ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 15, 2008

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 08-1045

C-SPAN, *ET AL*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties appearing before the agency are listed in petitioners' brief, as are all parties appearing before the Court, with the exception of *amici* The Africa Channel, Game Show Network, I-LifeTV, The Inspiration Network, and La Familia Cosmovision.

B. Ruling Under Review

Carriage of Digital Television Broadcast Signals, Third Report and Order, 22 FCC Rcd 21064 (2007) (JA).

C. Related Cases

The order on review has not been before this Court or any other court.

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GLOSSARY

DBS	Direct Broadcast Satellite. An all-digital programming distribution method that delivers signals to subscribers' households by satellite.
HDTV	High Definition Television. A digital broadcast transmission standard that enables high resolution and extremely good picture quality.
NCTA	The trade association for major cable operators.
SD	Standard Definition. The basic level of display quality for digital broadcast transmissions.

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

Congress has required that cable systems carry the signals of all full-power television stations that operate in the same market. That requirement, known as "must-carry," protects the viability of over-the-air television stations by ensuring that their audiences are not eroded by the refusal of cable systems, to which 60 percent of all television households subscribe, to carry them. Integral to the must-carry statute is the requirement set forth in section 614(b)(7) of the

Communications Act that all must-carry stations "shall be viewable … on all television receivers of a subscriber" for which the cable company provides a connection. If a broadcast station is not viewable, its right to carriage is meaningless.

On February 17, 2009, full-power television stations will cease broadcasting in analog format and switch entirely to digital transmission. The transition to digital broadcasting will render those broadcast stations, including must-carry stations, unviewable on the TV sets of the sixty-two percent of cable customers – 40 million households – who receive only analog cable service, unless cable providers take steps to make them viewable.

To forestall that outcome, the Commission in the order under review required cable operators to provide the signals of must-carry stations in a format that will be viewable by all subscribers. The Commission gave cable operators the choice of either: (1) providing all signals on the system in digital form and ensuring that all subscribers have the equipment necessary to view all stations; or, (2) if the system operator chooses not to convert to all-digital, providing the signals of must-carry stations in analog format.

The questions presented are:

1) Whether the petitioners, who are not directly regulated by the viewability rule, have standing to contest it;

If petitioners have standing:

2) Whether the Commission reasonably interpreted section 614(b)(7);

3) Whether the viewability rule is a reasonable response to problems resulting from the transition to digital broadcasting; and

4) Whether the viewability rule violates the First Amendment rights of cable television programmers.

JURISDICTION

The Court has jurisdiction over final FCC rulemaking orders pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Here, however, the Court lacks jurisdiction because petitioners lack standing to challenge the Commission's rule.

STATUTES AND REGULATIONS

Pertinent materials are attached.

COUNTERSTATEMENT

This case involves an application of the must-carry statute, which grants local broadcast stations a right to be carried on cable television

systems, to the broadcast digital transition. In the order on review, *Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064 (2007) (JA) (*Viewability Order*), the Commission took steps to ensure that all cable subscribers would continue to be able to see must-carry broadcast stations after the transition to digital broadcasting.

1. Must-Carry.

Local television stations are entitled to be carried on cable systems in their markets pursuant to the must-carry statute. In section 614(a) of the Communications Act, Congress required that "[e]ach cable operator shall carry … the signals of local commercial television stations." 47 U.S.C. § 534(a). Section 615(a), 47 U.S.C. § 535(a), imposes a similar requirement for non-commercial stations. For cable systems with more than 12 channels (which includes almost every system in operation today), Congress required carriage of must-carry stations on "up to one-third of the aggregate number of usable activated channels of such system." 47 U.S.C. § 534(b)(1)(B).

The must-carry requirement protects broadcast stations, often independent local stations with less bargaining power than stations affiliated with nationwide networks, from being refused carriage on cable systems. Lack of cable carriage translates into a lack of audience, which can degrade the service provided by a station to its local community or force it out of

business entirely. Prior to must-carry, cable operators were able to pick which stations to carry and had begun dropping local stations from their systems, often in favor of programming sources owned by the cable operator or for which the cable operator itself earned advertising revenue. By 1992, nearly a quarter of broadcast stations had been denied cable carriage. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 202-203 (1997) (*Turner II*). As the number of cable subscribers increased, the size of the over-the-air audience shrank proportionately, putting the economic viability of local broadcasters at risk. The result was a threat to the health of local broadcasting stations and a corresponding risk that stations could become unavailable to citizens who relied on over-the-air reception. *See id*. at 208-210. Must-carry restores the audience reach held by local stations prior to the advent of cable television.

A fundamental component of the must-carry regime is the statutory directive that must-carry stations be viewable on all subscribers' television sets; without viewability, must-carry serves no purpose. Congress provided in Section 614(b)(7) of the Communications Act that "[s]ignals carried in fulfillment" of must-carry "shall be provided to every subscriber of a cable system," and that "[s]uch signals shall be viewable via cable on all television receivers of a subscriber" that are connected to the system through

connections supplied by the cable operator. 47 U.S.C. § 534(b)(7) (we will refer to that statute by its Communications Act designation, section 614(b)(7)).

Not all broadcast stations rely on must-carry to obtain cable carriage. Stations with greater bargaining power are carried under "retransmission consent," under which the cable system and the station bargain over the terms of carriage, such as payment to the station. *See* 47 U.S.C. § 325. No precise data are available showing what percentage of stations rely on must-carry versus retransmission consent, but one large cable system informed the Commission that "the vast majority of broadcasters opt for retransmission consent." *Viewability Order* ¶26 (JA).

Another pertinent element of the must-carry regime is the "material degradation" provision. Section 614(b)(4)(A) of the Communications Act states that "[t]he signals of local commercial television stations that a cable operator carries shall be carried without material degradation." 47 U.S.C. § 534(b)(4)(A). Congress directed the Commission to ensure that "the quality of signal processing and carriage" for local commercial television stations "will be no less than that provided by the system for carriage of any other type of signal." *Ibid*. Congress imposed a similar rule governing carriage of noncommercial stations. 47 U.S.C. § 535(g)(2). The material

degradation requirement prevents cable systems from discriminating against broadcasters by making their programming look worse to the viewer than competing programming provided by the cable system.

2. *Turner II*.

In *Turner II*, the Supreme Court rejected First Amendment challenges to the must-carry statute brought by cable operators and cable programmers. The Court, applying intermediate scrutiny (which it found to be the applicable standard in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*)), held that must-carry fulfills important government policies of preserving local over-the-air television and promoting the widespread dissemination of information. *Turner II*, 520 U.S. at 189. The Court held that mandatory carriage reasonably achieves those interests and thus is consistent with the First Amendment. *Turner II* therefore rejected the idea that cable operators have a constitutional right to pick and choose which broadcast stations to carry.

The Court found that Congress intended must-carry to "prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households," which could result if cable systems refused to carry local stations and the stations failed for lack of an audience. *Turner II*, 520 U.S. at 193. Congress had a "substantial basis" for fearing

such an outcome: "cable operators had considerable … market power over local video programming markets" and operators had "increasing ability and incentive to drop local broadcast stations from their systems," driven in large part by vertical integration between cable system operators and programming suppliers. *Id*. at 196, 197-198. Cable programmers competed for both audience and advertisers with independent (*i.e.*, not affiliated with a network) local broadcasters, giving cable systems an additional incentive to drop such stations "in favor of other programmers less likely to compete with them." *Id*. at 200. That was true even though the must-carry stations generally had better ratings than some cable channels. *See id.* at 205.

The Court recounted the considerable evidence that denial of cable carriage could threaten a station's economic viability. *Turner II*, 520 U.S. at 208-210. Studies showed that carriage is crucial to reach audiences and that "even modest reductions in carriage could result in sizeable reductions in revenue." *Id*. at 210.

The Court found further that the benefits of must-carry outweighed the burden placed on cable operators. "[T]he actual effects [of must-carry] are modest," and are "congruent to the benefits it affords," because "most of the [must-carry] stations would be dropped in the absence of must-carry." *Turner II*, 520 U.S. at 214, 215. The statute therefore "is narrowly tailored

to preserve a multiplicity of broadcast stations" for over-the-air viewers. *Id*. at 215-216.

In 1992, between 60 and 70 percent of television households subscribed to cable, and the remainder watched over-the-air television. *See Turner II*, 520 U.S. at 197. Today, about 60 percent of the 110 million nationwide television households subscribe to cable and an additional 26 percent of households subscribe to another form of multi-channel video programming distributor, such as direct broadcast satellite service (DBS). Over-the-air television accounts for 14 percent of the television viewing marketplace, about 15 million households. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2506 (2006). A station's economic viability depends even more today than in 1992 on the ability to be viewed via cable. *See Viewability Order* ¶49 (JA).

3. Digital Broadcast Television.

The broadcast television industry is in the midst of a transition from analog to digital technology. Decades in planning, the transition must be completed by February 17, 2009. *See* Deficit Reduction Act of 2005 Title III, Pub. L. No. 109-171 § 3002, 120 Stat. 21 (2006). For the past several years, broadcast stations have been transmitting their signals in both analog

and digital format, but on February 17, 2009, all full-power television stations in the United States must return their analog spectrum to the government and broadcast their signals solely in digital format on digital spectrum assignments. *See*, *e.g.*, *Community Television, Inc. v. FCC*, 216 F.3d 1133 (D.C. Cir. 2000). Digital broadcasts can be aired in two formats: standard definition (SD), which is the basic level of display quality, and high definition (HDTV), which enables high resolution and extremely good picture quality. *See* http://www.dtv.gov/whatisdtv.html. The switch from analog to digital will render analog television sets incapable of displaying most broadcast television pictures unless the digital signal is converted into an analog format.[1]

Congress recognized that changes in broadcast technology would require changes to the must-carry regime and empowered the Commission to adapt must-carry as necessary. Section 614(b)(4)(B) of the Communications Act authorizes the Commission to "establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable

[1] Only full-power analog stations must cease broadcasting by the deadline. Deficit Reduction Act § 3002(b)(1). Low power, Class A, translator, and television booster stations will continue to broadcast in analog. In order to protect over-the-air households with analog television sets from losing television service, Congress has subsidized the purchase of over-the-air converter boxes. *Id*. § 3005.

carriage of such broadcast signals of local commercial television stations which have been changed" to digital technology. 47 U.S.C. § 534(b)(4)(B).

