

**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)	RM _____
)	

PETITION FOR RULEMAKING



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I. INTRODUCTION

With this Petition for Rulemaking ("Petition"), the American Cable Association ("ACA") asks the Commission to extend its small cable high definition ("HD") must-carry exemption, currently scheduled to expire June 12, 2015. Under this exemption, small cable systems (i) with 552 MHz or less of activated channel capacity, or (ii) that serve 2,500 or fewer subscribers and are not affiliated with a cable operator serving more than 10 percent of all multichannel video programming distributor ("MVPD") subscribers, are not required to deliver the signals of must-carry broadcast stations in HD (the "HD carriage exemption"). This exemption has worked as intended by providing many eligible small cable systems with the additional time they needed to provide must-carry broadcast signals in HD. At the same time, there remain a number of small cable systems that continue to rely on the exemption, and will need to rely on the exemption past its currently scheduled expiration in June 2015. Accordingly, ACA requests that the Commission extend the HD carriage exemption for an additional three years. In addition, ACA

requests that the Commission confirm that all-analog systems are not required, and have never been required, to transmit must-carry signals in HD.

Commission action to extend the exemption would build upon its longstanding recognition that the burdens associated with complying with the HD must-carry requirement would cause significant harm to some cable systems. In 2008, in response to concerns from small cable operators about the cost and technical capacity needed to comply with the 2007 *Viewability Order*, the Commission first established an exemption from the requirement to carry must-carry HD broadcast signals in HD for certain small systems.¹ This exemption applied to all eligible systems including those that carried *some* programming in HD (i.e., hybrid analog/digital systems),² and was set to expire three years after the conclusion of the DTV transition (June 12, 2012).³ In 2012, the Commission extended the HD carriage exemption for an additional three years.⁴ At that time, the Commission found that the same financial and capacity constraints that small cable operators faced in 2008 continued to exist and concluded that these operators required additional time to come into full compliance with the material degradation provisions of the carriage rules in a cost-effective way.⁵

For cable systems that continue to rely on the HD carriage exemption, ACA has found that very little has changed since 2012 to alter the conclusion reached by the Commission that the exemption is necessary to protect small system operators and consumers from the potential costs and service disruptions that immediate compliance would engender. ACA member companies operate 143 cable systems that continue to rely on the HD carriage exemption, and

¹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fourth Report and Order, 23 FCC Rcd 13618 (2008) ("Fourth Report and Order").

² *Id.*, ¶¶ 7, 12

³ *Id.*, ¶ 11.

⁴ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report and Order, 27 FCC Rcd 6529, ¶¶ 20-22 (2012) ("Fifth Report and Order").

⁵ *Id.*, ¶¶ 20-22.

the harms that would result from requiring these small cable systems to carry must-carry HD broadcast signals in HD remain as significant today as they were in 2008 and in 2012. For systems with a capacity of 552 MHz or less, the HD carriage mandate would force operators to drop existing channels or shut down systems altogether. Systems with 2,500 or fewer subscribers will also face a similar dilemma – either find a way to absorb the costs associated with new equipment or shut down their systems entirely. Avoiding the harms related to these potential actions warrants an extension of the HD carriage exemption in this proceeding. In other words, the small system HD carriage exemption continues to serve the public interest. Another three-year extension is uniquely appropriate now in light of the upcoming broadcast spectrum incentive auction. It would be inequitable to force cable operators to incur the burdens of offering “must carry” signals in HD now when there is a degree of uncertainty over the number of must-carry stations that will continue to broadcast in their market or will continue to offer their signals in HD if, as a result of participating in the auction, they ultimately share spectrum with another station.

