

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

In the Matter of:)	
)	
Carriage of Digital Television Broadcast)	CS Docket No. 98-120
Signals: Amendment to Part 76 of the)	
Commission's Rules)	

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: April 25, 2007

Released: May 4, 2007

Comment Date: July 16, 2007

Reply Comment Date: August 16, 2007

By the Commission: Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell
issuing separate statements.

I. INTRODUCTION

1. In this Second Further Notice of Proposed Rulemaking ("*Second FNPRM*"), we address issues concerning the carriage of digital broadcast television signals after the conclusion of the digital television ("DTV") transition. Section 614(b)(4)(B) of the Communications Act of 1934, as amended (the "Act"), directs the Commission to revise the mandatory signal carriage rules to reflect changes necessitated by the transition from analog to digital broadcasting.¹ We believe that this *Second FNPRM* is warranted at this time in light of the recently established deadline for the end of analog broadcasts by full-power television licensees.² Further, addressing these issues now will provide digital broadcasters and cable operators with adequate time to prepare to comply with any rules that we adopt.

2. In this *Second FNPRM*, we seek comment on the post-transition obligations of cable operators under Sections 614 (establishing mandatory carriage rights for local commercial television stations) and 615 (establishing mandatory carriage rights for noncommercial educational television stations) of the Communications Act of 1934, as amended (the "Act").³

¹ 47 U.S.C. § 534(b)(4)(B) ("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.")

² See Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2006). Among other things, Title III of that legislation, entitled the Digital Television Transition and Public Safety Act of 2005, established a hard deadline of Feb. 17, 2009 for the end of analog transmissions by full power television stations.

³ See 47 U.S.C. §§ 534, 535.

3. First, we remind industry of our 2001 decision regarding material degradation:⁴ A broadcast signal delivered in HDTV [high-definition television] to a cable system must be carried by that system in HDTV.⁵ In addition, we seek comment on exactly what constitutes material degradation.

4. Furthermore, we address the statutory requirement that cable operators must make the signal transmitted by a broadcaster electing mandatory carriage viewable by all of their subscribers,⁶ and seek comment on how cable operators can implement this requirement after the end of analog broadcasting on February 17, 2009. Specifically, we propose that cable operators must comply with this “viewability” provision and ensure that cable subscribers with analog television sets are able to continue to view all must-carry stations after the end of the DTV transition by either: (1) carrying the digital signal in analog format, or (2) carrying the signal only in digital format, provided that all subscribers have the necessary equipment to view the broadcast content. In the absence of such a requirement, analog cable subscribers (currently about 50% of all cable subscribers, or approximately 32 million house holds⁷) would no longer be able to view commercial must-carry stations or non-commercial stations after February 17, 2009. We believe such an outcome would adversely impact the DTV transition and would unduly burden millions of consumers.

5. In interpreting both of these statutory provisions, we are mindful of the need to minimize the burden imposed upon consumers by the end of analog broadcasting in order to facilitate the successful and timely conclusion of the DTV transition. The prohibition against material degradation ensures that cable subscribers who invest in a HDTV are not denied the ability to view broadcast signals transmitted in this improved format. The requirement that cable operators make must-carry stations viewable by all cable subscribers ensures that analog cable subscribers, who today are able to view all of their broadcast stations, do not lose access to those stations as a result of the switch to digital-only broadcasting.

II. BACKGROUND

6. Pursuant to Section 614(b)(4)(B) of the Act,⁸ the Commission initiated this proceeding in 1998 to address the responsibilities of cable television operators with respect to carriage of digital broadcasters in light of the significant changes to the broadcasting and cable television industries resulting from the conversion to digital operations.⁹

7. In the 2001 *First Report and Order*, the Commission concluded that broadcasters operating digital-only television stations are entitled to mandatory carriage under the Act.¹⁰ In an effort to

⁴ See *Carriage of Digital Television Broadcast Signals*, etc., CS Docket No. 98-120, First Report and Order and First Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2627-31, paras. 70-76 (2001) (“*First Report and Order*” or “*Further Notice*”).

⁵ *Id.* at 2629, para. 73.

⁶ 47 U.S.C. § 534(b)(7).

⁷ Kagan reports that as of June 2006, there were 65.3 million cable subscribers. Kagan Research, LLC, *Kagan's 10-Year Cable TV Industry Projections*, Broadband Cable Financial Databook 2006, at 11. NCTA reports that as of June 2006, there were 32.9 million digital cable subscribers. NCTA Comments in Video Competition Proceeding. Also, we note that many digital cable subscribers have one or more television sets that only receive analog cable service.

⁸ 47 U.S.C. § 534(b)(4)(B).

⁹ See *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15093, paras. 1-2 (1998) (“*1998 NPRM*”).

¹⁰ See *First Report and Order*, 16 FCC Rcd at 2606, para. 15.

support the ultimate conversion of digital broadcast signals and facilitate the return of the analog spectrum, the Commission also decided to permit a digital-only station, on an interim basis, to “demand that one of its HDTV [high-definition television] or SDTV [standard-definition television] signals be carried on the cable system for delivery to subscribers in an analog format.”¹¹

8. Now that Congress has established February 17, 2009 as the date certain for the end of analog broadcasts by full-power television licensees, we believe that the time has come for us to address the post-transition carriage responsibilities of cable operators under Sections 614 and 615 – particularly in light of the fact that there will continue to be a large number of cable subscribers with legacy, analog-only television sets after the end of the DTV transition.¹²

III. DISCUSSION

9. As discussed below, the Communications Act requires that cable systems provide mandatory-carriage signals without material degradation and ensure that all subscribers can receive and view those signals.¹³ This *Second FNPRM* proposes to provide more detail on the material degradation requirements adopted by the Commission in 2001 and offers for comment two proposals for ensuring that cable subscribers with analog television sets can continue to view all must-carry stations after the end of the DTV transition. It also seeks comment on other issues that would be directly implicated by the proposals.