4. Digital Cable.

Like broadcast television, cable television is also in the process of converting to digital format. Digital cable can carry substantially more programming in the same amount of bandwidth. For example, an analog system needs 6 MHz of bandwidth to carry a single broadcast channel. Using compression technology, a digital system can carry 15 or more SD channels or approximately two HDTV channels in the same amount of bandwidth. *See* Walter Ciciora *et al*., Modern Cable Television Technology 2nd Ed. 75 (2003).[2]

Like digital broadcast signals, digital cable signals are not viewable on analog televisions unless they are converted to analog format. Thus, a cable customer who subscribes to digital cable but desires to watch it on an analog television set must have a set-top cable box that converts the digital signal to analog (a function built into most digital cable boxes) or else the

[2] Specifically, 6 MHz of bandwidth in a digital system can transmit up to 38 megabits of data per second. An SD signal requires approximately 1.5-3.5 Mbps and an HDTV signal typically requires 12-18 Mbps. *Ibid*.

cable service is useless.[3] For the digital cable subscriber who owns an analog TV, a set-top box is therefore effectively a condition of service. With the box, such a subscriber will be able to watch digital cable programming, including digital broadcast stations carried by the cable system, on an analog set.

The subscriber to a digital system who owns a digital television set does not necessarily need a converter box. Most digital televisions can process digital cable signals, so a digital set owner typically needs no special equipment to watch broadcast stations via cable. A set-top box is necessary, however, to receive on-demand programming, pay-per-view, and other such services.

Not all cable customers subscribe to digital cable, and not all cable content is provided in digital format. Unlike the broadcast transition, the cable industry's transition to digital is being driven by market forces rather than a legislative deadline, and there accordingly is no date by which the end of the cable industry's transition to digital will or must occur. Thus, although some systems plan to be all-digital by February 2009, others expect for the near future to serve customers through hybrid systems that carry both

[3] Because the cable converter is different from the broadcast converter, *see* n.1 *supra*, the two cannot be used interchangeably.

digital and analog programming. *See Viewability Order* ¶20 (JA). Of the 65 million television households that subscribe to cable, 40 million of them – 62 percent – receive analog-only service. *Id*. n.3 (JA). Because analog-only subscribers do not have digital set-top boxes (there is no purpose in paying for a digital box to receive analog service), analog-only cable customers cannot view digital signals provided by the cable company. For that reason, up to 40 million analog-only cable subscribers nationwide will not be able to watch broadcast stations via cable after February 17, 2009, if the signals are provided by their cable company only in their original digital format.

5. The Viewability Proceeding.

With the deadline for the broadcast digital transition approaching, bringing with it the potential end of the ability of most cable subscribers to watch must-carry television stations, the Commission initiated a proceeding pursuant to section 614(b)(4)(B) to apply the must-carry statute to the impending change. *Carriage of Digital Television Broadcast Signals*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 8803 (2007).

In the order on review, the Commission ensured that all must-carry stations would be viewable after the transition to digital broadcasting. "[T]he mandatory carriage rules serve their purpose only when [must-carry]

stations are viewable by all cable subscribers, including those who will only have analog sets after the transition." *Viewability Order* ¶2 (JA). Indeed, "making stations actually viewable to cable subscribers is the most fundamental interest expressed in the must-carry rules that have been upheld by the Supreme Court. If [the Commission] declined to enforce the viewability requirement it would render the [must-carry] regime almost meaningless." *Id*. ¶34 (JA).

There are two basic ways that cable subscribers can view digital broadcast stations on analog television sets: either the cable system can convert the signal from digital to analog at the "headend" (the equipment that receives signals and sends them through the cables) and transmit the signals in analog format; or the system can transmit signals in digital format and individual viewers can convert them to analog format at their homes using converter boxes.

The Commission gave cable systems a choice between those two viewability options. A cable system may either (1) convert digital must-carry signals to analog format at the headend and thus continue to provide an analog signal for such stations; or (2) convert its operations to digital format, which will require that all subscribers have whatever equipment is necessary to view the signal – either a digital TV capable of displaying the digital

cable signal or a set-top box that will allow an analog TV to display a digital cable signal. *Viewability Order* ¶18 (JA); *see* 47 C.F.R. § 76.56(d)(3) (JA). That approach will "ensure that cable subscribers will continue to be able to view broadcast stations after the transition" of broadcasters to digital. *Viewability Order* ¶2 (JA).

The Commission's approach was based on a "straightforward reading" of section 614(b)(7), which directs that the signals of must-carry stations "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." The statute thus requires that "the operators of either all-digital or mixed digital-analog systems will be responsible … for ensuring that mandatory carriage stations are actually viewable by all subscribers." *Viewability Order* ¶23 (JA). Under the viewability rule, cable systems that provide hybrid digital-analog service must provide an analog version of every must-carry signal.

In 2001, the Commission applied the material degradation rule to digital television broadcasts and ruled that "a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer." *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2629 (2001) (*2001 Digital Carriage*

Order). Under that ruling, "a broadcast signal delivered in [high definition] must be carried in [high definition]." *Ibid.* In the *Viewability Order*, the Commission reiterated that "a broadcast signal delivered in HDTV must be carried in HDTV." *Id*. ¶7 (JA).

Thus, as a result of the independent operation of the viewability and material degradation rules, if a must-carry station is broadcasting HDTV programming (not all stations broadcast in HDTV all the time, and some do not broadcast in HDTV at all), a hybrid cable system is required to provide both a high definition signal (under the material degradation rule) and an analog signal (under the viewability rule).

A number of parties to the rulemaking proceeding objected to the viewability rule, claiming that it unconstitutionally requires cable systems to carry two signals of the same station. The Commission explained that the rule "does not require carriage of more than one broadcast signal … and … does not require carriage of an analog version of a signal unless an operator chooses not to operate an all-digital system." *Viewability Order* ¶27 (JA).

The Commission also found that the viewability requirement survived intermediate First Amendment scrutiny. The Commission explained that the requirement serves the same purpose as must-carry itself: the preservation of over-the-air broadcasting. *Viewability Order* ¶54 (JA -). In addition,

viewability "advance[s] a separate, but also important, governmental interest of minimizing adverse consumer impacts associated with the [digital television] transition." *Id*. ¶56 (JA).

The Commission found that the viewability requirement does not burden more speech than necessary to achieve those interests. The burden imposed is minimal. Given the expansion in the number of cable channels available on most systems – from far fewer than 100 in the 1990s to more than 200 today – "the relative burden of the [analog carriage option] would be far less of a burden than was the analog mandate upheld by the Supreme Court in *Turner II*." *Viewability Order* ¶59 (JA -). "[T]he typical cable operator electing to down-convert digital signals [to analog] will devote significantly less than one-third of its channel capacity to local broadcasters, the cap that was upheld in *Turner II*." *Id*. ¶60 (JA -).

The viewability rule expires of its own accord in three years unless the Commission votes to extend the rule. *Id*. ¶16 (JA). "A three-year sunset ensures that both analog and digital cable subscribers will continue to be able to view the signals of must-carry stations, and 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." *Ibid*.

Petitioners, companies that supply non-broadcast programming to cable systems, now challenge the viewability requirement (but not the material degradation rule) on statutory, APA, and constitutional grounds. Notably, cable operators, the entities that are directly regulated by the viewability rule, do not challenge the rule.

SUMMARY OF ARGUMENT

Congress required in section 614(b)(7) that must-carry stations must be viewable on all television sets in cable subscribers' households. The transition from analog to digital broadcasting poses a significant risk that 40 million analog-only cable households will not be able to view must-carry stations. The Commission took reasonable steps to fulfill the statute and assure that all cable customers can continue to view all must-carry stations.

1. Petitioners lack standing to challenge the *Viewability Order*. Only cable systems are regulated by the order; petitioners are not. Their alleged injury, a reduction in the number of available channel slots, is contingent on the independent actions of cable systems. Thus, petitioners could demonstrate an injury traceable to the FCC and redressable by this Court only if they show that cable operators with hybrid systems would not make the same carriage choices absent the Commission's rule. In fact, however,

the cable industry has pledged to follow the viewability rule voluntarily even if it is overturned. Petitioners lack standing on that ground alone.

Petitioners have also failed to show that cable companies would use any bandwidth made available by reversal of the *Viewability Order* to provide traditional programming, as opposed to on-demand, pay-per-view, Internet access, or telephone service. Nor have they shown any likelihood that a cable system with additional channel capacity would carry their programming instead of the programming offered by any of their 500 competitors. And to the degree that cable systems become all-digital as a result of the *Viewability Order*, the resulting increased channel capacity will benefit petitioners, not harm them.

