

**In the Matter of
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 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 of the National Association of Broadcasters and the Association of Maximum Service Television (“NAB/MSTV Petition”). The NAB/MSTV Petition seeks reconsideration of aspects of the *Fourth Report and Order* in the above-captioned proceeding. The *Fourth Report and Order* relieved small cable systems from a dual carriage requirement with respect to must-carry broadcasters that offer high definition digital programming. The broadcasters now urge the Commission to require these same small cable systems to “notify consumers, affected must carry stations, and the Commission of the system’s intent to utilize the exemption and the factual basis supporting its qualification for the exemption.”¹ The FCC should deny the NAB/MSTV Petition.

ARGUMENT

In its *Third Report and Order*, the Commission ruled that cable operators must provide digital must-carry broadcast signals in analog format and also provide any high-definition (HD) signals in HD format, during a three-year transition period beginning February 17, 2009.² The

¹ NAB/MSTV Petition at 2.

² 22 FCC Rcd 21064 (2007).

Fourth Report and Order, however, exempted certain smaller cable systems – specifically, systems with 2500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all MVPD subscribers and those with an activated channel capacity of 552 MHz – from the requirement.³

NAB/MSTV complain that small operators are not required to notify cable customers, broadcasters, or the FCC if they choose to avail themselves of this exemption.⁴ They urge the Commission to impose such a notice requirement, asserting that a “simple notice ... will not unduly burden cable systems.”⁵ But the burdens of such a new obligation would, in fact, far outweigh the overblown benefits that the broadcasters claim.

The point of exempting small systems from the dual carriage requirement was precisely to alleviate the burdens that these operators would incur to satisfy their must-carry obligations.⁶ It makes no sense to take away with one hand what the other has given. Contrary to NAB/MSTV’s suggestion that the notices they propose will not be “unduly burden[some],” these types of requirements – in the form of bill stuffers to customers or “written notice by certified mail” to all affected must carry broadcasters⁷ – will impose significant costs on the very operators that can least afford them. Such a requirement would run contrary to the protection for small businesses contained in the Paperwork Reduction Act, which requires agencies to take special account of the effect of reporting or compliance requirements on small entities.⁸ In fact,

³ *Fourth Report and Order*, 23 FCC Rcd 13618 (2008) at ¶12.

⁴ NAB/MSTV Petition at 3.

⁵ *Id.*

⁶ *See, e.g., Third Report and Order*, 22 FCC Rcd at 21104 (seeking comment on proposals to “minimize the impact on small cable operators”); *Fourth Report and Order* at ¶ 3 (noting concern about “impact these rules might have on small cable operators” and seeking comment on ways to minimize any harm).

⁷ NAB/MSTV Petition at 7.

⁸ 5 U.S.C. §§ 603(c)(1) – (c)(4).

FCC rules typically exempt small operators from burdensome paperwork requirements.⁹ They do not single out small cable systems for these types of obligations, nor should the FCC deviate from that practice here.

Cost considerations aside, NAB/MSTV provide no reason why cable customers need to be apprised that must-carry broadcasters' signal are available in analog only.¹⁰ Indeed, while there are dozens of cable program networks that provide HD programming, there are many cases in which a cable operator carries only an analog version of those networks. There is no requirement to notify customers of non-carriage of the HD version – and no evidence of any resulting customer confusion. “Yes, We Have No Bananas” may make for a catchy song but it is a bad customer care philosophy.

Moreover, NAB/MSTV's proposed customer notification requirement would be impractical. Even though they may be transmitting a 16:9 formatted frame, broadcasters may not actually be transmitting HD programming, or at least not all the time. The content they broadcast may only be 4:3 formatted, non-HD content. This typically results in the broadcaster transmitting their 4:3 pictures with black bars inside a 16:9 frame. It indeed would be ironic for the FCC to require a cable operator to notify customers that they are not carrying the broadcaster's signal in HD when the broadcaster itself is not broadcasting HD material. And this would be especially true since the broadcaster itself is under no obligation to tell the cable operator, the public, or the FCC about the HD content of its broadcast day.

Under these circumstances, customer notices that inform them that a particular must-carry station is not being retransmitted in HD on a cable system would be potentially misleading

⁹ See, e.g., 47 C.F.R. § 76.1700(a) (exempting systems with fewer than 1000 subscribers from certain recordkeeping requirements).

