Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules	)	CS Docket 98-120
	)	
	)	

ORDER

Adopted: August 24, 2012 **Released: August 24, 2012**

By the Chief, Media Bureau:

I. INTRODUCTION

1. On August 1, 2012, Agape Church, Inc. ("Agape"), London Broadcasting Company ("London"), the National Association of Broadcasters ("NAB"), and Una Vez Mas, LP ("UVM") (collectively, "Movants") filed a petition[1] requesting a stay of the Commission's *Fifth Report and Order* in this docket that allowed the Commission's "viewability" rule to sunset as scheduled under the terms of the rule. The "viewability" rule required cable operators with hybrid systems either to convert to all-digital systems or to carry digital must-carry signals in an analog format for the benefit of analog-service customers.[2] The Movants seek a stay of the implementation of the *Fifth Report and Order* pending the completion of judicial review.[3] For the reasons stated below, we deny the petition for stay.

II. BACKGROUND

2. Sections 614(b)(7) and 615(h) of the Communications Act of 1934, as amended (the "Act"), require cable operators to ensure that commercial and non-commercial must-carry broadcast stations are "viewable" or "available" to all cable subscribers.[4] In the 2007 *Viewability Order*, in

[1] Agape Church, Inc., London Broadcasting Company, the National Association of Broadcasters, and Una Vez Mas, LP (collectively, "Movants"), Joint Motion for Stay, CS Docket No. 98-120 (filed August 1, 2012) ("Movants Petition").

[2] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No 98-120, Fifth Report and Order, 27 FCC Rcd. 6529 (2012) ("*Fifth Report and Order*").

[3] Movants Petition at 1. Movants have filed a joint petition for review of the *Fifth Report and Order* with the U.S. Court of Appeals for the District of Columbia Circuit. *Agape Church, Inc., London Broadcasting Company, the National Association of Broadcasters, and Una Vez Mas, LP v. FCC*, No. 12-1334 (D.C. Cir. docketed July 31, 2012). The *Fifth Report and Order* also extended for three more years the HD carriage exemption for eligible small cable system operators, but that decision is not the subject of the joint petition for review or of the instant stay request.

[4] 47 U.S.C. § 534(b)(7), 535(h). 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." 47 U.S.C. § 534(b)(7). 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." 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

anticipation of the approaching end of the digital television transition and in light of the state of technology and the marketplace, the Commission established a rule to ensure that, after the DTV transition, cable subscribers would continue to be able to view must-carry 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] Although all cable systems were expected eventually to 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] Therefore, 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]

"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.

[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"*).

[6] *Id*. at 21065, ¶ 1.

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

[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.

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 was scheduled to, and ultimately did, sunset on June 12, 2012.[16]

5. On February 10, 2012, the Commission 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] Notably, the *Fourth FNPRM* sought "comment on how the sunset of the viewability requirement would impact the financial resources of must-carry stations" and sought "specific information that [would] allow [the Commission] to build a solid record that supports either the retention or the sunset of the viewability rule."[18] In addition, the *Fourth FNPRM* specifically sought comment on possible alternatives to the viewability rule and specifically asked for parties to include a statutory analysis with any proposals for changing the viewability rule.[19] In response to the *Fourth FNPRM,* the Commission received nine comments (four comments and five reply comments) during the official comment period in this proceeding and numerous *ex parte* submissions after the official comment cycle ended. Of the Movants, only NAB filed comments within the official comment period.[20]

6. On June 12, 2012, the Commission released the *Fifth Report and Order* in this docket and found that it was in the public interest to allow the viewability rule to sunset as scheduled. The *Fifth Report and Order* determined that the statutory term "viewable" is an ambiguous term. It then adopted a reasonable interpretation of the statutory text that best effectuates the statutory purpose in light of current marketplace conditions and technology developments that had occurred over the past five years. For example, the Commission observed that 80 percent of cable customers now subscribe to digital cable service and noted 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* reinterpreted the statutory viewability requirement to permit cable operators of hybrid systems 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). In this connection, the Commission found that small, limited-capability set-top boxes, called "Digital Transport Adapters" ("DTAs") can be made available at affordable cost. The Commission found that the range of charges reflected in the record for DTAs – *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. The

[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, 1714, ¶ 3 (2012) (*Fourth FNPRM*). The *Fourth FNPRM* expressly sought comment on "whether [the Commission] should extend the viewability rule or permit it to sunset," noting that the proceeding "provides an opportunity for [the Commission] to consider whether extending this rule best fulfills the statutory mandate, by reviewing it 'in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace.' *Id*. at 1717, ¶ 9.

