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

AGAPE CHURCH, INC., *et al.*, Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 12-1334

REPLY IN SUPPORT OF JOINT MOTION FOR A STAY PENDING JUDICIAL REVIEW

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I. SUMMARY

Movants are likely to prevail on the merits and, at least, raise a "substantial" legal challenge to the order on review.[1] If the *Order* takes effect, elimination of the viewability rule will seriously and irreparably harm must-carry broadcasters and viewers; whereas, if a stay is granted, covered cable operators will simply be required to continue complying with the rule (as they have done for the last several years). Cable operators can also obviate the need for compliance entirely by transitioning to all-digital systems. The balance of harms tips in favor of a stay to maintain the *status quo* while this Court conducts its full inquiry on the merits.

II. A STAY PENDING JUDICIAL REVIEW IS WARRANTED.

A. Movants Are Likely To Prevail On The Merits.

1. Section 614(b)(7) plainly requires that must-carry signals be *actually* viewable, not merely available in theory. Mot. 7-11. In an about-face from the position that Section 614(b)(7) is *unambiguous*, the FCC found that the statute is now *unclear* and relies on that hook to justify its "revise[d] . . . interpretation," Opp. 12, of the statute. The FCC now asserts that "the ordinary meaning of the term 'viewable' is simply 'capable of being seen or inspected'" and, thus, a must-carry signal is "viewable" if the cable operator offers additional equipment that enables viewability "'for sale or lease, either for free or at an affordable cost that

[1] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 27 FCC Rcd 6529 (2012) ("*Order*").

does not substantially deter use of the equipment.'" *Id.* at 8 (quoting *Order* ¶ 8). But Section 614(b)(7) mandates that every cable subscriber "shall" receive a viewable signal, Mot. 7, while the *Order* ensures the viewability of must-carry signals only if analog cable subscribers accept an offer of additional equipment, take the steps necessary to have it installed, and pay any required fees.

Contrary to the FCC's argument, Opp. 13, the structure of Section 614(b)(7) makes plain that must-carry signals must be viewable *without added equipment*, Mot. 8-9. The second sentence mandates that must-carry signals "be viewable via cable on all television receivers of a subscriber which are connected" by a cable operator, ensuring that all subscribers can access must-carry stations in the same manner as all other channels on at least one television—the one the cable operator "connect[s]." 47 U.S.C. § 534(b)(7). The third sentence allows an operator to meet its viewability obligation with an "offer to sell or lease" equipment but only for "additional" subscriber-installed receivers. *Id.* Thus, the FCC's conclusion that an "offer" of equipment satisfies Section 614(b)(7) renders the second sentence meaningless and conflicts with the statutory scheme. *See* Mot. 8-9.[2]

With respect to the evidence that Congress intended for must-carry signals to

[2] The FCC's legislative history citation fails to support its position. Opp. 14 (citing S. Rep. No. 102-92, at 86 (1991)). That material essentially restates Section 614(b)(7)'s language, supporting Movants' view. Intervenors' emphasis on the fact that all-digital systems require set-top boxes, Cable Opp. 11-12, is also unavailing; the *Order* violates the statute because it permits cable operators to require subscribers to employ equipment to view must-carry signals *beyond that* required to view other broadcast stations and cable channels.

be viewable without added equipment, Mot. 7-8, the agency alleges that Movants "quote language . . . from questions posed in a Senate Report," Opp. 14. But the "questions" regarding whether cable operators might impose terms of carriage—for example, carrying stations on channels that cannot be viewed without added equipment—were ones with potentially "enormous consequences" to viewers and the "American system of broadcasting." S. Rep. No. 102-92, at 45-46. These "questions" ultimately compelled Congress to "address[] both the primary concern of carriage and the secondary concerns of terms of carriage," *id.*, and thus were the very issues at which the statute was aimed. The FCC also attempts to minimize Congress' prior rejection of the A/B switch to ensure broadcast signal availability, *see* Opp. 14-15, but overlooks the reality that consumers are at least as unlikely to install a Digital Transport Adaptor ("DTA"), Mot. 8, as they are to toggle a switch.

Conceding that it previously found Section 614(b)(7) to be "plain," the FCC argues that "an agency may revise or modify its interpretation of an ambiguous provision of a statute that it administers." Opp. 11. This misses the point. The FCC reiterated that it is "*bound by statute* to ensure that must-carry signals are *actually* viewable by all subscribers" in the *NPRM*.[3] In the *Order*, the agency made an about-face on the threshold question whether Congress spoke directly to the question of viewability in Section 614(b)(7). *Order* ¶¶ 6, 8, 11, 15. Without

[3] *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 27 FCC Rcd 1713, 1715 ¶ 5 (2012) ("*NPRM*") (emphasis added).

reasoned explanation, the FCC concluded that the provision it once found "straightforward" is now unclear. Mot. 10-11. Today, it offers the justification that marketplace and technology changes altered "the proper 'understanding of the statutory viewability requirement.'" Opp. 5 (quoting *Order* ¶ 6). But such factual changes cannot convert a "straightforward" provision into an ambiguous one.[4]