A. Material Degradation – Sections 614(b)(4)(A) and 615(g)(2)

10. The Communications Act requires (1) cable operators to carry local broadcast signals “without material degradation,” and (2) the Commission to “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.”¹⁴ As noted above, Section 614(b)(4)(B) of the Act directs the Commission “to establish any changes in the signal carriage requirements of cable television systems

¹¹ *Id.* at 2630, para. 74.

¹² This will be the case despite the steady rise in DTV display sales over the last several years. *See, e.g.*, Julie Kearney, Consumer Electronics Association, DTV Update (March 22, 2006); Consumer Electronics Association, HDTV Guide, Winter 2006, available at <http://www.ce.org/PDF/hdtvguidewinter06.pdf> (noting that the number of DTV set purchases increased from 1.5 million in 2001 to projected sales of nearly 30 million units in 2006); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, para. 110 (rel. Mar. 3, 2006) (“*Twelfth Annual Video Competition Report*”) (“CEA reports that during the first six months of 2005, DTV products sold at a faster rate than during any previous comparable period of time, with 3.8 million DTV products sold, accounting for \$4.6 billion in sales, a 40 percent increase in unit sales from the same time period in 2004.”); CEA DTV Update at 30; CEA HDTV Guide at 3 (stating that digital television sales will account for 62 percent of the television sets sold in 2006, surpassing sales of analog TV sets for the first time).

¹³ 47 U.S.C. §§ 534(b)(4)(A), (b)(7).

¹⁴ 47 U.S.C. § 534(b)(4)(A). *See* Section 615(g)(2) of the Communications Act, 47 U.S.C. § 535(g)(2) (material degradation requirements applicable to noncommercial stations). *See also* H.R. CONF. REP. NO. 102-862, at 67 (1992) (“The FCC is directed to adopt any carriage standards which are needed to ensure that, so far as is technically feasible, cable systems afford off-the-air broadcast signals the same quality of signal processing and carriage that they employ for any other type of programming carried on the cable system.”); S. REP. NO. 102-92, at 85 (1991) (same).

necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed” as a result of the transition from analog to digital broadcasting.¹⁵

11. In the *1998 NPRM*, we solicited comments to determine the extent to which this provision precludes cable operators from altering a digital broadcast station signal when the transmission is processed at the system headend or in customer premises equipment.¹⁶ Some broadcasters argued that a digital signal would be materially degraded if it were not transmitted to the viewer in the format that the broadcaster intended. Other broadcasters sought to preclude cable operators from blocking or deleting any of the bits constituting the broadcast material. The *First Report and Order* concluded that cable operators are required to ensure that consumers with DTV equipment (e.g., Digital-Cable-Ready sets¹⁷ or DTV-ready sets connected to an HDTV digital cable set-top box) are able to view the digital signal in its original format – e.g., in high definition (“HD”) if delivered by the broadcaster in HD.¹⁸

12. As noted above, we previously determined in the *First Report and Order* that a broadcast signal delivered to the cable headend in HD must be carried in HD in order to comply with the prohibition on material degradation.¹⁹ We continue to require such carriage and reiterate that requirement. We now propose revisions to the material degradation requirements set forth in the *First Report and Order* with respect to carriage of bits in the broadcast signal.²⁰ Specifically, we propose to move from a subjective to objective measure. For instance, we seek comment on whether we should require that all primary video²¹ and program-related content bits transmitted by the broadcaster (the “content bits”) be carried to avoid material degradation. Alternatively, we seek comment on whether the Commission’s existing non-discrimination requirement is a better objective test for material degradation. In the *First Report and Order*, the Commission prohibited cable operators from treating cable programming services more favorably than broadcast signals for purposes of material degradation.²² We seek comment on the

¹⁵ 47 U.S.C. § 534(b)(4)(B).

¹⁶ See *1998 NPRM*, 13 FCC Rcd at 15122-23, paras. 63-68.

¹⁷ See *Implementation of Section 304 of the Telecommunications Act of 2006, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, 20900, para. 32 (2003) (describing the basic requirements for digital cable televisions or products to be labeled “digital cable ready”); see also 47 C.F.R. § 15.123.

¹⁸ See *First Report and Order*, 16 FCC Rcd at 2629, para. 73 (finding that the Act “requires that cable operators provide the same ‘quality of signal processing and carriage’ for broadcast signals as they provide for any other type of signal,” and that HDTV signals must be carried by the cable operator and delivered to the subscriber in HDTV). Several parties filed petitions for reconsideration of the Commission’s interpretation of the material degradation prohibition in the *First Report and Order*. Those petitions remain pending.

¹⁹ See *First Report and Order*, 16 FCC Rcd at 2629, para. 73.

²⁰ See *First Report and Order*, 16 FCC Rcd at 2629, para. 72 (“From our perspective, the issue of material degradation is about the picture quality the consumer receives and is capable of perceiving and not about the number of bits transmitted by the broadcaster if the difference is not really perceptible to the viewer.”).

²¹ See *id.* at 2620-22, paras. 51-57; see also *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules*, CS Docket No 98-120, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd at 4534-37, paras. 28-44 (2005). Bits that are not part of the primary video or program-related content need not be carried. See *First Report and Order*, 16 FCC Rcd at 2622, para. 57 (“[W]e conclude that ‘primary video’ means a single programming stream and other program-related content.”).