Moreover, the Commission should confirm that all-analog systems are not required, and have never been required, to transmit must-carry signals in HD on the grounds that carriage of must-carry signals in HD format on analog-only systems is not “technically feasible” within the meaning of Section 614(b)(4)(A) of the Communications Act and the Commission’s rules. These systems comprise an even smaller subset of the class of systems covered by the HD carriage exemption, and are technically incapable of providing HD channels. For this reason, and to remove any regulatory uncertainty, the Commission should clarify that any cable system that only offers programming in analog is not required, and has never been required, to provide must-carry signals in a HD format.

II. SOME SYSTEMS CONTINUE TO RELY ON THE COMMISSION'S HD CARRIAGE EXEMPTION

In 2012, the Commission concluded that extending the HD carriage exemption for an additional three years would be in the public interest.⁶ In particular, the Commission relied on ACA's data showing that at least 52 of its members, operating more than 385 systems in total, still relied on the exemption and would be harmed if it expired.⁷

As it did in 2012, ACA recently conducted a survey⁸ of its members to determine the number of systems still relying on the HD carriage exemption.⁹ The survey results show that, at a minimum, 53 ACA members, operating 143 systems in total, continue to rely on the HD carriage exemption. Respondents report these systems serve 49,790 subscribers in total, or on average, 348 subscribers per system. Additionally, the survey reveals that these systems offer, on average, 2.5 must-carry stations in a down-converted format only. A breakdown of the types of systems utilizing the HD carriage exemption from the survey is set forth in Table 1 below.

⁶ Fifth Report and Order, ¶ 20. The Commission found that a significant number of small systems with financial or channel capacity constraints continued to rely on the HD carriage exemption and required additional time to come into compliance in a cost-effective way. *Id.*

⁷ *Id.*, ¶ 20, citing *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket 98-120, Comments of the American Cable Association, at 5 (filed Mar. 13, 2012) ("2012 ACA Comments"); Reply Comments of the American Cable Association, at 8 (filed Mar. 22, 2012) ("2012 ACA Reply Comments").

⁸ ACA conducted an online survey of its members from October 2, 2014 through October 22, 2014.

⁹ ACA represents approximately 840 independent MVPDs that serve about 7.4 million video subscribers, primarily in smaller markets and rural areas. ACA's members range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. The median number of video subscribers per member is 1,060. 80% of ACA's members serve fewer than 5,000 subscribers. Most ACA members provide video, voice, and data services, as part of a triple play offering, delivering these critical services to smaller-market and rural subscribers across the nation. See *Protecting and Promoting the Open Internet, Framework for Broadband Internet Service*, GN Docket No. 14-28, GN Docket No. 10-127, Comments of the American Cable Association, Exhibit B, Connecting Hometown America, How Small Operators of ACA are Having a Big Impact, A paper by the American Cable Association, Research and Analysis by Cartesian, at 3 (filed July 17, 2014).

Table 1: ACA survey respondents relying on HD carriage exemption.

Types of Systems	System Totals
552 MHz or Less and More Than 2,500 Subs	0
552 MHz or Less and 2,500 or Fewer Subs	117
More Than 552 MHz and 2,500 or Fewer Subs	26
TOTAL: 552 MHz or Less or 2,500 or Fewer Subs	143

With regard to systems with 552 MHz or less system capacity, 42 respondents indicated that they rely on the HD carriage exemption. These respondents account for at least 117 systems, all of which also serve 2,500 or fewer subscribers. Of these systems with 552 MHz or less capacity, respondents report these systems serve 35,758 subscribers in total, or on average, 306 subscribers per system. Additionally, the survey reveals that these systems offer on average 2.3 must-carry stations in a down-converted format only. Only 20.5% (24 in total) of these systems report offering some HD digital television services. 38.5% (45 in total) of these systems report offering broadband service. A summary of the survey results for ACA members relying on the HD carriage exemption for systems with 552 MHz or less capacity is set forth in Table 2 below.

Table 2: ACA survey respondents with systems of 552 MHz or less capacity relying on HD carriage Exemption.