2a. Petitioners are wrong that the plain language of Section 614(b)(7) allows a cable system to provide analog-only customers with a digital signal accompanied by an offer, which the customer may reject, to lease a converter box that will allow the signal to be viewed on an analog television. The third sentence of section 614(b)(7) allows a subscriber to decline a set-top box that is necessary to view must-carry stations – but only if the subscriber provides his own connection to the cable system. That circumstance is an *exception* to the rule established in the second sentence requiring viewability on all television sets owned by a subscriber. Thus, the

second sentence of the statute does not allow a subscriber to choose to forego the ability to view must-carry signals provided by the cable system. Petitioners' reading of the statute would transform the exception into the general rule and render the "if" clause of the third sentence of the statute meaningless.

b. The Commission reasonably implemented the statutory mandate. There are only two ways to assure viewability of a digital signal on an analog TV – convert the signal to analog at the headend or at the television set. The Commission reasonably allowed cable operators to choose between those two methods.

Petitioners are wrong that the Commission required hybrid cable systems to carry both digital and analog versions of must carry signals. The Commission required *either* the carriage of an analog signal in the case of a hybrid cable system, or a digital signal in the case of an all-digital cable system. The material degradation provision may under certain circumstances require carriage of a digital signal in addition to the analog signal required under section 614(b)(7), but petitioners do not challenge or even mention that separate statute.

3. Market forces alone may not be sufficient to force cable systems to ensure the viewability of must-carry stations because vertically-integrated

cable systems retain an incentive to disadvantage must-carry stations in favor of programmers that are less likely to compete for audience and advertising. But if petitioners are correct, and the market will ensure viewability, petitioners have proven only that they will suffer no injury as a result of the *Viewability Order*.

The Commission did not depart from its approach in the 2001 and 2005 *Digital Carriage Orders*. The earlier orders addressed circumstances materially different from those at issue here. In 2001 and 2005, "a dual carriage requirement was not needed to preserve over-the-air broadcasting … because local analog broadcasts were already carried on virtually every cable system." *Viewability Order* ¶55 (JA). Here, by contrast, the Commission faced a situation "where the signals of must-carry stations will be completely unavailable to analog cable subscribers," which "obviously poses a much more serious challenge for must-carry stations." *Ibid.*

4a. The *Viewability Order* is constitutional. The Supreme Court held in *Turner II* that must-carry serves substantial government interests, and the viewability rule serves the same interests as must-carry itself, of which it is an integral aspect. The Commission needed no proof that providing unviewable signals to 40 million analog-only cable households will disable those subscribers from viewing must-carry stations and undermine the goals

of must-carry. That is a matter not of evidence, but simple logic. The economic health of broadcasters is worse now than it was in 1992, and it is even more important today that stations retain their audiences. The Supreme Court's observation that "even modest reductions in carriage could result in sizeable reductions in revenue," *Turner II*, 520 U.S. at 210, is especially forceful in the current environment.

b. The viewability rule does not burden more speech than necessary. Any carriage burden that results from the viewability requirement is "far less of a burden than" the carriage mandate upheld in *Turner II*. *Viewability Order* ¶59 (JA). Petitioners do not contend otherwise.

Petitioners are wrong that the First Amendment required the Commission to allow cable operators to provide only digital signals and offer subscribers a converter box. Petitioners' alternative may free a few channels, but that sort of marginal difference is not constitutionally significant under intermediate scrutiny. Moreover, petitioners' approach is inconsistent with section 614(b)(7) and would not carry out Congress's purpose. Many analog viewers would not be willing to incur the cost and inconvenience of obtaining and using a digital cable box just to receive a few additional channels, even if they would otherwise watch those channels. That outcome would restore the television marketplace to pre-must-carry

days, when cable systems could choose which stations their subscribers could view.

ARGUMENT

I. STANDARD OF REVIEW.

Review of the Commission's interpretation of the Communications Act is governed by the familiar standard of *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984). If "the intent of Congress is clear" from the language of the statute, "that is the end of the matter." *Id*. at 842-843. But if the statutory language does not reveal the "unambiguously expressed intent of Congress" on the "precise question" at issue, the Court must accept the agency's interpretation as long as it is reasonable and "is not in conflict with the plain language of the statute." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

Petitioners' claims under the APA are subject to high deference. The Court may reverse only if the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). Under that standard, the Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

Petitioner's constitutional claims are reviewed *de novo*. *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004).

II. PETITIONERS LACK STANDING.

"The party invoking federal jurisdiction bears the burden of establishing [the] elements" of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Petitioners thus must demonstrate three things: First, they must show that they have "suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Second, they must demonstrate "a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the court." Third, they must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Id.* at 560-561 (citations, quotation marks, and formatting deleted).

Petitioners' claim of injury is that the viewability rule "require[s] cable operators to carry both a digital and [an] analog version of each must-carry broadcast station." Br. 19. That duplicative carriage, petitioners

argue, takes up a channel that otherwise would be available for petitioners' potential use. Br. 4-5.

Petitioners themselves, however, are not regulated by the *Viewability Order*, which applies only to cable operators. "[W]hen [a litigant] is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan*, 504 U.S. at 562. Moreover, when "causation and redressability ordinarily hinge on the response of the regulated … third party to the government action or inaction … it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to … permit redressability of injury." *Id.* at 561-562.

Thus, to establish standing, petitioners must demonstrate all of the links in a four-step chain, each of which turns on decisions of cable operators: (1) that reversal of the viewability rule will result in additional capacity on cable systems, *i.e.*, that cable operators with hybrid systems would not continue to carry must-carry signals in analog absent the Commission's rule; (2) that reversal of the rule would result in cable operators' using any space saved for traditional programming as opposed to other services; (3) that there is a reasonable likelihood that the operators would carry petitioners' programming and not someone else's; and (4) that

any loss of bandwidth from cable systems that opt to remain hybrid will outweigh the gain from those that go all-digital. Petitioners have made none of those showings, much less all of them.[4]

A. It Is Speculative Whether Reversal Of The *Viewability Order* Will Result In Additional Capacity.

Petitioners fail to establish that any injury to them is caused by the Commission's order, as opposed to the voluntary actions of cable operators. In particular, they fail to demonstrate that cable operators operating hybrid systems would not voluntarily carry both analog and digital signals of must-carry stations absent the Commission's order. Whether petitioners' proffered injury will be redressed by reversal of the order is therefore speculative.

Subsequent to the issuance of the *Viewability Order*, the National Cable and Telecommunications Association ("NCTA"), the trade association for major cable operators, publicly pledged that its members operating hybrid systems will voluntarily provide both digital and analog versions of

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[4] *Turner I* does not establish that petitioners have standing. There, the Supreme Court observed that "must-carry rules … render it more difficult for cable programmers to compete for carriage on the limited channels remaining." 512 U.S. at 637. But the existence of an abstract injury does not relieve particular litigants of the obligation to demonstrate that *their* proffered injury is concrete, traceable to the agency, and redressable by the Court.

must-carry stations for three years irrespective of any FCC mandate. *See* Ted Hearn, *NCTA Keeping Three-Year Dual Carriage Vow: Operators Will Keep Promise Even if Court Challenge to FCC Succeeds*, Multi-Channel News, Feb. 5, 2008 (copy attached); Testimony of Kyle McSlarrow NCTA CEO before the House Committee on Energy and Commerce, Feb. 17, 2008 (referring to cable industry's "three year voluntary carriage commitment" and stating that the *Viewability Order* "mirrors our voluntary three year plan").

Such promises likely explain why no cable company has joined petitioners' challenge, even though they vigorously opposed a viewability mandate before the agency. Given the cable operators' vow, there is no injury traceable to the FCC's decision or redressable by the Court. To the extent that channel slots in hybrid systems are devoted to analog carriage after February 2009, the loss is traceable to cable operators, not the FCC.

Petitioners effectively acknowledge as much. For example, they argue that the viewability rule is not necessary because competitive forces will require cable operators to carry all stations in digital and analog format, with or without a regulatory mandate. Br. 30; *see* Br. for Amicus at 19. They claim as well that "[i]n systems providing both digital and analog services, the Commission has no idea whether cable operators will or will

not voluntarily opt to continue delivering broadcast signals in analog format to subscribers with analog sets. In fact, the [*Viewability Order*] acknowledges that continued carriage in analog format is likely to occur." Br. 46. In petitioners' own view, therefore, any injury they suffer is both speculative and results purely from the independent actions of cable carriers.

B. It Is Speculative Whether Cable Systems Will Use Extra Bandwidth For Cable Programming.

Even if hybrid cable systems would not choose to carry stations voluntarily in digital and analog format (notwithstanding their pledge to do so), it is speculative whether they would devote any extra bandwidth to traditional programming, rather than other applications. As petitioners recognize, a cable system's capacity is allocated among several different services, including video programming, broadband internet service, and telephone service. Systems also use bandwidth for on-demand and pay-per-view programming. Br. 6. Assuming that a cable system would choose not to continue carrying analog signals of must-carry stations, it is speculative whether any of the resulting additional capacity would be devoted to carriage of programming (such as that supplied by petitioners) or some other service.

C. It Is Speculative Whether Any Cable System Would Carry Petitioners' Programming.

Even if petitioners had shown that, absent the order, cable operators would have extra bandwidth that they would use for traditional programming, petitioners still would fail to demonstrate standing. That is because they have not demonstrated that there is a reasonable likelihood that cable operators would make additional channel slots available to petitioners, as opposed to another of the "565 satellite-delivered national cable programming networks and 101 regional non-broadcast cable networks vying for 'shelf space' on cable operators' distribution systems," Br. 6. Petitioners admit that "perhaps none of them will" gain access to any additional channel capacity. Br. 50.

