

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF THE



NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

William A. Check, Ph.D.
Sr. VP, Science & Technology

Andy Scott
VP, Engineering
Science & Technology

Lisa Schoenthaler
VP, Association Affairs
Office of Rural/Small Systems

March 3, 2008

Daniel L. Brenner
Diane B. Burstein
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments in the *Third Further Notice of Proposed Rulemaking* in the above-captioned proceeding. NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation’s largest broadband provider of high speed Internet access after investing more than \$100 billion in the past ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art voice service to millions of American consumers.

INTRODUCTION

In its *Third Report and Order*, the FCC required virtually all cable systems, for three years beginning February 2009, to deliver both an analog and a digital version of a must-carry station’s digital signal after the end of the digital television (“DTV”) transition. The *Third Further Notice of Proposed Rulemaking*¹ raises several questions about the mechanics of cable carriage in this post-transition period.

¹ *Third Report and Order and Third Further Notice of Proposed Rulemaking*, CS Docket No. 98-120 (rel. Nov. 30, 2007) (“*Third Further Notice*”).

The broadcasters' digital transition will occur in eleven months. Between now and then, cable operators and broadcasters must work cooperatively to minimize the impact on cable customers. And cable operators must be able to move forward to focus on the task at hand. It would be the wrong time to initiate new, burdensome regulatory requirements on cable operators that will distract from the real work that needs to be done to ensure a smooth transition for cable customers. In particular, with respect to issues regarding channel positioning and formatting of analog programming, the Commission should allow operators to proceed in a way that is least disruptive to cable operations and to consumers.

February 2009 is fast approaching for small systems, too, and the Commission should act quickly to ensure that they can gain necessary relief. The FCC should immediately exempt systems with limited channel capacity and systems with fewer than 5,000 subscribers from any dual carriage requirement. These small systems should be permitted to satisfy their mandatory carriage obligation during this three year transition period by providing must-carry signals in analog. This will strike a balance between the broadcasters' interest in continuing to have their programming carried for all cable customers and the small systems' interest in avoiding additional, unreasonable cost burdens necessitated by a dual carriage regime.

DISCUSSION

I. FOR BOTH PRACTICAL AND LEGAL REASONS, THE FCC MUST NOT ADOPT NEW CHANNEL POSITIONING RULES AT THIS TIME

The *Third Further Notice* asks how must-carry channel positioning rules, adopted in a single channel analog carriage environment, should apply post-transition where a cable operator will be forced to carry at least two, if not three, versions of the same signal from each commercial must-carry broadcaster.² The simple answer is the most consumer-friendly: a must-

² *Id.* at ¶ 76.

carry broadcaster's channel positioning rights should apply to the analog version of the digital signal post-February 17, 2009. Operators should position that analog version on the same channel as the must-carry station's analog signal is carried pre-February 17, 2009. Operators should be permitted to position the must-carry broadcaster's *digital* signal on a channel of the operator's choosing. This outcome will cause the least disruption to cable customers' channel line-ups, consistent with the overarching goal of smoothing the February 2009 transition for cable customers.

The *Further Notice* suggests that the Commission contemplates providing must-carry broadcasters with greatly expanded channel positioning rights – rights that would extend to the digital signal, too. For example, the *Further Notice* proposes that “the analog version be physically located on the appropriate channel as determined by the channel placement rules, and that *the version as broadcast appear on that same channel for digital subscribers who can view it.*”³ And the *Further Notice* asks whether “it will be technically possible for multiple digital versions to appear on the same channel from a subscriber perspective (*e.g.*, channel 35 in HD for subscriber with HD, and the same channel 35 in SD for subscribers with SD)” and if so, whether this should be an FCC rule.⁴ But during the three years when cable operators must carry multiple versions of a broadcaster's signal, there are obvious problems – both practical and legal – that arise with this channel positioning proposal.

As a practical matter, cable systems and cable set-top boxes cannot technically provide digital broadcast signals in this manner. As noted above, cable operators will carry the analog versions of must-carry stations' digital signals on the same physical channels (*i.e.*, the same 6 MHz frequencies) on which they currently carry the stations' analog signals, so that customers

³ *Id.* (emphasis supplied).

⁴ *Id.*

with cable-ready analog sets will tune to that channel to watch it just as they do today. However, it is not technically feasible for cable operators to channel map the HD signal and an SD version of that signal to the same channel number.

