

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of)	
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Carriage of Digital Television Broadcast)	CS Docket No. 98-120
Signals: Amendment to Part 76 of the)	
Commission's Rules)	
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**Reply Comments of the National Association of Broadcasters
on the Fourth Further Notice of Proposed Rulemaking
and Declaratory Order**

The National Association of Broadcasters (“NAB”)¹ submits this brief reply in response to two comments on the above-referenced *Notice of Proposed Rulemaking*.²

The National Cable & Telecommunications Association (“NCTA”)³ and Time Warner

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Carriage of Digital Television Broadcast Signals*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, CS Docket No. 98-120, FCC No. 12-18 (rel. Feb. 10, 2012)(“*Notice*”). The *Notice* proposed to extend for three years the rule implementing the statutory requirement that must carry signals be “viewable” on all receivers connected to a cable system (the “Viewability Rule”).

³ Comments of the National Cable & Telecommunications Association, CS Docket No. 98-120 (filed March 12, 2012).

Cable, Inc. (“TWC”)⁴ both oppose extension of the Viewability Rule and argue that the Commission cannot constitutionally require cable television systems to make must carry signals viewable on all receivers connected to a cable system.

The Commission need not address most of the cable comments since they, almost in their entirety, repeat unmeritorious arguments that the cable industry has raised for two decades against must carry before Congress, the Commission and the courts. These arguments have been uniformly rejected and are not strengthened by repetition. In particular, most of these arguments were raised and rejected in the proceedings leading to the *Viewability Order*.⁵

I. The Commission Has Not Reopened its Settled Interpretation of the Act

In the *Notice*, the Commission recognized that the Viewability Rule merely implements the statutory requirement that must carry signals be viewable on all receivers connected to a cable system, a requirement that would remain in place whether or not the Viewability Rule is extended.⁶ Although the Commission did not ask for comments on its decisions interpreting the viewability provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the “Act”), TWC seeks to reopen the Commission’s longstanding interpretation of the Act.⁷ The Commission need not, and indeed should not, accept its invitation to re-plow settled ground.

⁴ Comments of Time Warner Cable, Inc., CS Docket No. 98-120 (filed March 12, 2012).

⁵ *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 (2007) (“*Viewability Order*”).

⁶ *Notice* ¶¶ 6-7, 10.

⁷ TWC Comments at 3-7.

The *Viewability Order* was adopted by the Commission in 2007. It was published in the *Federal Register* on February 1, 2008.⁸ TWC did not seek review of the Commission's decision nor file a petition for reconsideration.⁹ It is too late for TWC to do so now.

The *Notice* is very clear; it does not ask for comment on the statutory analysis that the Commission has consistently held since 1993.¹⁰ Where an agency applies an existing policy or statutory interpretation without reexamining them or inviting comments on those conclusions, it does not reopen its previous decision, and the fact that unsolicited comments, like those of TWC, attempt to reopen those matters, does not subject its prior determination to challenge. See *CTIA v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006); *Kennecott Utah Copper Corp. v. Dept. of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996).

The same applies to NCTA and TWC's First Amendment arguments. The Commission concluded in the *Viewability Order*, in response to arguments raised by both NCTA and TWC (among others), that the Viewability Rule did not violate the First Amendment. The *Notice* did not solicit comments on that conclusion. Unless NCTA

⁸ 73 Fed. Reg. 6043 (Feb. 1, 2008).

⁹ Applications for review filed by C-SPAN and other cable programmers were dismissed for lack of standing. *C-SPAN v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008). TWC argues that the Viewability Rule "has never been subjected to judicial scrutiny." TWC Comments at 2. While the cable programmers who were petitioners in *C-SPAN* lacked standing to complain about the Viewability Rule, the same could not have been said about TWC, which could have argued that, absent the viewability requirement, it would not have carried some must carry signals in analog. Collateral estoppel precludes relitigation of issues that a party had a full opportunity to litigate. See *Va. Hosp. Assn. v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987). Having chosen not to contest the *Viewability Order* in 2008, TWC is barred from contesting the Commission's statutory interpretation now.

¹⁰ See *Viewability Order*, 22 FCC Rcd at 21073 n.60.

and TWC demonstrate that the impact of the Viewability Rule is substantially different than the Commission found in 2007 – and we show below that they did not – the Commission is not obliged to consider what, in effect, is a late-filed petition for reconsideration of the *Viewability Order*.

II. The Problems Addressed by the Viewability Rule Remain Significant

NCTA’s comments contend that cable systems should be permitted to offer must carry signals (or perhaps only some must carry signals) in digital format only, requiring subscribers to analog cable service, or subscribers to digital service who have analog receivers, to lease converters in order to view local television signals because, in NCTA’s words, “use of analog channels for those services” do not “provide substantial value” to the cable system. NCTA Comments at 15.