Type of Systems	System Totals	Total Subscribers Served	Total Number of Must Carry Signals Offered in a Down-Converted Format Only	Systems Offering Some HD Digital Television Service	Systems Offering Broadband Service
552 MHz or Less and More Than 2,500 Subs	0	0	0	0	0
552 MHz or Less and Fewer Than 2,501 Subs	117	35,758	271	24	45
TOTAL: 552 MHz or less	117	35,758	271	24	45

ACA obtained similar survey results for systems serving 2,500 or fewer subscribers, with 53 respondents reporting that they rely on the HD carriage exemption. These operators account for 143 systems, of which 81.8% (117 in total) also have 552 MHz or less capacity. Of these systems with 2,500 or fewer subscribers, respondents report these systems serve 49,790 subscribers in total, or on average, 348 subscribers per system. Additionally, the survey reveals that these systems offer on average 2.5 must-carry stations in a down-converted format only. A total of only 25.9% (37 in total) of these systems report offering some HD digital television services. 54.4% (62 in total) of these systems report offering broadband service. A summary of these survey results is set forth in Table 3 below.

Table 3: ACA survey respondents with systems of 2,500 or fewer subscribers relying on HD carriage exemption.

Type of Systems	System Totals	Total Subscribers Served	Total Number of Must Carry Signals Offered in a Down-Converted Format Only	Systems Offering Some HD Digital Television Service	Systems Offering Broadband Service
2,500 or Fewer Subs and More Than 552 MHz	26	14,032	85	13	17
2,500 or Fewer Subs and 552 MHz or Less	117	35,758	271	24	45
TOTAL: 2,500 or Fewer Subs	143	49,790	356	37	62

As discussed in more detail below, this data demonstrates that a significant number of cable operators continue to rely on the HD carriage exemption, supporting a conclusion by the Commission that ending the exemption and requiring these systems to carry the HD signals of must-carry stations would adversely affect a significant number of system operators.

III. CABLE SYSTEMS WITH 552 MHz OR LESS OF CHANNEL CAPACITY SHOULD NOT BE REQUIRED TO OFFER MUST-CARRY SIGNALS IN HD

Hybrid analog/digital cable systems with 552 MHz or less of channel capacity face significant burdens – notably, bandwidth constraints – in providing must-carry broadcast signals in both analog and HD format. The Commission has twice recognized this fact, relieving systems with 552 MHz or less capacity of the requirement to carry both signals in 2008 and extending this exemption in 2012.¹⁰ Because the circumstances that justified the HD carriage exemption and its extension have not improved for operators that still rely on it, the Commission

¹⁰ See Fourth Report and Order, ¶¶ 7-8; Fifth Report and Order, ¶ 20.

should extend the exemption to permit systems with 552 MHz or less of capacity to retransmit the HD broadcasts of must-carry signals in standard definition digital or analog format for an additional three years.

The results of ACA's member survey demonstrate that capacity constraints have not improved since 2012 for operators still relying on the exemption. In 2012, 46 respondents indicated that they operated a total of 279 systems with 552 MHz or less of activated channel capacity and transmitted at least one must-carry signal in a down-converted format only.¹¹ Today, 42 respondents, operating 117 systems in total, indicate that they transmit at least one must-carry signal in a down-converted format only. Moreover, of these respondents, 81% (34 in total) report that the amount of unused channel capacity available for new channels or services either decreased or remained the same in the past three years. Of the 34 respondents reporting no increase in their systems' unused channel capacity, 35.3% (12 in total) report that their free capacity has "significantly decreased;" 11.8% (4 in total) report that their free capacity has "somewhat decreased;" and 52.9% (18 in total) report that their capacity has remained the same. A summary of these survey results is set forth in Table 4 below.

Table 4: ACA survey respondents that operate systems with 552 MHz or less capacity that rely on HD carriage exemption and had no increase in their systems' unused channel capacity for new channels or services over the past three years.