²² See *First Report and Order*, 16 FCC Rcd at 2629, para. 73 (“Consequently, in the context of mandatory carriage of digital broadcast signals, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer (e.g., non-broadcast cable programming, other broadcast

application of the existing or a new non-discrimination rule in this context. We also seek comment on how to verify that cable operators are abiding by this requirement. Should we identify specific measurement tools? If so, what should those measurement tools be? We also request comment and specific estimates regarding the costs of compliance with this proposal, particularly with respect to small cable operators, and whether there are alternative means that would minimize the economic impact for small cable operators while still complying with the statutory requirements.²³

13. Our option of carrying all content bits is responsive to the Petitions for Reconsideration filed in this docket in which broadcasters requested that we require cable operators to carry “the entire qualified digital bit stream of each station in the format in which the broadcaster originally transmitted it.”²⁴ It also is consistent with the requests for clarification made by the Broadcast Group and the Noncommercial Broadcasters that the material degradation requirements “ensure that cable subscribers do not receive DTV service, including HDTV, that is inferior in quality to the service available over the air.”²⁵ In addition, by seeking comment on measurement tools, this option is responsive to broadcast commenters’ concern that the material degradation standard adopted in the *First Report and Order* did not provide an objective way to evaluate material degradation.²⁶

14. We request comment on this option. We specifically request comment on how cable operators are to distinguish between bits with content and so-called “null bits,”²⁷ and whether material degradation could result from failure to carry these empty bits. We also recognize that bandwidth-conserving techniques commonly are used by cable operators to improve efficiency. Is there a way to

digital program, etc.) carried on the cable system, provided, however, that a broadcast signal delivered in HDTV must be carried in HDTV.”) footnote omitted). *See also* 47 C.F.R. § 76.62.

²³ As noted in the *First Report and Order*, it may be especially burdensome for small systems with limited channel capacity (such as systems with fewer than 330 MHz) to carry an HDTV signal if they are not otherwise providing HDTV programming. *See First Report and Order*, 16 FCC Rcd. at 2629, para. 73 n.216. Therefore, if a small system that is not otherwise carrying any HDTV signals is required to carry a broadcast signal in HDTV, such that the signal straddles two 6 MHz channels (*i.e.*, if they are passing through the broadcaster’s 8-VSB modulated signal), the system may include all of the lost spectrum when calculating its one-third capacity for purposes of the statutory cap. *See id.* *See also* 47 U.S.C. § 534(b)(1).

²⁴ *See* Broadcast Group Petition at 7; *see also id.* at 7-8 (advocating a standard requiring that cable operators “pass all the content bits” to assure no material degradation) (the “Broadcast Group” comprises Arizona State University, Benedek Broadcasting Corp., Midwest Television, Inc., and Raycom Media, Inc.). The Broadcast Group, Commercial Broadcasters (comprising the National Association of Broadcasters, the Association of Maximum Service Television, and the now-defunct Association of Local Television Stations), Noncommercial Broadcasters (comprising the Association of America’s Noncommercial Broadcasters, Public Broadcasting Service, and Corporation for Public Broadcasting), and Tribune seek reconsideration and/or clarification of our rules concerning material degradation. *See* Broadcast Group Petition at 7; Noncommercial Broadcasters Petition at 18-20. *Accord* Tribune Reconsideration Comments at 3 (the Commission should “strengthen its material degradation definition in the DTV context to require cable operators to pass all the program related bits in the DTV transport stream to their subscribers”). *But see* NCTA Opposition at 4, 5-17; Time Warner Opposition at 23-24.

²⁵ *See* Broadcast Group Petition at 7. *See also* Noncommercial Broadcasters Petition at 18-19.

²⁶ *See* Broadcast Group Petition at 20.

²⁷ So-called “null bits” need not be passed through or included in the signal as carried, as they are, as the name implies, empty of any content.

permit the use of improved compression, statistical multiplexing, rate shaping,²⁸ or other techniques that would not result in prohibited material degradation?

15. We further seek comment on whether, under the option of carrying all content bits, a cable operator that wishes to reduce the number of content bits in a digital broadcast signal first must demonstrate to the broadcaster that such reduction will not result in material degradation. In doing so, how might the cable operator demonstrate that, although not all of the content bits are being carried, the content will not be degraded in a material way? Would it be necessary and/or sufficient for the cable operator to demonstrate that the broadcast station's digital signal carriage does not differ from other broadcast or non-broadcast programmers? (We note that this latter comparison also would ensure that cable operators do not discriminate against some or all broadcast content as compared with non-broadcast content.) We seek comment on whether, under these circumstances, the cable operator must continue to pass through all of the content bits until an agreement has been reached with the broadcast station to permit the reduction in the number of bits. Similarly, we seek comment on a rule that when a broadcast station files a carriage complaint concerning material degradation, the cable operator must pass through all of the content bits during the pendency of the complaint.²⁹ In situations where negotiations between cable operators and broadcasters reach an impasse, cable operators may notify the station in writing of that fact and the station will then have 30 days from receipt of the letter to file a complaint with the Commission in order to preserve its claim. We seek comment on these options and on the procedures and mechanisms for cable operators and stations to engage in such discussions short of filing a carriage complaint with the Commission.

