

**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)	

**OPPOSITION OF THE NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION
TO PETITION FOR RECONSIDERATION**

The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its Opposition to the Petition for Reconsideration and Clarification of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters in the above-captioned proceeding. NCTA is the principal trade association for the cable television industry in the United States. Its members include owners and operators of cable television systems serving 90 percent of the nation’s cable customers, and owners of more than 200 cable program networks.

INTRODUCTION AND SUMMARY

MSTV/NAB seek reconsideration of two aspects of the FCC’s *Third Report and Order* in the above-captioned proceeding.¹ In that Order, among other things, the Commission reaffirmed its rules for determining whether a digital must carry signal has been “materially degraded”² and permitted operators of systems with an activated channel capacity of 552 MHz or less that do not have the capacity to carry the additional must-carry signals to seek a waiver.³

¹ *Third Report and Order and Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 21064 (2007) (hereinafter “*Third Report and Order*”).

² *Id.* at 21067.

³ *Id.* at 21081.

The broadcasters' objections to these aspects of the *Third Report and Order* are baseless. As to "material degradation," the FCC merely reaffirmed its 2001 determination not to define compliance by reference to carriage of "all the bits." Broadcasters are not entitled to yet another opportunity to reargue these same points, and their Petition in this regard should be dismissed on this ground alone. On the merits, their arguments are no more valid this time than when they were previously raised and rejected.

MSTV/NAB's argument against the FCC entertaining waivers of its carriage rules as applied to small systems is equally meritless. NCTA has explained in its Comments on the *Further Notice* in this proceeding why the Commission should go beyond a case-by-case waiver approach to establish an exemption for certain low capacity small systems and systems with few subscribers. At the very least, the Commission has every reason to examine whether its dual carriage obligations serve the public interest in particular cases and to issue waivers where they do not.

ARGUMENT

I. THE FCC SHOULD DISMISS THE PETITION FOR RECONSIDERATION OF THE "NO MATERIAL DEGRADATION" RULE BECAUSE IT MERELY REPEATS IDENTICAL ARGUMENTS THAT HAVE TWICE BEEN REJECTED

MSTV/NAB – for the second time – complain that the FCC has not adopted their preferred interpretation of the Act's prohibition against "material degradation."⁴ They essentially espouse the identical position – that carriage of all bits is necessary to protect against material degradation – which the FCC has already twice considered and rejected. Their Petition contains nothing new.

⁴ Petition for Reconsideration and Clarification of the Association For Maximum Service Television, Inc. and The National Association of Broadcasters, CS Docket No. 98-120 (hereinafter "MSTV/NAB" or "Petition").

In 2001, the FCC adopted rules⁵ interpreting Section 614's requirement that cable operators shall carry must carry commercial broadcasters "without material degradation."⁶ The FCC decided not to require cable carriage of any particular quantity of "bits" transmitted in a must carry broadcaster's digital signal. Instead, the Commission determined that "in the context of mandatory carriage of digital broadcast signals, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer (*e.g.*, non-broadcast cable programming, other broadcast digital program, etc.) carried on the cable system, provided, however that a broadcast signal delivered in HDTV must be carried in HDTV."⁷ MSTV and NAB petitioned for reconsideration of that decision in 2001,⁸ urging the FCC to "reconsider and revise its Report and Order to establish a 'pass all the content bits' standard as the best way to assure no material degradation in the digital world."⁹

The 2007 *Third Report and Order* merely reaffirmed the Commission's 2001 decision. It "retain[ed] the requirement that HD signals be carried in HD, as well as the comparative approach to determining whether material degradation has occurred.... Because we decline to rely on measurement of bits to determine whether degradation has occurred, we do not require carriage of all content bits."¹⁰ Thus, the Commission again decided against the broadcasters' arguments in support of a requirement to carry all bits.

⁵ *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 (2001) at ¶ 70-74 (hereinafter "*First Report and Order*").

⁶ 47 U.S.C. § 614(b)(4)(a) provides that "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 types of signal."

⁷ *First Report and Order* at ¶ 73.