When this Court assessed the standing of a cable programmer bringing the very type of challenge brought here in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1445 & n.24 (D.C. Cir. 1985), it suggested that such a speculative possibility was not sufficient under Article III. The Court found that a cable programmer had standing where it could "point to assertions by cable operators that, but for the must-carry rules, they would carry its programming." In that situation, the Court had "no doubt that the likelihood that the injury would be redressed by a favorable decision is sufficiently

high to confer standing." *Id*. at 1445 n.24. "If the cable system is 'saturated' with must-carry signals," the Court held, "the [must-carry] rules operate to deprive programmers of any opportunity at all to sell their services." *Id*. at 1445.

Here, unlike *Quincy Cable*, there is no evidence (and it is very unlikely) that cable systems with hundreds of channels are "saturated" with must-carry stations that deprive petitioners "any opportunity at all" to secure a channel slot. To the contrary, "the vast majority of broadcasters opt for retransmission consent" and not must-carry. *Viewability Order* ¶26 (JA). For that reason, the Commission found that "any incremental increase of bandwidth devoted to must-carry stations [as a result of the viewability rule] will be negligible." *Ibid*. Moreover, here, unlike in *Quincy Cable*, petitioners have not produced any proof that, but for the viewability rule, cable operators would carry *petitioners'* programming. *Cf. Quincy Cable*, 768 F.2d at 1445 n.24. Any possible redress of petitioners' alleged injury is insufficiently concrete to satisfy Article III.

D. Petitioners May Benefit From The *Viewability Order*.

Rather than suffer an injury from the *Viewability Order*, petitioners may in fact experience "a very positive impact" from it. *Viewability Order*

¶26 (JA). The viewability rule provides cable systems with an incentive to become all-digital (to avoid down-converting digital broadcast signals to analog), and those systems will save potentially substantial amounts of bandwidth, creating additional capacity usable for programming, such as that provided by petitioners. *Ibid*. Indeed, numerous cable systems already have pledged to convert to all-digital operations by February 17, 2009. *See Consolidated Requests for Waiver*, 22 FCC Rcd 11780, 11806 (MB 2007) (appendix) (listing more than 120 cable operators that will be all-digital by February 17, 2009). At least one cable system has informed the Commission that its decision to convert to all-digital was motivated in part by the *Viewability Order*. *See* Waiver Request of Mediacom Communications Corp., File No. CSR-7758-Z (filed Jan. 18, 2008) (excerpt attached). In order to demonstrate injury, petitioners would have to demonstrate that any loss in channel capacity in systems that remain hybrid would outweigh the gain from those that go all-digital. Without such a showing, petitioners fail to demonstrate that they are injured – rather than helped – by the order.

* * *

In short, any injury that petitioners claim they will suffer depends on a chain of events that rests on speculation about third-party actions at each of

its links. Petitioners have not shown that they will suffer any injury, that any injury is attributable to the FCC, or that any injury would be redressed by reversal of the *Viewability Order*.

III. THE *VIEWABILTY ORDER* IS CONSISTENT WITH THE COMMUNICATIONS ACT.

A. The Commission Properly Interpreted Section 614(b)(7).

Petitioners claim that section 614(b)(7) unambiguously required the Commission to allow all cable systems to supply only a digital signal and to offer analog-only customers – who would be allowed to turn down the offer – the opportunity to lease a set-top box that can convert the digital cable signal to analog. Br. 21-25. That interpretation of the statute is inconsistent with its text and structure.

An analysis of whether the *Viewability Order* complies with section 614(b)(7) "begin[s], as always, with the plain language of the statute in question." *Citizens Coal Council v. Norton*, 330 F.3d 478, 482 (D.C. Cir. 2003). The three-sentence provision states:

> Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals 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. If 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, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3).

47 U.S.C. § 534(b)(7).

Congress directed in plain language that all must-carry stations "*shall* be provided to every subscriber" and "*shall* be viewable via cable," which establishes a mandatory requirement that every subscriber receive a viewable signal. *See Harris v. Gonzales*, 488 F.3d 442, 444 (D.C. Cir. 2007) ("shall" is "mandatory language"). The Commission thus properly found that a "straightforward reading" of the statute requires cable operators to ensure that must-carry signals are viewable on every television for which the cable operator provides the connection. *Viewability Order* ¶22 (JA); *accord id*. ¶23 (JA).

The Commission correctly rejected the idea that the statutory command of viewability would be satisfied by a cable system's provision of a digital signal only, combined with an *offer* to lease a set-top converter that an analog-only customer could refuse and thereby forego the ability to view must-carry stations. The second and third sentences of the statute make plain that cable subscribers may not choose to forego viewability entirely, but that at least one television set in every household must be able to view

every must-carry station. The second sentence directs that signals must be viewable 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." The third sentence, by contrast, allows the subscriber to decline to obtain a converter box necessary to view all channels only "*[i]f* 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." Read together, those sentences *require* viewability, with no customer option, except when the customer provides his own connection – and even then, "[b]y referring to 'additional' receivers that are attached without operator involvement, the provision contemplates that at least one receiver is connected by the operator." *Viewability Order* n.59 (JA). Viewability at the option of the customer does not satisfy the statute.

Petitioners are wrong that the word "viewable" unambiguously allows cable operators to provide a signal that is *capable* of being viewed in some manner, even if an analog-only subscriber chooses not to acquire the equipment necessary to view the signal. Br. 20. Even if petitioners' reading of the word "viewable" were plausible in isolation, it cannot be squared with the remainder of the statute, which clearly requires mandatory viewability

with one narrow exception. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). *Every* signal is viewable in *some* manner, but that is clearly not what Congress had in mind.

Furthermore, petitioners' interpretation reads both the "if" clause of the third sentence and the word "additional" out of the statute entirely and thereby violates the basic interpretive canon that the Court must "give meaning to each word of a statute." *Financial Planning Ass'n v. SEC*, 482 F.3d 481, 492 (D.C. Cir. 2007). Congress knew how to permit optional viewability, but it did so only in limited circumstances. Petitioners' reading of the statute would transform that narrow exception into the general rule.

For the same reason, petitioners are wrong when they argue that "[t]he third sentence in § 614(b)(7) makes plain that the viewability requirement can be met by an 'offer to sell or lease a converter box.'" Br. 23. That argument "confuse[s] the separate mandates set forth in the second and third sentences." *Viewability Order* ¶22 (JA). The optional rule in the third sentence applies only to additional, user-installed connections.

Having properly found viewability to be mandatory, the Commission implemented the viewability mandate in a reasonable manner. Congress has

not "directly addressed the precise question" of how to achieve viewability, *Chevron*, 467 U.S. at 843, and the statute thus grants the FCC discretion to fill in that statutory gap as necessary to fulfill the congressional purpose.

As noted above, there are two ways to ensure that a digital signal can be viewed on analog TV sets: either supply an analog signal from the cable headend, or convert the signal to analog at the subscriber's set. The Commission allowed cable operators to choose which method to use – a cable system may either provide digital-only service and thus ensure that all subscribers will have either a converter box or a TV set that can process digital cable signals, or it may transmit must-carry stations in analog format, also ensuring that all subscribers can view the signals. Either way, all must-carry signals will "be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator." 47 U.S.C. § 534(b)(7). That approach was reasonable and provided cable operators with appropriate flexibility.

Petitioners claim that the Commission's approach "require[s] cable operators to carry both a digital and [an] analog version of each must-carry broadcast station." Br. 19. That alleged requirement, they contend, poses such "grave and doubtful constitutional questions" that the Court should

reject the Commission's otherwise reasonable interpretation. Br. 20. That claim fails for several reasons.

First, the argument rests on an erroneous premise. The Commission did not interpret *section 614(b)(7)* to require carriage of two signals for any must-carry station. The Commission read section 614(b)(7) to require *either* the carriage of an analog signal in the case of a hybrid cable system, or a digital signal in the case of an all-digital cable system. To be sure, a separate statute, section 614(b)(4)(A), the material degradation provision, which petitioners do not challenge (or even cite), may under certain circumstances require carriage of a digital signal in addition to the analog version required for hybrid systems under section 614(b)(7). The Commission did not, however, read section 614(b)(7) itself to require duplicative carriage, and in the case of an all-digital system there will be no double carriage required.[5]

[5] Section 614(b)(7) itself could require carriage of both analog and digital signals only if a cable system deployed digital set-top boxes that are incapable of processing analog cable signals and thus digital subscribers could not view the analog signal. In that unusual circumstance (on which petitioners do not appear to rely), a digital subscriber would not be able to view an analog signal. In that event, the operator must either replace the boxes with ones that can process the analog signal or provide both digital and analog must-carry signals.

Second, as shown in Section IV below, petitioner has not raised a serious constitutional argument. *Turner II* upheld must-carry over the very type of challenge petitioners now make and found it constitutional to require carriage of must-carry stations on up to *one-third* of all the channels on an entire cable system. As we explain, any incremental effect of the *Viewability Order* will not come anywhere near one-third of the capacity of a modern cable system. *See Viewability Order* ¶59 (JA).