B. Availability of Signals – Sections 614(b)(7) and 615(h)

16. Pursuant to Sections 614 and 615 of the Act, cable operators must ensure that all cable subscribers have the ability to view all local broadcast stations carried pursuant to mandatory carriage. Specifically, Section 614(b)(7) (for commercial stations) states that broadcast signals that are subject to mandatory carriage must 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.”³⁰ Similarly, Section 615(h) for noncommercial stations states that “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 tier that includes the retransmission of local commercial television broadcast signals.”³¹ These statutory requirements plainly apply to cable carriage of digital broadcast

²⁸ Rate shaping “describes bit rate adaptation techniques applied to MPEG-2 encoded streams, to further enhance bandwidth efficiency. This technique can substitute for decoding-encoding operations that are expensive, space consuming and ultimately harmful to content quality.” Sylvain Riviere, “Seamless, Scalable HDTV Roll-Outs Over Today's Headends” (June 10, 2003), at http://www/bigbandnet.com/technology/tech_whitepaper_hdtv_roll.php (visited April 28, 2006).

²⁹ The Commission is required to resolve carriage complaints within 120 days after the filing of a complaint. See 47 U.S.C. §§ 534(d)(3) (for commercial stations) and 535(j)(3) (for noncommercial stations).

³⁰ 47 U.S.C. § 534(b)(7).

³¹ See 47 U.S.C. § 535(h). Although Sections 534(b)(7) and 535(h) use different language, the Commission consistently has treated them as imposing identical obligations. See, e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, etc., MM Docket No. 92-259, Report and Order, 8 FCC Rcd. 2965, 2974, para. 32 (1993) (“*Analog Must Carry Report and Order*”) (noting that all must-carry signals must be available to all subscribers); see also *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 18223, 18308, para. 162 (1996) (“Pursuant to Section 614(b)(7) and 615(h), the operator of a cable system is required to ensure that signals carried in fulfillment of the must-carry requirements are provided to every subscriber of the system.”).

signals,³² and, as a consequence, cable operators must ensure that all cable subscribers – including those with analog television sets – continue to be able to view all commercial and non-commercial must-carry broadcast stations after February 17, 2009.³³ Below we seek comment on how to implement this statutory requirement. We note that all cable subscribers today are able to view all of their must-carry stations, and we believe that it is critical to the successful and timely conclusion of the DTV transition that they are not disenfranchised by the switch to digital-only broadcasting. We therefore are mindful of the need to minimize the burden imposed on consumers, including cable subscribers with analog television sets, by the end of the DTV transition.

17. To achieve compliance with the viewability requirement of Sections 614(b)(7) and 615(h) after the end of the DTV transition, we propose that, in order to ensure that subscribers with analog television sets remain able to view all local broadcast television stations electing mandatory carriage, cable operators must either: (1) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or (2) for all-digital systems, carry those signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast content.³⁴ This requirement would be in addition to the requirement that the cable operator pass through the HD signal to cable subscribers of an HD package, as discussed above. We believe that these proposals are consistent with our articulation of carriage requirements in the analog must-carry context, in which the Commission has made clear that mere transmission of the must-carry signal is not sufficient to meet the requirements of Section 614(b)(7). The Commission stated in 1993 that:

We believe that the 1992 Act is clear in its requirement that all local commercial television stations carried in fulfillment of the must-carry requirements must be provided to every cable subscriber and must be viewable on all television sets that are connected to the cable system by a cable operator for which the cable operator provides a connection. The Act does not give the Commission authority to exempt any class of subscribers from this requirement.³⁵

In other words, the signal must be “viewable” on all television sets connected to the cable provider’s system.³⁶ We seek comment on these proposals.

³² See 47 U.S.C. § 534(b)(4)(B).

³³ Analog-only television sets plainly qualify as “television receivers” under Section 614(b)(7) at the present time, and we think that it is eminently reasonable to conclude that they will continue to fall within the scope of that term as it is used in Section 614(b)(7) after the transition.

³⁴ In the 2001 *First Report and Order*, the Commission afforded a digital-only station mandatory carriage rights pursuant to Sections 614 and 615, coupled with the option to request that its digital signal be carried on the cable system for delivery to subscribers in an analog format, at the station’s expense (a mechanism also referred to as “down-conversion.”). See *First Report and Order*, 16 FCC Rcd at 2605-082630, paras. 13-16, 74. See also *WHDT-DT, Channel 59, Stuart, Florida: Petition for Declaratory Ruling that Digital Stations Have Mandatory Carriage Rights*, CSR-5562-Z, Memorandum Opinion and Order, 16 FCC Rcd 2692 (2001) (petition for reconsideration pending). This interim “down-conversion” option will continue to be available to broadcasters until the end of the transition on Feb. 17, 2009. The pending petitions for reconsideration of the *First Report and Order* request reconsideration of this down-conversion option. We will address the merits of those arguments in a separate order.

³⁵ 8 FCC Rcd 2965, 2974.

³⁶ See *Analog Must Carry Report and Order*, 8 FCC Rcd at 2974, para. 34; see also 47 C.F.R. § 76.56(d).

18. As we consider these issues, we are cognizant that the ultimate goal of Congress is that every customer should enjoy the benefits of the digital transition. That is, our policies should advance the goal of transitioning all consumers—including cable consumers—to digital. We seek comment on ways to promote this goal within the context of this proceeding. In particular, we seek comment on ways to move cable subscribers from analog to digital in a manner consistent with the statute and consumer expectations.

19. Under the Commission’s interim down-conversion policy for digital-only stations during the transition, broadcasters that request carriage of an analog version of their digital signal must pay for the cost of down-conversion.³⁷ Under the first option set forth in our proposal, however, cable operators themselves would elect to satisfy their obligations under Sections 614 and 615 by carrying a digital signal in analog format to ensure that the signal is viewable by all subscribers. Given the circumstances, should cable operators be responsible for any expense associated with down-conversion?