The must carry rules, however, were not adopted to provide value to cable *operators*, but instead to ensure that cable *subscribers* have access to all local television signals. Indeed, Congress adopted the must carry regime because it found that many cable operators believed they would benefit by denying their subscribers access to local television signals.¹¹ NCTA merely repackages the arguments cable systems have made against must carry for decades.

The Commission must consider cable customers as it reviews this rule. NCTA is wrong to dismiss the beneficiaries of the Viewability Rule as a “shrinking minority,”¹² “not only unwilling to purchase digital tiers but also unwilling to obtain and use the

¹¹ See Section 2(a)(5) & (15) of Act, 47 U.S.C. § 521 nt.

¹² NCTA Comments at 3.

equipment necessary to watch digital basic tier programming.”¹³ The fact is that these customers should be able to access local programming as Congress intended.

The Viewability Rule, of course, does not force cable operators into offering analog cable service. Under this rule, operators may convert their systems to all-digital service and carry local television signals in digital format only.¹⁴ But if they do decide to provide analog or hybrid service, then under the Act, they cannot decide that some local signals should be viewable by all subscribers and others not.

NCTA’s desired rule would allow cable operators to discriminate among local signals, or provide cable network signals in a viewable format but not local broadcast signals. Such a rule would not only violate the viewability requirements of the Act, but would independently violate section 614(b)(4)(A), 47 U.S.C. § 534(b)(4)(A), which provides that “the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for other type of signal.” NCTA asks the Commission to permit precisely

¹³ *Id.* at 15.

¹⁴ TWC (Comments at 6-7) claims that, if cable systems do so, they must offer free converters to subscribers. Nothing in the Viewability Rule prevents cable systems from charging subscribers for equipment. TWC made this same argument in comments on the Viewability Rule, and the Commission then pointed out that “Time Warner’s argument is premised on an interpretation of Section 614(b)(7) that we decline to adopt, namely that it requires cable operators to provide set top boxes.” The Commission also observed that if cable systems facilitated the retail availability of digital equipment, that would further reduce the burden on cable operators “to provide such boxes.” *Viewability Order*, 22 FCC Rcd at 21079. That cable operators have chosen not to make set-top boxes available for purchase at retail is not a basis for the Commission to relieve them of their obligations to make local television signals viewable on all connected receivers.

what the Act denies cable operators the right to do – provide better carriage conditions for some signals than they do for local broadcast stations.¹⁵

The Commission has had no difficulty rejecting similar schemes. It found that Echostar’s carriage of some local television signals on one satellite, while relegating others to a second satellite that required subscribers to install a separate receive antenna, violated Echostar’s carriage obligations.¹⁶ NCTA’s proposal would have the identical effect – some must carry signals would be viewable and others would not without additional equipment.

Moreover, what NCTA calls a “shrinking minority” in fact represents millions of cable subscribers. According to NCTA’s own statistics, 21.6 percent of cable basic video subscribers receive only analog service.¹⁷ That means, of the 58.3 million total subscribers to basic cable video service, almost *12.6 million* households could be affected by repeal of the Viewability Rule. This is not an insular minority. And millions of additional cable homes may subscribe to digital video service but still view television over analog receivers. In the *Viewability Order*, the Commission rejected a proposal that would have permitted cable operators to stop carrying an analog version of must carry signals once 85 percent of subscribers in an area could view digital signals,

¹⁵ Indeed, NCTA acknowledges that operators of hybrid cable systems “had to find a way to make those [cable programming] networks . . . available to those analog sets.” NCTA Comments at 8. At bottom, NCTA demands the flexibility to ensure access to cable networks, but not local broadcast signals, for subscribers with analog receivers. The Cable Act was passed precisely to bar cable operators from making those decisions.

¹⁶ *NAB and ALTV Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, 17 FCC Rcd 6065 (Med. Bur. 2002). Notably, Echostar – unlike NCTA’s proposed regime – did not charge subscribers for the additional equipment needed to view all local signals.

¹⁷ www.ncta.com/StatsGroup/Availability.aspx (last visited March 7, 2012).

concluding that “we do not believe we have the authority to exempt any class of subscribers from this requirement, no matter how few the analog subscribers.”¹⁸ That conclusion continues to support the Viewability Rule.

Neither NCTA nor TWC propose an alternative rule that would ensure compliance with the statutory mandate that must carry signals be actually viewable on the many millions of analog receivers that remain connected to cable systems. That is the problem that prompted the adoption of the Viewability Rule, and the fact that so many subscribers continue to rely on analog receivers fully supports the Commission’s proposal to extend it.¹⁹

III. The Cable Comments Provide No Basis for the Commission to Revisit its Conclusion that the Viewability Rule is Consistent with the First Amendment

NCTA and TWC finally assert again their oft-repeated arguments that, regardless of Congress’ detailed findings supporting must carry, its specific directives to the Commission to implement those findings, and the Supreme Court’s confirmation of the constitutionality of must carry in *Turner II*,²⁰ the Commission must somehow conclude

¹⁸ *Viewability Order*, 22 FCC Rcd at 21082.