Third, petitioners' suggested means for achieving viewability – provision of a digital signal only, combined with the offer of a converter box – is not reasonable. As explained above, that approach is fundamentally inconsistent with the statute. Even if there were a more significant constitutional question here, the Court cannot rewrite the statute in order avoid it. *See CFTC v. Schor*, 478 U.S. 833, 841 (1986).[6]

Petitioners' reading of the statute would also undermine Congress's intent to protect must-carry stations by ensuring viewability. If a cable system chose to provide only digital versions of must-carry signals, but

[6] Petitioners' claim that "the Commission has long recognized that, under § 614(b)(7), must-carry signals might only be available to subscribers that lease converter boxes," Br. 23 & n.4, is irrelevant. The question here is not whether subscribers can or cannot view signals without a box, but whether they can choose to forego a box that is necessary to view must-carry signals. The statute plainly does not allow such an outcome, and the FCC Order to which petitioners refer does not suggest otherwise.

continued to provide analog versions of highly popular programming such as network affiliates and ESPN, many analog subscribers might not be willing to incur the hassle and expense of obtaining a converter box for the sole purpose of receiving must-carry stations, even if they otherwise would watch them. In that way, petitioners' approach would replicate the very situation that existed prior to must-carry. Cable operators effectively would be empowered to pick-and-choose the stations that their analog subscribers will be able to watch, and the economically less powerful local stations – those Congress intended to protect – potentially stand to lose an audience of 40 million analog-only subscribers. At the same time, petitioners' alternative suggestion, analog-only carriage, would violate the statutory prohibition on material degradation, a restriction their brief fails to mention, let alone challenge. The Commission's interpretation, by contrast, is faithful to the statutory text and purpose.[7]

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[7] Petitioners insinuate that section 614(b)(7) is no longer good law, arguing that the Commission has "dust[ed] off" the statute "from the days of dial-type television channel selector knobs." Br. 18. But the concept of viewability is as important today as 1992. The specific threat to viewability has changed, but Congress expressly anticipated in section 614(b)(4)(B) that the Commission would have to adjust the must-carry regime to accommodate digital technology. In any event, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

B. Petitioners' Remaining Statutory Arguments Are Incorrect.

None of petitioners' remaining claims that the Commission has violated the Communications Act is persuasive.

1. Petitioners wrongly claim that the Commission has interpreted section 614(b)(7) to mean that all signals must be transmitted "so that they can actually be displayed on subscriber television sets without the need for additional equipment" such as a converter box. Br. 21. That obviously is not so because the Commission gave cable systems the option of complying with viewability by becoming all-digital, which will require many, if not most, customers to obtain either a converter or a digital television set. Indeed, the Commission has long recognized that converter boxes may be necessary to achieve viewability, *see, e.g.*, *2001 Digital Carriage Order*, 16 FCC Rcd at 2632 n.224; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723, 6726 (1994). In the *Viewability Order* itself, the Commission "neither require[d] nor reject[ed] boxes" but was "totally agnostic as to their use." *Viewability Order* n.99 (JA). Ultimately, the choice whether or not to require subscribers to use a converter box (by going all digital) is up to individual cable systems, which have the flexibility to accommodate the economics of their own markets.

To be sure, if a cable operator chooses to provide an analog signal, most analog subscribers will continue to be able to watch cable television without a converter box (although as the Commission has recognized, some older analog sets require a box. *2001 Digital Carriage Order* 16 FCC Rcd at 2632 n.224.). That is not because the Commission has adopted a no-box rule, but because hybrid cable systems may choose to remain hybrid for the very reason that they do not want to force their customers to obtain boxes or do not want to invest the money it would take to supply all subscribers with a box.

2. The *Viewability Order* does not conflict with section 614(b)(5) of the Act. That section states in relevant part that "a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system." 47 U.S.C. § 534(b)(5). The statutory language plainly addresses the carriage of duplicative programming of two *different* stations, both of which would be viewable to all subscribers – a situation that has no bearing here, where the whole point is that the digital signal will not be viewable to analog subscribers. The Commission correctly found that section 614(b)(5) "does not address a requirement to carry multiple versions of a single station's signals."

Viewability Order ¶28 (JA). It added that "some subscribers will not be able to see any of a station's programming unless a downconverted version is carried." *Ibid*. For those subscribers, "there need not be more than one viewable version of a broadcaster's signal." *Ibid*. (JA -). Sections 614(b)(5) and 614(b)(7) address different issues, and it does not violate the former to carry out the mandate of the latter.

3. Petitioners also err in contending that the Court must find that Congress did not intend the FCC to play "any role" or take "any action" "with respect to assisting cable television subscribers with analog television sets." Br. 26. Their argument is that Congress's creation of a program to subsidize converter boxes for over-the-air analog viewers, without having created a similar program for analog-only cable subscribers, reflects a "legislative judgment that market forces and consumer preferences should shape the transition of cable subscribers with analog television sets to digital television." *Ibid.*

That argument ignores Section 614(b)(4)(B), which had already been enacted at the time Congress adopted the broadcast converter program and which authorizes the Commission to "establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations

which have been changed" to digital technology. 47 U.S.C. § 534(b)(4)(B). As petitioners themselves recognize (Br. 26), Congress was aware that the majority of households do not receive over-the-air TV programming, and Congress would have known that the statutory viewability mandate itself, along with section 614(b)(4)(B)'s grant of administrative authority to update that mandate in light of the digital transition, would ensure that cable subscribers continue to receive a viewable signal. Thus, Congress would have recognized that it did not need to address cable viewability because it had already done so.

Petitioners reliance on *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2003), is wholly misplaced. There, the Court reversed an FCC action that, quite unlike here, was not directly authorized by the Communications Act, but for which the FCC relied only on ancillary authority. *Id*. at 801-803. In the absence of express authority, the Court considered Congress's failure to adopt express authorization to be a strong indication of its intent. *Id*. at 802. No such circumstances are present in a case like this, where Congress has expressly delegated authority to the Commission. *See* 47 U.S.C. §§ 534(b)(4)(B), 534(b)(7).

4. Finally, petitioners argue briefly that the Commission improperly applied the viewability mandate to noncommercial broadcast stations. Their

argument is that the language of section 615(h), which governs must-carry of noncommercial stations, is "markedly different" than that of section 614(b)(7) and that "the term 'viewable' does not even appear in § 615(h)." Br. 21.

Petitioners have waived that argument by failing to raise it before the Commission. It is "a condition precedent to judicial review" that a litigant seek agency reconsideration before it may raise in court "questions of fact or law" on which the agency "has been afforded no opportunity to pass." 47 U.S.C. § 405(a). Petitioners neither raised their claim before the agency initially nor sought reconsideration on the issue. The Court therefore lacks jurisdiction to consider the matter. *See*, *e.g.*, *SprintNextel Corp. v. FCC*, 524 F.3d 253, 256 (D.C. Cir. 2008) .

The claim fails on its merits in any event. Like section 614(b)(7), section 615(h) is addressed to the "availability of signals," and those headings make it apparent that both provisions were intended to achieve the same policies. *Cf. INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"). The Commission recognized years ago the "importance of ensuring that noncommercial educational stations are accessible to the viewing public," which "is consistently emphasized in the

Act itself and its legislative history." *2001 Digital Carriage Order*, 16 FCC Rcd at 2606-2607.

The Commission's interpretation of Section 615(h) was clearly reasonable because viewability is an inherent aspect of must-carry, without which the must-carry program would fail to fulfill its purposes. Making signals "available" in a form in which fewer than half of all subscribers can see them accomplishes little. *See Viewability Order* ¶34 (lack of viewability "would render the [must-carry] regime almost meaningless") (JA). Thus, even though Congress did not expressly require viewability in section 615(h), it was within the Commission's discretion to apply to that provision its traditional understanding that noncommercial stations should be treated the same as commercial stations. In that context, petitioners' reliance on an *expressio unius* rationale is "simply too thin a reed to support the conclusion that Congress has clearly resolved this issue." *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991); *see also ibid*. ("this canon has little force in the administrative setting").

IV. THE *VIEWABILITY ORDER* IS CONSISTENT WITH THE APA.

Petitioners contend that the *Viewability Order* violates the APA because it is unsupported by the record, because the Commission departed without explanation from prior agency practice, and because the

Commission's resolution of First Amendment issues was arbitrary. All of those contentions are wrong.

A. Viewability Is Supported By The Record.

Petitioners' record argument rests on a slew of mostly small-bore issues, none of which has merit. They argue that the *Viewability Order* "fails to demonstrate a problem in need of a proposed remedy." Br. 29. A viewability rule is not necessary, they claim, because market forces will lead cable operators to ensure viewability. Br. 30. If petitioners are correct, the *Viewability Order* amounts only to the regulatory implementation of a statutory mandate in the face of voluntary compliance with that mandate. There is no error in an agency's doing so. The regulation will harm nobody; at worst, it could amount only to harmless error. *See* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"). More fundamentally, if cable operators voluntarily provide a viewable signal of all must-carry stations – and pledges by the cable industry that were made subsequent to the release of the *Viewability Order* indicate they will – petitioners are not injured by the rule and lack standing to challenge it. *See* pp. 26-28 above.

But the record before the agency did not demonstrate that market forces would require cable operators to supply signals of every must-carry

station that are viewable by all subscribers. In that event, the purpose of the must-carry program would not be fulfilled in the absence of the *Viewability Order*. Must-carry stations, often unaffiliated local stations, tend to attract fewer viewers than retransmission consent stations (like network affiliates), and the Supreme Court found that cable operators often have anticompetitive motives to drop them because they compete with cable-only channels for advertising dollars. *Turner II*, 520 U.S. at 216-217. Thus, there is a natural incentive for cable operators to drop these stations (or refuse to set aside additional bandwidth to make them viewable). Indeed, *Turner II* cited evidence that "subscribership … typically does not bear on carriage decisions." 520 U.S. at 202. The *Viewability Order* thus responds directly to a potentially serious problem. Even if cable operators had definitively pledged before release of the *Viewability Order* that they would continue making must-carry stations viewable voluntarily, *see Viewability Order* nn.45, 56, 68 (JA , ,), those same operators also submitted comments vigorously opposing a viewability requirement. It therefore was reasonable for the Commission to codify the requirement. *Cf. National Confectioners Ass'n v. Califano*, 569 F.2d 690, 694 (D.C. Cir. 1978) ("it is proper for [an agency] to conclude that it cannot rely exclusively on voluntary compliance to protect the public interest").

