FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98–120; FCC 05–27]

Carriage of Digital Television Broadcast Signals

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: In this document, the Commission considers several petitions for reconsideration of its First Report and Order (FCC 01–22) and various comments submitted in response to the Further Notice of Proposed Rulemaking (FCC 01–22) in this proceeding, but limited to two issues raised therein: Whether cable operators are required to carry both the digital and analog signals of a station during the transition when television stations are still broadcasting analog signals (also referred to as the ''dual carriage'' issue); and how to construe the ''primary video'' carriage limitation under Sections 614(b)(3)(A) (for commercial stations) and 615(g)(1) (for noncommercial stations) under the Communications Act of 1934, as amended, if a broadcaster chooses to broadcast multiple digital television streams (also referred to as the ''multicast carriage'' issue). In this document, the Commission grants in part and denies in part the petitions for reconsideration. The Commission affirms its tentative conclusion in the First Report and Order not to impose a dual carriage requirement. With regard to the digital multicast carriage issue, the Commission affirms its earlier conclusion in the First Report and Order and declines to require cable operators to carry any more than one programming stream of a digital television station. Although the Commission found that the operative statutory language at issue is ambiguous on the subject of multicast must carry, it also found, based on the current record, that such a requirement is not necessary to further the purposes of the must carry statute, as defined by the Supreme Court.

DATES: Effective March 22, 2005.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Ben Bartolome, *Ben.Bartolome@fcc.gov*, or Eloise Gore, *Eloise.Gore@fcc.gov*, of the Media Bureau, Policy Division, (202) 418–2120. For additional information concerning the Paperwork Reduction Act of 1995 analysis, please contact Cathy Williams, Federal Communications Commission, 445 12th St, SW., Room 1–C823, Washington, DC, 20554, or via the Internet to *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Second Report and Order and First Order on Reconsideration, FCC 05–27, adopted February 10, 2005, and released on February 23, 2005. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC, 20554. These documents will also be available via ECFS *(http://www.fcc.gov/cgb/ecfs/)*. (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Initial Paperwork Reduction Act of 1995 Analysis

This Second Report and Order and First Order on Reconsideration has been analyzed with respect to the Paperwork Reduction Act of 1995 (''PRA''), Public Law 104–13, 109 Stat 163 (1995), and does not contain proposed new and/or modified information collection requirements.

Synopsis of the Second Report and Order and First Order on Reconsideration

I. Introduction

1. In this Second Report and Order and First Order on Reconsideration, we consider several petitions for reconsideration of the Commission's *First Report and Order,* 66 FR 16533, Mar. 26, 2001, and the various comments submitted in response to the *Further Notice of Proposed Rulemaking (FNPRM),* 63 FR 42330, Aug. 7, 1998, in this proceeding. The actions taken in this order are limited to two significant issues, the resolution of which are essential to the Commission's ongoing efforts to complete the transition from analog to digital television. In the interest of providing certainty on these significant issues at this time, we are deferring resolution of the other issues raised on reconsideration and in the *FNPRM* to a future order. The two issues resolved in this order are: (1) whether cable operators are required to carry both the digital and analog signals of a station during the transition when television stations are still broadcasting analog signals (also generally referred to as the ''dual carriage'' issue); and (2) how to construe the ''primary video'' carriage limitation under Sections 614(b)(3)(A) (for commercial stations) and 615(g)(1) (for noncommercial stations) under the Act if a broadcaster chooses to broadcast multiple digital television streams (this issue is generally referred to as the mandatory multicast carriage issue); *see* 47 U.S.C. 534(b)(3)(A), 535(g)(1).

2. With respect to the dual carriage issue, we determined in the *First Report and Order* that the statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station's digital and analog signals. Furthermore, we tentatively concluded that, based on the available record evidence, a dual carriage requirement would likely violate the cable operator's First Amendment rights. In order to evaluate the issue more fully, we adopted the *FNPRM* to solicit comment on the constitutionality of imposing a dual carriage requirement. Several members of the broadcast industry seek reconsideration of the Commission's statutory interpretation on this issue, and urge us to conclude that the Act mandates dual carriage. For the reasons provided in this order, we are denying the petitions on this issue and affirm our tentative decision not to impose a dual carriage requirement.

3. With respect to the mandatory multicast carriage issue, the Commission, in the *First Report and Order,* interpreted the statutory term ''primary video'' to mean only a single programming stream. As a result, if a digital broadcaster elects to divide its digital spectrum into several separate, independent, and unrelated programming streams, the Commission found that only one of these streams is considered primary and entitled to mandatory carriage. Several members of the broadcast industry seek reconsideration of our statutory interpretation. For the reasons provided below, we are also denying the petitions on this issue and thereby affirm our decision in the *First Report and Order.*

II. Background

4. Sections 614 and 615 of the Act govern mandatory carriage for cable operators. Our task in this ongoing proceeding is to determine how to

implement and apply the statute to digital signals during the transition as well as after the transition is completed. Our approach is guided by Title VI of the Act, which states, in part, that ''cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.'' In addition, we are directed to ''promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.''

5. The law governing retransmission consent generally prohibits cable operators and other multichannel video programming distributors, such as satellite carriers, from retransmitting the signal of a commercial television station, unless the station whose signal is being transmitted consents or chooses mandatory carriage; *see* 47 U.S.C. 325(b)(1)(A) and (B). Generally, every three years, commercial television stations must elect to either grant retransmission consent or pursue their mandatory carriage rights; *see* 47 CFR 76.64(f).