Response to Survey	Number of Operators	% of Respondents
"Significant decrease" in capacity	12	35.3
"Somewhat" decrease" in capacity	4	11.8
No change in capacity	18	52.9
TOTAL	34	100

ACA's survey also asked these respondents why their system capacity has decreased. Similar to the last time ACA surveyed its members, the most common response to why system capacity has decreased was the need to meet the demands of non-broadcast programmers that

¹¹ 2012 ACA Comments at 5.

require the carriage of additional channels in exchange for access to, or less drastic increases in rates for, popular non-broadcast channels.¹² Also, for the first time, ACA has heard from members reporting the need to allocate system capacity to launch broadband Internet access service as a reason for channel capacity decreasing. On the other hand, the most common reason given for no change in channel capacity was that the system was channel locked three years ago and remains in the same state today because the operator either lacks the financial resources to expand system capacity or because there is no business case for increasing the system's capacity.¹³

In addition, 35 of the 42 total respondents (83.3%) operating systems with 552 MHz or less capacity that carry at least one must-carry signal in a down-converted format only reported that they currently do not have the unused channel capacity to deliver these signals without changing existing channels or services.¹⁴ Of these 35 respondents, 80.0% percent (28 in total) reported that it would be a significant burden to make channel capacity available for HD must-carry signals.¹⁵ A summary of these survey results is set forth in Table 5 below.

¹² The following is a sampling of responses for why these systems' unused channel capacity has decreased: (1) "everytime you turn around you have to and another channel because its owned by a more popular channel that you carry;" (2) "Programmers continue to require their programming to be carried on our largest tier, which is analog. there is a finite amount of space in this area. In some cases we have had to drop popular channels in order to make room for less popular channels just to meet contract obligations; and (3) "Channel capacity has been used to accommodate required carriage of new stations.

¹³ The following is a sampling of responses for why these systems' unused channel capacity has remained unchanged: (1) "There is no unused channel capacity here and has not had any for 10 years; (2) "These systems are 330Mhz at have been at capacity for many years; and (3) "We were at peak capacity 3 years ago. More cost is not justified when the subscribers don't want to pay any more. Fixed income and low income does not support the Hollywood lifestyle."

¹⁴ Of the 42 total respondents, one respondent did not provide an answer to this question.

¹⁵ The following is a sampling of responses explaining the reason why it would be a burden: (1) "I would have to get rid channels to add them in Digital. So what do you do away with, CNN, WTBS, ESPN, ESPN2....then I won't have any customers and I will shut down; Because I am 330mhz/30volts and all 35 channels are being used. I would have to eliminate some programming to carry duplication; have to change all amplifiers to move up to 450 mhz or eliminate channels; (2) "we are not in a position to rebuild this system. it serves only 100 sub at peek season. Summer homes & hunting cabins mostly;" and (3) "Significant system upgrades would have to be performed to carry the channels in several of the systems."

Table 5: The burden of making capacity available for carriage of HD must-carry signals on systems with 552 MHz or less capacity that do not have unused channel capacity “without changing any existing channels or services.

Response to Survey	Number of Operators	% of Respondents
Making capacity available would be a “significant burden”	28	80.0
Making capacity available would be “somewhat of a burden”	7	20.0
TOTAL	35	100.0

The data shows that many subscribers of systems with 552 MHz or less of capacity will be harmed if the HD carriage exemption is repealed. If forced to transmit must-carry signals in HD, these capacity constrained systems will encounter a dilemma – a choice between dropping channels, shutting down their systems entirely, or continuing to offer signals only in a down-converted format with the understanding of the risks of the Commission imposing forfeiture penalties for non-compliance. In response to the possibility of an increased broadcast signal carriage requirement, respondents stated that if faced with these choices, 45.2% would shut down their systems;¹⁶ 14.3% would drop existing channels; and 19.0% would risk receiving fines from the Commission for non-compliance rather than comply with an HD must-carry mandate.¹⁷