20. Finally, we note that, in the *First Report and Order*, the Commission concluded “not to require a cable operator to provide subscribers with a set top box capable of processing digital signals for display on analog sets.”³⁸ That decision, however, was premised on factual considerations that will not apply in a post-transition environment. Specifically, the Commission was reluctant to require cable subscribers to obtain such equipment because the content available on the digital signal likely would have been identical to analog programming to which subscribers already had access. In that same vein, the Commission pointed out that the obligation to simulcast – which later was eliminated³⁹ – weighed against requiring the provision of equipment necessary to view a digital signal. However, given that our proposal here would apply to the carriage of digital signals *after* the end of analog broadcasting, we believe that the Commission’s 2001 decision is not directly relevant since subscribers with analog sets after the transition will face the prospect of not being able to view the signals of must-carry stations unless they possess the necessary equipment (*i.e.*, a Digital-Cable-Ready television set or a digital cable set-top box). Nevertheless, we seek comment on this issue.

IV. PROCEDURAL MATTERS

A. Filing Requirements

21. **Ex Parte Rules.** This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under Section 1.1206(b) of the Commission’s rules.⁴⁰ Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.⁴¹ Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

22. **Comments and Reply Comments.** Pursuant to Sections 1.415 and 1.419 of the Commission’s rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before the

³⁷ See *First Report and Order*, 16 FCC Rcd at 2602, para. 7.

³⁸ *First Report and Order*, 16 FCC Rcd at 2632, para. 79.

³⁹ See *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18282, para. 5 (2004).

⁴⁰ See 47 C.F.R. § 1.1206(b).

⁴¹ See *id.*, § 1.1206(b)(2).

dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998). To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

23. Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

24. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, D.C., 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD, 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail, should be addressed to 445 12th Street, SW, Washington, D.C., 20554. All filings must be addressed to the Commission's Secretary: Office of the Secretary, Federal Communications Commission.

25. ***Availability of Documents.*** Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bill.cline@fcc.gov. These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at fcc@bcpiweb.com; or via their website at <http://www.bcpiweb.com>. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

26. ***Additional Information.*** For additional information on this proceeding, contact Eloise Gore, Eloise.Gore@fcc.gov, of the FCC's Media Bureau, Policy Division, (202) 418-2120.

B. Paperwork Reduction Act of 1995 Analysis

27. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days after publication of this *Second Further Notice of Proposed*

Rulemaking in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

C. Initial Regulatory Flexibility Analysis

28. The Initial Regulatory Flexibility Analysis for the *Second FNPRM* is found in the attached Appendix.

V. ORDERING CLAUSES

29. **IT IS ORDERED** that, pursuant to authority contained in Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 534, and 535, this *Second Further Notice of Proposed Rulemaking* **IS HEREBY ADOPTED**.

30. **IT IS FURTHER ORDERED** that the Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Second Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis For the *Second FNPRM*

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁴² the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible economic impact on a substantial number of small entities by the policies and rules proposed in this *Second Further Notice of Proposed Rulemaking* (“*Second FNPRM*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second FNPRM* as indicated on the first page of the Order. The Commission will send a copy of the *Second FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).⁴³ In addition, the *Second FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.⁴⁴

A. Need for, and Objectives of, the Proposals

2. This *Second FNPRM* seeks comment on several issues relating to the carriage of digital television broadcast stations after the analog to digital transition. Our goal in this proceeding is to determine how to implement the statutory requirements under Sections 614 (local commercial television station mandatory carriage) and 615 (noncommercial educational television station mandatory carriage) of the Communications Act of 1934, as amended (the “Act”), when digital broadcasters seek mandatory carriage for their digital signal after February 17, 2009, the date established by Congress as to when analog service must cease.⁴⁵ We remind industry of our 2001 decision regarding material degradation (*i.e.*, that a broadcast signal delivered in HDTV to a cable system must be carried by that system in HDTV).⁴⁶ In addition, we seek comment on the proposal that cable operators be required to carry all of the primary video and program-related content bits transmitted by the broadcaster and on the alternative proposal to rely on the existing non-discrimination requirement or a new non-discrimination rule to provide a better objective test for material degradation. We also seek comment on procedures by which cable operators could demonstrate that, although they were not carrying every content bit (*e.g.*, through the use of improved compression or other efficiency maximizing techniques), they nevertheless were providing must-carry digital signals without material degradation.⁴⁷ The *Second FNPRM* proposes that cable operators can comply with the “viewability” provisions of Sections 614 and 615 (as discussed in the *Second FNPRM*) and ensure that cable subscribers with analog television sets are able to continue to view all must-carry stations after the end of the DTV transition by either: (1) carrying the digital signal in analog format to ensure that the signal is viewable by all subscribers, or (2) for all-digital systems, carry

⁴² See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁴³ See 5 U.S.C. § 603(a).

⁴⁴ See *id.*

⁴⁵ See Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2006). Among other things, Title III, entitled the Digital Television Transition and Public Safety Act of 2005, establishes a hard deadline of February 17, 2009 for the end of analog transmissions by full power television stations.

⁴⁶ See *id.*, ¶¶ 2, 8. See also *Carriage of Digital Television Broadcast Signals*, etc., CS Docket No. 98-120, *et al.*, First Report and Order, 16 FCC Rcd 2598, 2727-31 (2001).

⁴⁷ See *Second FNPRM*, ¶¶ 2, 10-15.

those signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast content.⁴⁸

B. Legal Basis

3. The authority for the action proposed in this rulemaking is contained in Sections 1, 4(i) and (j), 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 534, and 535.

C. Description and Estimate of the Number of Small Entities To Which the Proposals Will Apply

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.⁴⁹ The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵⁰ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁵¹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).⁵² The rules we may adopt as a result of the comments filed in response to this *Second Further Notice of Proposed Rulemaking* will primarily affect cable operators and television stations. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

5. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”⁵³ The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having \$13.5 million or less in annual receipts.⁵⁴ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁵⁵ Of this total, 1,087 firms had annual receipts of under \$10 million, and

⁴⁸ See *id.*, ¶¶ 16-19.