When an SD version of the broadcaster's signal is carried, digital boxes that are currently deployed will typically map the channel to the broadcaster's over-the-air channel number. That number may differ from the number in which the analog version appears. And, when an HD version of the broadcaster's signal is also being carried, it is not assigned the same virtual channel number as the SD version. Instead, set-tops with HD capability today generally assigned HD channels to a particular grouping of virtual channels (*e.g.*, in the channel 300 range). HD and SD signals not only must be physically separate, but they also must be virtually separate. That means that each digital version (HD or SD) of a broadcast station in these cases must appear as a different channel on existing cable set-top boxes. Because different equipment is already deployed in the field, reengineering cable systems and swapping out boxes to provide the type of channel uniformity that the *Notice* imagines for must-carry signals presents enormous challenges at this late date. For these reasons, it is critical that cable operators be provided with flexibility with respect to the channel positioning of digital versions of must-carry stations' signals.

Providing broadcasters with channel positioning rights for their digital signal would be highly consumer-unfriendly as well. Cable customers with HD sets have already become accustomed to receiving certain channel line-ups of both broadcast and non-broadcast HD signals. Giving HD must-carry broadcasters a right to choose an additional channel on the cable system would disrupt these established patterns.

As a legal matter, Section 614(b)(6) is not to the contrary. As the Commission recognized in adopting post-transition digital carriage rules in 2001, “given the new digital table of allotments, we find that there is no need to implement channel positioning requirements for digital television signals of the same type currently applicable to analog signals.”⁵ A digital broadcaster’s over-the-air channel position may have no relationship to how its channel number is displayed on digital television sets. For example, digital broadcasters will continue to brand themselves as their analog channel number even when their digital station is transmitting on a different channel altogether.

Moreover, Section 614(b)(6) provides broadcasters with only one choice for channel positioning. During these early stages of the transition when concerns about continuity are paramount, that choice should run to the analog version of the digital signal. Must-carry broadcasters will exercise that choice when they make their must-carry election in October 2008, effective January 1, 2009. The Commission has no authority to grant broadcasters yet another choice for February 2009. Instead, operators should have maximum flexibility to minimize customer confusion and continue to provide broadcasters analog slots identical to those occupied in the month before the transition date. Such an approach will allow operators to achieve a smoother transition.

⁵ *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 2598 (2001) at ¶ 83 (hereinafter “*First Report and Order*”). The Commission chose to rely on a “technology-based solution” that required cable operators to pass through channel mapping PSIP information. NCTA previously explained why reliance on PSIP data was not the correct way to address this issue for cable customers. *See* Opposition of National Cable & Telecommunications Association to Petitions for Reconsideration at 17-18 (filed May 25, 2001). NCTA pointed out that “PSIP carriage is not an effective way to implement the must-carry channel positioning rights of the statute.” Cable operators can display the channel number, but the use of PSIP is neither necessary nor relevant to the process. In fact, cable digital set-top boxes that will be attached to analog television sets do not respond to PSIP. Cable systems instead rely on their own service information to instruct digital set-top boxes how to display particular channel numbers, regardless of the physical location of the channel on the cable system plant.

II. FORMATTING DECISIONS FOR ANALOG VERSIONS OF HD PROGRAMMING SHOULD BE MADE BY OPERATORS CREATING AND CARRYING AN ANALOG SIGNAL

The Commission's *Third Report and Order* requires virtually all cable operators to provide an analog version of a must-carry broadcaster's HD signal. Creating that analog version requires operators to install equipment at their headend that can receive an HD signal, which is transmitted in a 16:9 format for viewing on HD television sets, and reformat it into an analog version that can be displayed on an analog 4:3 screen. A broadcaster transmitting in HD, moreover, may not be presenting HD programming throughout its entire broadcast day. So there may be instances or times of day where an HD must-carry broadcaster itself is transmitting a program that is not in the 16:9 format.⁶

There are two options for reformatting a 16:9 image into a 4:3 image for viewing on an analog set; the picture can be letter-boxed (with bars on the top and bottom) or center-cut (filling the screen). The *Third Further Notice* asks who decides how this program should be formatted on a cable system: the Commission, the cable operator or the must-carry broadcaster.⁷ It is much too early in this digital transition for the Commission to adopt a rule that dictates how that formatting should occur in the context of mandatory carriage, even assuming *arguendo* that the FCC has authority to do so. During this transition period, operators must have the flexibility to present an analog version of an HD signal in the way that maximizes the over-all viewing experience of its customers.