6. Under Section 614 of the Act, and the implementing rules adopted by the Commission, a commercial television broadcast station is entitled to request mandatory carriage, if it does not elect retransmission consent, on cable systems located within the station's market. A station's market for this purpose is its ''designated market area,'' or DMA, as defined by Nielsen Media Research (A DMA is a geographic market designation that defines each television market exclusive of others based on measured viewing patterns). Systems with more than 12 usable activated channels must carry local commercial television stations ''up to one-third of the aggregate number of usable activated channels of such system[s]''; *see* 47 U.S.C. 534(b)(1)(B). Beyond this requirement, the carriage of additional television stations is at the discretion of the cable operator. In addition, Section 615 of the Act requires cable systems to carry local noncommercial educational television stations (''NCE'' stations) according to a different formula, and based upon a cable system's number of usable activated channels. Carriage of NCE stations are in addition to the one-third cap that applies to full power commercial stations. Low power television stations, including Class A stations, may request carriage if they meet six statutory criteria; *see* 47 U.S.C. 534(c)(1) and (h)(2); 47 CFR 76.55(d). A cable operator, however, cannot carry a low power television station in lieu of a full power television station; *see* 47 U.S.C. 534(b)(1)(A) and (h)(2); 47 CFR 76.56(b)(1) and (b)(4)(i). Among these criteria are that the low power TV station meets all of the Commission's requirements that are applicable to full power TV stations with respect to certain types of programming, such as children's and political programming, and ''the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license''; *see* 47 U.S.C. 534(h)(2)(B).

III. Carriage of Digital Broadcast Signals

A. Stations Broadcasting in Analog and Digital

7. A fundamental issue addressed in the *First Report and Order* and in the *FNPRM* is whether cable operators are required to carry both the analog and digital signals of a station during the transition when television stations are broadcasting analog and digital signals; *see* 16 FCC Rcd at 2603–09, 2649–52. We said therein that if the Commission requires carriage of both analog and digital signals (*i.e.,* ''dual carriage''), cable operators could be required to carry double the number of television signals, many of which contain duplicative content, while having to drop or forego carriage of varied cable programming services where channel capacity is limited; *see* 16 FCC Rcd at 2603–09, 2649–52.

8. In the *First Report and Order,* we examined our authority to impose a dual carriage requirement and determined, after extensive review of Sections 614 and 615 of the Act and the accompanying legislative history, that ''the statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station's digital and analog signals;'' *see* 16 FCC Rcd at 2600. It is precisely the ambiguity of the statute that has driven contentious policy debate on this issue. In order to weigh the constitutional questions inherent in a statutory construction that would permit dual carriage, we determined that it was appropriate and necessary to more fully develop the record in this regard. It was our tentative conclusion, however, that a dual carriage requirement would burden cable operators' First Amendment rights substantially more than necessary to further the government's substantial interests; *see* 16 FCC Rcd at 2600. We issued a *FNPRM* addressing several critical questions concerning the constitutionality of dual carriage, including: (1) Whether a cable operator will have the channel capacity to carry the digital television signal of a station, in addition to the analog signal of that same station, without displacing other cable programming or services; (2) whether market forces, through retransmission consent, will provide cable subscribers access to digital television signals; and (3) how the resolution of the carriage issues would impact the digital transition process; *see* 16 FCC Rcd at 2600, 2647–54. Before considering the additional record and finally determining the dual carriage question, we first address the petitions for reconsideration of our preliminary decision on the statutory issue in the *First Report and Order.*

1. Statutory Analysis

9. Several members of the broadcast industry seek reconsideration of the Commission's statutory interpretation on this issue, and urge us to conclude that the Act mandates dual carriage. Commercial Broadcasters specifically argue that Section 614(a) of the Act makes no distinction between qualifying analog and digital signals, so therefore all local television station signals must be carried. They point out that Section 614(h)(1)(A) of the A defines the term ''local commercial television station,'' does not expressly exclude DTV signals from carriage during the time that the companion analog signal would be carried. They state that ''Section 614 applies to the signals of any full power commercial television station licensed and operating on a channel regularly assigned to its community by the Commission, not otherwise excluded by the terms of Section 614.'' Furthermore, they assert that the new DTV signals of full power television broadcast stations at issue here were, at the time of the 1992 Cable Act, anticipated to be ''licensed and operating on a channel regularly assigned to its community by the Commission.'' They surmise that if Congress intended to exclude these DTV signals from carriage requirements during the transitional period, it would have so indicated in Section 614. In their view, ''[b]ecause the statutory mandate to carry broadcasters' DTV signals is clear, the Commission lacks discretion to water down or modify the express requirement that cable operators carry DTV signals.''

10. Cable operators and non-broadcast programmers, on the other hand, ask the Commission to deny petitioners' request for reconsideration of this issue. NCTA argues that, in the absence of a clear statutory directive for dual carriage, the

Commission must read the statute to err on the side of avoiding constitutional infirmities. Cable programmer A&E states that if Congress had intended for the Commission to greatly expand the cable industry's carriage burden during the DTV transition, it would have done so much more plainly and explicitly. A&E points out that subsequent congressional actions and relevant legislative histories in the Telecommunications Act of 1996, the Balanced Budget Act of 1997, and the Satellite Home Viewer Improvement Act of 1999, demonstrate that Congress did not intend to compel dual carriage through Section 614(b)(4)(B) of the Act.

11. The arguments that the parties have presented in support of a statutory reading to require dual carriage essentially are no different from those that have previously been submitted, considered, and rejected in the *First Report and Order; see* 16 FCC Rcd at 2603–09. We therefore affirm our earlier conclusion that the Act is ambiguous on the issue of dual carriage. The statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station's digital and analog signals; *see* 16 FCC Rcd at 2600. Further, we do not believe that mandating dual carriage is necessary either to advance the governmental interests identified by Congress in enacting Sections 614 and 615 and upheld in *Turner II* or to effectuate the DTV transition. Since no evidence or arguments submitted on reconsideration gives us any reason to question our original judgment, we deny the petitions for reconsideration on this point.