⁴⁹ 5 U.S.C. § 603(b)(3).

⁵⁰ 5 U.S.C. § 601(6).

⁵¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”(6).

⁵² 15 U.S.C. § 632.

⁵³ U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

⁵⁴ 13 C.F.R. § 121.201, NAICS code 517510.

43 firms had receipts of \$10 million or more but less than \$25 million.⁵⁶ Thus, under this size standard, the majority of firms can be considered small. We note, however, that the proposals at issue in this *Second FNPRM* only apply at this time to cable operators,⁵⁷ and not other MVPD providers.⁵⁸

6. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.⁵⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.⁶⁰ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.⁶¹ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.⁶² Thus, under this second size standard, most cable systems are small.

7. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁶³ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁶⁴ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁶⁵ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁶⁶ and therefore we are unable to estimate

⁵⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁵⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁵⁷ The proposals would also apply to OVS operators.

⁵⁸ On this point, we note that the proposals do not, for example, apply to DBS services.

⁵⁹ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

⁶⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁶¹ 47 C.F.R. § 76.901(c).

⁶² Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

⁶³ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

⁶⁴ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

⁶⁵ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁶⁶ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

more accurately the number of cable system operators that would qualify as small under this size standard.

8. *Television Broadcasting.* The proposed rules and policies apply to digital television broadcast licensees, and potential licensees of digital television service. The SBA defines a television broadcast station as a small business if such station has no more than \$13 million in annual receipts.⁶⁷ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”⁶⁸ According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on October 18, 2005, about 873 of the 1,307 commercial television stations⁶⁹ (or about 67 percent) have revenues of \$12 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁷⁰ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

9. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

10. *Other Program Distribution.* The SBA-recognized definition of Cable and Other Program Distribution includes other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS and OVS. This definition provides that a small entity is one with \$13.5 million or less in annual receipts.⁷¹ As previously noted, according to the Census Bureau data for 2002, there were a total of 1,191 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,087 firms had annual receipts of under \$10 million and an additional 43 firms had receipts of \$10 million or more, but less than \$25 million.⁷² The Commission estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

⁶⁷ See 13 C.F.R. § 121.201, NAICS Code 515120.

⁶⁸ *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

⁶⁹ Although we are using BIA’s estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1,368. See *News Release*, “Broadcast Station Totals as of June 30, 2005” (dated Aug. 29, 2005); see <http://www.fcc.gov/mb/audio/totals/bt050630.html>.

⁷⁰ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

⁷¹ 13 C.F.R. § 121.201, NAICS code 517510. This NAICS code applies to all services listed in this paragraph.

⁷² See notes 72-73 and accompanying text, *supra*.

11. While SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.⁷³ There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

12. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”⁷⁴ The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.⁷⁵ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.⁷⁶ Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.⁷⁷ Thus, under this size standard, the majority of firms can be considered small.

⁷³ In addition, the term “small entity” under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

⁷⁴ U.S. Census Bureau, 2002 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

⁷⁵ 13 C.F.R. § 121.201, NAICS code 334220.

⁷⁶ U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

⁷⁷ *Id.* An additional 18 establishments had employment of 1,000 or more.

D. Description of Projected Reporting, Record Keeping, and other Compliance Requirements for Small Entities

13. The *Second Further Notice of Proposed Rulemaking* seeks comment on statutory interpretations and proposals to address post-transition obligations of cable operators with respect to carriage of digital broadcast signals pursuant to the must carry requirements in the Communications Act. Small cable operators currently have obligations with respect to carriage of local commercial and non-commercial broadcast stations which vary according to the size of the cable system. As with existing statutory and regulatory requirements, small cable operators will need engineering and legal services to comply with the proposed rules. The *Second FNPRM* reiterates the Commission's 2001 decision regarding material degradation and requests comment on requiring cable operators be required to carry all of the primary video and program-related content bits transmitted by the broadcaster and on an alternative proposal to rely on the existing non-discrimination requirement or a new non-discrimination rule to provide a better objective test for material degradation. The 2001 *First Report and Order* recognized that the material degradation requirements could impact small cable operators disproportionately and made special provision for such situations. This recognition is retained in the proposals set forth in the *Second FNPRM*. The *Second FNPRM* also notes that cable operators must make the primary video and any program-related material transmitted by a digital broadcaster electing mandatory carriage viewable by all of their subscribers and proposes to permit cable operators to comply with the "viewability" provisions by either: (1) carrying the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or (2) for all-digital systems, carry those signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast content. Small cable operators will need engineering and legal analysis to comply with this proposal. The *Second FNPRM* seeks comment on the cost of compliance to small cable operators and solicits alternative approaches that would reduce the burden on small cable operators while still complying with statutory requirements. Small broadcast stations will also be affected by the proposed rules and other issues raised in the *Second FNPRM*, but we do not have any reason to expect that the compliance burden will be any greater than under the existing rules, except that initially, broadcasters may need additional legal services.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁷⁸ We seek comment on the applicability of any of these alternatives to affected small entities.