[18] *Id*. at 1718, ¶ 10.

[19] *See Id*. at 1721, ¶ 16 ("[W]e 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. 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.").

[20] The *Fourth NPRM* afforded 35 days after the date of publication in the Federal Register for parties to file comments and replies. The official comment period closed March 22, 2012.

Commission determined, however, that materially higher leasing fees could deter subscriber willingness to order the equipment needed to ensure viewability on a hybrid cable system. Accordingly, it ruled that such fees would not meet the statutory viewability requirement as the Commission interpreted it.[21]

7. Therefore, until a hybrid cable system operator completes its transition to all-digital service, it may comply with the statutory viewability requirement in two ways. The operator must deliver 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 Order* established a transitional period of six months after expiration of the current rule – that is, until December 12, 2012 – during which hybrid systems are required to continue to carry the signals of must-carry stations in analog format to all analog cable subscribers. This post-sunset transitional period gives cable operators an opportunity to acquire an adequate supply of the necessary equipment and time to comply with notification requirements to affected broadcasters and customers about changes in carriage. In addition, the transitional period gives affected must-carry stations sufficient time to communicate with their viewers and gives subscribers time regarding any arrangements necessary to continue viewing a station's signal after changes in cable carriage.[22]

8. The Movants seek to stay the implementation of the *Fifth Report and Order* until the D.C. Circuit Court of Appeals acts on their petition for review.[23] The National Cable & Telecommunications Association ("NCTA") filed an opposition to the Movants' motion for stay.[24] For the reasons discussed below, we deny the Movants' petition for stay.

III. DISCUSSION

9. In determining whether to stay the effectiveness of one of its orders, the Commission applies the four-factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, as modified in *Washington Metropolitan Area Transit Cmm'n v. Holiday Tours, Inc*.[25] Under this standard, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.[26] The relative importance of the four criteria will vary depending on the circumstances of the case,[27] but a showing of irreparable injury is generally a critical element in justifying a request for stay of an agency order.[28]

10. In the instant case, we conclude that the Movants have satisfied none of the four factors

[21] *Fifth Report and Order* at ¶ 14.

[22] *Fifth Report and Order* at ¶ 17.

[23] Movants Petition at 1.

[24] National Cable & Telecommunications Association ("NCTA"), Opposition to Joint Motion for Stay, CS Docket No. 98-120 (filed August 8, 2012) ("NCTA Opposition").

[25] *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum*"); *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*Washington Metro*").

[26] *Virginia Petroleum*, 259 F.2d at 925; *Washington Metro*, 559 F.2d at 843; *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) ("*Winter*").

[27] *See, e.g., Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

[28] *See Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking an injunction to demonstrate that irreparable injury is *likely* in the absence of an injunction."); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying requests for stay after considering only the second factor) ("*Wisconsin Gas*").

in the stay calculus. They fail at the outset to demonstrate that they are likely to prevail in the merits of their claims. Nor have they demonstrated irreparable injury to themselves absent a stay, the absence of harm to other interested parties if a stay is granted, or that a stay would serve public interest. Accordingly, we find that a stay is not warranted.

A. The Movants Are Unlikely to Prevail on the Merits

11. The Movants have failed to show that they will likely prevail on the merits. The Movants contend that they are likely to succeed on the merits because "Section 614(b)(7) clearly requires 'must-carry' signals be actually viewable" without additional equipment.[29] The Commission rejected this argument in the *Fifth Report and Order*.[30] Nothing in the language of the statute plainly prohibits cable operators from 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 disagree with the Movants that Section 614(b)(7) unambiguously requires that cable subscribers must be capable of viewing must-carry signals without the use of additional equipment. As the Commission concluded in the *Fifth Report and Order,* the term "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.[31] 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 dependent on the customer's willingness to incur significant additional effort and expense. It is consistent with both the ordinary meaning of the word "viewable" – defined as "capable of being seen or inspected"[32] – and also prior interpretations of the Communications Act.[33] 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).[34]

12. Indeed, even NAB conceded before the Commission that it is consistent with the statutory language for a signal to be accessible with the use of additional equipment. Specifically, 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 the Movants now assert in their petition for

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[29] Movants Petition at 6-7.