An HD must-carry mandate would harm consumers if even one system, let alone the 117 indicated in ACA’s survey, shuts down due to prohibitive compliance costs. As the Commission recognized when it adopted and when it extended the HD carriage exemption, the loss of these small cable systems could result in the loss of access to local broadcast networks where customers cannot obtain strong signals over-the-air and where local signals are not available from other sources, such as through the direct broadcast satellite (“DBS”) operators.¹⁸

¹⁶ The following is a sampling of responses from respondents who would shut down their system rather than comply with the HD carriage requirement: (1) “we would love to sell it.. and are trying. but it is in the middle of no where and no one wants it!!! we will even give it away at this point. call us;” and (2) system is too small and revenue is too low to do necessary upgrades for digital.”

¹⁷ The following is a sampling of responses from respondents who would risk the imposition of forfeiture penalties by the Commission rather than comply with the HD carriage requirement: “NO MONEY TO DO SO; Not enough funds to upgrade and have applied for grants but government turned down.”

¹⁸ See Fourth Report and Order, ¶ 7; Fifth Report and Order, ¶ 21.

Moreover, where small system operators must shut down their systems, consumers could end up losing access to terrestrial MVPD services altogether, thus depriving them of the benefits of competition in these markets. Lastly, the survey indicates that some systems utilizing the HD carriage exemption have started offering broadband Internet access service, and customers of these systems would lose this valuable service if these systems shut down.

In 2008 and 2012, the Commission found that the harms that would result from requiring systems with 552 MHz or less capacity to transmit must-carry signals in HD made applying that requirement on these systems inappropriate.¹⁹ The data collected through the ACA survey demonstrates that requiring these systems to transmit must-carry signals in HD continues to be inappropriate. Accordingly, the Commission should extend the HD carriage exemption for systems with 552 MHz or less capacity.

IV. CABLE SYSTEMS WITH 2,500 OR FEWER SUBSCRIBERS SHOULD NOT BE REQUIRED TO OFFER MUST-CARRY SIGNALS IN HD

The Commission should also retain the current HD carriage exemption that applies to cable systems serving 2,500 or fewer subscribers and that are not affiliated with an operator serving more than 10 percent of all MVPD customers.²⁰

In support for its decision to adopt the HD carriage exemption for systems with 2,500 or fewer subscribers, the Commission cited evidence in the record demonstrating that requiring HD carriage by small systems – even those hybrid analog/digital systems that carried some programming in HD – would “create a regime that is too expensive to operate.”²¹ Subsequently, in 2012, the Commission extended the exemption after finding that the challenges facing small

¹⁹ Fourth Report and Order, ¶ 7.

²⁰ *Id.*

²¹ Fourth Report and Order, ¶ 7 (*quoting Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket 98-120, Reply Comments of the Rural Independent Competitive Alliance, at 4 (filed Mar. 17, 2008)).

systems “have not diminished.”²² Today, the circumstances that justified the HD carriage exemption and its initial extension, particularly the lack of available financial resources to purchase the necessary equipment, have not improved.

ACA’s recent survey of its members regarding the HD carriage exemption demonstrates this fact. In its survey, 53 ACA members state that they operate a total of 143 systems with 2,500 or fewer subscribers that transmit must-carry signals in a down-converted format only. Among these 53 ACA members, 11 had systems with more than 552 MHz of bandwidth, 38 had systems with less than 552 MHz of bandwidth, and six had at least one system with more than 552 MHz of bandwidth and at least one system with less than 552 MHz of bandwidth. ACA received 59 responses from 53 ACA members about their systems with 2,500 or fewer subscribers with more or less than 552 MHz of bandwidth. An overwhelming number of the 59 survey respondents, 51 in total (representing 86.4% of these respondents) report that their net income from their systems’ video services²³ has declined over the past three years. Of these 51 responses, 78.4% (40 in total) report that their video net income “decreased significantly.”

