

**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 TO PETITION FOR RECONSIDERATION AND CLARIFICATION OF  
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC., AND THE  
NATIONAL ASSOCIATION OF BROADCASTERS**



Matthew M. Polka  
President and CEO  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220  
(412) 922-8300

Nicole E. Paolini-Subramanya  
Scott C. Friedman  
Cinnamon Mueller  
307 North Michigan Avenue  
Suite 1020  
Chicago, Illinois 60601  
(312) 372-3930

Ross J. Lieberman  
Vice President of Government Affairs  
American Cable Association  
4103 W Street, N.W., Suite 202  
Washington, DC 20007  
(202) 494-5661

Attorneys for the American Cable  
Association

April 22, 2008

## I. Introduction

In their Petition for Reconsideration,<sup>1</sup> the Association for Maximum Service Television, Inc., and the National Association of Broadcasters (collectively, “NAB”), ask the Commission to reconsider its DTV must-carry waiver process for cable systems with 552 MHz or less of activated channel capacity.<sup>2</sup> ACA opposes the Petition for Reconsideration for the following reasons:

- Upgrade costs and capacity constraints compel a waiver process from the DTV must-carry requirements.
- The Commission’s waiver process significantly benefits consumers.
- The Commission has the statutory authority to grant waivers of the DTV must-carry requirements.
- Commission support for an exemption from the DTV must-carry requirements for capacity-constrained systems evidences the need for relief.

For these reasons, the Commission must deny NAB’s Petition for Reconsideration.

**About the American Cable Association.** ACA represents nearly 1,100 small and medium-sized cable companies that serve more than 7 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states. The companies range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. More than half of ACA’s

---

<sup>1</sup> See *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Petition for Reconsideration and Clarification of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters, CS Docket No. 98-120 (filed Mar. 3, 2008) (“*Petition for Reconsideration*”).

<sup>2</sup> See *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd. 21,064, ¶ 37 (2007) (“*Third Report and Order*”).

members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets.

**II. Upgrade costs and capacity constraints compel a waiver process from the DTV must-carry requirements.**

Commenters in this proceeding agree – upgrade costs and capacity constraints compel relief from the Commission’s DTV must-carry requirements.<sup>3</sup>

As shown in the comments filed in this docket by ACA, capacity constraints make a waiver process necessary. A 552 MHz system can accommodate, at most, 77 6-MHz channels.<sup>4</sup> Smaller systems – which may have capacity of only 450 MHz or 330 MHz – have correspondingly less capacity. Considering the number of channels devoured by programming and retransmission consent tying and bundling,<sup>5</sup> a significant number of these low-capacity systems are channel-locked or close to channel-locked and do not have capacity for new broadband and other advanced services.

---

<sup>3</sup> *In the Matter of: Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking CS Docket No. 98-120, Comments of the American Cable Association (filed Mar. 2, 2008) (“ACA’s Comments”) (advocating an exemption from the DTV must-carry requirements for cable systems serving 5,000 or fewer subscribers or with 552 MHz or less of capacity); Comments of the Office of Advocacy, U.S. Small Business Administration at 7 (filed Mar. 3, 2008) (“SBA Advocacy’s Comments”); Comments of Charter Communications, Inc. at 6 (filed Mar. 3, 2008) (“Charter’s Comments”); Comments of the National Cable & Telecommunications Association at 20 (filed Mar. 3, 2008) (“NCTA’s Comments”).

<sup>4</sup> The frequency band for Channel 2 begins at 55.25 MHz, and the FM band also occupies frequency. This leaves bandwidth for only seventy-seven 6-MHz channels on a 552 MHz system.

<sup>5</sup> ACA discusses this issue in detail in its comments in the Commission’s inquiry into programming tying arrangements. See *In the Matter of: Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 07-198, Comments of the American Cable Association at 5-14 (filed Jan. 3, 2008). ACA requests that the Commission incorporate these comments into the record in this proceeding.