[30] *See Fifth Report and Order* at ¶ 8.

[31] *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)").

[32] *See* Webster's Third New International Dictionary 2551 (1993).

[33] *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)).

[34] *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)]"). *See Fifth Report and Order* at ¶ 8 (rejecting these same arguments).

stay.[35] Once one acknowledges that equipment may be required, we see no basis in the statutory text to distinguish between offering that equipment for free or at a nominal fee. We thus find that the term "viewable" does not unambiguously *require* that must-carry stations be capable of being seen without the use of additional equipment.[36] In reaching this conclusion, we note that an agency may change its interpretation of an ambiguous statutory provision and that such a revised interpretation is entitled to deference.[37]

13. The Movants also assert that the *Fifth Report and Order*'s "new interpretation is at odds with the statutory structure because it renders the distinction between the second and third sentences of Section 614(b)(7) meaningless."[38] The Commission rejected this argument, as well, in the *Fifth Report and Order*.[39] The first sentence of Section 614(b)(7) requires that each must-carry signal "shall be provided to every subscriber to a cable system."[40] As the Commission has explained, this provision requires that every class of subscriber must receive all must-carry signals.[41] Cable operators have complied with this requirement through the use of a basic service tier,[42] *i.e.,* a level of service to which a viewer must subscribe in order to be eligible for access to any other tier of service at additional charge.[43] 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 sentence of Section 614(b)(7) is also a distinct mandate from the third sentence, as the Commission observed in both the 2007 *Viewability Order* and *Fifth Report and Order*.[44] 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

[35] *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 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 by providing free equipment to subscribers. *See* NAB *Ex Parte* (dated June 8, 2012).

[36] *See Fifth Report and Order* at ¶ 8. *See also* TWC Comments at 4.

[37] *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.") *See Fifth Report and Order* at ¶ 8.

[38] Movants Petition at 6-7.

[39] *See Fifth Report and Order* at ¶ 9.

[40] *Id.*

[41] *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-ups; 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).

[42] *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").

[43] 47 U.S.C. § 543(b)(7)(A).

[44] *See Viewability Order,* 22 FCC Rcd at 21073, ¶ 22; *Fifth Report and Order* at ¶ 9.

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."[45] 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. In short, the second sentence as interpreted by the Commission 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)."[46]

14. We disagree, as well, with the Movants' contention that "the legislative history confirms that the Act was intended to prevent local stations from being 'located on a channel . . . that subscribers . . . cannot view *without added equipment*.'"[47] The Movants' selective quotation of the Senate Report distorts its meaning. In considering methods by which cable operators could exercise market power, the Senate Committee merely posed questions which included "Will the station be located on a channel different from the one assigned by the FCC for over-the-air service or on a channel location that subscribers rarely view or cannot view without added equipment?"[48] The posing of that question hardly constitutes a legislative ban on required equipment use in connection with must-carry channels. Indeed, such an interpretation would be inconsistent with rate regulation provisions of the Act, which expressly contemplate use of equipment by subscribers receiving the basic service tier – a tier that includes must-carry channels.[49] As NCTA points out, conversion to all-digital systems, which indisputably is permissible, would require additional equipment use in connection with analog television sets.[50]

15. The Movants further argue that allowing cable operators to satisfy the viewability requirement by providing equipment conflicts with the "signal quality" provision 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."[51] The Commission also rejected this argument in the *Fifth Report and Order*.[52] The Commission observed that Section 614(b)(4)(A) speaks specifically to the issue of signal quality "nondegradation" and "technical specifications" and does not address the issue of "viewability."[53] The Movants, moreover, have not shown that carrying must-carry signals only in a digital format would violate the "nondegradation" and "technical specification" requirements 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

[45] 47 U.S.C. § 534(b)(7).

[46] 47 U.S.C. § 534(b)(7).

[47] Movants Petition at 6 (quoting S. Rep. No. 102-92, at 44, 45) (emphasis supplied by the Movants).

[48] S. Rep. No. 102-92, at 45.

[49] *See* 47 U.S.C. § 543(b)(3)(A) (regulations prescribed by the Commission "shall include standards to establish, on the basis of actual cost, the price or rate for – installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit…"); 47 U.S.C. § 543(b)(7) (listing must-carry channels as among the required components of the basic service tier).

[50] NCTA Opposition at 4.

[51] Movants Petition at 9-10.