2. Constitutional Analysis

12. As indicated above, the *First Report and Order* held that the Act was ambiguous as to the question of dual carriage and that further fact-finding was necessary to determine the appropriate statutory interpretation; *see* 16 FCC Rcd at 2648. We rely on several constitutional principles and cases, in particular the Supreme Court's decisions in *Turner I (Turner Broadcasting Systems, Inc.* v. *FCC,* 512 U.S. 622 (1994)) and *Turner II (Turner Broadcasting Systems, Inc.* v. *FCC,* 520 U.S. 180 (1997)) in addressing the constitutionality of mandatory dual carriage. The Supreme Court has recognized that mandatory carriage directly interferes with the free speech rights of cable operators and cable programmers. Nevertheless, the *Turner II* Court upheld the constitutionality of Sections 614 and 615 under an intermediate scrutiny analysis. A majority of the Court found that the mandatory carriage provisions of the Act furthered two governmental interests: (1) preserving the benefits of free, over-the-air local broadcast television for viewers; and (2) promoting the widespread dissemination of information from a multiplicity of sources. Significantly, the Court found that mandatory carriage was narrowly tailored because the burden imposed at that time was congruent to the benefits obtained. A plurality of the Court also concluded that Sections 614 and 615 furthered a third governmental interest—Justice Breyer, whose vote was necessary to sustain the requirement, however, did not believe that must carry was necessary to promote ''fair competition,'' as did the other justices in the majority.

13. In the *First Report and Order,* we recognized that any type of dual carriage rule must satisfy the *Turner* factors and pass the test provided in *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968), for determining whether a content-neutral rule or regulation violates the Constitution; *see* 16 FCC Rcd at 2648. Under the *O'Brien* test, a content-neutral regulation would be upheld if: (1) it furthered an important or substantial governmental interest; (2) the government interest was unrelated to the suppression of free expression; and (3) the incidental restriction on First Amendment freedoms was no greater than is essential to the furtherance of that interest. In sum, under the *O'Brien* test, a regulation must not burden substantially more speech than is necessary to further the government's legitimate interests. We invited commenters that support a dual carriage requirement to submit evidence to show how mandatory dual carriage would satisfy the constitutional requirements of both *Turner* and *O'Brien.* After close examination of the information submitted, we find nothing in the record that would allow us to conclude that mandatory dual carriage is necessary to further the governmental interests identified in *Turner,* or other potential governmental interests put forward by commenters. In addition, even if it could be shown that dual carriage could further any of the governmental interests based on the current record, the burden that mandatory dual carriage places on cable operators' speech appears to be greater than is necessary to achieve the interests that must carry was meant to serve. Mandatory dual carriage would essentially double the carriage rights and substantially increase the burdens on free speech beyond those upheld in *Turner.* As noted, *Turner II* found the benefits and burdens of must carry to be congruent, such that must carry is narrowly tailored to preserve the multiplicity of broadcast stations for households that do not subscribe to cable.

14. *Preserving the benefits of free over-the-air television for viewers.* The first governmental interest identified in *Turner* to support mandatory carriage is the preservation of the benefits of free over-the-air television for non-subscribers. The broadcast industry argues that a slow DTV transition places preservation of over-the-air broadcasting at risk. Commercial Broadcasters assert that the entire premise of the digital transition is for digital signals to replace analog signals. They argue that if viewers are unable to receive digital signals, digital cannot replace analog, and broadcasters will be forced to sustain the operation of two facilities at considerable expense, without any additional revenue. Noncommercial Broadcasters assert that the costs of dual transmissions are overwhelming for smaller television stations.

15. NCTA contends that the broadcast industry sought a second channel of spectrum to provide digital programming, prior to which there was no apparent threat to the preservation of broadcast stations for over-the-air viewers, given that cable operators were required to carry virtually all existing analog stations. International Channel asserts that analog carriage, by itself, serves the government interest in preserving the benefits of free over-the-air television. A&E states that the only reason the Court upheld the analog carriage requirements is that Congress found cable carriage to be necessary to promote the continued availability of free television programming, ''especially for viewers who are unable to afford other means of receiving programming.''

16. Despite the broadcast parties' assertions, the record as a whole does not demonstrate that television stations would face undue hardship in the absence of dual carriage that would, in turn, threaten the ability of broadcasters to provide service to non-cable households. The critical governmental interest, reflected in the Act, was described by the Supreme Court as the preservation of over-the-air broadcasting. More specifically, the congressionally-adopted governmental interest identified in *Turner* was the protection of the interests of over-the-air television viewers—*i.e.*, viewers whose interests were not reflected in the carriage decisions of cable operators nor in the viewing options available to cable subscribers. Thus, the focus of the government interest in *Turner* is not the economic health of broadcasting per se,

but the benefits that broadcasting provides to consumers. In sum, the critical factor in interpreting the intent of the statute and in the constitutional analysis of it is that it is designed ''to provide over-the-air viewers who lack cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate'' and to assure the over-the-air public ''access to a multiplicity of information sources.'' With respect to mandatory dual carriage, all broadcast stations are required to build a digital facility and broadcast a digital signal. Thus, cable carriage is not needed to ensure that non-cable, over-the-air viewers have access to digital broadcast signals. Broadcasters advocating mandatory dual carriage have not demonstrated that non-cable households would benefit from more or better broadcast programming if stations have mandatory dual carriage. (We note that Congress has recently enacted a dual carriage requirement under very limited circumstances. The Satellite Home Viewer Extension Reauthorization Act (''SHVERA''), Public Law 108–447, sec. 210, 118 Stat. 2809, 3393 (2004), requires a phase-in of mandatory dual carriage only in Alaska and Hawaii by satellite carriers with more than five million subscribers. Congress may, of course, decide to impose a dual carriage requirement in situations in which it finds it necessary to further an important governmental interest. By imposing a dual carriage requirement in only two states, Congress implicitly determined that the benefits and burdens of dual carriage in Alaska and Hawaii with respect to satellite carriers are different from those in the contiguous United States.). Local analog broadcasters are already carried today—either pursuant to must carry or retransmission consent—on virtually every cable system in their market. We have no evidence that the absence of a dual carriage requirement will substantially diminish the availability or quality of broadcast signals available to non-cable subscribers. A small number of broadcasters that have demonstrated legitimate financial hardship if they were required to build their digital facilities have been granted extensions, but the hardship is not due to lack of cable carriage. The absence of a dual carriage requirement might in fact encourage broadcasters to produce a ''rich mix of over-the-air programming'' in order to convince cable operators to voluntarily carry their digital signal. Furthermore, the goal of the DTV transition is not to support the ongoing existence of two 6 MHz channels for each broadcast licensee, but rather to transition from one 6 MHz analog allocation to one 6 MHz digital allocation, with the anticipated return of one 6 MHz allocation.

