BIA's estimate for purposes of this revenue comparison.

[12] *See Broadcast Station Totals*, *supra*, note 10.

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

an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

10. *Cable and Other Program Distribution*. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[14] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[15] According to Census Bureau data for 2007, there were a total of 955 firms in the subcategory of Cable and Other Program Distribution that operated for the entire year.[16] Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.[17] Thus, under this size standard, the Commission believes that a majority of firms operating in this industry can be considered small.

11. *Cable Companies and Systems (Rate Regulation Standard)*. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[18] Industry data indicate that, of 1,076 cable operators nationwide, all but 11 are small under this size standard.[19] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[20] Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.[21] Thus, under this second size standard, the Commission believes that most cable systems are small.

12. *Cable System Operators*. The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose

[14] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[15] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[16] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (located at http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en).

[17] *See id*.

[18] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

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

[20] 47 C.F.R. § 76.901(c).

[21] Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

gross annual revenues in the aggregate exceed $250,000,000."[22] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[23] Industry data indicate that, of 1,076 cable operators nationwide, all but 10 are small under this size standard.[24] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[25] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

13. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.[26] The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[27] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[28] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[29] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 3,188 firms in this previous category that operated for the entire year.[30] Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.[31] Thus, under this size standard, most cable systems are small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[32] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[33] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators

[22] 47 U.S.C. § 543(m)(2); *see also* 47 C.F.R. § 76.901(f) & nn.1–3.

[23] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[24] These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[25] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

[26] *See* 47 U.S.C. § 573.

[27] 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

[28] *See* 47 U.S.C. § 573.

[29] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[30] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

[31] *See id*.

[32] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[33] *See Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

may qualify as small entities.

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

14. This *Fifth Report & Order* does not impose any reporting, record keeping, or other compliance requirements.

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

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

16. *Viewability Requirement*. In this *Fifth Report & Order*, the Commission allows the viewability rule to expire, subject to a six-month post-sunset transition period (as described above in Section A of this FRFA), and revises its interpretation of the statutory viewability requirement to afford greater flexibility to cable operators, including small operators, for complying with the statute. Specifically, whereas hybrid cable operators were previously required to carry both the digital and analog versions of a must-carry broadcast station, hybrid operators may, instead, comply with the statute by carrying only the digital format and making set-top equipment available to their analog cable customers, at no cost or at an affordable cost that does not substantially deter use of the equipment, that will enable such customers to view the digital format. As a result, small hybrid cable system operators will have a choice for complying with the statutory viewability requirement. In addition, we do not believe the expiration of the viewability rule will have a significant impact on small broadcasters. We believe our new statutory interpretation of the viewability requirement – which hinges on a cable operator making equipment available at no cost or an affordable cost – will ensure that subscribers on hybrid systems may continue to access these signals at little or no additional expense, thereby mitigating any adverse impact on broadcasters. We note that a must-carry signal carried only in digital format will still be included in the basic service tier; analog cable subscribers would not be required to subscribe to an enhanced tier of service to view the digital version of a must-carry channel. We also expect this issue 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 systems.

17. *HD Carriage Exemption*. The HD carriage exemption provides temporary regulatory relief to small cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers, and those with an activated channel capacity of 552 MHz or less). This *Fifth Report & Order* extends this exemption for three more years. As noted in the IRFA, the HD carriage exemption does not impose a negative economic impact on any small cable operator, and, indeed, provides a positive economic impact to any operator of a system that chooses to take advantage of the exemption. In addition, the exemption does not impose any significant burdens on small television stations.

[34] 5 U.S.C. § 603(c)(1) – (c)(4).

F. Report to Congress

18. The Commission will send a copy of this *Fifth Report & Order*, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA.[35] In addition, the Commission will send a copy of this *Fifth Report & Order*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this *Fifth Report & Order* and the FRFA (or summaries thereof) will also be published in the Federal Register.[36]

[35] *See id.* § 801(a)(1)(A).

[36] *See id*. § 604(b).

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120.*

In 2007, the Commission implemented rules to ensure that analog cable subscribers (of which I was one in 2007 and remain so to this day) did not lose their must-carry broadcast stations after the digital television (DTV) transition. At that time, my colleagues and I endeavored to ensure a smooth and seamless DTV transition by requiring hybrid cable systems to carry both the analog and digital signals of must-carry broadcast stations. As stated in the 2007 order and as referenced in my statement to that order, this requirement "shall be in force for three years from the date of the digital transition, subject to review by the Commission during the last year of this period." Thus, cable operators, broadcasters and consumers have been on notice since 2007 that the elimination of this rule was more than a mere possibility.

Since our consideration of this matter in 2007, the video programming marketplace has experienced dramatic change. The DTV transition has been successfully completed, new technologies and platforms have entered the market, high-definition (HD) channels now abound, and broadband capacity is at a premium. Today, affordable set-top boxes that enable cable subscribers to view digital signals are available. Such low-cost equipment was not obtainable by consumers when we adopted the rules requiring cable operators to maintain analog streams for must-carry broadcast channels.