Furthermore, the cost of upgrading a system to carry digital broadcast signals ranges from \$28,600 to \$54,900.<sup>6</sup> This is in addition to the cost to convert the digital signal to analog for carriage on the analog tier. These costs far exceed the \$6,000-\$10,000 per system cost of compliance that the Commission found would be a significant financial hardship for small systems in hundreds of EAS waiver orders,<sup>7</sup> and therefore constitute *per se* financial hardship for these systems.<sup>8</sup>

For these reasons, the Commission's DTV waiver process provides much-needed relief.

### **III. The DTV waiver process significantly benefits consumers.**

NAB claims that waivers for systems with a capacity of 552 MHz or less would be "contrary to the pro-consumer statutory framework that Congress has provided."<sup>9</sup> This claim does not withstand even superficial scrutiny. The Commission's DTV must-carry

---

<sup>6</sup> See *ACA's Comments* at 2-3 and Exhibit 1. The incremental cost for adding a single additional must-carry signal is approximately \$8,000. *Id.* at 2. See also *SBA Advocacy's Comments* at 6 (citing estimate by a group of U.S. Senators that the cost of compliance with the FCC's DTV must-carry obligations is approximately \$75,000 per small cable operator); *Charter's Comments* at 8-9 (cost of compliance is \$100,000 per system); *NCTA's Comments* at 14-15.

<sup>7</sup> See, e.g., *In the Matter of Clearvision Cable Systems, Inc.*, Order, 19 FCC Rcd. 14,592 (2004) (granting relief on the basis of financial hardship where compliance with EAS requirements would cost \$6,000 per system); *In the Matter of Charter Communications, Inc.*, Order, 19 FCC Rcd. 13,178 (2004) (granting relief on the basis of financial hardship where compliance with EAS requirements would cost \$6,000-\$10,000 per system); *In the Matter of Cable & Communications Corporation*, Order, 19 FCC Rcd. 11,843 (2004) (granting relief on the basis of financial hardship where compliance with EAS requirements would cost \$9,000 per system); *In the Matter of SM Cable Holdings, LLC*, Order, 19 FCC Rcd. 2213 (2004) (granting relief on the basis of financial hardship where compliance with EAS requirements would cost \$7,300 per system) ("*EAS Orders*").

<sup>8</sup> Under the precedent set by the *EAS Orders*, the \$8,000 incremental cost of adding a single additional digital broadcast channel alone warrants waivers for these systems. See *ACA's Comments* at 2.

<sup>9</sup> *Petition for Reconsideration* at 6.

waiver process will advance key public interest benefits in smaller and rural markets, including increased broadband deployment, affordable video services, MVPD competition, and comparable regulatory treatment of different MVPD technologies.

The majority of the cable systems with 552 MHz of capacity or less are located in smaller and rural markets. As explained above, many of these systems do not have the capacity to carry duplicate must-carry signals and to deploy broadband and new programming services. The Commission's waiver process therefore benefits smaller-market and rural consumers by making the deployment of broadband and new programming services in their communities possible.

Further, the waiver process will reduce the cost of services for the subscribers of these cable systems. As detailed above, the costs to upgrade to provide digital signals in both analog and digital formats are significant. These costs must be passed through to the very small subscriber bases served by these cable systems. For an analog-only system serving 100 subscribers, the per-subscriber cost of upgrading to carry just one must-carry in digital format would start at \$550. Small-market and rural subscribers should not be required to shoulder such costs merely to receive duplicate must-carry signals, especially in the current financial climate.

Moreover, requiring these systems to devote bandwidth to duplicative signals rather than to broadband and new programming services impedes these systems' ability to compete with well-financed, bandwidth-rich competitors like DirecTV, EchoStar, Verizon and AT&T.

Finally, the capacity concerns that warranted a 4-year phase-in period for the carriage of HD must-carry signals by DBS providers<sup>10</sup> apply with equal force to capacity-constrained cable systems and warrant regulatory relief for these systems.