⁶ In addition to cable operators, broadcasters whose signals are retransmitted using translators will also face this same down-conversion problem. Because the Commission has yet to address when the DTV transition will occur for translators, they will continue to transmit in analog after February 18, 2009. Analog translators will need to receive the broadcaster's HD and convert it to analog. Similarly, DBS operators will need to receive the local broadcaster's HD signal and convert it to SD.

⁷ *Third Further Notice* at ¶ 77.

Cable operators have every incentive to offer their analog customers an optimal viewing experience once broadcasters no longer transmit an analog signal. Many consumers will continue to view analog programming on their analog sets without the need for a set-top box post-transition. Operators, rather than the FCC or individual broadcasters, will be best positioned to determine the optimal format for a particular channel based on how it fits in with the rest of the channels they plan to offer on their analog tiers – including other non-must-carry broadcasters and analog cable programmers. Operators should be able to ensure a consistent look across all their analog channels. Allowing each broadcaster to choose would undermine that legitimate interest.

This is not to say that must-carry broadcasters can have no say in how their signal is presented, if that can be accomplished easily and at no cost to operators. As we have stated previously,⁸ the only way that can be done today is if a broadcaster provides a separate over-the-air non-high definition version of its must-carry HD digital signal. Such a separate feed allows a broadcaster to exercise complete control over the format of its signal on a program-by-program basis; all that a cable operator would need to do would be to convert that non-HD feed into analog. That could be easily accomplished in a cost-effective manner and the formatting as presented on that non-HD version would be preserved. In fact, receiving such a feed and converting it to analog at the headend is a routine, efficient method cable operators use today with respect to certain cable programming services that they deliver to their analog customers.

Creating the analog version of HD programming is an entirely different matter. If must-carry broadcasters do not provide an over-the-air SD version of their HD signal, then operators are forced to receive the HD signal at the headend and from that feed create a 4:3 format version

⁸ See NCTA Reply Comments, CS Docket No. 98-120 at 19 (filed Aug. 16, 2007).

of the picture. Because downconversion of the signal takes place at the headend, operators must be free to determine the format of the analog version that they will transmit system-wide to their customers. Operators at the headend must decide between “center-cutting” and letterboxing a particular channel, and cannot be required to alter the formatting based on the particular programming changes of each must-carry broadcaster.

Over time, technology may develop that will solve these issues so that operators would not need to make manual program-by-program formatting changes. The reality, though, is that the transition is occurring in less than a year. Broadcasters today do not embed information in their HD signal that would automatically trigger equipment located at the cable headend to change the format of an analog version of an HD picture on a program-by-program basis.⁹ And it would be unreasonably burdensome to require cable operators to manually respond to instructions from each must-carry broadcaster about formatting on a program-by-program basis. Thus, providing operators the choice of how to format programming is not only the simplest and least disruptive approach for cable customers, but the *only* realistic approach at this juncture.¹⁰

⁹ One potential technique is using Active Format Description (“AFD”). AFD is data embedded in each of the programs broadcast whenever the rectangular picture area containing useful information does not extend to the full height or width of the coded frame. In the future, AFD may be able to make those formatting changes possible on a more or less automated basis. However, AFD has not been widely deployed, and any obligation to provide it on cable’s part would be entirely premature. In fact the Commission’s *Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 43 Comm. Reg. (P&F) 683 at ¶ 183 (2007), agreed with broadcasters that AFD’s use should remain voluntary on the part of broadcasters. The Commission there found that “it would be premature to require mandatory broadcaster use of AFD, given that the standard is relatively new and has not yet been required through the ATSC standard.” The FCC also understood that “not all content providers now uniformly provide AFD data to broadcasters” and that “not all consumers are equipped to obtain the benefits of AFD.” *Id.* at ¶ 184.

¹⁰ The *Third Further Notice* also asks whether cable boxes must be required to allow the consumer to determine the format. *Third Further Notice* at ¶ 77. Because the formatting that will be taking place is creating an analog version at the headend for viewing on *analog* television sets, the features of digital cable boxes would be irrelevant to this issue. Analog viewers would not need any box to see the must-carry signal in analog. In any event, the millions of digital cable boxes already deployed do not contain a feature that allows each individual cable customer to modify the format of an SD signal.