[52] *See Fifth Report and Order* at ¶ 10.

[53] *Id*.

should be no perceptible difference between them.[54] Furthermore, 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.[55]

16. The Movants, however, suggest that this statutory provision extends beyond issues of signal quality, saying that the *Fifth Report and Order* ignored a statutory bar on discrimination in the "quality of … carriage provided."[56] We disagree with Movants' claim of such a statutory bar. Movants only support for this assertion is a Media Bureau decision interpreting a *different* statutory provision, Section 338(d), which applies to satellite carriage of local broadcast stations. We find that Bureau decision (which in all events was not binding on the Commission) to be irrelevant to the proper interpretation of Section 614(b)(4)(A). Rather, we agree with NCTA that this provision "is all about the comparative signal quality of must-carry signals and other signals carried on a cable system."[57] As NCTA observes in its Opposition, "Section 614(b)(4) is captioned 'Signal Quality,' and Section 614(b)(4)(A) is captioned 'Nondegradation; Technical Specifications.'"[58]

17. The Movants assert that the *Fifth Report and Order* departs from the Commission's settled interpretation of the statute "absent reasoned explanation."[59] The Movants argue in this regard that "nothing in the language of Section 614 has changed" and therefore the Commission's interpretation should not change.[60] In addition, the Movants contend that the interpretation is inconsistent with the fundamental purpose of must-carry.[61] We disagree with the Movants' assertions. As noted above, the Commission did not make the viewability rule permanent. Rather, the Commission established the rule

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[54] *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*"). *See Fifth Report and Order* at ¶ 10.

[55] *Id*.

[56] Movants Petition at 10 (citing National Association Of Broadcasters And Association Of Local Television Stations; Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, CSR-5865-Z1, Declaratory Ruling and Order, 17 FCC Rcd. 6065, 6076, ¶ 23 (MB 2002), vacated in part by Memorandum Opinion and Order, 22 FCC Rcd. 16074 (MB 2007)). In the 2002 Declaratory Ruling, the Media Bureau found that EchoStar's "two-dish" plan – a practice of placing some, but not all, local stations in a market on a "wing" satellite that necessitated subscriber use of a second satellite dish antenna – violated Section 338(d) of the Act. 47 U.S.C. § 338(d) (A satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers "on contiguous channels and provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu."). The Declaratory Ruling, however, did not specifically prohibit a two-dish approach, but instead ordered EchoStar to comply with various remedial measures to eliminate the unlawful discrimination. There was no Commission-level review of the Bureau's 2002 Declaratory Ruling. *See Comcast Corp. v. FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008) (absent an order on review, there is no way to know how the Commission would have ruled on the issue). Subsequent to the Bureau's ruling, Congress amended the statute to specifically prohibit the two-dish approach. See 47 U.S.C. § 338(g). See also 47 U.S.C. § 338(g)(1) ("Each satellite carrier that retransmits the analog signals of local television broadcast stations in a local market shall retransmit such analog signals in such market by means of a single reception antenna and associated equipment."). Section 338(g)(2) provides an exception to this requirement in the case of local digital signals by allowing satellite carriers to retransmit local digital channels to subscribers by means of a separate dish, provided they transmit all local digital channels to the same dish. See 47 U.S.C. § 338(g)(2). In 2007, in light of the amendment to the statute, the Bureau vacated its Declaratory Ruling to the extent that it concluded that EchoStar's former two-dish approach could comply with the statutory requirements.

[57] NCTA Opposition at 10.

[58] NCTA Opposition at 10 (quoting 47 U.S.C. § 534(b)(4)).

[59] Movants Petition at 8-9.

[60] Movants Petition at 9.

[61] Movants Petition at 7-8.

for three years based on the marketplace conditions at the time (the uncertainty surrounding the advent of the digital television transition as well as the unavailability of low-cost DTAs) and determined to reevaluate the rule three years after the DTV transition in light of then-existing marketplace conditions. Subsequently, in the *Fifth Report and Order*, the Commission chose a reasonable interpretation of the statutory text that best effectuates the statutory purpose in light of current marketplace conditions.[62] Moreover, the Commission explained that the doctrine of constitutional avoidance[63] counseled it to interpret the Act as not imposing a rigid analog-carriage requirement on cable operators, where the record established a reasonable, less burdensome alternative that meets the statutory objectives.[64] Specifically, the Commission was persuaded by cable commenters' arguments 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.[65] The Commission found that the current record lacked evidence that limiting cable operators' discretion by requiring both digital and analog carriage of the same broadcast station content was necessary to protect the viability of over-the-air broadcasting where an affordable set-top box option that will achieve the same viewability was readily available to customers.[66] Nor was 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 would diminish the availability or quality of broadcast programming.[67] The Commission thus found that the burden placed on cable operators by the 2007 viewability rule was not justified on the current record, which demonstrated that a less burdensome alternative was available.[68]