Table 6: Magnitude of decrease in net income from video (video-related revenues minus video-related costs) for systems with 2,500 or fewer subscribers reporting their net video income decreased over the past three years.

Response to Survey	Number of Operators	% of Respondents
Respondents reporting systems’ net income from video has “significantly decreased”	40	78.4
Respondents reporting systems’ net income from video has “somewhat decreased”	11	21.6
TOTAL	51	100.0

Respondents cited a number of reasons for the reported decrease in system net income. The primary cause, identified by a majority of respondents, is the significant increase in their

²² Fifth Report and Order, ¶ 21. The Commission also declined to further restrict the exemption for small systems by eliminating it for systems that carried any signal in HD. *Id.*, ¶ 23.

²³ Video net income is defined as video-related revenues minus video-related costs.

programming costs, particularly retransmission consent fees.²⁴ In addition to surging programming costs, a significant number of ACA members reported losing subscribers during this period to competitors, particularly to DBS operators.²⁵ These members also noted an inability to pass along higher costs to their customers because their customers would either drop their service or switch to their competitors.²⁶

Requiring operators of systems that serve 2,500 or fewer subscribers to carry HD must-carry signals would further exacerbate this deteriorating economic picture. Only 8.5% of the 59 responses (five in total) from respondents with systems with 2,500 or fewer subscribers state that they would not need to purchase additional equipment in order to offer the must-carry stations signals in digital. Among the other responses, 52 indicate they would need to purchase equipment to comply.²⁷ Of these 52 responses, 78.8% (41 in total) assert that purchasing the necessary equipment would be a “significant burden,” and 19.2% (10 in total) indicated it would

²⁴ The following is a sampling of responses: (1) “Retransmission and channel fees are increasing faster than what we can pass on to our consumers. Money that should be spent on upgrading these systems is being used paying increased programing;” (2) “the cost in programming fees in this system which only has 40 channels currently have increased \$8 per sub since 2011. and with retrans renewing at the end of this year for the locals. it doesn't look good. Big 4 Networks (they call themselves) want to triple the current price per network!!!;” (3) Never ending programming increases.. Particularly retransmission fees.”

²⁵ The following is a sampling of responses: (1) “lost customers to competition;” (2) “subscriber loss;” (3) “competition from satellite;” (4) Do to competition from telcos and dish providers has taken over 50% of our customer base;” (5) “Competition form Dish Network and DirecTV.”

²⁶ The following is a sampling of responses (1) “Programming costs grow at 10% a year and it's hard to continue to raise customer rates every year;” (2) “Due to the ever increasing carriage fees and trying to keep the cost to the subscriber down has hurt us financially;” (3) “increasing programming costs, specifically related to retrans, sports and bundle deals (having to carry multiple networks from a corporate parent; The rapidly rising costs of video programming coupled with the inability of our subscribers to pay more;” (4) “HUGE INCREASES IN NETWORK COST. WE ARE IN A VERY LOW INCOME AREA AND CAN'T PASS ON ALL THE COSTS;” (5) Programming costs have increased so much that my customers cannot afford the rate increases that I would have to pass along. Subsequently, in order to keep my prices low (competitive), our budget for expansion and plant upgrades has been decimated;” (6) “THE COST OF PROGRAMMING KEEPS GOING UP INCLUDING THE OFF AIR. WE ARE IN A SMALL ELDERLY AND HIGHLY HISPANIC COMMUNITY AND THEY CAN NOT AFFORD TO KEEP PAYING HIGHER COSTS;” and (7) “The cable programming rates are increasing more than 7% each year and retransmission rates are being proposed at a 50% increase and 10% for the following 2 years. We cannot increase rates enough to keep pace.”

²⁷ Two respondents did not respond to this question.

be “somewhat of a burden.”²⁸ Accordingly, if required to transmit must-carry signals in HD, many small systems will be forced to incur costs that either will be difficult to absorb or will need to be passed through to their customers.