It is worth noting that DBS service does not present such a problem. DBS is and always has been an entirely digital service, and thus every DBS subscriber necessarily has the set-top box necessary to view every channel carried on a DBS system. Moreover, DBS is subject to a "carry one, carry all" rule under which if a DBS system chooses to carry *any* broadcast station in a market, it must carry *all* stations in that market. *See* 47 C.F.R. § 76.66 *et seq*. Because DBS systems have a strong incentive to carry the most popular broadcast stations, the carry one, carry all rule effectively guarantees that all DBS subscribers will be able to view all broadcast stations. In those circumstances, petitioners' repeated suggestions that the Commission has unfairly discriminated between cable and DBS, Br. 14, 15, 16, are entirely unfounded.

Petitioners next complain that although the Commission stated in the *Viewability NPRM* that it was motivated to adopt the viewability rule by a desire to facilitate the digital broadcast transition, the agency "fail[ed] to explain how the rule advances that objective" and thus is arbitrary. Br. 32.

While the *Viewability* ***NPRM*** does mention facilitating the digital transition as one of the goals of the proceeding, the *Viewability* ***Order*** makes clear from the start that the principal purpose served by the viewability rule is "ensur[ing] that cable subscribers will continue to be able to view

broadcast stations after the transition" to digital broadcasting. *Id*. ¶2 (JA). Must-carry, the Commission found, "serve[s] [its] purpose only when such stations are viewable by all cable subscribers, including those who will only have analog sets after the transition." *Ibid*. *See also id*. ¶34 (failure to ensure viewability would "render the [must-carry] regime almost meaningless") (JA); *id*. ¶41 ("The must-carry obligation is meaningful only if all cable subscribers are able to view local broadcasters' signals, even if they have analog televisions.") (JA). As explained above, the Commission provided a detailed explanation of why the viewability rule advances the objectives of the must-carry regime. Petitioners' argument thus misses the mark entirely.

Petitioners charge that the Commission "relie[d] upon considerations that Congress had not intended the FCC to consider," in two respects. Br. 33. First, they complain that the Commission stated that analog cable subscribers are "the actual people Sections 614 and 615" were intended to protect, whereas in *Turner I*, the Supreme Court indicated that the must-carry rules were intended to protect over-the-air households. Br. 33. But *Turner II* deemed over-the-air viewers "the immediate, *though not sole*, beneficiaries" of must-carry. 520 U.S. at 205 (emphasis added). Thus, cable subscribers, who gain valuable local sources of news and information thanks

to the regime, are at least partial beneficiaries of must-carry. In any event, the Commission clearly recognized the central purpose of must-carry, *i.e.*, to preserve the viability of local broadcasters, and it recognized that the must-carry rules serve that purpose only when cable subscribers can view the signals. *Viewability Order* ¶¶2, 34, 41 (JA ,). The Commission also recognized that stations denied their audience lose advertising revenue and economic viability. *Id*. ¶54 (JA -). In sum, the Commission recognized that "[t]he steps we take here to ensure that cable operators comply with the statutory viewability requirement … serve th[e] same interests" identified in *Turner II*. *Id*. ¶55 (JA).

Second, petitioners charge that the Commission improperly relied upon the congressional program to subsidize over-the-air tuners to justify the viewability rule. The Commission noted that an "addition[al]" point in favor of its rule was that Congress's allotment of significant sums of public money to preserve over-the-air viewability is evidence of Congress's desire to ensure that viewers do not lose access to programming as a result of the transition to digital broadcasting. *Viewability Order* ¶¶20, 56 (JA ,). "Just as Congress sought to minimize the burden of the DTV transition on consumers who rely on over-the-air broadcasting, we act here to minimize the impact of the DTV transition on cable subscribers." *Id.* ¶56 (JA). It

was clearly reasonable for the Commission to look to Congress's actions in an analogous situation when exercising its expressly delegated authority to apply the must-carry regime to the digital transition, *see* 47 U.S.C. § 534(b)(4)(B).

Finally, petitioners assert that there is no reason why "analog cable subscribers cannot be trusted to request a digital converter box from their cable operator in the event that they lose access to any broadcast stations" after the transition. Br. 34. That is an argument against the must-carry statute itself, not the Commission's regulations. Section 614(b)(7) requires that all must-carry stations be viewable after the transition, and under its terms cable operators are flatly prohibited from allowing a subscriber to "lose access to any broadcast stations." Petitioners may disagree with Congress's judgment that mandatory (as opposed to optional by subscriber) must-carry is necessary to preserve independent local broadcasting, but the Supreme Court has upheld it, and it is not now subject to challenge. Petitioners' suggested educational campaign, Br. 35, is merely a variation on its "customer choice" argument and is therefore irrelevant.

B. The Commission Did Not Depart From Prior Practice.

Beginning in the late 1990s, some television stations began to broadcast the same programming simultaneously in both digital and analog

formats. In 2001 and 2005, the Commission declined to order that cable systems carry both analog and digital versions of the signals. *See 2001 Digital Carriage Order*, 16 FCC Rcd 2598; *Carriage of Digital Television Broadcast Signals*, Second Report and Order, 20 FCC Rcd 4516 (2005). Petitioners claim (Br. 36-38) that the Commission failed to explain why the *Viewability Order*, which in combination with the material degradation rule can in some circumstances result in the carriage of two signals from the same station, came to a different result than the prior orders.

In fact, the Commission explained that the prior orders confronted circumstances materially different from those at issue in the viewability proceeding. Principally, in 2001 and 2005, "a dual carriage requirement was not needed to preserve over-the-air broadcasting … because local analog broadcasts were already carried on virtually every cable system. Therefore, the lack of a dual carriage requirement would not have any meaningful effect on a station's viewership, and there was thus no evidence that the absence of dual carriage would diminish the availability of broadcast signals to non-cable subscribers." *Viewability Order* ¶55 (JA). The order on review, by contrast, presented a situation "where the signals of must-carry stations will be completely unavailable to analog cable subscribers," which "obviously poses a much more serious challenge for must-carry stations."

Ibid. Moreover, the viewability rule does not require "dual carriage," as the rule rejected in 2005 would have done. For example, every cable system can become all-digital, and avoid carrying both analog and digital signals. *Id*. ¶¶27, 41 (JA ,). Thus, the earlier orders confronted issues that neither implicated the ability of cable subscribers to view over-the-air stations, nor threatened to undermine fundamental goals of must-carry. Petitioners have not even attempted to refute the Commission's entirely sound explanation of the differences.

Petitioners also argue that the *Viewability Order* "failed to acknowledge, let alone explain, its radical departure" from prior orders that "never required that all must-carry stations be available without a converter box." Br. 38. As we have explained at pages 40-41 above, however, the *Viewability Order* imposed no such requirement. Petitioners' claim is simply wrong.

C. The Commission's First Amendment Analysis Is Not Arbitrary.

Petitioners' final administrative law argument is that the Commission committed reversible procedural error by failing to distinguish the constitutional analysis set forth in the *2005 Digital Carriage Order* and by failing to engage in a discussion of First Amendment issues specific to programmers as opposed to cable systems. Br. 40-41.

The first claim fails for the reasons set forth above: the Commission explained that the interests at stake in the *2005 Digital Carriage Order* were fundamentally different from those at issue in the current proceeding. *Viewability Order* ¶55 (JA). With entirely different issues at stake, the earlier order had no bearing on the *Viewability Order* and presented no need to "grapple with the constitutional analyses" in the *2005 Digital Carriage Order*.[8] Br. 40.

The second claim fails because the Commission's extensive consideration of the constitutional implications of viewability covered all arguments. Petitioners do not provide a single example of an argument unique to programmers that the Commission failed to confront. Indeed, as non-regulated parties, the programmers' rights are largely derivative of the cable systems' rights, and there was no need to discuss the two separately. That surely explains why *Turner II*, despite having recognized a First Amendment right of programmers and despite having engaged in an extensive discussion of the constitutionality of must-carry, itself conducted no separate analysis of issues related to programmers.

[8] The *2001 Digital Carriage Order* contained no constitutional analysis, but if it did that analysis would be irrelevant for the same reasons.

V. THE *VIEWABIILTY ORDER* IS CONSTITUTIONAL.

The Supreme Court established in *Turner I* that must-carry is content-neutral and subject to intermediate scrutiny. "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. The viewability rule passes that test for many of the same reasons why the must-carry statute – of which viewability is an integral part – was upheld in *Turner II*. Petitioners' constitutional arguments amount to little more than an effort to relitigate *Turner* (and the constitutionality of the must-carry statute) in the guise of an attack on the Commission's rulemaking.

A. Viewability Serves Important Governmental Interests.

As described at length above, the viewability rule protects the must-carry regime during broadcasters' switch from analog to digital. In the absence of the rule, forty million analog-only cable subscribers – 62 percent of cable subscribers and 36 percent of all television households in the country – could lose access to must-carry stations after February 17, 2009, and that severe loss of audience would jeopardize the already precarious financial viability of those stations. *See Viewability Order* n.192 ("the

economic health of local broadcasters is substantially weaker than it was when Congress imposed the must-carry requirements in 1992") (JA). The Commission recognized that "[t]he must-carry obligation is meaningful only if all cable subscribers are able to view local broadcasters' signals." *Id*. ¶41 (JA).