18. The Movants also assert that the *Fifth Report and Order* "is inconsistent with the basic tier requirements" in Section 623(b)(7) that all broadcast signals be available in the lowest price tier because, without the viewability rule, cable subscribers may be required to pay more for access to must-carry broadcast stations" due to added equipment fees.[69] We disagree. The Movants conflate equipment fees with service fees. The two are regulated separately. Section 623(b)(3) contemplates that cable operators may charge for equipment to access the basic service tier.[70] We agree with NCTA that so long as must-carry channels remain included in the basic tier of service, "and the only additional fee for viewing such signals is the separate fee that customers might have to pay for equipment needed to view

[62] *Fifth Report and Order* at ¶ 11. *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").

[63] *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").

[64] *Fifth Report and Order* at ¶ 11. *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").

[65] *Fifth Report and Order* at ¶ 11.

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] Movants Petition at 10-11.

[70] 47 U.S.C. § 543(b)(3).

such signals, the basic tier requirement of Section 623 is met."[71] In any event, under the Commission's *Fifth Report and Order*, any necessary equipment will be provided by the cable operator for free or at an affordable cost that does not substantially deter use of the equipment.[72]

19. The Movants also assert that the *Fifth Report and Order* violates the Administrative Procedure Act (APA) for several reasons.[73] We reject each in turn. Contrary to the Movants' assertion, the *Fifth Report and Order* did provide a detailed explanation for its reinterpretation of the statute. After consideration of the statutory arguments raised by the parties, and on further review of the statute, the Commission found that 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 cable systems.[74] The Movants also argue that "greater evidence of DTA availability was required."[75] We disagree, and reiterate that the availability of affordable set-top boxes is a pre-condition for hybrid cable operators to stop carrying must-carry stations in analog format. To be clear, a hybrid operator may stop carrying the analog signal of a must-carry station *only* if it is making affordable set-top equipment available to its subscribers. The Movants also argue that the *Fifth Report and Order* violates the APA's notice requirements because it adopted an equipment-based approach that the NPRM observed was previously rejected by the Commission in the 2007 *Viewability Order*.[76] We disagree. While noting the Commission's prior rejection of an equipment-based approach, the *Fourth FNPRM* specifically sought comment on possible alternatives to the viewability rule, including on proposals that would satisfy the statute in a less burdensome manner.[77] 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 provide analog customers access to digital must-carry signals makes the Commission's viewability rule obsolete.[78]

20. The Movants also argue that the *Fifth Report and Order*'s "conclusion that six months will allow a 'smooth transition' is arbitrary and capricious."[79] The Commission found in the *Fifth Report and Order* that six months struck an appropriate balance by easing the burden on cable operators while affording broadcasters and cable operators alike sufficient time to prepare their operations and consumers for the changes in carriage. Indeed, we note that the viewability rule was scheduled to sunset on June 12,

[71] NCTA Opposition at 11. NCTA observes that "[t]he fact that some customers might have to acquire additional equipment to view some but not all signals (including some must-carry signals) in the mandatory basic tier has never been viewed as violative of the basic tier requirement." *Id*. NCTA further explains that "customers without cable ready television sets used to have to obtain converter boxes (for which they were required by the rate regulation rules to pay an additional fee) to view any basic tier services provided on channels other than the 12 channels that could be tuned directly by their sets. Yet cable operators were never required to place all must-carry signals on channels 2-13 in order to comply with the basic tier requirement. In fact, the statute gives must-carry broadcasters the option of channel placement on their over-the-air channel number – which, in many cases, is a UHF channel number that cannot be tuned without a cable ready set or an additional set-top converter box." *Id*.

[72] *See Fifth Report and Order* at ¶ 11.

[73] Movants Petition at 11.

[74] *See Fifth Report and Order* at ¶ 2.

[75] Movants Petition at 12.

[76] Movants Petition at 12 *citing* 5 U.S.C. § 553(b)(3).