The FCC claims that NAB "conceded" that the agency's novel substantive reading is reasonable. *Id.* 2, 12. Although NAB suggested that the "provi[sion of] *free* equipment that enables access to digital broadcast signals" might satisfy the viewability requirement, this was "based on the voluntary commitments [by cable operators] identified in the record" at that time.[5] As NAB later explained, it offered this proposal "in the spirit of compromise" but "never intended to prejudice [its] legal rights with respect to the proper interpretation of the statute."[6] Based on new information that "even a free equipment offer would present barriers to access . . . inconsistent with the statute," NAB withdrew its voluntary offering.[7] The full

[4] The FCC and Intervenors suggest that the agency needed to avoid a constitutional question. Opp. 8-9; Cable Opp. 9. But "[t]he canon of constitutional avoidance comes into play only when . . . the statute is found to be susceptible of more than one construction." *Clark v. Martinez*, 543 U.S. 371, 385 (2005). Further, it is settled that the must-carry provisions of Section 614 are constitutional. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *see also Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 97-98 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3275 (2010).

[5] *Ex Parte* Letter from NAB, CS Docket No. 98-120, at 2-3 (May 23, 2012) ("NAB May 23 *Ex Parte*").

[6] *Ex Parte* Letter from NAB, CS Docket No. 98-120, at 4 (June 8, 2012) ("NAB June 8 *Ex Parte*").

[7] *Id.* at 2.

record shows that NAB's position below was that the *2007 Order*[8] correctly held that the "plain meaning" and "structure" of Section 614(b)(7) preclude an equipment-based solution.[9] In any case, it is the *Commission's* departure from its prior understanding of the statute that matters, Mot. 10-11, not what NAB may have written in a letter that it later withdrew.

2. The *Order* also violates Section 614(b)(4)(A)'s bar on discriminatory carriage by permitting cable operators to require analog subscribers to pay for added equipment in order to view must-carry stations, while delivering cable channels and certain broadcast channels in a format accessible without such equipment. *Id*. 11-12. The FCC attempts to distinguish its *EchoStar Order* because it "constru[es] a *different* statutory provision, 47 U.S.C. § 338(d), . . . directed to 'channel positioning' rather than 'signal quality' and imposes a requirement of 'nondiscriminatory' access by its terms." Opp. 16. But Section 614(b)(4)(A) likewise prescribes non-discriminatory carriage. Mot. 11. Indeed, the Communications Act expressly recognizes that the provisions establish "comparable" nondiscrimination standards. 47 U.S.C. § 338(j).

3. The *Order* also conflicts with Section 623(b)(7)'s requirement that cable operators make must-carry signals available in the lowest priced basic service tier

[8] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 22 FCC Rcd 21064 (2007) ("*2007 Order*").

[9] NAB June 8 *Ex Parte*, at 3 (collecting citations to NAB submissions).

and apply the same definition of basic service for all classes of customers. Mot. 12-13. Responding that this "claim 'conflates equipment fees with service fees[,]'" Opp. 16, the FCC again misses the point. At the end of the day, it will cost more for analog subscribers to receive must-carry signals in the basic tier because the *Order* requires them to pay for additional equipment. Mot. 13.

4. The FCC fails to rebut Movants' arguments that the *Order* otherwise violates the Administrative Procedure Act ("APA"). *First*, the agency made no attempt to refute the argument that it failed to adequately explain why facts that it previously said would support a three-year extension instead support repeal. *Id.* 13-14. *Second*, the FCC fails to show that record evidence supports its conclusion that DTAs are readily available in an "affordable" range of "no more than $2," Mot. 14, responding with a conclusory statement that this is so. Opp. 6 (quoting *Order* ¶ 14). The FCC deems its lack of evidence on this "critical" factor, Mot. 14, "inconsequential" because the *Order* only permits operators to cease analog carriage of must-carry signals if they offer "affordable set-top equipment," Opp. 12 n.5. But "[w]ithout this crucial datum, the Commission has no way of knowing whether" its new regulatory regime will "be of net benefit." *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011).

Third, the FCC's response to Movants' argument that the *Order* violates the APA's notice requirements, Mot. 14-15, is meritless. Foremost, the viewability

rule was not set to automatically sunset. *See* Opp. 4, 13 n.6. Rather, the *2007 Order* contemplated "review by the Commission during the last year" it was effective. 22 FCC Rcd at 21070 ¶ 16. Moreover, the FCC's assertion that "no notice was required[,]" Opp. 13 n.6, is flawed. This logic would exempt *any* rule requiring statutory interpretation from APA rulemaking processes.

Fourth, the FCC failed to rebut Movants' showing that the agency's conclusion that a six-month "transition" period will allow a "smooth transition" is arbitrary and capricious. *See* Mot. 15. Although the FCC contends that this period will "give consumers 'sufficient time to make any necessary arrangements,'" Opp. 17 (quoting *Order* ¶ 17), the six-month period is illusory. Broadcasters will receive a mere 90-days voluntary notice from cable operators, *see infra* at 9, and viewers will receive only 30 days "mandatory" notice, Opp. 17. The FCC makes no meaningful effort to explain how even a six-month period is rational in light of past experience with the digital television ("DTV") transition. Mot. 15.