⁸ NAB/MSTV/ALTV Petition for Reconsideration and Clarification, CS Docket No. 98-120 (filed Apr. 25, 2001).

⁹ *Id.* at 22.

¹⁰ *Third Report and Order* at ¶ 7.

Having already failed twice to convince the Commission of their interpretation, the broadcasters' reconsideration petition should be dismissed. Section 1.429(i) provides that unless a rule is modified on reconsideration, "a second petition for reconsideration may be dismissed by staff as repetitious."¹¹ This sound policy provides certainty to the parties and conserves FCC resources: "reconsideration will not be granted to debate matters on which the Commission has already deliberated and spoken."¹² As the FCC has long held, "there must be some finality to the administrative process...."¹³ Otherwise, the FCC "would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion."¹⁴

In this case, broadcasters have unsuccessfully tried to convince the FCC to adopt the same rule on two occasions. Their arguments have already been thoroughly considered and rejected, and the broadcasters provide no reason for the Commission to take a third look.

II. BROADCASTERS' ARGUMENT ON THE MERITS ARE NO MORE PERSUASIVE THIS TIME THAN THE LAST TWO TIMES

Even if the Commission chooses not to dismiss the Petition on procedural grounds, there are ample grounds to dismiss it on the merits. The broadcasters simply try to repackaging their same claim – that cable operators somehow must be forced to carry all the bits that broadcasters transmit over the air – to avoid "materially degrading" their broadcast signal.

First, broadcasters propose that "even if the Commission declines to impose an all content bits approach, that should not prevent the Commission from evaluating as evidence the

¹¹ 47 C.F.R. § 1.429(i).

¹² *Dennis P. Corbett, Esq.*, 22 FCC Rcd 4795 (2007) (citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 387 U.S. 967 (1966)).

¹³ *VHF Drop-Ins*, 3 RR2d 1549, 1551 n. 3 (quoting *Atlantic City Broadcasting Co.*, 21 P&F RR 194a (1961)).

¹⁴ *Id.*

removal of bits from broadcast signals when it is evaluating material degradation claims. For example, if a broadcaster could show that a cable system was stripping more bits from a broadcast HD signal than it was from a cable HD signal during signal processing and/or transmission, then that should establish material degradation.”¹⁵ This test for determining whether a signal is materially degraded makes no sense. As NCTA’s Comments in this proceeding explained,

Cable operators routinely use digital compression and statistical multiplexing to present digital programming – broadcast and non-broadcast – on their cable systems. Compression and statistical multiplexing are critical elements in any operator’s efforts to maximize the information-carrying efficiency of the cable plant. These techniques allow an operator to use each 6 MHz slot on its system in the most efficient way possible, for both cable and broadcast programming. It is source agnostic: statistical multiplexing simply looks at the nature of the content (e.g., fast action vs. talking heads) to determine how many bits to allocate to any particular picture.¹⁶

Therefore, whether a broadcast signal or cable program network contains more or less bits than the other would be irrelevant to determining whether material degradation had occurred. A broadcaster might be presenting a comparatively less bit-intensive talking head show while a cable network might be presenting a sporting event requiring many more bits – or vice versa. Nothing about the quality of a customer’s viewing experience can be inferred from the quantity of bits devoted to one show compared to another.

MSTV/NAB also are off the mark in taking issue with the FCC’s conclusion that the “material degradation” requirement should not impede technological developments, such as advanced compression technologies.¹⁷ The broadcasters argue that the Commission erred because, in their broadcaster-centric view, there is “always” some “perceptible degradation” in a

¹⁵ Petition at 3-4.

¹⁶ NCTA Comments at 29 (emphasis supplied).

¹⁷ *Third Report and Order* at 21068.