III. THE RULE AGAINST MATERIAL DEGRADATION DOES NOT COVER RETRANSMISSION CONSENT STATIONS, AND THE COMMISSION MAY NOT EXTEND IT TO DO SO

The *Third Further Notice* again asks whether retransmission consent stations can take advantage of the rules regarding “no material degradation” that apply to must-carry stations.¹¹ As NCTA explained in its previous comments on this issue,¹² the FCC has never found the provision at issue here – Section 614(b)(4)(B)¹³ – to apply to retransmission consent stations. It may not lawfully do so here. Retransmission consent stations already negotiate for the terms and conditions of their carriage, and they should not be permitted to avail themselves of these protections designed for stations that purportedly cannot fend for themselves in the marketplace.

The 1992 Act does not grant retransmission consent stations this additional benefit. Rather, Section 325, the retransmission consent provision, expressly states that “if an originating television station elects ... to exercise its right to grant retransmission consent under this subsection with respect to a cable system, *the provisions of section 614 shall not apply to carriage of the signal of such station by the cable system.*”¹⁴ The legislative history confirms Congress’s intent that stations electing retransmission consent would not automatically be granted the statutory benefits contained in Section 614; instead they would bargain for these terms and conditions with cable operators.¹⁵ The structure of the Act reinforces this view:

¹¹ *Third Further Notice* at ¶ 78.

¹² NCTA Reply Comments, Docket No. 98-120 at 13-15 (filed Aug. 16, 2007).

¹³ See *Third Report and Order* at ¶ 5 (discussing Act’s direction that the Commission establish any changes “‘necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed’ as a result of the DTV transition”).

¹⁴ 47 U.S.C. § 325(b)(3)(C)(4)(emphasis supplied).

¹⁵ See, e.g., S. Rep. No. 92, 102d Cong., 1st Sess. 37 (“Section 325 makes clear that a station electing to exercise retransmission consent with respect to a particular cable system *will thereby give up its rights to signal carriage and channel positioning established under Section 614 and 615 for the duration of the three-year period. Carriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system.*”)(emphasis supplied).

Section 614(b) is entitled “Signals *Required*” (emphasis added). And the *First Report and Order* made clear that the “material degradation” provision applies only to those commercial stations carried pursuant to must-carry.¹⁶

There is no justification to stretch the Act to cover stations that voluntarily choose to forgo must-carry rights in order to negotiate over carriage. As Congress recognized, retransmission consent stations are more than able to protect their own interests. They can and do negotiate for the terms and conditions of digital carriage, including terms relating to technical matters. No public policy reason justifies creating a new regulatory floor for these sizable players in the video marketplace.

IV. NEW NOTICE REQUIREMENTS ARE UNNECESSARY

In the *Third Report and Order*, the Commission reminded operators that transition to all-digital systems “that they must provide written notice to subscribers about the switch, containing any information they need or actions they will have to take to continue receiving service.”¹⁷ The *Further Notice* reiterates that cable operators must notify their subscribers if they decide to become an all-digital system.¹⁸

Cable operators routinely communicate with their customers, through monthly billing statements, on-screen information, web-sites, and a variety of other means. Operators have every incentive to ensure that a transition to an all-digital environment occurs with the least disruption to its customer base. Sufficient communication and notice of those changes obviously would be critical elements in any such transition plan. No new rules are needed to ensure that

¹⁶ *First Report and Order*, 16 FCC Rcd. at ¶ 73 (“in the context of mandatory carriage of digital broadcast signals, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer (e.g., non-broadcast cable programming, *other broadcast digital program*, etc.) carried on the cable system....”) (emphasis supplied).

¹⁷ *Third Report and Order* at ¶ 38.

¹⁸ *Third Further Notice* at ¶ 79.

operators take every step necessary to smooth the way to an all-digital system. As the Commission concluded in the *Third Report and Order* with respect to going all-digital, the Commission should conclude here that no new notice provisions are necessary.¹⁹

V. SMALL SYSTEMS MUST BE RELIEVED OF ANY DUAL CARRIAGE OBLIGATION

The *Third Report and Order* failed to provide an exemption for small systems from the requirement to carry a broadcaster's digital signal in an analog format. Instead, the Commission provided that "operators of systems with an activated channel capacity of 552 MHz or less that do not have the capacity to carry the additional digital must-carry stations may seek a waiver from the Commission."²⁰ The *Third Further Notice* asks whether to adopt different rules that "would minimize the economic impact for small cable operators while still complying with the statutory requirements."²¹ NCTA believes that the FCC must take action quickly to minimize the economic harm for small systems.²²