The viewability rule thus serves the same purposes as must-carry itself. Specifically, the rule "serve[s] the important, and interrelated governmental interests of (1) preserving the benefits of free, over-the-air local broadcast television; and (2) promoting the widespread dissemination of information from a multiplicity of sources." *Viewability Order* ¶54 (JA). *Turner II* recognized all of those interests as "important governmental interests." 520 U.S. at 189-190. In addition to the interests at issue in *Turner II*, the viewability rule also "advance[s] a separate, but also important, governmental interest in minimizing adverse consumer impacts associated with the [digital broadcast] transition." *Viewability Order* ¶56 (JA).

Petitioners do not dispute the importance of those governmental interests. They argue only that *Turner II* does not apply here because "[t]he Commission offers no evidence to support the assertion that, absent its rule, broadcasters would 'lose an audience of millions' of analog cable

households." Br. 45. *Turner I*, they argue, "made clear that a must-carry obligation can be sustained only on the basis of actual empirical evidence that broadcasters would" lose their audience. Br. 45.

The Commission concluded that if cable systems carried only the digital signal of must-carry stations, their analog-only customers would lose access to those stations. That is a matter not of evidence, but simple logic – if cable systems do not provide a signal that customers can actually see, then those customers cannot watch that station. There is no doubt that providing unviewable signals to 40 million analog-only cable households will disable those subscribers from viewing must-carry stations and undermine the goals of must-carry. The Court in *Turner II* noted that "even modest reductions in carriage could result in sizeable reductions in revenue," 520 U.S. at 210, and the same would be true of a reduction in the number of cable subscribers who can view a station.

Petitioners nevertheless contend that "the Commission has no idea whether cable operators will or will not voluntarily opt to continue delivering broadcast signals in analog format to subscribers with analog sets." Br. 46. But the record before the Court in *Turner II* showed that cable operators have the "ability and incentive to drop local broadcast stations from their systems." 520 U.S. at 197. The *Turner II* Court concluded that

the cable industry has "little interest in assisting, through carriage, a competing medium of communication," *Turner II*, 520 U.S. at 201, and the record before the agency, which included vigorous opposition to a viewability mandate by cable operators, provided no reason to think that the situation has changed since then, notwithstanding the cable industry's pledges subsequent to the *Viewability Order* to assure viewability for a three-year interim period.

The record before the agency showed that today, the cable industry faces even greater incentives than in 1992 to drop stations that compete with the cable systems' own programming (indeed, several of the petitioners are owned in part by cable systems, *see* Br. iv-v). The Commission concluded that "[t]he incentives that [*Turner II*] recognized for cable operators to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advertisers … have steadily increased." *Viewability Order* ¶51 (JA); *see id*. ¶52 ("the evidence confirms that local advertising revenue has become an increasingly important source of revenue for the cable industry") (JA); n.192 ("broadcasters face *increasing* competition from cable operators for advertising dollars") (JA) (emphasis added).

Moreover, "the economic health of local broadcasters is substantially weaker [today] than it was when Congress imposed the must-carry

requirements." *Viewability Order* n.192 (JA). In particular, "at least 25 percent of independent stations across the country had a negative cash flow and … a pretax loss of over half a million dollars." In some markets, the losses exceeded 800,000 dollars per station. *Ibid*. Thus, the record showed that the very considerations that led the Supreme Court to uphold must-carry prevail today.

In any event, even if cable systems voluntarily carry must-carry stations in analog format, petitioners will suffer no injury as a result of the rule and thus lack standing to challenge it. As discussed at page 46 above, cable operators' voluntary analog carriage of must-carry stations could render the rule merely confirmatory, but would not make it reversible error.

Contrary to petitioners' claim, the Commission was not required to demonstrate a danger to "the health and viability of the system of over-the-air broadcasting." Br. 46. Rather, as the Supreme Court made clear in *Turner II*, "Congress was concerned not that broadcast television would disappear in its entirety without must-carry, but that without it, significant numbers of broadcast stations will be refused carriage on cable systems, and those broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." 520 U.S. at 191-192 (quotation marks omitted). That interest remains valid today.

Petitioners also attack the Commission's interest in minimizing the impact on cable subscribers of the broadcast transition to digital. They claim that there would be no adverse impact from non-carriage of analog signals if analog subscribers acquire a converter box. Br. 47. The Commission expects that all cable systems ultimately will become all-digital, and at that point most subscribers will use converter boxes. That is why the viewability rule sunsets in three years. But not all subscribers will have digital boxes by February 2009, and the Commission has a strong interest in ensuring that those viewers can watch the same programming the day after the transition as the day before.

B. The *Viewability Order* Does Not Burden Substantially More Speech Than Necessary.

Under intermediate scrutiny, a regulation that advances an important government interest will be sustained if the interest "would be achieved less effectively absent the regulation" and the regulation "does not burden substantially more speech than necessary to further" the government's interest. *Turner II*, 520 U.S. at 189, 213-214 (quotation marks omitted). "[W]hen evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the preferred remedial scheme because some

alternative solution is marginally less intrusive" on First Amendment activity. *Id*. at 217-218.

Turner II found that must-carry, which required cable systems to use up to one-third of their entire channel capacity for commercial must-carry stations, plus additional capacity for noncommercial stations, did not burden more speech than necessary. The Court held that "the burden imposed by must-carry is congruent to the benefits it affords." 520 U.S. at 215.[9] Here, the same is true because the broadcast stations benefited by the rule are those that would not be viewable by all cable subscribers in the absence of the rule.

Any carriage burden that results from the viewability requirement is a significantly smaller burden on speech than the one already upheld by the Supreme Court. The Commission found that 18 analog channels, the typical amount carried on a cable system's basic service tier, which includes all must-carry stations as well as retransmission consent stations, "represent about 4.2 percent of the total number of channels and about 6.8 percent of

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[9] Congress did not enact protection for cable-based non-broadcast networks such as petitioners and their amici, and the Supreme Court affirmed that arrangement in *Turner II*. *See Viewability Order* ¶26 ("Congress … disagrees" that "independent cable programmers deserve protections on par with must-carry broadcasters") (JA). Thus, the amicus brief, which argues largely that broadcast stations are unfairly advantaged, amounts mostly to an attack on must-carry itself that is foreclosed by *Turner II*.

the total downstream spectrum of a typical cable system today." *Viewability Order* ¶60 (JA). And according to Time Warner, a major cable system operator, the "vast majority of broadcasters opt for retransmission consent." *Viewability Order* ¶26 (JA). "In 1993 [roughly the time of *Turner II*], by contrast, the same number of channels represented 33 percent of the capacity of a 'high capacity' cable system." *Viewability Order* ¶60 (JA). At that time, a "high capacity" system had only 54 channels, compared with the 70 analog and 150 digital channels provided by an "average" system in 2004. *Id*. ¶59 (JA). Thus, "the typical cable operator electing to down-convert digital signals [to analog format] will devote significantly less than one-third of its channel capacity to local broadcasters," *id*. ¶60 (JA -), and "the *relative* burden … would be far less … than was the analog mandate upheld" in *Turner II*, *id*. ¶59 (JA). Moreover, the Commission expects technology to improve in the near future, even to the point of cable systems' "never running out of [channel] capacity." *Id*. ¶60 (JA).

In light of the minimal burden imposed by the viewability rule, the Commission was correct to conclude that "the relative burden on speech … is outweighed by the benefits." *Viewability Order* ¶61 (JA). In the absence of the rule, "subscribers of cable systems that choose not to operate 'all-digital systems' will suffer both the loss of local broadcasts and

confusion over that loss, and [over-the-air] consumers risk deterioration, if not loss, of over-the-air broadcasting options." *Ibid*.

Petitioners do not take issue with any of the foregoing analysis. They do not dispute that the relative burden of must-carry today is a fraction of what it was at the time of *Turner II*. They do not dispute that the vast majority of stations rely on retransmission consent or the Commission's finding that cable channel capacity is growing continuously. Instead, their argument is that because it would be less restrictive of cable programmer speech to require either analog or digital-carriage-only, the First Amendment requires the Commission to take one of those less restrictive options. Br. 49, 50.

That claim fails for three principal reasons. First, it relies on a least-restrictive means test. To satisfy intermediate scrutiny, however, "a regulation need not be the least speech-restrictive means of advancing the government's interests." *Turner I*, 512 U.S. at 662. Rather, "when evaluating a content-neutral regulation which incidentally burdens speech, [a court] will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." *Turner II*, 520 U.S. at 217-218. Petitioners' proposed approaches, which might make available a few more channels out

of hundreds (although cable systems may use any additional capacity for services such as Internet access or on-demand), is the very type of "marginally less intrusive" approach the Supreme Court held would not invalidate the choice of a marginally more intrusive alternative.

Second, the proffered alternative of digital-carriage-only by hybrid cable systems, with an offer to lease a converter box, would not be consistent with section 614(b)(7). We have explained above that the statute does not give subscribers the option to forego viewability. Petitioners do not challenge the constitutionality of the statute, and their claim is therefore misplaced.

Even if petitioners were challenging the statute, their proffered alternative would not adequately advance the government's interests. Digital-only carriage would immediately disenfranchise 40 million analog-only cable subscribers. Petitioners' response – viewers who want to watch must-carry stations can opt to get a converter box – is no solution, as discussed above at pages 38-39. Many analog viewers may not be willing to incur the cost and inconvenience of obtaining and using a digital cable box just to receive a few additional channels, even if they would watch those channels if they could receive them without the box. *Turner II* noted that "even modest reductions in carriage [can] result in sizeable reductions in

revenue," 520 U.S. at 210, and an optional box regime would clearly lead to at least "modest reductions" in viewability.