¹⁰ DBS providers that do not provide HD programming pursuant to their exemption face no comparable customer notice requirement. *Amendment to Part 76, Carriage of DTV Broadcast Signals*, 23 FCC Rcd 5351 (2008).

and confusing to cable customers as well. And providing a notice that details the factual basis for claiming the exemption would be meaningless to consumers.

These adverse effects on operators and their customers outweigh any purported benefits that the broadcasters conjure. They claim that a notice would be “critical for consumers who seek to make informed decisions about *subscribing to MVPD services* and *purchasing expensive equipment.*”¹¹ In neither case does their argument hold water.

First, the notion that this information is needed to help viewers decide whether to *subscribe* to cable is nonsensical and counterintuitive. Broadcasters provide no evidence – other than their own self-serving statements – that a customer’s decision whether to subscribe to a cable system offering a myriad of other channels would hinge on whether an operator opts not to carry an HD version of a must-carry channel that is already carried in analog and that has very limited consumer appeal in the first place.

Equally specious is the claim that this information is necessary to help customers make informed *equipment* purchasing decisions. Cable customers considering purchasing an HD set can easily ascertain their system’s array of HD offerings without the need for a specific notice about the availability of HD programming from must-carry stations.

Finally, it appears that NAB/MSTV’s supposed solicitude for the interests of cable customers is really just a pretext for broadcasters to avoid having to do their own homework to find out whether their HD signals are being carried. Thus, NAB/MSTV proposes that along with being required to notify customers if they are not carrying HD signals, cable operators should also be required to send a notice that “identif[ies] the specific factual basis for the exemption

¹¹ NAB/MSTV Petition at 3 (emphasis added).

(i.e., the number of subscribers served or capacity of the system)”¹² to each must-carry station and the FCC. But this burden-shifting exercise has it backwards. A broadcaster has ample existing data easily accessible at the FCC from which to make these determinations.¹³ Other signal carriage obligations are self-effectuating with no notice requirements,¹⁴ and broadcasters demonstrate no legitimate reason why starting up a notification scheme should be imposed here.

The argument that broadcasters need this notice in order to “provide those cable systems with information on how to treat the picture format of the widescreen HD content being supplied to them”¹⁵ is without merit. Downconversion from HD to analog is not unique to small operators – FCC rules require all commercial must-carry stations to be downconverted to analog by all cable operators if an operator provides an analog tier of service.¹⁶ And for the reasons stated in NCTA’s comments in the *Third Further Notice of Proposed Rulemaking* in this proceeding,¹⁷ there is no reason for the FCC to adopt a rule that limits cable operators’ flexibility to make these determinations. In any event, NAB/MSTV is well aware that coordination between cable operators and broadcasters already is taking place at the local level to address these concerns.¹⁸ The argument that notice is necessary to “facilitate communication” at the local level rings hollow and is out of date.¹⁹

¹² *Id.* at 7.

¹³ The FCC’s COALS database provides channel capacity and subscribership information on a community-by-community basis. Other commercially-available information also can be used to determine whether a particular cable system is exempt.

¹⁴ *See, e.g.*, 47 C.F.R. §76.62 (manner of carriage rules).

¹⁵ NAB/MSTV Petition at 5.

¹⁶ Nor are cable systems alone in downconverting an HD signal – translators and DBS operators also may not be showing an HD picture in HD.

¹⁷ NCTA Comments, CS Docket No. 98-120 (filed Mar. 3, 2008).

¹⁸ *See* Checklist for DTV Transition Coordination (jointly developed by NCTA and the broadcasters).

¹⁹ *See Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 23 FCC Rcd. 2994, 3073 (2007) (rebuffing broadcaster effort to impose cable

CONCLUSION

With the deadline for the digital transition approaching, now is not the time to indulge the broadcasters' efforts to pile more must-carry obligations on cable operators. The FCC correctly decided to exempt small systems from the obligation to carry HD versions of must-carry broadcast signals to minimize the harms otherwise caused by must carry. Imposing the notice requirements suggested in the broadcasters' Petition would impose unnecessary costs and burdens. The Petition should be denied.

Respectfully submitted,

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reporting requirements, and “strongly supporting active coordination between the parties” and “urg[ing] broadcasters to directly contact the MVPDs that carry their stations if they require specific information from MVPDs to ensure a successful transition”).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of the National Cable & Telecommunications Association to Petition for Reconsideration were served via postage-prepaid first-class mail to:

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