[77] *See Fourth FNPRM*, 27 FCC Rcd at 1721, ¶ 16.

[78] NCTA Comments at 12 ("DTAs could be used to receive digital must-carry signals").

[79] Movants Petition at 12-13.

2012, without any additional transitional period. We further reiterate that hybrid cable operators may not terminate analog carriage without first making set-top boxes available to subscribers at no cost or at an affordable cost. The Movants also argue that the *Fifth Report and Order* "undermines, rather than promotes" the purpose of the viewability rule "by allowing hybrid operators simply to drop analog must-carry signals rather than completing the transition to all-digital systems."[80] We disagree. The interpretation of the statutory viewability requirement will continue to ensure that all must-carry television signals will remain viewable to all analog customers who are served by hybrid systems, while easing burdens on cable operators. We also expect that all operators will eventually transition to all-digital systems, but note that doing so is a business decision at a cable operator's discretion.

B. The Movants Would Not Suffer Irreparable Harm

21. The Movants fail to show that they would be irreparably harmed if a stay is not granted. In claiming irreparable harm, the Movants assert that, absent a stay, "must-carry broadcasters likely will lose viewership and audience share"[81] and "Movants will lose advertising revenues that cannot be recouped" even absent actual losses in viewership.[82] Movants claim that, because any effort to quantify loss in overall corporate value for must-carry broadcasters would be "exceedingly speculative," the loss is thus irreparable.[83] The Movants further assert that must-carry broadcasters "will suffer irreparable competitive injury" and, in particular, must-carry broadcasters serving niche audiences will be disproportionately adversely impacted.[84]

22. To warrant injunctive relief, an injury must be "both certain and great; it must be actual and not theoretical."[85] Petitioners must provide "proof indicating that the harm [they allege] is certain to occur in the near future."[86] Moreover, economic loss does not, by itself, constitute irreparable harm

[80] Movants Petition at 13.

[81] Movants Petition at 13-14.

[82] Movants Petition at 14.

[83] *Id*. *citing CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673-74 (D.C. Cir. 2005). The Movants' reliance on the D.C. Circuit's decision in *CSX Transp.* is unavailing to establish "irreparable injury." In that case, the D.C. Circuit granted a rail carrier's request for a preliminary injunction of a D.C. law that would prohibit rail transport of certain hazardous materials within a two mile zone around the U.S. Capitol building. Although the court in *CSX Transp.* observed that "it would be exceedingly speculative … to place a dollar figure" on the petitioner's injury, it was not merely the inability to calculate an exact dollar amount that established "irreparable injury" in that case. *Id.*, 406 F.3d at 673. Rather, in that case, the court found "irreparable injury" based on the petitioner's specific evidence demonstrating that the D.C. law being challenged would constrain petitioner's railroad operations by "significantly decreas[ing] the capacity and flexibility" of the petitioner's rail network. *Id.* Here, by contrast, the Movants have offered no specific evidence of injury, relying instead on speculative claims of economic loss based on concerns of total loss of analog viewers and possible declines in advertising revenue. Movants' assumptions, however, fail to take into account the measures adopted in the *Fifth Report and Order* that are designed to minimize, if not eliminate, any disruption to viewing must-carry stations, including that hybrid cable operators must first make the necessary equipment available to subscribers before they can stop carrying must-carry channels in analog format, the equipment must be offered at no cost or at an affordable cost that does not substantially deter use of the equipment, and hybrid cable operators must comply with notification requirements to affected broadcasters and customers before making changes in carriage of must-carry stations. In addition, the six-month transitional period adopted by the Commission provides affected must-carry stations an opportunity to conduct public outreach efforts directly to their viewers to inform them about any upcoming carriage changes..

[84] Movants Petition at 15-16.

[85] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[86] *Id.*

unless it threatens the very existence of the movant's business.[87]