Petitioners' position would restore the television marketplace to the state that existed prior to must-carry. That is why Congress decreed in section 614(b)(7) that viewability be mandatory, not permissive. On the other hand, if every viewer were required to get a converter box, the effective result would be an all-digital system, an option the Commission has expressly allowed. *See Viewability Order* ¶61 (carriers "may avoid analog downconversion by converting to all-digital systems, including by providing their subscribers with set-top boxes") (JA).[10]

Analog-only carriage, on the other hand, would nullify the material degradation statute, which petitioners do not contest here. Congress intended broadcasts, such as high-definition programming, to be carried in a form that the viewer would not perceive as materially different from the source signal. Otherwise, cable operators could discriminate against broadcast content by making it look worse than programming provided by

[10] Petitioners' amici suggest that cable subscribers can watch must-carry stations over-the-air and use a switch to change between cable viewing and over-the-air viewing. The Supreme Court rejected that approach in *Turner II*, 520 U.S. at 219-221, and the Commission found that "switching signal sources … does not represent an adequate alternative to must-carry," *Viewability Order* ¶53 (JA).

the cable operator itself. That rule, too, serves important government interests. As petitioners did not challenge the material degradation rule before the Commission – and indeed did not even bother to mention it in their opening brief – the constitutionality of that rule is not properly before the Court. 47 U.S.C. § 405(a).

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review for lack of standing. Should the Court find that petitioners have standing, it should deny the petition for review.

Respectfully submitted,

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June 6, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C-SPAN, ET AL, PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 08-1045

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13929 words.

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June 6, 2008

STATUTORY APPENDIX

47 U.S.C. § 534(b)(4)(A)
47 U.S.C. § 534(b)(4)(B)
47 U.S.C. § 534(b)(7)
47 U.S.C. § 535(h)

47 C.F.R. § 76.56(d)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART II. USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

§ 534. Carriage of local commercial television signals

(b) Signals required

* * * * * * * *

(4) Signal quality

* * * * * * * *

(A) Nondegradation; technical specifications

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 type of signal.

(B) Advanced television

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

* * * * * * * *

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART II. USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

§ 534. Carriage of local commercial television signals

(b) Signals required

* * * * * * * *

(7) Signal availability

Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals 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. If 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, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 543(b)(3) of this title.

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UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART II. USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

§ 535. Carriage of noncommercial educational television

* * * * * * * *

(h) Availability of signals

Signals 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 service tier that includes the retransmission of local commercial television broadcast signals.

* * * * * * * *

47 C.F.R. § 76.56

TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 76. MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART D. CARRIAGE OF TELEVISION BROADCAST SIGNALS

§ 76.56 Signal carriage obligations.

* * * * * * * *

(d) Availability of signals.

(1) Local commercial television stations carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals 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.

(2) Qualified local NCE television stations 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 service tier that includes the retransmission of local commercial television broadcast signals.

(3) The viewability and availability requirements of this section require that, after the broadcast television transition from analog to digital service for full power television stations cable operators must either:

(i) Carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or

(ii) For all-digital systems, carry those signals in digital format, provided that all subscribers, including those with analog television sets, that are connected to a cable system by a cable operator or for which the cable operator provides a connection have the necessary equipment to view the broadcast content.

(4) Any costs incurred by a cable operator in downconverting or carrying alternative-format versions of signals under § 76.56(d)(3)(i) or (ii) shall be the responsibility of the cable operator.

(5) The requirements set forth in paragraph (d)(3) of this section shall cease to be effective three years from the date on which all full-power television stations cease broadcasting analog signals, unless the Commission extends the requirements in a proceeding to be conducted during the year preceding such date.

* * * * * * * *

Ted Hearn, *NCTA Keeping Three-Year Dual Carriage Vow: Operators Will Keep Promise Even if Court Challenge to FCC Succeeds*, Multi-Channel News, Feb. 5, 2008

NCTA Keeping Three-Year Dual Carriage Vow

Operators Will Keep Promise Even If Court Challenge To FCC Succeeds

By Ted Hearn -- Multichannel News, 2/5/2008 12:15:00 PM

Washington – Major cable operators will comply for three years with federal rules that require duplicative carriage of some local TV stations even if cable programmers succeed in overturning the rules in court, National Cable & Telecommunications Association president Kyle McSlarrow said Tuesday.

"Notwithstanding what happens to the FCC rule [in court], our commitment stands," McSlarrow told Multichannel News.

NCTA's major cable operators include Comcast Corp, Time Warner Cable, Charter Communications, Cox Communications, and Cablevision Systems Corp.

Cable operators, McSlarrow said, could have gone to court with the programmers but decided against it.

"This was largely the product of the MSOs' making a commitment [on dual carriage to Congress]. Programmers weren't a party to that and certainly weren't bound by it," McSlarrow said.

C-SPAN corporate vice president Bruce Collins declined to respond to McSlarrow's statements.

At one time, NCTA had threatened a legal challenge based on duplicative carriage as a taking of private property without just compensation, violating the 5th Amendment in the Constitution. But it backed down after the FCC agreed to NCTA's three-year sunset.

McSlarrow's comments came a day after a group of major cable networks, including C-SPAN, Discovery Communications, and The Weather Channel, **sued to overturn FCC regulations** adopted last September that imposed new TV station carriage requirements on cable systems.

Under the rules, commercial TV stations that demand, rather than negotiate, access to cable systems are entitled to have their signals sent to cable homes in both analog and digital formats. The tiny number of all-digital cable systems don't need to send an analog version, presumably because their customers have digital reception equipment connected to all their TVs.

Public TV stations -- which have only must carry rights – normally would have been covered by the FCC's rules, but public TV stations represented by the Association of Public Television Stations forfeited their analog cable carriage rights in a private agreement with NCTA almost three years ago.

Cable systems don't need to comply with the FCC's dual carriage mandates until Feb. 18, 2009, the day after federal law requires TV stations to shut off their analog signals.

In 2005, NCTA's cable operator members pledged to Congress that they would offer dual carriage instead of forcing consumers to lease set-top boxes to tune in digital must carry signals sent to the home.

Last year, NCTA's MSO members made the same promise to the FCC, which codified it in its rules. But NCTA first had to overcome resistance from Republican FCC chairman Kevin Martin, who opposed a three-year sunset.

"Our plan reflected our commitment to Congress -- which had nothing to do with the FCC – which was we would try to make the transition as seamless for our customers as possible," McSlarrow said.

EXCERPT FROM REQUEST FOR EXPEDITEDWAIVER FILED BY MEDIACOM COMMUNICATIONS CORP. FILE NO. CSR-7758-Z

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

In the Matter of	)	
	)	
Mediacom Communications Corporation's	)	
Request for Expedited Waiver	)	
Of 47 C.F.R. § 76.1204(a)(1)	)	CSR No. _____
	)	
	)	

To: Chief, Media Bureau

REQUEST FOR EXPEDITED WAIVER

Pursuant to Sections 1.2 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.2, 76.7, Mediacom Communications Corporation ("Mediacom"), by its attorneys, respectfully requests that the Commission grant, on an expedited basis, a conditional waiver of Section 76.1204(a)(1) allowing Mediacom to continue to deploy low-cost, limited function integrated set-top boxes in certain cable systems that Mediacom commits to upgrade to all-digital operations by February 17, 2009.

As described herein, the grant of the requested waiver is consistent with Commission precedent and the public interest. The waiver will enable Mediacom to implement an all-digital service in systems that, due to their technical, competitive and regulatory circumstances, could not otherwise be upgraded in a timely, economically feasible fashion and, indeed, might in some instances have to cease operations. In light of the lead time needed to implement all-digital operations and in light of prior Commission precedent requiring that subscribers be provided timely notice of the

transition them to all-digital operations. However, such a transition will require the deployment of digital set-top boxes to the vast majority of subscribers. As other operators have convincingly demonstrated, deployment of low-cost integrated boxes will facilitate the timely transition of subscribers to all-digital networks that will allow operators to utilize reclaimed bandwidth to offer advanced services such as high definition television and video-on-demand.

Mediacom notes that the Commission's recent digital television "viewability" decision provides an additional incentive for Mediacom to accelerate the transition of the subject systems to all-digital and thus makes a grant of the requested waiver even more imperative. The Commission has ruled that cable operators who do not deploy all-digital networks by February 17, 2009 must provide both analog and digital retransmissions of local must carry broadcast stations.[1] Bandwidth constraints will make compliance with this dual carriage mandate extraordinarily challenging, if not impossible for a number of Mediacom's systems.

The systems that Mediacom would consider converting to all-digital by February 19, 2007 if it receives the requested waiver represent less than nine percent of Mediacom's total subscribership, average about 2,600 subscribers per system and have a

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[1] *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, FCC 07-170 (rel. Nov. 30, 2007). As indicated above, by making it possible for Mediacom to convert certain systems to all-digital by February 17, 2009, a grant of the requested waiver will obviate the need for Mediacom to seek a waiver of the "viewability" rules for those systems. Mediacom notes that it also operates a number of very small, all-analog systems (averaging under 200 subscribers per system) that, even with a waiver of Section 76.1204(a)(1), could not economically be converted to all-digital by the transition deadline. Mediacom is currently weighing its options for these systems, which include seeking a waiver of the viewability requirement or, possibly, terminating operations altogether.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C-Span, et al., Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing typewritten "Brief For Respondents" was served this 6th day of June, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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