Further, to meet the demands of American consumers, many cable operators carry vast HD offerings. In fact, HD channels have increased by 732 percent over the past five years. Many cable systems dedicate bandwidth to carry separate high-definition, standard-definition (SD), and analog streams of certain channels. Cable operators also need substantial capacity to provide the Internet services that Americans require. In fact, each 6 megahertz analog channel can be used to provide 10 to 12 SD digital streams, 2 to 3 HD channels, or significant broadband capability. Required carriage of analog signals, when there is a low-cost, less burdensome means for cable operators to comply with the statute, is not an efficient use of resources.

For these reasons, I vote in support of today's order that implements the 2007 intent to sunset the viewability rule in favor of a more flexible approach that allows cable operators to decide whether to maintain both the analog and digital streams or make available affordable set-top boxes. Although I had hoped that cable operators would have migrated to all-digital cable systems by now alleviating the understandable concerns of must-carry stations, I continue to maintain that Commission rules need to be modernized to reflect the current media marketplace and development of new media technologies and platforms – such as the Internet and mobile devices – that have revolutionized the video programming market. We are doing so by taking this action today.

Finally, I expect that the cable industry will work with the affected broadcasters and their viewers (such as myself) to ensure that, if analog signals will be ceased, consumers are aware of how to obtain an affordable set-top box and that such equipment is provided in a timely manner so that consumers are not inconvenienced and broadcasters do not lose viewership. I also trust, however, that the ability to reimpose a dual carriage requirement as a remedy in the case of consumer complaints will be used with great restraint and will not be utilized as a means to reinstate this rule on a case-by-case basis. I thank the Chairman and Commissioners Clyburn, Rosenworcel and Pai for their willingness to engage in an open dialogue on this matter. And many thanks to the Bureau for its work on this order.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120.*

The decision to allow the viewability rule to expire was not an easy one for me. Voting to let this rule sunset requires this agency to once again trust corporate stakeholders to act in the public's best interest, and to do so in such a way that meshes with the spirit of the FCC's intentions.

It is of the utmost importance that stations are able to reach any and all cable viewers, regardless of whom or where they are. Cable providers have committed to this office that they will make the transition as painless as possible and that if needed, set-top boxes will be widely available, at an extremely low (if any) cost, easy to get, and easy to install. I will hold them to that commitment.

This step is the one of the biggest examples of a trust-based approach in quite some time, and yes, it comes with some anxiety. As I have mentioned time and again, we look to industry to use best practices, proactive and thorough outreach, and forward thinking when a large-scale change of service is on the horizon. My staff and I have repeatedly pressed cable providers on this point, and have expressed our concerns regarding the availability, affordability, and deployment of TV set-top boxes for the public once the analog signal ceases to be utilized. I also made my hesitancy known to Chairman Genachowski, and mentioned that the only way this transition can effectively serve all Americans is if low-cost converter boxes are attainable to all consumers immediately prior to the transition. I also noted that some consumers may lack the wherewithal to fully realize what has all of the sudden happened to their signals, and we must stand ready to assist them should they seek answers from the Commission.

After stating these concerns, language was added to this rulemaking that contemplates a remedy to resume analog carriage of channels should consumer outcry and confusion rise to a noticeable level. As always, we are prepared to take into account complaints made to our consumer bureau, and will closely monitor the transition. My interest in a smooth adaptation is so great that I will be personally inquiring about it during every one of my field engagements, town halls, and public speaking opportunities going forward. No matter the venue, the audience, nor the subject, I intend to gauge the level of awareness and reaction to this rulemaking with individuals all across the nation. If set-top box fees become higher than I have been led to expect, and viewers experience "box-shock", I will be vocal with the cable industry, and will seek appropriate and stiff remedies.

To be clear: Through this rulemaking, we are not instructing cable companies to shut off their analog signals. Rather, we are giving them the flexibility to do so, consistent with the First Amendment. These companies have a vested interest in providing their subscribers with comprehensive service at reasonable rates, and I am confident that easing the transition away from analog service will be no exception.

Cable companies, both large and small, have committed to provide stations with no fewer than 90 days of notice before switching away from analog service. Further, the six-month phase-in laid forth in our ruling will enable must-carry stations to educate their viewers about the transition, via on-air messages, website postings, mailings, and any other form of communication that will increase viewer awareness regarding the change in service. The better the consumer expectations, the more likelihood that subscribers will not be surprised, and I expect nothing less than an unprecedented and vigorous canvassing operation from the cable industry in this regard.