Table 7: The burden of purchasing the additional equipment needed to comply with the HD carriage requirement for systems with 2,500 or fewer subscribers that need additional equipment.

Response to Survey	Number of Responses	% of Responses
Purchasing additional equipment would be a “significant burden”	52	78.8
Purchasing additional equipment would be “somewhat of a burden.”	10	19.2
No response	1	1.9
TOTAL	35	100.0

Given this situation, it is not surprising that 37.3% (22 in total) of operators of systems with 2,500 or fewer subscribers report that that they would shut down their systems rather than invest in the equipment necessary to bring them into compliance with the HD must-carry rule. Another 22.0% (13 in total) felt that it would be better not to comply, and continue to deliver the signals of the must-carry stations in a down-converted format only with the risk of the Commission imposing forfeiture penalties for violating its rules. Finally, 35.6% (21 in total) of operators of systems with 2,500 or fewer subscribers report they would either absorb the majority of the cost for the additional equipment needed or pass along the majority of the cost. For operators of these systems, it will lead to increased consumer rates or decreased service offerings.²⁹ These harms vastly outweigh the benefits that the Commission seeks to create through its mandatory HD must-carry requirement. Consequently, the Commission should

²⁸ One respondent indicated that additional equipment would be necessary, but did not indicate whether purchasing the additional equipment would be a burden.

²⁹ The following is a sampling of responses: (1) “Costs such as these have to be passed along to the consumer;” (2) “The customers would not bear higher rates for an antiquated lineup therefore eventually we would be forced to shut the system down; and (3) “We would not be able to absorb the cost - we would need to pass this onto our customers - also we might look at what channels we could drop.”

extend the HD carriage exemption for systems that service 2,500 or fewer subscribers and are not affiliated with a very large MVPD.

#

Revoking the HD carriage exemption now makes little public policy sense in light of the broadcast spectrum incentive auction that is planned to take place within the next three years.³⁰ It is unfair to force cable operators that rely on the exemption to make a decision that will require them to incur significant costs and will likely cause harm to their customers, when there is a degree of uncertainty over the number of must-carry stations that will continue to broadcast in their market or will offer their signals in HD if as a result of participating in the auction they share spectrum with another station.

V. AVAILABLE EVIDENCE SUGGESTS THAT THE NUMBER OF SYSTEMS RELYING ON THE HD CARRIAGE EXEMPTION IS DIMINISHING AND WILL CONTINUE TO DIMINISH OVER THE NEXT THREE YEARS

In 2012, ACA reported that at least 52 of its members, operating more than 385 small systems in total, still relied on the exemption and would be harmed if it expired.³¹ ACA now reports that at least 53 of its members, operating 143 systems in total, rely on the HD carriage exemption. Therefore, 242 fewer systems are currently utilizing the HD exemption today than were in 2012. These 53 members also report that by June 2018, they expect only 73 of the 143 systems relying on the HD exemption to still be in operation and meet the criteria for taking advantage of the HD exemption. As the Commission predicted would be the case when it initially adopted the HD exemption,³² and as available evidence strongly suggests, the number of systems that are relying on the HD exemption has been steadily decreasing and will

³⁰ As noted last October in the FCC's Official Blog, the spectrum incentive auction is currently planned for early 2016. See <http://www.fcc.gov/blog/incentive-auction-progress-report>. This makes a three-year extension of the HD exemption well timed to cover this period of transition for the broadcasting industry.

³¹ Fifth Report and Order, ¶ 20 *citing* 2012 ACA Comments at 5; 2012 ACA Reply Comments at 8.

³² See Fourth Report and Order, ¶ 11 (the Commission anticipated that the original three year exemption would give small systems an opportunity to come into compliance by making relatively large expenditures over a longer period of time).

decrease significantly in the next three years. While system shutdowns is the primary reason that there will be fewer systems relying on the HD exemption, in at least some cases, system owners are planning to make the financial investment to increase channel capacity. This will permit the carriage of “must carry” signals in HD and the offering of Internet broadband service.³³ Given that the trend of decreasing reliance continues, it is appropriate to extend the HD exemption for the relatively few remaining operators that continue to rely on the exemption.