15. The requirements proposed in the *Second FNPRM* are the result of statutory requirements that do not expressly provide exceptions for small entities. Broadcast stations, including small entity stations, are afforded the flexibility to elect mandatory carriage of their digital signal or elect to negotiate carriage with cable systems. The proposals do not contemplate imposing any significant burdens on small television stations, but station licensees and other parties are encouraged to submit comment on the proposals' impact on small television stations. Every effort will be made to minimize the impact of any adopted proposals on cable operators. In this IRFA, we seek comment on whether there is a specific legal

⁷⁸ 5 U.S.C. § 603(c)(1) – (c)(4).

basis for affording operators that qualify as small systems special consideration in this regard. We anticipate that more and more cable systems will become all-digital cable systems, thereby minimizing any potential impact that our proposals, if adopted, might have. Finally, we are mindful of the potential concerns of small entities and will, therefore, continue to carefully scrutinize our policy determinations going forward. We invite small entities to submit comment on how the Commission could further minimize potential burdens on small entities if the proposals provided in the *Second FNPRM*, or those submitted into the record, are ultimately adopted.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

16. None.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: Cable Carriage of Digital Television Broadcast Signals (CS Docket No. 98-120)

The digital transition in February 2009 will offer television viewers expanded choice in programming and an overall enhanced viewing experience. Without the proper policies in place, however, some viewers may be left in the dark or be unable to realize the full opportunities offered by digital technology. Such a result would be unacceptable.

A lot of attention has appropriately been placed on the estimated 15 percent of Americans that do not subscribe to a multichannel video programming service, such as cable. The federal government has proposed an ambitious and important program to ensure that they are not left behind after the transition. It is equally important, however, to remember that about 50 percent of cable subscribers today – at least 32 million people – subscribe to analog, not digital cable. These consumers also risk losing their broadcast signals after the digital transition unless the Commission acts. The Commission has a statutory responsibility to ensure that these customers are also able to watch broadcast television after the transition.

The 1992 Cable Act is very clear. Cable operators must ensure that all local broadcast stations carried pursuant to this Act are “viewable” by *all* cable subscribers. These commercial and non-commercial must-carry broadcast stations provide consumers with valuable local news, information, and entertainment. Under the statute, cable operators cannot simply cut off these broadcast signals to any of their customers after the transition to digital.

In this item, the Commission proposes to ensure that cable subscribers will not lose access to broadcast signals because of the digital transition. Rather, cable operators should continue to carry these broadcast signals in analog format to the millions of analog cable customers. Alternatively, for cable operators who have chosen go all digital, they should provide their subscribers with the necessary equipment to view the broadcast and other channels.

Importantly, I do not believe that every consumer should be forced to rent a set-top box. Many consumers do not want the expense or hassle of having to get a set-top box. Instead, the cable operator should ensure that all of its customers have access to the broadcast signals, including those customers that do not want to rent a digital box. Today’s Commission action ensures that cable subscribers will not be forced to rent a set top box to view the broadcast signals.

One of the most exciting features of digital technology is the advent of HDTV. Broadcasters are providing all sorts of sports, news and entertainment content in this format and increasing numbers of consumers are purchasing televisions to watch this programming. Consumers with these sets should be able to fully experience this enhanced viewing opportunity. If consumers buy a new expensive HDTV, they reasonably expect to get high-definition signals. Thus, the Commission reaffirms that broadcast signals delivered in HDTV must be able to be seen in HDTV by cable subscribers with a high-definition set.

I am pleased that the Commission is doing everything in its power to make sure that no American is left behind in this part of the digital revolution and that all Americans reap its rewards.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Carriage of Digital Broadcast Signals (CS Docket 98-120)

These are tough issues. We start with a must-carry statute that was written in the analog world. Our job is to apply it to digital. That's difficult enough. But then add the fact that broadcasters are facing a hard DTV transition date in less than two years while cable's digital transition could go on much longer, and the web of technical, legal, and policy issues grows ever more complex.

In untangling these issues, I'm guided by two principles. First, Congress intended the fruits of the digital television transition to be shared by all Americans, not just over-the-air viewers. Cable subscribers, like all consumers, deserve to have access to the benefits digital is capable of bringing us. Indeed, given that most households in the U.S. subscribe to cable, it's doubtful that we could have a successful digital television transition without the full participation of the cable industry. I therefore do not treat the digitization of over-the-air broadcasting, cable, and satellite as separate transitions. There is one national digital television transition of which these services are all a part.

Second, while advancing the DTV transition is a national goal, we must take extra care not to leave any of our fellow citizens behind. In the over-the-air context, that means doing everything we can to ensure that no one wakes up on February 18, 2009 to a blank screen. There has been a lot of focus on the broadcast aspects of this. But a similar question confronts analog cable subscribers on that winter's day. When they wake up on February 18, 2009 and turn on their sets, will they still be able to see their local broadcast stations? Many consumers are probably unaware that they may not.

So as we engage in technical discussions about the impact of statistical multiplexing on a broadcaster's bit stream, pore over the legislative history of the 1992 Cable Act, and debate the fine points of First Amendment jurisprudence, we'd better be asking some other questions, too:

1. What about those cable viewers?
2. How do we really make sure *no* viewer is left behind?
3. What policies and programs can get us there?

With that as background, this notice seeks comment on two specific issues – the meaning of the statutory terms “material degradation” and “viewability” in the digital world. As for material degradation, I support the proposal to move to an objective test and away from a subjective “I know it when I see it” standard. I think both of the options identified in the item – a requirement that cable operators pass through all content bits or a requirement that they not discriminate between cable and broadcast programming – have some appeal. In any event, the rule will remain that HD broadcast programming must be passed through in HD. The only issue is how to measure it. That part of the item advances my first principle set forth above.

“Viewability” is really about my second principle – ensuring that the legitimate expectations of analog cable subscribers are respected, even as we are doing everything we can to move all of our services to digital. The current proposal does that. No cable subscribers should lose a single broadcast service when they wake up on February 18, 2009.