In short, the public policy interests in broadband deployment,<sup>11</sup> affordable MVPD services, MVPD competition,<sup>12</sup> and cohesive regulatory treatment for DBS and cable services<sup>13</sup> certainly outweigh any public policy interest in providing a duplicate of a channel already carried on a cable system.

#### **IV. Statutory authority exists for the Commission's waiver process.**

NAB argues that the Commission did not explain the statutory basis for instituting a waiver process for systems with 552 MHz of activated channel capacity or less.<sup>14</sup> Just one source of the Commission's authority can be found in 47 U.S.C. § 157(a), which requires the Commission to encourage the deployment advanced telecommunications capability to all Americans. Another source can be found in 47 U.S.C. § 521(6), which establishes a policy of "minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems."<sup>15</sup>

---

<sup>10</sup> See *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking, CS Docket No. 00-96, ¶¶ 7-14 (rel. Mar. 27, 2008).

<sup>11</sup> See notes to 47 U.S.C. § 157(a).

<sup>12</sup> See 47 U.S.C. § 521(6).

<sup>13</sup> See 47 U.S.C. § 338(j).

<sup>14</sup> *Petition for Reconsideration* at 6.

<sup>15</sup> NAB also argues that "Congress did not articulate any caps or carve-outs to the viewability and material degradation requirement...." *Petition for Reconsideration* at 6. However, the prohibition on material degradation applies only where "technically feasible." 47 U.S.C. §

**V. Chairman Martin's proposed exemption for capacity-constrained systems evidences the need for relief.**

Commission Chairman Kevin J. Martin recently circulated an order to the Commissioners containing an exemption from the DTV must-carry requirements for cable systems with 552 MHz or less of activated capacity.<sup>16</sup> Small system relief has also been supported by Commissioners Adelstein, Copps and McDowell.<sup>17</sup> Commissioner support for this exemption evidences the public interests benefits in providing relief from the DTV must-carry requirements.

**VI. Conclusion**

The Commission's DTV waiver process is much-needed, significantly benefits consumers, and is compelled by statute and policy. The Commission should deny NAB's *Petition for Reconsideration*.

---

534(b)(4)(A). Carriage of must-carry signals in digital format on an all-analog or channel-locked system that does not have room for an additional signal is not "technically feasible." With regard to NAB's viewability argument, NAB conveniently ignores the Commission's requirement that cable operators granted a waiver carry the must-carry signal on a tier of service where it will be viewable to all subscribers. See *Third Report and Order* at note 119 ("Such systems must, however, commit to continue carrying an analog version such that their subscribers are assured of being able to view all must-carry stations carried on the system.").

<sup>16</sup> See *Remarks by FCC Chairman Kevin J. Martin, ACA's 15<sup>th</sup> Annual Summit* (Apr. 8, 2008), available at [www.fcc.gov](http://www.fcc.gov).

<sup>17</sup> See *Statement of Commissioner Jonathan S. Adelstein and Statement of Commissioner Michael J. Copps, Third Report and Order* at 21,126-21,129; John Eggerton, *Copps Aide: Leased-Access Ruling Was Reasonable Approach*, BROADCASTING & CABLE, April 1, 2008, available at <http://www.broadcastingcable.com/article/CA6546859.html?industryid=47171> ("[McDowell aide Christina] Pauze said McDowell...supports a blanket waiver from the dual-carriage/viewability rules for smaller operators, which the NCTA also backs.").

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

By:   
\_\_\_\_\_

Matthew M. Polka  
President and CEO  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220  
(412) 922-8300

Nicole E. Paolini-Subramanya  
Scott C. Friedman  
Cinnamon Mueller  
307 North Michigan Avenue  
Suite 1020  
Chicago, Illinois 60601  
(312) 372-3930

Ross J. Lieberman  
Vice President of Government Affairs  
American Cable Association  
4103 W Street, N.W., Suite 202  
Washington, DC 20007  
(202) 494-5661

Attorneys for the American Cable  
Association

April 22, 2008