“concatenated decompress/recompress process.”¹⁸ But this is just another way of saying that cable operators’ technology should be tied to the least efficient technology used by a must carry broadcaster – a position that the Commission was right to reject the last time. The FCC has made clear from the very start that the “no material degradation” provision was not meant to “imped[e] technological advances and experimentation by the cable industry....”¹⁹

Nor is there any more reason to freeze cable’s technological advancements based on the broadcasters’ supposed interest in the continued operation of one-way digital cable-ready television sets without the use of a set-top box.²⁰ Broadcasters argue that “maintaining backward compatibility with digital television products widely deployed in the marketplace is an important principle that should not be threatened by new regulatory decisions that conflict with this principle.”²¹ But broadcasters create that principle out of whole cloth: Congress explained when adopting the equipment compatibility provision in Section 629 that the FCC was to “avoid actions which would have the effect of freezing or chilling the development of new technologies and services.”²² The fact that one-way digital cable-ready television sets may not be “future-proofed” provides no reason to force operators into a technology straitjacket with respect to carriage of digital must carry broadcast signals.²³

¹⁸ Petition at 4.

¹⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2965, 2990 (1993).

²⁰ Petition. at 4-5.

²¹ *Id.*

²² S. Conf. Rep. No. 104-230 at 181 (1996).

²³ As NCTA demonstrated in its Comments and Reply Comments in this proceeding, there is no “objective” test for measuring material degradation; it is based on whether the purported degradation is perceptible to the human eye. Therefore, the Commission should reject the Petitions’ arguments that digital signals should be tested at various points at the set-top box. *See* Petition at 5-6.

III. SMALL SYSTEM WAIVERS SHOULD BE ENTERTAINED

Finally, the broadcasters object to the Commission's decision to provide a modicum of relief to certain small systems in the form of entertaining waivers from the burden of having to carry a digital broadcast signal in both a digital and analog format to viewers.²⁴ They claim that "a special rule for systems with a capacity of 552MHz or less would be contrary to the pro-consumer statutory framework that Congress has provided."²⁵ But as NCTA has already shown, the broadcasters' arguments are meritless. Customers of these small systems will not be harmed in any way if small systems are granted relief from this requirement; they will continue to receive an analog version of a broadcaster's must carry signal, just as they do today. To the contrary, if the FCC fails to act, it is likely that both these systems and their customers will be hurt. As demonstrated in NCTA's *Further Notice* Comments, forcing small systems to devote the capacity or resources to carriage of duplicative versions of must carry signals will inflict serious damage on these systems and their customers since these systems would be required to remove other services customers enjoy today, abandon the deployment of advanced services consumers want or, in some cases, to shut down these systems altogether.

In its Comments and Reply Comments, NCTA argued that, for these reasons, small systems should be exempt from the requirement to carry a digital signal in a digital and analog format.²⁶ But the broadcasters object even to allowing small systems to file for a waiver. They claim that the FCC failed to explain the "statutory basis for providing relief for systems with 552 MHz or less of activated channel capacity," and that only systems with 12 or fewer activated

²⁴ Petition at 6. The *Third Report and Order* permitted "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 [to] seek a waiver from the Commission." *Third Report and Order* at 21081.

²⁵ Petition at 6.

²⁶ Comments of NCTA at 11-17 (filed Mar. 3, 2008); Reply Comments of NCTA at 7-10 (filed Mar. 17, 2008).

channels or with 300 or fewer subscribers are entitled to relief under the must carry provisions of the Act.

But these arguments against a waiver are specious. Even absent the express statement in the *Third Report and Order* regarding the ability to file for waivers, the FCC's rules permit *any* interested party to file a petition, and "the Commission may waive any provision of ... part 76."²⁷ The FCC has established these requirements and codified the "material degradation" and "viewability" requirements in part 76. The agency surely has the authority to waive their application where appropriate.

Moreover, as NCTA's *Further Notice* Comments show, the Act neither requires dual carriage nor mandates carriage of a high definition signal in HD.²⁸ Contrary to the broadcasters' claim, nothing in the Act prevents the FCC from relieving small systems from these regulatory requirements.

²⁷ 47 C.F.R. § 76.7(a)(1).

²⁸ NCTA Comments at 18.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed or denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2008, I served one copy of the foregoing Opposition to Petition for Reconsideration via first-class postage pre-paid on the following parties:

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