¹⁹ No party objected to extending the HD Carriage Exemption, although cable commenters suggest that the exemption be made permanent. To the extent that the Commission considers doing so, rather than reviewing the exemption again in three years, it should consider also making the Viewability Rule permanent. In both cases, the rules will diminish in effect as cable systems expand their capacity and convert to all-digital operations.

²⁰ *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997)(*Turner II*). While both TWC and NCTA argue that strict constitutional scrutiny should apply to an extension of the Viewability Rule, the Supreme Court held that must carry is subject to only intermediate scrutiny. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994). That conclusion is binding upon the Commission.

that an extension of the Viewability Rule would violate the First Amendment. Their arguments are easily refuted.²¹

First, the arguments that NCTA and TWC raise would not only apply to the Viewability Rule, but also would affect the entire must carry regime. It is well-settled that the Commission cannot consider arguments about the constitutionality of its governing statute. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)(noting that “the constitutionality of a statutory requirement [is] a matter which is beyond [the] jurisdiction [of an agency] to determine”).

Second, to the extent that NCTA and TWC challenge findings made by Congress that continuation of local broadcasting remains an important governmental interest, that must carry is needed to ensure the benefits of local broadcasting, and that signal selector options are not an adequate substitute for carriage,²² their arguments are addressed to the wrong party. Once Congress reached those judgments and they were upheld as reasonable in *Turner II*, only Congress has the power to revisit those conclusions. Neither agencies nor lower courts have the power to continually re-evaluate the reasonableness of Congress’ judgments about the need for must carry, despite NCTA and TWC’s wishes.

Third, while NCTA claims that the requirement of carrying some local broadcast channels in analog severely impacts some hybrid cable systems, these claims are

²¹ NAB has rebutted these arguments before in detail and will not burden the Commission with a repetition here. See, e.g., Reply Comments of NAB and MSTV, CS Docket No. 98-120 (filed Aug. 16, 2007); *Ex Parte* Letter from Jack N. Goodman, NAB, to Marlene H. Dortch, Federal Communications Commission, CS Docket No. 98-120 (filed Aug. 5, 2002); Reply Comments of NAB, CS Docket No. 98-120 (filed Dec. 22, 1998) at 70-88; Comments of NAB, CS Docket No. 98-120 (filed Oct. 13, 1998) at 42-46 & App. A.

²² See Section 2(a)(9),(10),(16) & (17) of the Act, 47 U.S.C. § 521 nt.

accompanied by no evidence. NCTA's comments (as well as those of TWC) do not include any showing of how many hybrid cable systems exist, the percent of capacity those systems use for analog service, or the number of those channels that cable systems devote to carriage of cable programming networks or broadcast channels carried under retransmission consent agreements. The Commission is once again asked to act on supposition, not data.²³ When the FCC did require cable operators to present actual data concerning cable capacity, it showed that – as of 2003 – carriage of both analog and digital signals of all local television stations would occupy less than 8.5 percent of an average cable system.²⁴ And as cable capacity has continued to increase in the past nine years, the impact today would be very significantly smaller.

Finally, the Viewability Rule remains *voluntary*. Cable operators who claim to face capacity constraints because of the need to carry a few must carry signals in both analog and digital can convert their systems to all-digital operation, obtain expanded capacity for all services, and carry local broadcast signals in only one format. The fact that cable operators have a choice forecloses any argument that the Viewability Rule imposes a special First Amendment burden. See *Viewability Order*, 22 FCC Rcd at 21083-86; *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 365 (4th Cir. 2001)(upholding satellite must carry because satellite carriers have a choice of whether to become subject to the rule).

²³ NAB notes that many previous claims of harm by the cable industry have proven to be exaggerated. See *Turner II*, 520 U.S. at 205; Letter from Edward O. Fritts to Brian Lamb, Exh. C to Reply Comments of NAB, CS Docket No. 98-120 (filed Dec. 22, 1998)(contrary to its claims, C-SPAN *gained* subscribers after must carry went into effect).

²⁴ See Comments of NAB and MSTV, CS Docket No. 98-120 (filed July 16, 2007) at 13-15. That figure included stations carried under retransmission consent; thus, the impact of carriage of must carry stations only would be far less.

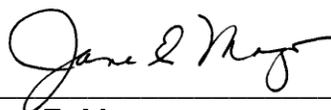
NCTA and TWC offer no evidence that the impact of the Viewability Rule on their First Amendment rights has materially changed since 2007; indeed, as more cable systems increase capacity or convert to digital, the actual impact of the rule will steadily decrease. The Commission should reject once again their efforts to undermine Congress' determination – upheld by the Supreme Court – that must carry rules serve an important governmental interest in a constitutional way.

Conclusion

For the foregoing reasons and the reasons set forth in NAB's initial comments, the Commission should extend the Viewability Rule.

Respectfully submitted,

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