17. *Promoting the widespread dissemination of information from a multiplicity of sources.* The second of the three interrelated governmental interests identified in *Turner* is ''promoting the widespread dissemination of information from a multiplicity of sources.'' Discovery argues that if the Commission were to mandate dual carriage, it would allow a single broadcaster to use up to 12 MHz of cable capacity. Discovery comments that the second 6 MHz channel requested by broadcasters could instead be used by a cable operator to provide as many as a dozen diverse non-broadcast programming services offered on a compressed digital basis. Cable industry commenters also argue that most broadcast stations are upconverting analog signals to a standard definition digital format, and that such duplicative broadcast programming does not contribute to program diversity. On the other hand, CEA argues that dual carriage assures broadcasters and programmers of carriage for digital programming, thus motivating them to produce original digital programming, that will, in turn, provide consumers with incentive to purchase digital receivers. On balance, we find that the current record fails to demonstrate that dual carriage is needed to further this governmental interest because program diversity is not promoted under a dual carriage requirement, given that it would not result in additional sources of programming and that digital programming largely simulcasts analog programming.

18. *Promoting fair competition in the market for television programming.* The third important governmental interest identified in *Turner* is promoting fair competition in the market for television programming. While a majority of the Court agreed that this is an important governmental interest, only four justices found that this interest was achieved by the must carry statutory requirements. Based on our previous conclusions—*i.e.*, that dual carriage is not needed to further the governmental interests found by a majority of the Court, it is unnecessary to consider this third interest in great detail. The anti-competitive concerns cited by Congress and the Supreme Court stemmed from the increasing vertical integration and penetration of the cable industry in 1992. Commercial Broadcasters claim that cable operators still act as gatekeepers as they serve nearly 70% of American households, and compete with local broadcast stations for advertising dollars. They contend that the enhanced services that DTV makes possible directly compete with cable services, resulting in greater disincentives for cable to afford digital broadcasters access to their audience. Cable operators and programmers counter that such concerns about competition for local advertising are misplaced.

19. Court TV urges the Commission to recognize the central premise of broadcasting—*i.e.*, that the medium has the inherent ability to reach viewers over-the-air independent of cable carriage. HBO adds that broadcasters use analog retransmission consent/must carry rights to secure cable channel capacity for their affiliated cable networks. The Filipino Channel argues that dual carriage, even for a limited period of time, would foreclose carriage options for many cable networks.

20. In many respects, competition in the MVPD market has increased since 1992, although the market for the delivery of video programming to households continues to be characterized by substantial barriers to entry. The record, however, does not evidence a connection between mandating dual carriage and remedying any allegations of cable operators' anti-competitive action against local broadcast stations. Because operators must carry local broadcaster's analog signal, there is no obvious need for cable operators to carry two signals for each local station, and it has not been proven necessary to guarantee such access for both analog and digital signals to ensure fair competition. We believe the burden is on the advocates of dual carriage to prove this competitive necessity and that speculative allegations in this regard are inadequate in light of the burden on cable operators and cable programmers competing for cable access.

21. *Advancing the Digital Transition.* Broadcast commenters state that a rapid transition from analog to digital broadcast signals is an important governmental interest that can justify burdening speech protected by the First Amendment. They contend that dual carriage is necessary to achieve a swift and successful DTV transition. NCTA counters that Congress never expressed that hastening the end of the transition is a governmental interest, and nor has the Supreme Court ''embraced any such interest'' in upholding must carry requirements. CEA, on the other hand,

states that some form of dual carriage is necessary for public acceptance of digital television technology because it will spur broadcasters to produce digital television programming, which, in turn, will convince consumers to purchase DTV receivers. Maranatha argues that consumers will not have the incentive to buy DTV receivers until they can actually receive digital broadcast programming through their local cable systems. AT&T and others in the cable industry counter that dual carriage provides no incentive for consumers to purchase digital television sets, particularly when broadcasters are creating little or no original content.

22. A swift digital television transition and the return of the analog spectrum for other uses are important governmental concerns. We find that the imposition of a dual carriage requirement, however, is not necessary to complete the transition. Many factors are necessary for the transition to be successful, such as consumer acceptance of a new type of television service and rapid digital receiver penetration. The top ten cable operators (representing more than 85% of cable subscribers nationwide) have committed to deploying high-definition services and are fulfilling that commitment. More recently, NCTA reports that the HDTV carriage data reflect that more and more cable households are receiving HDTV programming: (1) the number of local TV markets in which consumers can now receive a package of HDTV services from their cable operator has grown to 184 (out of 210), including all of the top 100 DMAs; (2) the number of local digital broadcast stations being carried voluntarily by cable systems increased to 504, up from 304 in December 2003; (3) of the 108 million U.S. TV households today, 92 million are now passed by a cable system that offers a package of HDTV programming; and (4) 18 cable networks now offer HD programming during some or all of their network schedules, in broad genres reflecting movies, sports, and general interest.

23. The voluntary carriage of network television stations by these operators, as well as carriage of high definition digital programming from non-broadcast sources like HBO, are more likely to spur the sale of digital television equipment (thereby, facilitating the transition) than the forced dual carriage of all television stations. We thus decline to impose dual carriage requirements that burden speech in the absence of record evidence showing dual carriage is necessary for a timely completion of the transition.