VI. THE COMMISSION SHOULD CONFIRM THAT ALL-ANALOG SYSTEMS ARE PERMANENTLY EXEMPT FROM THE REQUIREMENT TO TRANSMIT MUST-CARRY SIGNALS IN HD

With this Petition, ACA also renews its request that the Commission confirm that cable systems that only offer programming in analog are permanently exempt from the HD carriage requirement.³⁴

For all-analog systems, carriage of must-carry signals in HD format is not “technically feasible” within the meaning of Section 614(b)(4)(A) of the Communications Act and the Commission’s rules. Section 614(b)(4)(A) requires that cable operators transmit must-carry local broadcast signals “without material degradation,” and instructs the Commission to “adopt carriage standard 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.”³⁵

³³ ACA notes that some systems that relied on the HD exemption in the past no longer rely upon it because a business case materialized for an upgrade to occur. In these cases, the availability of the HD exemption played an important role in giving the owners of these systems the time and flexibility necessary to come up a means to upgrade the system – providing a benefit to the community served by the system. The market is dynamic, and the lack of a business case to upgrades a system three or six years ago for a bandwidth constrained system may still become possible in the future for various reasons. Accordingly, the benefit of the HD exemption is not only in avoiding the hastening of system closings, but in giving systems’ time to make upgrades possible.

³⁴ 2012 ACA Comments at 17-18; 2012 ACA Reply Comments at 13-14.

³⁵ 47 U.S.C. § 534(b)(4)(A) (emphasis added).

ACA believes that, by definition, it has *never* been and will *never* be feasible for analog-only systems to provide HD programming. Put another way, analog-only systems are unable to carry any HD signals. If an analog-only system had the capability of carrying an HD signal, which can only be done in digital format, the system would no longer be, by definition, an analog-only system. It would be a hybrid analog/digital system.

Clarifying that analog-only systems are not required to carry must-carry signals in HD would benefit a small and decreasing number of systems, and would be consistent with the treatment of these systems by programmers and broadcasters who grant carriage. The number of analog-only systems relying upon the HD carriage exemption has decreased since 2012, due in part to systems shutting down, and the number of systems dependent on the exemption is expected to continue to decrease over time. Nonetheless, some analog-only systems will continue to remain in operation for a variety of reasons. Although most provide vastly fewer channels than their competitors, do not offer any advanced services (e.g., video-on-demand), and, by definition, provide no channels in HD, many of these provide the only available video service in hard-to-reach, rural areas where over-the-air antenna reception is not feasible. Others provide a locally operated, lower cost service that allows customers to receive basic cable channels without needing costly set-top boxes. The marketplace also recognizes the constraints faced by analog-only systems and neither broadcasters that elect retransmission consent nor national cable networks require carriage of their signals in HD as a condition to offering their signals.

In light of the fact that analog-only systems are not capable of carrying signals in HD, that decreasing numbers of these systems are relying on the HD carriage exemption, and of market recognition of these realities, the Commission should confirm that analog-only systems are permanently exempt from the requirement to carry must-carry signals in HD.

VII. CONCLUSION

For the foregoing reasons, ACA respectfully requests that the Commission initiate a rulemaking proceeding for the purpose of extending the HD exemption for three more years. Although the number of operators and systems that will qualify for the HD exemption is steadily decreasing, reliance on the HD exemption remains critical for those systems that remain channel locked or are financially unable to afford the necessary equipment purchases to expand their channel capacity. Finally, ACA asks that the Commission confirm that because HD carriage is technically infeasible on all-analog systems these systems are exempt from the HD carriage obligation altogether.

Respectfully submitted,

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