I feel it necessary to directly address the issue of diversity in the context of this ruling. While there will be an initial adjustment period once the analog stream is removed, this transition may actually help increase diverse programming via the dedication of more spectrum, which in actuality could lead to more capacity for increased channel options. Going from analog to digital will result in better and more efficient service to consumers, and will allow cable companies to offer more content with less bandwidth. Stemming from this will be the ability to provide more *diverse* services, such as multiple digital streams for a variety of unique offerings, like national diverse and ethnic programming that cannot be currently carried due to space restrictions. Capacity to offer faster and better broadband can be reclaimed, over-the-top video viewing can be done at increased speeds, and the number of new high-definition stations will result in more competition between providers, thus driving down prices for consumers and providing new services for viewers.

Finally, I want to dispel some of the misinformation that has persisted throughout our deliberation of this ruling. All must carry stations will continue to be carried! They will be on the basic service tier that is available to all consumers, and will not be carried in a duplicative nature. This is in furtherance of the undeniable shift in the marketplace, in which everything is going digital. Moreover, it is consistent with other recent rulemakings, most notably the nation's shift to digital television via our DTV transition. That undertaking was done with robust oversight and strong commitments from private industry, and I hope this ruling mirrors it.

Customers must not be burdened any more than necessary, and on that, I will hold cable providers accountable.

STATEMENT OF
COMMISSIONER AJIT V. PAI

Re: *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120.*

The Commission must routinely reevaluate its rules to ensure that they reflect current economic and technological realities. Otherwise, agency inertia can allow regulations to stay on the books far longer than they should. One way to avoid this result is through the use of sunset clauses. A sunset clause forces an agency to take a fresh look at rules that are about to expire and decide whether they are still warranted in the face of changes in the marketplace.

The viewability proceeding illustrates the benefits of this approach. Two key facts have changed since the Commission adopted the viewability rule half a decade ago. First, in the wake of the digital television transition, the number of households receiving analog-only cable service has dropped substantially, from about 40 million in 2007 to 12 million today. And second, Digital Transport Adapters ("DTAs") that enable analog-only subscribers to view digital signals are increasingly available and inexpensive.

Given these changed circumstances, I support the Commission's decision to modify the five-year-old viewability rule. Specifically, so-called hybrid systems (those carrying both analog and digital signals) should no longer be subject to what effectively has been a dual-carriage mandate. Rather than being required to carry the same broadcaster's signals twice (in both analog and digital), cable operators should have the flexibility to use the bandwidth to supply customers the advanced services and/or additional programming options they demand.

That having been said, today's decision was not an easy one. I take seriously my duty as a Commissioner to implement the laws passed by Congress, and I agree with broadcasters that the Commission's 2007 interpretation of the viewability statute, 47 U.S.C. § 534(b)(7), appears more consistent with its structure. In particular, I am sympathetic to the broadcasters' argument that the Commission's new interpretation of the statute obscures the distinction between the provision's second and third sentences, and do not find the Order's refutation of this point to be particularly persuasive.

However, the issue before us is not solely one of statutory interpretation. Constitutional concerns, too, are involved. Cable operators present a powerful argument that renewing the viewability mandate on the state of the current record would run afoul of the First Amendment.

In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), the U.S. Supreme Court rejected a First Amendment challenge to must-carry on the grounds that the carriage mandate was justified by the government's substantial interest in the preservation of over-the air broadcasting. But it is difficult to see how that rationale would apply here. The rule change we adopt today will have absolutely no effect on the ability of about 80% of cable subscribers to view must-carry stations. And the diminishing minority of cable customers who have analog-only service will be able to continue viewing must-carry stations on cable systems simply by obtaining affordable DTAs that cable operators must offer as a result of this Order.

In light of these facts, I have serious doubts that continuing to impose the current viewability mandate would be consistent with the First Amendment. Moreover, cable operators correctly point out that the viewability statute does not unambiguously preclude the use of affordable equipment provided by cable operators to view must-carry signals. As a result, I believe that the Commission not only has the discretion to interpret the statute in a manner that avoids constitutional difficulties, but that it is best to do so.

During the next six months, cable operators and broadcasters must work together to ensure that the transition proceeds as smoothly as possible for consumers. Must-carry stations need to educate their viewers on the steps they must take to be able to continue viewing affected stations. It is therefore critical that cable operators have committed in the record to notifying must-carry stations no fewer than 90 days in advance of ceasing carriage of their analog signals. Cable operators also must give affected subscribers timely information on how they can acquire DTAs, and I am pleased that they have committed to provide such notices to their customers no fewer than 30 days ahead of time.

An old proverb says that the more things change, the more they stay the same. When it comes to regulation, however, that shouldn't be the case. The Commission should calibrate its rules to the current state of the marketplace in order to secure for American consumers the benefits of innovation. After listening to the views of all stakeholders and carefully reviewing the record, I have reached the conclusion that now is the time to change the Commission's 2007 viewability requirement. I therefore support this Order.