B. Movants And The Viewing Public Will Suffer Irreparable Harm.

The FCC seeks to diminish Movants' assertions of harm as mere economic injuries capable of later redress. Opp. 18. But Movants stand to suffer grave and *irreparable* harm in the form of unquantifiable and unrecoverable economic, competitive, and goodwill losses. Mot. 16-19. As demonstrated, they will suffer losses in viewership and audience share if the *Order* takes effect. *Id.* at 16. Such

losses are irreparable because they are "'difficult, if not impossible, to quantify in terms of dollars.'" *Id*. (citation omitted). Further, Movants face "'the threat of a *permanent* loss of [viewers]'" once they lose access to viewers. *Id*. at 17 (citation omitted, emphasis added). Declining viewership will cause losses in advertising revenues, *id*., which are unrecoverable and, thus, the very type of "economic loss," Opp. 18, that justifies a stay, Mot. 17. These competitive injuries are irreparable precisely because lost viewers and revenues *cannot* "'be regained through competition.'" Opp. 18 (quoting *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir. 1985)). Absent a stay, the *Order* will also irreparably injure the viewing public, as must-carry broadcasters will be forced to eliminate or reduce programming, Mot. 18-19, disproportionately hurting low-income viewers, "people of color[,] and non-English speakers." NHMC Resp. at 3.

Each of the FCC's attacks on Movants' showing of irreparable harm lacks merit. *First*, the FCC emphasizes the *Order*'s lack of "impact . . . on most (*i.e.*, digital cable) subscribers' access to must-carry stations." Opp. 18. But this ignores the fact that Movants' irreparable harm flows from the impact of the *Order* on the *twelve million plus* analog cable households. Mot. 13-14. *Second*, the FCC's attempt to refute Movants' irreparable harm based on the *ipse dixit* that the *Order* "would not 'threaten the viability of must-carry stations,'" Opp. 18 (quoting *Order* ¶ 15), should be rejected.

Third, the FCC contends that Movants improperly "assume[] a substantial loss of viewership" because "the *Order* ensures that 'subscribers on hybrid systems may continue to access [must-carry] signals at little or no additional expense.'" Opp. 18 (quoting *Order* ¶ 15). This ignores the fact that an *offer* of free or low-cost DTAs does not "ensure" viewability; analog subscribers will be unable to view must-carry signals if they do not *accept* and *implement* the offer. Mot. 16. The assumption that consumers will do so disregards past experience, including the DTV transition, which demonstrates that many consumers will not understand the need for added equipment or choose to obtain, install, and incur continuing charges for it. *Id.* 15-16; *see also* NHMC Resp. at 7-12.

Fourth, the agency irrationally contends that the six month "transition period" allows Movants to avoid any harm, suggesting that "broadcasters might prudently be advised to take [steps] to educate their viewers." Opp. 19-20. Yet, the equipment-based solution is optional, *id.* at 18, and the FCC relied on cable operators' voluntary commitment to notify broadcasters a mere 90 days before a change, Mot. 6. Thus, broadcasters at best will have *90 days*—not six months—notice of the need for viewer education. Notice could come at any time after December 12, and the decision to cease analog carriage is left solely to the cable operators' discretion. To begin a viewer education plan before knowing when or if a must-carry signal would be dropped would harm the broadcaster and confuse

consumers. Broadcasters would be forced to devote air-time to education instead of paid advertising, while inviting competitive harm (by suggesting publicly to competitors and advertisers that they fear viewer loss).[10] And viewer education efforts, before or after receipt of the relevant notice, will necessarily be over-inclusive and generate confusion. It is impossible for stations to target announcements only to analog subscribers needing additional equipment, so such announcements will reach not just affected cable subscribers but all viewers including all-digital subscribers, hybrid subscribers where analog carriage may continue, satellite subscribers, and even over-the-air viewers.[11]

C. The Balance Of Harms and the Public Interest Favor A Stay.

Maintenance of the *status quo* will not appreciably harm cable operators or their customers. The FCC claims that cable operators should be "relie[ved] from capacity constraints" and permitted to re-dedicate capacity to high-definition cable and high-speed broadband Internet carriage. Opp. 20. Because cable operators can obtain the very same relief by transitioning to an all-digital system, the harm to cable operators of maintaining the *status quo* are insubstantial. Moreover, the public interest favors a stay. *See* Mot. 20.

III. CONCLUSION

The Joint Motion for a stay pending judicial review should be granted.

[10] Mot., Ex. A, Crosby Decl. ¶ 7; Ex. B, Wilkinson Decl. ¶ 7.

[11] Mot., Ex. A, Crosby Decl. ¶ 7; Ex. B, Wilkinson Decl. ¶ 7.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Helgi C. Walker, hereby certify that on September 10, 2012, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case will be served by the CM/ECF system:

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