23. The Movants' irreparable injury argument does not meet this exacting standard. The fact that equipment may be necessary at no cost or an affordable cost does not result in "irreparable injury" to must-carry broadcasters. Congress specifically contemplated that equipment might be required for subscribers to receive the basic service tier – a tier which includes must-carry channels.[88] In any event, the Movants largely repeat claims about loss of viewers and advertising revenues that the Commission rejected in its *Fifth Report and Order* factual findings. Most notably, the Commission in the *Fifth Report and Order* rejected the broadcasters' claims that allowing the viewability rule to expire on schedule will threaten the economic viability of must-carry stations.[89] According to the 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."[90] But the Commission concluded that this analysis improperly assumed that elimination of the rule would automatically result in the broadcaster's signal being unavailable to analog subscribers.[91] The Commission found that the analysis failed to take into account that analog customers will be able to continue to access must-carry channels (as well as other programming offered by the cable operator in digital format) through free or affordable equipment made available by the cable operator.[92] The Commission determined that its statutory interpretation – which hinges on a cable operator's making equipment available at no cost or an affordable cost[93] – will ensure that subscribers on hybrid systems can continue to access these signals at little or no additional expense.[94] A must-carry signal carried only in digital format will still be included in the basic service tier; analog cable subscribers will not be required to subscribe to an enhanced tier of service to view the digital version of a must-carry channel. The Commission also noted that the significance of this issue is expected 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 transmission.[95] We also note that hybrid system cable

[87] *Id*.; *see also Brady v. National Football League*, 640 F.3d 785, 794-95 (8th Cir. 2011).

[88] *See* 47 U.S.C. § 543(b)(3)(A) (regulations prescribed by the Commission "shall include standards to establish, on the basis of actual cost, the price or rate for – installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit…"); 47 U.S.C. § 543(b)(7) (listing must-carry channels as among the required components of the basic service tier).

[89] *Fifth Report and Order* at ¶ 15.

[90] *See also* NAB *Ex Parte* (dated April 23, 2012) Attachment at 2. Notably, the broadcasters' financial impact showing was not submitted during the official comment period, despite the NPRM's clear request for such information. *Fourth NPRM* at 1718, ¶ 10. Nonetheless, the Commission considered NAB's economic analysis, but found it unpersuasive. *Fifth Report and Order* at ¶ 15.

[91] *Fifth Report and Order* at ¶ 15. *See* NCTA *Ex Parte* (dated April 26, 2012) at 2.

[92] *Fifth Report and Order* at n. 52.

[93] We note that the available DTA (or similar equipment) will provide subscribers equivalent access to all cable programming, including must-carry stations.

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

[95] *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

operators alternatively may choose to continue to carry the digital signal of must-carry stations in analog format to all analog cable subscribers in addition to any digital version carried.

C. Harm to Others and Public Interest Considerations

24. The Movants have also failed to show that the balance of hardships and the public interest favor a stay. The Movants state that no party would be harmed because a stay would maintain the status quo.[96] The record shows, however, that allowing the rule to sunset as scheduled will relieve constraints on cable system capacity that hybrid operators maintain they need to meet the increasing demands of their customers.[97] Cable commenters explained 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."[98] Cable commenters explained 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.[99] The Commission in the *Fifth Report and Order* noted that 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.[100] 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.[101] Thus, as cable commenters explained, elimination of the viewability rule will provide operators with much needed flexibility to meet fast-changing consumer demands for HD cable services and high-speed broadband services, while ensuring subscribers continued access to must-carry channels.[102]

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").

[96] Movants Petition at 16.

[97] *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").

[98] 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 takes up more bandwidth than carriage of 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.").

[99] NCTA Comments at 13.

[100] *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*.

[101] *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").

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

25. Finally, the Movants argue that judicial review will not be possible before the transition period ends on December 12, 2012 and that "millions of analog cable subscribers, including some of the most vulnerable groups, such as foreign language speakers and minorities, will lose access to must-carry signals." Again, we disagree with Movants' assumption that all (or, indeed, any) analog subscribers on hybrid cable systems will lose access to must-carry stations upon conclusion of the transitional period. Hybrid cable operators must continue to carry local broadcast stations electing mandatory carriage on the basic service tier in digital format. And we repeat that hybrid operators may not cease analog carriage without first making affordable set-top boxes available to subscribers at no cost or at an affordable cost. Therefore, we believe the Commission's interpretation of the statutory viewability requirement will ensure continued subscriber access to must-carry television signals, while doing so in a less burdensome manner.

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended,[103] and Section 1.43 of the Commission's Rules,[104] the Movants' Joint Motion for Stay IS DENIED.

27. This action is taken under delegated authority pursuant to Sections 0.61 and 0.283 of the Commission's Rules.[105]

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief
Media Bureau

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).

[103] 47 U.S.C. §§ 151, 154(i) and (j).

[104] 47 C.F.R. § 1.43.

[105] 47 C.F.R. §§ 0.61, 0.283.