Specifically, the FCC should adopt a categorical exemption to ensure that cable systems with a small customer base or limited capacity are not unduly and adversely affected by the FCC's dual carriage requirement. Consistent with its pledge to resolve this issue in six months, the Commission should expedite action on this exemption in order to give small system operators certainty about their regulatory obligations and their equipment needs so they can prepare for the February 2009 compliance deadline. The commitment was made on September 11, 2007 –

¹⁹ See *Third Further Notice* at ¶ 79 & n. 263.

²⁰ *Third Report and Order* at ¶ 37.

²¹ *Third Further Notice* at ¶ 80.

²² The size of the operator of the system should be irrelevant for these purposes. Customers to small systems and systems with low capacity would be adversely affected by a dual carriage regime, regardless of system ownership. Small systems must purchase and install equipment at each headend to receive and transmit digital broadcast signals. Similarly, capacity constraints are system-based, regardless of ownership.

nearly six months ago already. No matter how the start clock is set, the FCC owes small systems and their customers a prompt resolution.

An exemption from the digital carriage requirement will not harm broadcasters. Customers of small and low capacity systems will be able to see an analog version of a digital must-carry broadcaster's signal on their television sets without the need for a converter box. Thus, even assuming the Commission's interpretation of "viewability" is correct, that provision can be satisfied without the need for dual carriage so long as customers can view the analog signal.

A. Systems with Few Customers or Limited Capacity Will Suffer Significant Harm if Required to Dual Carry Each Must-Carry Broadcast Station

The FCC must provide additional flexibility to systems with few customers (5,000 or fewer) and with limited capacity (552 MHz or less) ("small systems") to avoid the significant costs and damage to subscribers that a dual carriage requirement would cause. Without that flexibility, these small systems will be forced to absorb or impose significant and unsustainable price increases, or in some instances to shut down altogether. Where there is limited bandwidth, these small systems may be forced to drop program services or, contrary to the Administration's, Congress', and the Commission's goal of bringing broadband service to rural America, be prevented from adding and offering to their customers new, advanced services such as high-speed Internet, video on demand, or digital telephone service.

The reality is that must-carry broadcasters' digital transition will impose significant costs on all operators, large and small. All cable operators under the FCC's *Third Report and Order* must pay for equipment to convert digital signals to analog for the three-year transition period. In addition, operators may need to do receive-tower work, change antennas, and incur significant labor costs simply to continue to receive must-carry digital broadcasters that are transmitting on

new frequencies. Again, according to the *Third Report and Order*, all these costs that directly relate to the *broadcaster's* digital transition must be borne by the *operator* – even though the must-carry law did not intend operators to pay extraordinary costs and requires must-carry *broadcasters* to pay to deliver a good quality signal to the cable headend. The cost burdens of imposing a requirement to carry digital signals *on top of* the costs associated with providing analog versions of those signals far outweigh the marginal benefits.

There are thousands of cable systems throughout the United States, with varying system characteristics. Many of these systems serve a small customer base, are located in rural communities characterized by relatively low populations, a low number of homes per mile, low activated bandwidth capacity, and in some cases, geographic isolation. Unlike larger cable systems today, which usually offer a mix of analog and digital services, some of these smaller cable systems, particularly those serving 5,000 or fewer customers, are analog-only and provide no digital or HD service at all. Customers of these systems are not likely to be the first to purchase HD sets. And if they do, they already have a competitive option available to them: to subscribe to one of two DBS providers, both of which are offering hundreds of channels of all-digital programming. The very survival of these small systems depends on their ability to induce customers to continue to take their service notwithstanding these attractive alternatives. If these systems are not upgrading to digital to compete, there is only one rational explanation: the economics simply do not yet make sense given their limited customer base and their inability to obtain a sufficient return on investment. Systems who cannot “go digital” are paying the price of that reality today; their costs are high and they have to fight tooth and nail to retain each and every customer.