24. *Fifth Amendment Argument.* NCTA argues that dual carriage would constitute an uncompensated taking of private property in violation of the Fifth Amendment to the Constitution, especially where, as here, Congress has not clearly authorized such a requirement. NAB responds, in part, that the mere fact that a dual carriage rule might exact some financial toll from cable operators would not render mandatory dual carriage a taking. Given that we have declined to impose dual carriage on other grounds, we need not address the cable industry's Fifth Amendment argument.

25. *Conclusion.* We have analyzed the governmental interests identified in *Turner,* additional governmental interests proposed by the broadcast industry, and policy concerns. We find that there has not been an adequate showing that dual carriage is necessary to achieve any valid governmental interest. Therefore, in the absence of a clear statutory requirement for dual carriage, we decline to impose this burden on cable operators.

B. Primary Video/Multicast Carriage

26. In the *First Report and Order*, the Commission examined how to apply the ''primary video'' carriage limitation if a broadcaster chooses to broadcast multiple standard definition digital television streams, or a mixture of high definition and standard definition digital television streams; *see* 16 FCC Rcd at 2620–22. Section 614(b)(3)(A) of the Act states:

> A cable operator shall carry in its entirety, on the cable system of that operator, the *primary video*, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking [interval] or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends; *see* 47 U.S.C. 534(b)(3).

Largely parallel provisions are contained in Section 615(g)(1) for noncommercial stations; *see* 47 U.S.C. 535(g)(1).

27. In the *First Report and Order*, the Commission recognized that ''the terms 'primary video' as used in Sections 614(b)(3) and 615(g)(1) are susceptible to different interpretations,'' and that ''[t]he legislative history does not definitively resolve the ambiguity regarding the intended application of the term 'primary video' as used in [the multicasting] context;'' *see* 16 FCC Rcd at 2620–21. The Commission thus analyzed the term within its statutory context, considered the legislative history, and examined the technological developments at the time the must carry provisions were enacted; *see* 16 FCC Rcd at 2620–22. As a result of dictionary definitions and legislative history indicating that ''must carry provisions were not intended to cover all uses of a signal,'' the Commission stated that ''[b]ased on the record currently before us, we conclude that 'primary video' means a single programming stream and other program-related content;'' *see* 16 FCC Rcd at 2620–22. As a result, the Commission held that if a digital broadcaster elects to divide its digital spectrum into several separate, independent, and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage; *see* 16 FCC Rcd at 2620–22. Under this determination, the broadcaster elects which programming stream is its primary video, and the cable operator is required to provide mandatory carriage only of that designated stream; *see* 16 FCC Rcd at 2620–22.

28. Several commercial and noncommercial broadcasters seek reconsideration of our interpretation of the term ''primary video.'' They contend that we wrongly concluded that when a digital signal becomes eligible for mandatory carriage, cable operators are only required to carry a single video stream. In the view of some broadcast petitioners, ''primary video'' means all video that is included in a broadcaster's digital signal. Other broadcast petitioners suggest that since all video contained in analog broadcast signals has been available free to over-the-air viewers, the ''primary video'' of a digital signal should be deemed to include video programming that is available ''free of charge.'' Disney specifically asks us to adopt a definition of ''primary video'' that requires ''full carriage of the entire 19.4 Mbps bit stream of a local broadcaster's digital signal, except for those ancillary and supplementary services expressly excluded by statute.'' Disney asserts that such a standard will impose no greater burden on cable operators than that created by the existing analog must carry requirements, or by carriage of an HDTV signal.

29. More specifically, the broadcast petitioners argue that the Commission's definition of ''primary video'' is not supported by the statutory language and the accompanying legislative history.

Noncommercial Broadcasters state that because of the unavailability of a plain meaning interpretation, the Commission must look to the Act as a whole to determine what Congress meant by a broadcaster's ''primary video.'' They submit that, because of the ambiguity of the statute, the most reasonable interpretation of the term ''primary video'' includes ''the package of video and audio digital services transmitted by the broadcaster free and over the air to viewers.'' Similarly, Commercial Broadcasters argue that the word ''primary'' is a generic adjective that may be used with singular or plural noun forms, as in the phrases ''primary elements'' and ''primary colors.'' They state that the Commission should not have applied a literal definition, but rather interpreted for the new digital context what was intended by the term for the analog situation.

30. NCTA, Time Warner, and other parties ask us to deny the petitions. They contend that a plain reading of the statute clearly indicates a limited carriage obligation, and that, even if there are other interpretations of the provision, the Commission's interpretation is a reasonable one, because it gives meaning to the word ''primary'' and is consistent with the common usage and meaning of the term. Additionally, NCTA contends that the Commission's interpretation is consistent with the underlying policy objectives of the Act and Congress's clear intention to limit carriage obligations in light of First Amendment concerns. NCTA argues that carriage of multiple video programming streams would multiply the burden on cable operators as well as the unfairness to cable program networks without serving any of the purposes of the must carry provisions of the statute, thereby raising First Amendment infirmities. NCTA states that the Commission is compelled to avoid such a construction of the Act even if it were to find the term ''primary video'' to be at all ambiguous. According to Professor Tribe's filing on behalf of the NCTA, ''forcing cable operators to carry multiple video streams of digital broadcasters would abridge the editorial freedom of cable operators, harm cable programmers, and invade the right of audiences to choose what they want to view—all without promoting any of the governmental interests contemplated by Congress in enacting the must-carry rules, or any of the interests approved by the Supreme Court in Turner I and Turner II.'' Professor Tribe also argues that mandatory carriage of multiple streams of video programming would result in a permanent, physical occupation of a substantial amount of a cable operator's capacity, raising ''substantial issues under the Fifth Amendment's Takings Clause and under the separation of powers.''