I recognize that some may argue there are practical or constitutional reasons we cannot achieve both goals simultaneously, that choices need to be made between access to digital services and ensuring that no one is left behind. While I don't rule anything out, for those who would make such arguments let me put this as mildly as I can – I will have to be convinced.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: Cable Carriage of Digital Television Broadcast Signals (CS Docket No. 98-120)

I support this *Notice* to seek comment on cable operators' carriage obligations in the post-transition era. It is clear that under section 614 and 615 of the Communications Act, both today and post-transition, cable operators must not degrade the primary video signal transmitted by must-carry stations and must make the primary video viewable by all of their subscribers. It also seems clear that, beyond these legal requirements, cable operators have a direct financial incentive to make sure that their subscribers get good quality pictures.

In the analog world, we apply a comparative, non-discriminatory standard to determine whether cable operators are satisfying their obligation to refrain from materially degrading the picture quality of must-carry stations. To date, I do not believe we have a record of any complaints alleging material degradation. In fact, for many households cable service improved substantially their television's picture compared to over-the-air transmission.

In the digital world, where picture quality will be a significant product differentiator in a competitive video marketplace, the financial incentive seems just as strong as it is in the analog world.

While we ought to be able to quantify what material degradation is or is not, to date we have not identified what percentage of content bits, if not transmitted to the consumer, would constitute degradation in picture quality that is *material* to the average viewer. It is not sufficient to simply declare, "carry all the program bits." Such a standard would establish the ceiling – the best resolution possible – not the floor, which is more akin to statutory meaning of "material degradation." I believe the Commission should refrain from making a proposal that is essentially reverses our 2001 decision before we have had a chance to review a refreshed record.

I think it is also important for the Commission to refrain from tentatively and prematurely reversing prior Commission decisions before we have had a chance to get public comment and deliberate over a complete and refreshed record.

Regarding the viewability of broadcast signals, on two separate occasions the Commission previously decided, for various reasons, to refrain from imposing dual carriage obligations on cable operators. There are important constitutional, technical, economic, and equity-based concerns that have been thoughtfully considered. Before the Commission publicly supports a new proposal that will likely lead us to a previously-rejected dual carriage regime, we should first seek comment on a set of objective questions that considers all options and does not pre-judge the outcome or weigh heavily against viable alternatives.

We should consider fully the consequences before limiting ourselves and an entire industry to options that could have unintended consequences for technological development and consumer choice. Today's proposal could force cable operators to move more and more channels from their expanded basic tier in order to reclaim capacity that will, in turn, be used to provide more high-definition programming – the main reason consumers are purchasing expensive HDTV sets. This migration of popular channels to the digital tier will likely force cable subscribers to rent digital set-top boxes. We may inadvertently be forcing set-top boxes on many consumers who have strived mightily to avoid them.

What are we telling consumers if we limit cable operators' options to either carry dual broadcast signals or deploy expensive digital set-top boxes, while the Media Bureau has rejected operators' pleas to provide cheaper, low-end set top boxes to consumers? We are potentially putting consumers in a squeeze where they will be forced to pay for expensive new digital cable boxes at a time when they are already complaining about steep hikes in cable prices.

Limiting cable operators to a choice of dual carriage or deploying expensive digital set-top boxes throughout their footprint rejects outright the possibility of other workable, negotiated solutions that have been contemplated and supported by many Members of Congress, and negotiated by interested stakeholders. At this point, all proposals should be on the table.

The fact is that, personally, I have not decided the right outcome. But I am open-minded and willing to consider the facts in an objective manner. That is why I have advocated for all proposals to be considered on a level playing field. I am hopeful all of us on this Commission will keep an open mind as we review comments filed in this proceeding.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: Cable Carriage of Digital Television Broadcast Signals (CS Docket No. 98-120)

Pursuant to Sections 614 and 615 of the Communications Act of 1934, as amended, cable operators are required to make the signals of local television stations that are subject to mandatory carriage “viewable on all television receivers of a subscriber” and provide such signals “without material degradation.” The interplay of these two statutory provisions raises a number of difficult, but important, questions concerning how cable subscribers will view “must-carry” television signals after the digital transition, now set by Congress to occur on February 17, 2009. At that point, broadcasters will transmit in digital format only, but many cable systems still will have a significant number of subscribers who receive only analog cable service. I believe that the item asks the right questions concerning how cable operators can abide by their statutory obligations until they have completed their own transition to fully digital operations, so that consumers remain able to receive news, information, entertainment, and even emergency alerts.

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL**

Re: Cable Carriage of Digital Television Broadcast Signals (CS Docket No. 98-120)

Given Congress' DTV deadline, the natural next step for the Commission is to review how cable operators will carry the broadcasters' digital signals. In this Notice, we seek comment on the obligations of cable operators, after the conclusion of the digital transition, to ensure that the digital signals of "must carry" stations are not materially degraded and are viewable by all cable subscribers, as required by law. Even though broadcasters will be all digital by the deadline, some analog cable equipment will remain in cable systems and in the homes of cable subscribers. Accordingly, we must address how to ensure that cable subscribers are able to view the higher quality signals provided by the broadcast stations in their communities. This Notice initiates our review.

Ideally, I would have preferred that we refrain from making specific proposals about these issues at this juncture. In my view, we should first build a record about the marketplace solutions being developed to address cable operators' statutory obligations with respect to material degradation and viewability before we make judgments about what standards the government should impose. I have questions about the possible statutory and constitutional implications involved in this proposed endeavor, particularly with respect to mandating carriage of a broadcast signal in both analog and digital formats. I hope that commenting parties will enlighten us with their views of these issues. I look forward to working with my colleagues to set the appropriate standards to accomplish our common goal through this proceeding in a legally sustainable way.

I thank the Bureau for their hard work and I support this Notice.