Other small systems do have a mix of analog and digital programming. In many cases, these systems provide digital programming through adaptive technology such as “Headend in the Sky” (“HITS”), a third party provider which enables small systems to provide satellite-delivered digital programming without having to invest in expensive digital equipment at each cable headend. At least two variations of HITS used by many small system operators today, HITS2Home and Quicktake, typically do not offer the capability even to insert digital programming locally at the headend and HITS2Home is, in any case, being discontinued,²³ meaning that these cable systems will have to revert to providing only analog service.

1. The Cost of Dual Carriage Cannot be Justified in Systems with Fewer than 5,000 Customers

Operators of the small systems described above would incur significant costs at each headend to provide digital broadcast signals. They would be forced to install headend equipment that would cost anywhere from \$4,000 at the low end to a more typical \$8,000 per digital broadcast channel. In cases where a system cannot simply upgrade its existing equipment but rather must purchase new equipment, the cost would rise substantially, by as much as \$21,000 more even to deliver one must-carry broadcaster in digital.²⁴ These systems would also bear the significant lost opportunity costs of having to carry duplicative programming from each must-carry broadcaster.

²³ See, e.g., “Comcast Media Center to Repackage HITS,” *CED Magazine.com* (Jan. 21, 2008) (noting that cable affiliates were notified that HITS2Home service would be discontinued this summer).

²⁴ The equipment needed to deliver digital broadcast signals includes an (1) 8 VSB receiver/decoder, (2) a groomer/multiplexer or cherry picker to ensure that bandwidth is used efficiently, and (3) a QAM modulator. While cable operators could optionally buy equipment to process and pass along an 8 VSB signal to the customer’s DTV set at a cost of \$500 to \$1000 per channel, that solution is largely unworkable for these bandwidth-strapped systems, since each 8 VSB signal consumes a full 6 MHz of bandwidth and comes along with other technical limitations.

In addition, if analog-only small systems were forced to upgrade to digital in order to transmit digital must-carry signals, the cost for such systems would skyrocket by another \$25,000 to \$37,000 per headend, given the cost of the digital headend equipment needed to address the consumers' box²⁵ and by the cost of the \$350 HD-capable converter boxes required to be held as inventory.²⁶ In addition, for systems that currently are only one-way, there may be significant costs beyond these headend upgrades and box costs to convert the plant to provide two-way services.

The reality is that the imposition of an onerous and costly dual carriage requirement would force many small systems to seriously reevaluate whether it makes sense to continue to provide cable service to customers at all. Shutting down a cable system is bad not only for the system owner, but also for the broadcaster who loses a "community antenna" for its voice in the smaller market, and the consumer who loses access to a competitive alternative.

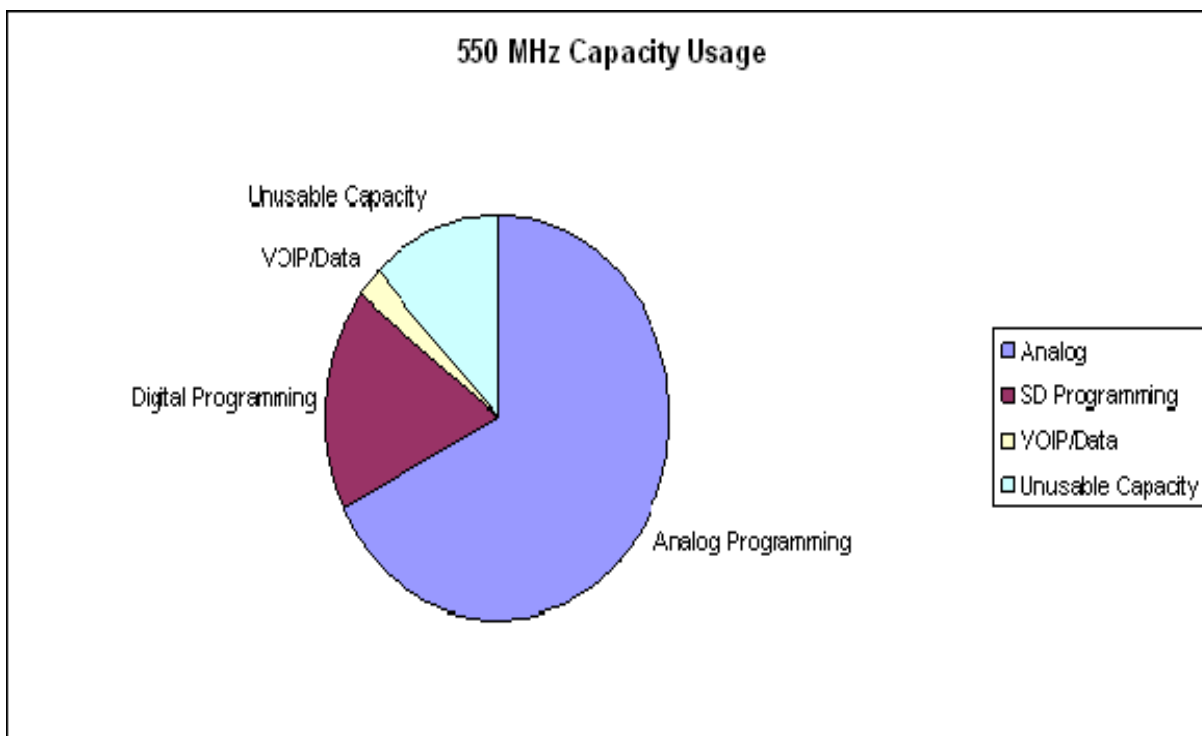
Simply put, there is a pressing need to exempt all cable systems that provide service to fewer than 5,000 customers from a requirement to carry HD signals in addition to an analog downconverted version.