31. After consideration of all the arguments and evidence presented on this issue, we affirm our earlier decision, and decline, based on the current record before us, to require cable operators to carry any more than one programming stream of a digital television station that multicasts. On reconsideration, we acknowledge, however, that the language of the Act may be less definitive than portions of our earlier decision suggested. This conclusion is, in fact, more consistent with our observations in the *First Report and Order* ''that the terms 'primary video' as used in sections 614(b)(3) and 615(g)(1) are susceptible to different interpretations,'' and that ''[t]he legislative history does not definitively resolve the ambiguity regarding the intended application of the term 'primary video' as used in this context;'' *see* 16 FCC Rcd at 2620–21. As explained below, however, we continue to hold that the best construction of the must-carry provisions, based on the current record before us, is that cable operators need not carry more than one programming stream.

32. We recognize that Sections 614(b)(3) and 615(g)(1) do not directly translate to digital technology generally, much less to associated multicasting capabilities specifically, and thus do not appear to compel a particular result for multicasting must-carry. In the *First Report and Order*, we noted that ''the incorporation of the primary video construct into the Act in 1992 was reasonably contemporaneous with the gradual change in common understanding of the new television service * * * to DTV (digital television) with the ability to broadcast high definition television, SDTV (standard definition television) with multicasting possibilities, as well as the broadcast of non-video services;'' *see* 16 FCC Rcd at 2621. On reconsideration, we agree with the broadcasters that Sections 614(b)(3) and 615(g)(1) appear to have been written with analog technology in mind, given references to ''line 21,'' ''vertical blanking interval,'' and ''subcarriers,'' which are not applicable in digital technology. Thus, we conclude that Congress—although aware of digital technology when it drafted the must-carry requirement—did not expressly compel a particular result with respect to the application of ''primary video'' to digital television generally, and multicasting specifically; *see* 16 FCC Rcd at 2621–2622, H.R. Rep. No. 104–204(I), 104th Cong., 1st Sess. 220 (1995) (We reject, however, the argument of Disney and other broadcast petitioners that the Commission's definition of ''primary video'' for purposes of Section 614(b)(3)(A) of the Act is somehow inconsistent with Section 614(b)(3)(B), which provides that ''[t]he cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991) or any successor regulations thereto,'' 47 U.S.C. 534(b)(3)(B). The legislative history of Section 614(b)(3)(B) does not indicate any connection to the carriage of multiple video programming streams of a single broadcaster. According to the House Report accompanying the 1992 Cable Act, ''[s]ubsection (b)(3)(B) prohibits 'cherry picking' of programs from television stations by requiring cable systems to carry the entirety of the program schedule of television stations they carry. * * *'' H.R. Rep. No. 102–628, at 93 (1992). In other words, the point of Section 614(b)(3)(B) is ''to prevent[] cable operators from using portions of the signals of different broadcasters to create composite channels in an effort to increase the audience for cable programming.'' *Id*. at 58. That provision, therefore, requires cable operators to carry the entire program lineup that is assembled by a broadcaster on a particular channel that is entitled to carriage pursuant to Section 614(b)(3)(A). We agree with Time Warner Cable that it has nothing to do with carriage of multiple channels or program lineups. Section 614(b)(3)(B) simply requires that when a cable operator carries an eligible primary video programming stream, it must carry that stream in its entirety and may not provide a composite, cherry-picked programming stream. If Section 614(b)(3)(B) meant what broadcasters say it means, then Section 614(b)(3)(A) would be a nullity. We also disagree with some broadcasters' argument that, as a policy matter, the Commission's interpretation of ''primary video'' creates potential ''administrative problems.'' Disney, for example, asserts that a digital broadcast signal may be configured in a variety of ways throughout the day, requiring the broadcaster, at multiple times throughout the day, to have to ascertain whether the programming elements being televised are independent or

related, program-related, or otherwise. They surmise that there will thus be constant disputes as to whether particular multicast signals are program-related (and thus required to be carried) or unrelated (therefore not required to be carried). Although a mandatory multicast carriage policy could eliminate the need to determine what is or is not program related, we do not find that a compelling reason to read the term ''primary video'' as requiring cable operators to carry more than one programming stream. We will define in a subsequent Report and Order in this docket the parameters of what is program-related in the digital context, which we believe will assist in alleviating the type of dispute that some broadcasters predict.).

33. Recognizing that the statutory language is ambiguous, however, of course does *not* mean that we are now *compelled* to interpret the statute differently than the Commission previously did. Rather, given that ''Congress has not directly addressed the precise question at issue''—*i.e.*, ''the statute is silent or ambiguous with respect to the specific issue,'' the question for us is to derive a ''reasonable interpretation'' of the meaning of ''primary video;'' *see Chevron USA Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843, 844 (1984).

34. Given the ambiguity of the language of the statute, we consider its legislative history. As the Commission acknowledged in the *First Report and Order*, however, ''[t]he legislative history does not definitively resolve the ambiguity regarding the intended application of the term 'primary video' as used in [the multicasting] context;'' *see* 16 FCC Rcd at 2621. The legislative history indicates that ''the must carry provisions were not intended to cover all uses of a signal,'' but they do not precisely specify which portion of a signal is entitled to carriage and which is not; *see* 16 FCC Rcd at 2621. In other words, ''[t]he term primary video, as found in Sections 614 and 615 of the Act, suggests that there is some video that is primary and some that is not,'' but the legislative history of these sections does not suggest precisely which video signal(s) is (are) primary and which is (are) not; *see* 16 FCC Rcd at 2621. The legislative history of subsequently enacted Section 336, which relates not to cable carriage obligations but mostly to digital television implementation, likewise does not reveal any clear intention of Congress with respect to the multicasting must-carry issue.

35. We next focus on the underlying purposes of the statutory provisions, and evaluate whether requiring cable operators to carry more than one programming stream of a multicasting station would fulfill those purposes. In *Turner II*, a majority of the Supreme Court recognized as ''important'' two ''interrelated interests'' that Congress sought to further through the must-carry provisions: (1) preserving the benefits of free, over-the-air local broadcast television for viewers, and (2) promoting ''the widespread dissemination of information from a multiplicity of sources.'' As explained below, we cannot find on the current record that a multicasting carriage requirement is necessary to further either of these goals. Based on the current record, we find a reasonable interpretation of the Act is to require cable operators to carry one programming stream.