2. Systems with Limited Bandwidth Should Not Be Forced to Dual Carry

The Commission should also exempt cable systems with 552 MHz or less capacity from the dual carriage requirement. As the chart below shows, these low capacity systems are already channel-locked, using a sizable amount of their capacity simply to provide analog service to their customers.

²⁵ This is the estimated cost of the standard digital headend that small systems would likely consider, although other more costly options are available to perform this function, including digital addressable controllers whose costs are in the \$120,000 - \$200,000 range.

²⁶ These estimates do not even include the cost of testing equipment, spares needed in the case of equipment failure, staff training, and of ongoing licensing fees associated with the equipment.



Indeed, the typical 552 MHz system only has usable bandwidth of about 486 MHz to provide any service. And of that bandwidth, more than 330 MHz – fully 68% – is allocated to analog services. The relatively small amount of digital capacity – roughly 150 MHz – must be used for digital video programming as well as high speed data and digital phone service. Systems with 552 MHz capacity must maximize the use of the capacity available in order to remain competitive with the much higher-capacity DBS providers, who typically can offer subscribers close to 300 channels of programming.

Devoting additional bandwidth – on top of the 6 MHz that small systems already will be providing to *each* must-carry station – cannot be justified as a matter of policy. It will force operators to take off valuable services simply to provide duplicative programming from must-carry stations whose digital signal can be received over-the-air in any event. And even if an operator could find a spare 3-6 MHz slot on their small capacity systems to dedicate to each must-carry station’s duplicative HD signal, it would compromise its 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. Such a requirement would not only damage its competitive position, but would also undermine one of the cable industry's true success stories – deploying, in many cases for the first time, broadband access to rural America.

Given the attractive array of video and non-video offerings that upgrades would allow, and given the intense competition with high-capacity DBS providers, small system operators already have a strong marketplace incentive to upgrade where they can. But financial realities are such that these cable operators cannot cost-justify upgrading their systems to 750 MHz. Thus, for systems that are still 550 MHz or less, the alternative would be to remove programming and services that customers already enjoy today simply to make room for duplicative programming services that every cable customer already will receive in analog. The costs of such an approach to small cable systems and to rural and smaller market consumers clearly outweigh the speculative benefits. In that regard, small systems should be treated no differently than low power broadcasters, who have been given a longer period to transition to digital.

In three years, when cable operators are no longer obligated to provide an analog version of these signals, operators can switch out analog carriage and carry the digital signal. But for the reasons noted above, it makes no sense during this three-year transition period to force operators of these low capacity systems to provide duplicative carriage to must-carry stations.

B. Exemptions for Small Systems Are Consistent with the Cable Act and FCC Precedent

The *Third Further Notice* asks whether the Commission can adopt an exemption for small systems consistent with the must-carry provisions of the Act.²⁷ The Commission

²⁷ *Third Further Notice* at ¶ 82.

undoubtedly has authority to do so. NCTA previously demonstrated that the dual carriage requirement is entirely of the Commission's making; Congress evidenced interest in *limiting* duplicative carriage, not requiring it. But even assuming, *arguendo*, that the Commission correctly interpreted the must-carry requirement, the Commission can exempt small systems from a dual carriage requirement.

The dual carriage obligation arises from the Commission's interpretation of two separate provisions of Section 614: (1) the "viewability" requirement found in subsection (b)(7); and (2) the "no material degradation" requirement found in subsection (b)(4)(A). It is the latter that the Commission has interpreted to require carriage of an HD signal in high definition.²⁸ But nothing in the statute compels that conclusion.

In fact, the must-carry provision nowhere mentions high definition programming. All that Section 614(b)(4)(B) provides, in a section labeled "Advanced Television," is that "at such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards." Having already ensured cable carriage of a digital signal (albeit in an analog format), the Commission has satisfied Congress's command.

The FCC has ample authority to declare that analog-only carriage is all the Act demands under these circumstances. Indeed, the Commission already interpreted the Act to allow carriage

²⁸ 2001 *Must Carry Order* at ¶ 73.

of a converted analog version of a digital signal during the transition period to satisfy the must-carry obligation.²⁹ Nothing prevents the Commission from reaching the same conclusion here.³⁰

Finally, Commission precedent supports an exemption for limited capacity and small systems. Historically, the FCC has granted relief to small cable systems based on the costs of compliance. This relief has included the imposition of less costly requirements and additional time in which to come into compliance.

For example, the FCC took into account the adverse financial impact on small systems in adopting a five-year phase-in period for emergency alerting system (“EAS”) requirements for systems with fewer than 5,000 customers.³¹ The Commission understood that small system operators with a limited customer base could not be expected to absorb the same costs of equipment as larger systems, particularly where (as here) equipment had to be installed at each headend. Moreover, the Commission viewed waivers as an adjunct, rather than a substitute for, such an exemption.³² Ultimately, even after the phase-in period, the FCC reduced the burdens on systems with 5,000 or fewer subscribers based on continuing concerns about the costs of compliance.³³

²⁹ *Id.* at ¶ 74 (“We do not believe the conversion of a digital signal to an analog format under these specific and temporary circumstances is precluded by the non-degradation requirement in Sections 614(b)(4)(A) and 615(g)(2).”).

³⁰ In any event, there is no reason why the “no material degradation” requirement should require cable systems that are analog-only to provide HD must-carry broadcast stations in high definition. That requirement only obligates cable operators to afford must-carry digital broadcasters no “lesser format or lower resolution than that afforded to any digital programmer (*e.g.*, non-broadcast cable programming, other broadcast digital program, etc.) carried on the cable system....” A cable operator that carries no digital programming by definition would not be in violation of this section – even if no exemption were provided.

³¹ *Second Report and Order*, 12 FCC Rcd. 15503, 15504 (1997).

³² *Id.* at 15513 (noting that waivers were needed because there was a potential for hardship for small cable systems “even with an extended phase-in period.”)

³³ 17 FCC Rcd. 4055 (2002) (adopting reduced EAS obligations for systems serving 5,000 or fewer subscribers per headend).

So, too, has the FCC imposed lesser requirements on systems with more limited channel capacity. For example, the FCC exempted systems with activated channel capacity of less than 750 MHz from most standards and obligations associated with support for one-way digital cable ready televisions sets.³⁴

Thus, there is ample precedent for relieving small systems from burdensome regulation. The Commission has every reason to take such action here by exempting small systems from a requirement to carry a digital signal in addition to an analog version of a commercial must-carry broadcaster's digital signal. A waiver policy is no substitute for this categorical exemption. Only an exemption can provide the certainty that small systems need in order to move ahead with equipment purchases and consumer education. And waivers are not only costly for those small systems with limited resources, but there is no guarantee that the FCC will act in a timely manner to provide the necessary relief to the numerous similarly-situated small systems.

³⁴ See 47 C.F.R. § 76.640 (applying lesser requirements to digital cable systems with less than 750 MHz capacity).

CONCLUSION

The cable industry aims to ensure that the broadcasters' digital transition is a non-event for its cable customers. The best way to achieve this smooth transition is to avoid burdening cable operators with new, onerous must-carry obligations and to quickly relieve small systems from a dual carriage obligations.

Respectfully submitted,

/s/ Daniel L. Brenner

William A. Check, Ph.D.
Sr. VP, Science & Technology

Andy Scott
VP, Engineering
Science & Technology

Lisa Schoenthaler
VP, Association Affairs and the
Office of Rural/Small Systems

March 3, 2008

Daniel L. Brenner
Diane B. Burstein
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445