36. Significantly, there is nothing in the current record to convince us that mandatory carriage of all multiple streams of a broadcaster's transmission is necessary to achieve either of these goals. In the analog context, broadcasters could invoke explicit Congressional findings that the benefits of free, over-the-air television for viewers would be jeopardized without must carry. Congress, however, has made no such findings regarding multicast must carry and broadcasters have not made a convincing argument that over-the-air broadcasting would be jeopardized in the absence of mandatory multicasting. Unlike in the analog carriage debate, here broadcasters fail to substantiate their claim that mandatory multicasting is essential to ensure station carriage or survival. Broadcasters argue that carriage of multicast streams is essential to help them develop and support additional programming streams, but they have not made the case on the current record that these additional programming streams are essential to preserve the benefits of a free, over-the-air television system for viewers. Broadcasters will continue to be afforded must carry for their main video programming stream, which can be in standard definition or high definition, and any additional material that is considered program-related. Broadcasters can also rely on the marketplace working without mandatory carriage in order to persuade cable systems to carry additional streams of programming. There is evidence from the record, as well as news accounts, that cable operators are voluntarily carrying the multiple streams of programming of some broadcast stations, including public television stations, that are currently multicasting. Indeed, the Association of Public Television Stations and the NCTA recently announced an agreement that involves cable operators carrying up to four programming streams of at least one public TV station in a DMA during the transition from analog to digital technology, and *every* public TV station in a DMA after the transition, subject to certain nonduplication contingencies. Under these circumstances, the interests of over-the-air television viewers appear to remain protected.

37. Likewise, based on the current record, there is little to suggest that requiring cable operators to carry more than one programming stream of a digital television station would contribute to promoting ''the widespread dissemination of information from a multiplicity of sources.'' Under a single-channel must-carry requirement, broadcasters will have a presence on cable systems. Adding additional channels of the same broadcaster would not enhance source diversity. Furthermore, programming shifted from a broadcaster's main channel to the same broadcaster's multicast channel would not promote diversity of information sources. Indeed, mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system.

38. Additionally, no persuasive case has been made on the current record that a multicasting carriage requirement will facilitate the digital transition. High quality programming in a digital format is a major factor that will drive this transition. Some broadcasters explain that they are reluctant to invest in additional programming streams absent an assurance of carriage. In response, NCTA states that cable operators ''*want* to carry HDTV and other compelling digital broadcast content that is desired by their customers,'' and that they want to carry local programming to distinguish their offerings from satellite. NCTA also cautions that giving ''shelf space'' to broadcasters might lead to carriage of ''infomercials, home shopping, or other low value content.'' NCTA therefore suggests that a guaranteed carriage requirement would diminish incentives for broadcast stations to produce high quality programming, which would ''reduce incentive for consumers to switch to digital TV.''

39. Given the lack of a meaningful showing on the current record that mandatory carriage of more than one programming stream is necessary to

achieve any of the goals discussed above, we determine not to impose such a requirement. We thus find it a reasonable construction of the must-carry provisions of the Act, on the record before us and in light of the Supreme Court's precedent, not to require cable operators to designate capacity or ''shelf space'' for multicasting programming streams at the expense of other competing interests.

40. We also note that cable operators contend that requiring them to carry more than one programming stream would constitute a taking under the Fifth Amendment. Given that we decline to impose such a requirement, we do not reach this issue.

41. Nothing in this Order diminishes the Commission's commitment to completing action on the multiple open proceedings on localism and on the public interest obligations of digital broadcasters. We believe the public interest and localism proceedings are essential components of the Commission's efforts to complete the transition to digital television. The Commission intends to move forward on these decisions within the next few months and complete action in these dockets by the end of the year.

42. Accordingly, we grant in part and deny in part the petitions for reconsideration on this issue and affirm our decision in the *First Report and Order.* Therefore, if a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide carriage of that stream. Cable operators can choose to carry additional video programming streams through retransmission consent agreements. As reflected in the statute, cable operators are also required to carry ''program-related material,'' to the extent technically feasible; *see* 47 U.S.C. 614(b)(3)(A). What constitutes program-related material in the new digital context is defined separately from primary video and will be addressed fully in a subsequent Report and Order in this docket.

IV. Procedural Matters

43. *Paperwork Reduction Act of 1995 Analysis.* This document does not contain new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

44. *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities;'' *see* 5 U.S.C. 601–612, 5 U.S.C. 605(b). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction;'' *see* 5 U.S.C. 601(6). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act; *see* 5 U.S.C. 601(3), 5 U.S.C. 601(3). 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); *see* 15 U.S.C. 632.

45. In this Second Report and Order and First Order on Reconsideration, the Commission takes action on two significant cable carriage issues, the resolution of which are essential to the Commission's ongoing efforts to complete the transition from analog to digital television. The issues resolved in this Order concern (1) whether cable operators are required under the Communications Act to carry both the digital and analog signals of a station (also referred to as ''dual carriage'') during the transition when television stations are still broadcasting analog signals; and (2) whether the Commission, in the *First Report and Order* in this proceeding, properly construed the term ''primary video,'' which appears in Sections 614(b)(3) (for commercial broadcasters) and 615(g)(1) (for noncommercial broadcasters), as requiring cable operators to carry only a single video programming stream (and not multiple streams of several separate, independent, and unrelated programming streams). Further, in the *First Report and Order,* the Commission also determined that the statute neither mandates nor precludes the mandatory carriage of both a television station's digital and analog signals. The Commission tentatively concluded that, based on the available record evidence, a dual carriage requirement would likely violate cable operators' First Amendment rights. In order to evaluate the issue more fully, the Commission adopted a *Further Notice of Proposed Rulemaking.* In this Second Report and Order and First Order on Reconsideration, the Commission affirms its tentative decision in the *First Report and Order* not to impose a dual carriage requirement on cable operators, and declines, based on the record evidence, to require cable operators to carry any more than one programming stream of a digital television station that multicasts.

46. Although the Commission did not receive any comments directed at the Initial Regulatory Flexibility Analysis, some of the comments filed in response to the *Further Notice of Proposed Rulemaking* addressed issues of concern to small entities. The American Cable Association, for example, filed reply comments contending that dual carriage and mandatory multicast carriage would be overly burdensome for small cable operators because of the more limited channel capacity of smaller cable systems and that the costs of implementing such requirements, if imposed, ''present an economic impossibility'' for smaller systems. The Commission considered these concerns, and decided not to impose additional requirements. While small broadcast television stations could benefit from a decision to impose mandatory dual carriage and mandatory multicast carriage, consideration of the economic impact of our decision is only relevant to cable operators, because the obligation to comply with an expanded must carry requirement would attach (in the context of this proceeding) only to cable operators (*i.e.*, a decision not to impose expanded must carry requirements does not, in any way, result in any regulatory obligation on the part of television broadcast stations or any other non-cable entities. Our resolution of the specific issues in the Second Report and Order and First Order on Reconsideration does not result in any rule changes affecting small entities.

47. The Commission, therefore, certifies that the requirement of this Second Report and Order and First Order on Reconsideration will not have a significant economic impact on a substantial number of small entities. Rather, it appears that our decisions here are likely to foster competition in the video marketplace and ensure the ability of small cable systems, in particular, to maximize the use of its available capacity to deliver diverse digital programming and to offer other

services, such as high-speed Internet service, to customers.

48. The Commission will send a copy of the Second Report and Order and First Order on Reconsideration, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act; *see* 5 U.S.C. 801(a)(1)(A). In addition, the Second Report and Order and First Order on Reconsideration will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the **Federal Register**; *see* 5 U.S.C. 605(b).

V. Ordering Clauses

49. Accordingly, *it is ordered,* pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. 405(a), and § 1.429 of the Commission's rules, 47 CFR 1.429, that the petitions for reconsideration filed by the parties are granted in part and denied in part as indicated above, and that this Second Report and Order and First Order on Reconsideration is adopted.

50. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Second Report and Order and First Order on Reconsideration, including the Final Regulatory Flexibility Certification, to Congress, pursuant to the Congressional Review Act, and also to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–5611 Filed 3–21–05; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2004–17917]

Tire Safety Information

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule; response to petitions for reconsideration; technical amendment.

SUMMARY: In November 2002, NHTSA published a final rule establishing, among other things, new tire safety information labeling requirements for vehicles. In June 2004, we published a final rule (June 2004 final rule) responding to petitions for reconsideration on a variety of issues, and made certain amendments to the new vehicle labeling requirements. The new tire safety information labeling requirements for vehicles become effective September 1, 2005.

This document responds to petitions for reconsideration of the June 2004 final rule requesting further changes to the vehicle labeling requirements. After carefully considering the petitions, the agency is modifying certain aspects of these requirements by allowing the option of including selected additional information.

DATES: This rule is effective September 1, 2005, except for the amendment to S4.4.2, which is effective June 1, 2007. Voluntary compliance is permitted before that time. In addition, vehicle placards conforming to the amended requirements of S4.3 of 49 CFR 571.110, as published on November 18, 2002 (66 FR 69600) and including any correcting amendments, may be used for vehicles manufactured before September 1, 2006.

FOR FURTHER INFORMATION CONTACT: For technical and policy issues: Ms. Mary Versailles, Office of International Policy, Fuel Economy and Consumer Programs. Telephone: (202) 366–2750. Fax: (202) 493–2290. E-mail: *Mary.Versailles@nhtsa.dot.gov.*

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Both persons may be reached at the following address: NHTSA, 400 7th Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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I. Summary of Decision

In November 2002, NHTSA published a final rule establishing, among other things, new tire safety information labeling requirements for vehicles. In June 2004, we published a final rule responding to petitions for reconsideration on a variety of issues, and made certain amendments to the new vehicle labeling requirements. In response to the June 2004 final rule, NHTSA received several new petitions for reconsideration. After considering these petitions, this final rule makes a technical amendment to the new vehicle labeling requirements to permit certain additional information on the placard and the label at the option of the manufacturer. Specifically, the manufacturers may show light truck tire load range identification and tire service description information on the placard or the label. Further, the manufacturers may place an alphanumeric and/or barcode part identifier along the bottom or side edges of the placard or the label. This final rule also clarifies certain placard and label subheading requirements and responds to several requests for legal interpretations. We are denying requests to delay the effective date of September 1, 2005 because we have neither changed nor imposed new mandatory vehicle labeling requirements. However, between September 1, 2005 and August 31, 2006, the manufacturers can use placards and labels that comply with the requirements of the November 2002 final rule.

II. Background

The Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 (TREAD Act) [1] required the agency to, among other things, improve tire labeling in order to assist consumers in identifying tires that may be the subject of a recall.[2] Additionally, the TREAD Act provided that the agency may take whatever additional action it deemed appropriate to ensure that the public is aware of the importance of observing motor vehicle tire load limits and maintaining proper tire inflation levels for safe vehicle operation.[3] For example, such additional action could include a requirement that the manufacturers provide the vehicle purchasers with information on appropriate tire inflation levels and load limits.

In response to this mandate, NHTSA published a final rule (November 2002 final rule), which among other things, established new tire safety information labeling requirements for vehicles.[4] These requirements become effective September 1, 2005, and are specified in S4.3 of Federal Motor Vehicle Safety

[1] See Pub. L. 106–414, November 1, 2000.

[2] See *id* at Sec. 11(a).

[3] See *id* at Sec. 11(b).

[4] See 67 FR 69600 (November 18, 2002).